THE DIFFERENT APPROACHES TO RECENT DEVELOPMENTS IN CHINESE AND US SHIP ARREST LAWS

Jimmy Ng and Sik Kwan Tai

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Abstract

In the context of ship arrest law in the West and the East, namely the US and the People’s Republic of China (PRC), understanding the different approaches adopted in these countries’ maritime courts would be a topic of interest to both comparative lawyers and international traders.

The tremendous volume of shipping activities taking place in the US and China makes the two countries popular forums for ship arrest proceedings. In the US, maritime imports accounted for 42 percent of all imports in 2004. In China, the container volume exported is expected to reach 100 million TEUs (twenty-foot equivalent units) by 2010. This article argues that a through comparative longitudinal study of these countries’ court practices concerning ship arrest, it may be possible to uncover any consistent approaches taken by the maritime courts. The aim of this article is twofold: (I) to provide an overview of the developments in ship arrest law in today’s US and China, and (ii) to contribute to the comparative study of the different approaches adopted in Chinese and US ship arrest laws by filling a gap in the existing literature in this area.

The last section of the article is devoted to a review of the 2003 New Practice Direction, issued by the Supreme People’s Court, on Chinese maritime procedural law. As there are ten maritime courts in China, different interpretations of the ambiguous maritime statutes are inevitable. The discussion will focus on those approaches to ship arrest laws that were reviewed in the 2003 New Practice Direction.

This article is designed to provide helpful information to European legal professionals who are new to ship arrest law practices in the Chinese maritime courts as well as to more experienced practitioners who may need to enforce a ship arrest order in the PRC’s jurisdiction.

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I Introduction

In the last decade or two, the range of inquiry and the kinds of approaches used in the academic research circles of maritime law have broadened astonishingly. However,
comparative longitudinal research concerning ship arrest laws is engaged in relatively infrequently. One reason may be that maritime law researchers in academic circles are attracted to the study of legal phenomena that are conveniently and quickly accessible through the existing literature. As the two most powerful maritime nations in the international trade arena, the US and China have become popular forums for ship arrest proceedings. This article argues that, the international admiralty communities would benefit from a comparative longitudinal study of these countries’ court practices concerning ship arrest. The aim of this article is twofold: (I) to provide an overview of the developments in ship arrest law in today’s US and China, and (ii) to contribute to the comparative study of the different approaches adopted in Chinese and US ship arrest laws by filling a gap in the existing literature in this area.

Commercial lending in the maritime field is frequently based on a creditor’s ability to enforce unpaid debts by applying for a ship arrest order from a maritime court. In fact, ship arrest is often the only way of wiping out accumulated debts and returning the vessel to the creditors who lent the money to buy the ship in the first place. It is not uncommon for maritime lenders to engage in “jurisdiction shopping” to their advantage. The dominant role the US and China play in global trade inevitably puts them on the top of the shopping list. In the US, maritime imports accounted for 43 percent of all imports in 2004. The table below shows the dominant position of US sea logistics:

Table 1: Import value by mode of transportation

<table>
<thead>
<tr>
<th>Mode</th>
<th>Import value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sea</td>
<td>USD 600 billion</td>
</tr>
<tr>
<td>Air</td>
<td>USD 364 billion</td>
</tr>
<tr>
<td>Truck</td>
<td>USD 252 billion</td>
</tr>
<tr>
<td>Rail</td>
<td>USD 77 billion</td>
</tr>
<tr>
<td>FTZ</td>
<td>USD 83 billion</td>
</tr>
<tr>
<td>Other</td>
<td>USD 37 billion</td>
</tr>
</tbody>
</table>


In China, total container trade rose to 65 million TEUs (twenty-foot equivalent units) in 2003, with more than two-thirds being handled in mainland China ports. The container volume exported is expected to reach 100 million TEUs by 2010, according to Zhang Chunxian, China’s Minister of Communications, speaking at the New York–New Jersey Port Industry conference. Zhang also predicted that total ocean trade in terms of tonnage will jump

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from 1 billion tons in 2004 to 3.5 billion tons by 2010.\textsuperscript{5} The tremendous volume of shipping activities taking place in the US and in China makes the two countries popular forums for ship arrest proceedings.

In this article it is argued that ship arrest law is a part of maritime law and that the historical development of a country’s maritime courts has a strong bearing on its approaches to rules of interpretation and construction. Hence, first a historical analysis of the maritime court systems of the two countries will be presented. Secondly, it is argued that a country’s admiralty jurisdiction will have a strong correlation with its national policy on maritime development, the context in which its ship arrest law operates. Thus, the different approaches taken by the US and China to promote a uniform system of maritime law will be examined. Thirdly, the scope of ship arrest is studied by analyzing its definition. China has been shifting away from the absolute immunity doctrine that most socialist countries still insist on. The section examining the conflicts of law relating to ship arrest contains a comparative analysis of the different approaches the US and China take in using the law of the flag as a solution. Using the law of the flag as a solution allows maritime creditors to know in advance which order of priorities applies to their maritime liens. In this section, a description will be given of the current developments in the different ways in which the two countries take on such practices. After a comparison of the Chinese and US approaches to maritime liens and their ranking with mortgage, the Chinese and US approaches to \textit{in personam} and \textit{in rem} actions are examined. Next, the different approaches adopted by the two countries to extending ship arrest power to new rights are explored, namely the container leasers’ right to arrest a vessel and the treatment of freights as the subject of maritime arrest. The last section is devoted to a review of the 2003 New Practice Direction on Chinese maritime procedural law, issued by the Supreme People’s Court. As there are ten maritime courts in China, different interpretations of the ambiguous maritime statutes by these maritime courts are inevitable. The discussion will focus on the approaches to ship arrest laws that were reviewed in the 2003 New Practice Direction.

\section*{II Historical development of courts, jurisdiction, and approaches}

\subsection*{II.A Maritime courts}

In this section it is argued that, since ship arrest law is a part of the general maritime law system, its rules of interpretation can best be understood by making a historical analysis of a country’s maritime courts. Generally speaking, the common-law method of statutory interpretation tends to be more “restrictive” than that of the civil law.\textsuperscript{6}

\begin{thebibliography}{9}
\bibitem{a}
“A Turning Tide for U.S. Seaports”, \textit{World Trade Magazine} (Magazine Issue Date 05/01/2005), \url{http://www.worldtrademag.com/CDA/ArticleInformation/features/BNP_Features_Item/0,3483,151435,00.htm} (last visited October 2005).

\bibitem{b}
\end{thebibliography}
II.A.1 The establishment of the US maritime courts

The roots of the US admiralty court development can be traced back to the reign of Richard I and his Laws of Oléron. It was regarded as the most important sea code in the Anglo-American heritage. Although it cannot now be known with absolute certainty what originally was the nature of the admiralty, it rests on the original jurisdiction of the courts of common law. It was generally agreed that the maritime courts of England and of all other powers in Europe were formed upon the same common model – the consular courts of the Mediterranean. These courts are described in the Consolato del Mare as having jurisdiction over all maritime controversies.

The maritime systems originating from the Laws of Oléron adopted the English common-law approach. Starting with the surge of British overseas shipping in the 1500s, the English admiralty courts handled an increasing volume of cases. Having once been a colony of the British Empire, the US had followed the British approach; for example, the US had inherited the British tradition of a separate system of admiralty court with specific rules relating to the arrest of vessels. The US admiralty courts also followed the custom of common-law England which required no juries.

In line with the very nature of its common-law origin, the US statutory construction is such that the role of maritime statutes function as a corrective to the gaps or defects in the

include reports on the interpretation of such conventions by courts in Australia, Belgium, Canada, Finland, France, Germany, Greece, Japan, the Netherlands, Poland, Sweden, the UK, the US, and Venezuela.

8 Nicholas Healy & David Sharpe, Cases and Materials on Admiralty, 3d edn., (St. Paul, Minn.: West Group, 1999), at p. 2. Oléron is a large island off the Atlantic coast of France, which in former days was used because of the shelter it provided for trade to the north. Oléron’s sea code may have crossed over to England at the end of the 1100s, when Eleanor of Aquitaine married Henry II.
10 Ibid.
11 Ibid.
12 Ibid. They include “all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commission or bailment to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, gallies or other vessels; and generally of all other contracts declared in the customs of the sea.”
14 See Healy & Sharpe (n. 8 above), p. 3.
15 Ibid.
common law. In short, the common-law statutory construction is restrictive in approach; it
tends to focus on the usual meaning of the words of the enactment, with a view to ascertain
and to give effect to the intention of the lawgiver as expressed in the text, and to admit few, if
any, external aids to interpretation.\(^{16}\)

Some minority states in the US, such as Louisiana, developed a mixed legal system
where the Romano-Germanic tradition had become suffused to some degree with Anglo-
American law.\(^ {17}\) In those states, the courts follow the civil-law tradition of constructing codes
whilst interpreting the statutes in the common-law manner.

II.A.2 The establishment of the Chinese maritime courts

In contrast, the Chinese maritime court system is a modern establishment. As a result of the
rapid development of China’s shipping and foreign trade during the early 1980s, maritime
courts were established in the principal port cities of China in 1984, in accordance with the
decision made by the Standing Committee of the National People’s Congress (hereafter
“NPC”).\(^ {18}\)

From a historical point of view, China’s maritime courts, having been set up at a later
stage of the development of uniform international laws, have had the opportunity to adopt the
best uniform laws and practice concerning ship arrest. Although the prospect of creating a
uniform body of domestic laws that can match international ship arrest practice is daunting, it
has been the principal objective of the Chinese maritime legislators over the past decades.
The Chinese maritime law drafters have spent much time and effort on standardizing the
procedures for ship arrest, bringing them in line with the international practice, as can be seen
from China’s substantial incorporation of the International Convention for the Unification of
Certain Rules Relating to the Arrest of Sea-Going Ships\(^ {19}\) (hereafter “1952 Arrest
Convention”) into its domestic law. The 1952 Arrest Convention was aimed at creating a set
of binding procedures on international ship arrest.\(^ {20}\) China did not ratify the 1952 Arrest
Convention; still the Convention has affected China in two indirect ways. First, China has
traditionally leaned towards Hong Kong’s legal system in enacting its foreign economic law,

\(^{16}\) See Tetley (n. 6 above), p. 34.

\(^{17}\) The term “mixed jurisdiction” was first used by Professor T. B. Smith of Edinburgh. See T. B. Smith,
“The Preservation of the Civilian Tradition in Mixed Jurisdictions,” in A. N. Yiannopoulos (ed.), Civil Law and

\(^{18}\) On November 14, 1984, the Standing Committee of the NPC promulgated the “Decision of the
Standing Committee of the National People’s Congress on the Establishment of Maritime Courts in Coastal Port
Cities” (hereafter “Decision on Establishment of Maritime Courts”). The official objective of setting up the
maritime courts is: “To meet the needs in the development of the country’s maritime transport and in its
economic relations and trade with foreign countries, effectively exercise the country’s judicial jurisdiction and
handle maritime affairs and maritime trade cases promptly, so as to safeguard the lawful rights and interests of
both Chinese and foreign litigants.”

\(^{19}\) International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going

\(^{20}\) Preamble to the 1952 Arrest Convention, at p. 195.
On June 4, 1997, the Embassy of China issued a letter to the Belgian Minister of Foreign Affairs, indicating that the 1952 Arrest Convention would continue to apply in Hong Kong after July 1, 1997. The letter stated that China would assume the responsibility arising from the Convention.

With a declaration deposited on March 23, 1999, Portugal announced the extension of the 1952 Arrest Convention to Macao as from September 23, 1999. On October 15, 1999, the Chinese Embassy informed the Belgian Minister of Foreign Affairs that the Convention would continue to apply in Macao.


The 1969 Vienna Convention on the Law of Treaties (hereafter “1969 Vienna Convention”) is an international document that lays down the basic rules of treaty interpretation. It codifies the approaches of customary international law in respect of treaty interpretation. China ratified the Vienna Convention on September 3, 1997. From then onward, Chinese maritime judges have to consider the Vienna Convention when they decide international ship arrest cases. In addition to the Convention, as a civil-law jurisdiction in origin China tends to construe international treaties in a more “liberal” manner, which may be justified under Article 31, paragraphs (3) and (4). Article 31(3) allows the construction be taken into account, together with the context, the subsequent agreement and practice between the parties regarding the treaty’s interpretation. Article 31(4) states that the courts may give a special meaning to a term if it has been established that the parties so intended.

One point the Chinese and US maritime regimes have in common is that the Vienna Convention is highly respected in both countries. Although the US never ratified 1969 Vienna Convention, the American courts have cited the Convention as “a compendium of international norms applicable to various questions of treaty law.”

II.B Maritime jurisdiction

II.B.1 Jurisdiction of the US Congress in maritime industry

A country’s national policy on maritime development has a strong correlation with its

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admiralty jurisdiction, a context in which its ship arrest law operates. A country tends to adopt an approach to organizing its admiralty jurisdiction that serves maintaining a uniform maritime law best. In the US, the jurisdiction of the maritime courts is laid down in the US Constitution. Pursuant to Article III, Section 2 of the US Constitution, the judicial power of the federal courts extends to “all Cases of admiralty and maritime Jurisdiction.” Moreover, the jurisdiction of the US maritime courts is exclusive in its very nature, as Congress has provided for exclusive federal jurisdiction over all such cases. The US Supreme Court forcefully repeated the principle that Congress retains the power “to alter, qualify or supplement [admiralty and maritime law] as changing conditions might require.”

From the early days of the US as a nation, the US Congress maintained a national policy to build an adequate domestic merchant marine on the rationale that it was essential to the defense and commercial welfare of the country. The British Colonies in America were the world’s leading shipbuilders, owing primarily to the proximity of suitable timber to major port cities. Although the US became a maritime power before it became a nation, the British exercised substantial control over the colonial maritime operations. Since the Revolutionary War, US maritime industry had prospered because Congress skillfully maintained the status of the US vessels as neutral ships during the late-eighteenth- and early-nineteenth-century European wars. The D.C. Circuit Court, in *Marine Carriers Corporation v. Fowler*, summed up the national policy adopted by the US Congress:

> It has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country. We require a sound merchant marine to protect foreign trade and to provide support for the armed forces in times of war or national emergency. We also require a modern, efficient shipbuilding industry capable of providing military vessels in times of stress.

When maritime conditions changed, the US Congress was expected to exercise its federal legislative power to improve maritime industry. In the mid-nineteenth century, clipper ships were gradually being replaced by steamships, the US began to lose its comparative advantage in the maritime industry.

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32 429 F. 2d 702, 708 (2d Cir. 1970), cert. den’d 400 U.S. 1020 (1971).
33 *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F. 2d 908, 911 (D.C. Cir. 1982), where the Court reaffirmed the judicial view established in *Marine Carriers Corporation v. Fowler*. 

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advantage in shipbuilding, and the US merchant marine began to decline.\textsuperscript{34} After passage of the US Constitution in 1789, the First Congress promptly exercised its sovereign powers to protect the US merchant marine fleet from foreign flag competition in its domestic maritime trades. The third law passed by the new Congress imposed a tax on foreign vessels operating in the domestic trades at a rate that, as a practical matter, precluded them from competing with the domestic merchant marine in those trades.\textsuperscript{35} In 1817, Congress expressly prohibited foreign vessels from operating in the coastwise trades.\textsuperscript{36}

A historical analysis of the American shipping policy demonstrated that Congress maintained a legislative activist approach toward the maritime field. From 1817 to 1866, the US Congress enacted laws that prohibited the transportation of merchandise “from one port of the US to another port of the US in a vessel belonging wholly or in part to a subject of any foreign power.”\textsuperscript{37} In 1866, when Congress was alerted concerning the possibility of US law being evaded by transshipping cargo at nearby Canadian ports, it broadened the coverage of the Act.\textsuperscript{38}

Furthermore, Congress’s legislative activism has shown no hesitation about tolerating opposite common-law decisions. In \textit{United States v. Two Hundred and Fifty Kegs of Nails},\textsuperscript{39} a hardware merchant tested the limits of the US law by shipping kegs of nails from New York City to Antwerp on a Belgian flag vessel, discharging the cargo at Antwerp and promptly reloading it onto a British flag vessel bound for California. When the cargo arrived in California, the Collector of Customs arrested the vessel and brought a forfeiture action against the cargo owner. The court of appeals found the prohibitions were not applicable to the situation at issue.\textsuperscript{40} The US Congress then amended the laws in 1893 by prohibiting foreign flag transportation between two US ports directly or indirectly “via a foreign port.”\textsuperscript{41} The 1893 amendments were adopted without revision when the Jones Act was passed in 1920

\begin{itemize}
\item Chapter 2, §5 of the Act of July 4, 1789, 1 Stat. 27 (1848).
\item Chapter 31, §4 of the Act of March 1, 1817, 1 Stat. 351 (1850).
\item \textit{Ibid.}
\item Chapter 201, §20 of the Act of July 18, 1866, 22 Stat. 641 (1883). The amended Act covered “merchandise . . . at any port in the US on the northern, northeastern or northwestern frontiers thereof . . . laden upon any vessel belonging wholly or in part to a subject or subjects of a foreign country or countries, and . . . taken thence to a foreign port or place to be reladen and reshipped to any other port in the US on said frontiers, either by the same or any other vessel, foreign or American, with the intent to evade the provisions relating to the [transportation of merchandise from one port of the US to another port of the US].”
\item 61 F. 410 (9th Cir. 1894).
\item \textit{Ibid.}, at p. 411, and the judicial reasoning was that “[I]n the plain and ordinary meaning of the words, ‘to transport goods from one domestic port to another’ means to carry goods in one continuous voyage . . . It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels . . .”
\item This phrase was added even before the Court of Appeals printed its decision in the \textit{250 Kegs of Nails} case; Ch. 117 of the Act of February 15, 1893 (27 Stat. 455).
\end{itemize}
and remain unchanged to date.\textsuperscript{42} The US Congress could even legislate to change the cost structures of the maritime industry. For example, during the 1980s, when the US merchant marine was not competitive in the world market due to relatively high wages and stringent safety standards in every aspect of the industry, from shipbuilding to vessel operations to insurance,\textsuperscript{43} the US Congress feared that the American shipping industry, if left to its own resources, would have all of its ships built abroad, registered under foreign flags, and manned by foreign seamen.\textsuperscript{44} To promote a national policy of maintaining an adequate merchant marine in spite of its non-competitive cost structure, the US Congress attempted to equalize foreign and domestic cost structures by granting various offsetting subsidies to US shipbuilders and vessel operators competing in foreign trades.\textsuperscript{45}

II.B.2 Jurisdiction of the US federal courts in maritime cases

Despite the broad scope of legislative power of the US Congress, the Supreme Court imposed two limitations on Congress’s power, in order to maintain a uniform system of maritime law, which is recognized by all federal courts:

One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments … shall be co-extensive with and operate uniformly in the whole of the US.\textsuperscript{46}

In other words, although the US Congress is free to arrange and rearrange substantive maritime remedies, its legislative power should be consistent with the basic approach that it “cannot expand or contract admiralty jurisdiction, nor can it leave admiralty law non-
II.B.3 Jurisdiction of the Chinese maritime courts

In contrast, China adopted a three-step approach to maintain the stability and uniformity of its maritime court system.

The first step was that the Standing Committee of the NPC was allowed to play a role in enacting maritime-related laws. The legal implications of this are quite significant because the Constitution of the People’s Republic of China (hereafter “PRC Constitution”), promulgated by the NPC on December 4, 1982, lays down a checks-and-balances system for the NPC and its Standing Committee. Article 62(11) specifies that the NPC is empowered to “amend or annul” inappropriate decisions of the Standing Committee. Although Article 67(7) merely provides the Standing Committee with the power to “annul” laws enacted by the NPC that are inconsistent with the Constitution, Article 67(1) confers upon the Standing Committee the important power to construe the Constitution. In one sense, the Chinese drafters of the law intended to maintain uniformity of maritime law by allowing the Standing Committee, the state organ that has the official power to construe the Constitution, to set up the maritime court system.

The second step was that this legislative design allowed the Supreme People’s Court to decide on the organization of the Chinese maritime courts and their administrative offices. In China, the stability of the maritime courts is preserved in two ways. First, their alteration and abolition is to be decided by the Supreme People’s Court only. Second, such a legislative design makes it very difficult to remove the chief judge of a maritime court, as the proposal for removal must be initiated by the chairman of the Standing Committee.

The third step was aimed at ensuring specialization. The maritime court was made a part of the national judicial organ rather than one of provincial nature, and the maritime court is at the same level as the intermediate people’s court. In other words, the maritime courts have jurisdiction over maritime cases in the first instance, and they are not to handle criminal cases or other civil cases. The higher people’s court in the locality where a maritime court is located has jurisdiction over appeals against the judgments and orders of the maritime court. In other words, no maritime cases go to the intermediate people’s court, neither in the first

48 See “Decision on Establishment of Maritime Courts” (n. 18 above).
49 PRC Constitution, Art. 1.
50 Ibid.
51 PRC Constitution, Art. 4.
52 PRC Constitution, Art. 3.
53 Ibid.
54 Ibid.
II.C Chinese and US approaches to maritime court jurisdiction

Both the US and China aim to promote the uniformity of maritime law, but they took two very different approaches. Unlike China, which chose to promote uniformity merely through the legislative power of the Standing Committee, the US opted to achieve the goal through a process of gradual transfer of power, through court decisions, from state government level to federal government level. The two landmark cases are *Southern Pacific Co. v. Jensen*55 and *Chelentis v. Luckenbach S.S. Co.*56

In *Jensen*, the US Supreme Court held that state legislation may not interfere with the uniformity of general maritime law. In that court case, the New York Court of Appeals affirmed an award of compensation under a New York statute to the widow of a stevedore who had been killed while unloading a vessel upon navigable waters. Southern Pacific Company appealed on the ground that the New York statute conflicted with “the general maritime law, which constitutes an integral part of the Federal law under art. 3, §2, of the Constitution, and to that extent is invalid.”57 Mr. Justice McReynolds found that “in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.”58 He therefore held that the New York statute was invalid.

The process of power transfer from state legislation to its federal counterpart was not a smooth one. Mr. Justice Holmes, the influential Judge in US Supreme Court, dissented on the ground that except for a “very limited body of customs and ordinances of the sea,” there was no general maritime law. Mr. Justice Pitney also dissented, claiming that where the law of the sea established substantive rights, it was paramount, but in situations where there was no maritime law, the common law might supplement the maritime law, whether in the courts of admiralty or in the common-law courts.59 However, Mr. Justice Pitney also believed there was no compulsion on the common-law courts to accept maritime law, and vice versa; each court was free to use either law as a source for the rights of the parties.60

Indeed, the *Jensen* Court took a limited approach to such power transfer because it invalidated only the state legislation that interfered with the proper harmony and uniformity
of an Act of Congress that governed international and interstate relations. Logically, therefore, the opportunity still existed to argue that the common-law courts could create rights in maritime causes when no federal legislation or general maritime principle furnished affirmative relief.

Next, the US Supreme Court took the opportunity presented in *Chelentis v. Luckenbach S.S. Co.* to consolidate federal maritime power. In *Chelentis*, a wave had swept over a vessel at sea, breaking the leg of a seaman on duty on the deck. The seaman brought an action against the owner of the vessel in a New York state court, alleging that his injury was the result of an order of the master. He claimed that the defendant, under the common-law doctrine of *respondeat superior*, must indemnify him fully for the damage he had suffered. The federal district court, to which the case was removed on the ground of diversity of citizenship, directed a verdict for the defendant. The Court of Appeals for the Second Circuit Court affirmed the judgment of the District Court. Before the Supreme Court, the seaman claimed that the “saving clause” preserved his common-law right to full indemnity. In a six-to-three majority opinion, Mr. Justice McReynolds found that the common-law court had no power to supplement the maritime law by giving a right of indemnity to the petitioner. He also reasoned, however, that a right arising out of the maritime law, the “saving clause,” did not empower the common-law courts to create new rights. Thus, the *Jensen* and *Chelentis* cases together established a complete requirement of uniformity in the maritime law, not only within the federal system of admiralty courts, but also in the common-law courts, state or federal, when such courts provided a remedy under the “saving clause.”

The process then took many years to complete in practice. In theory, for the sake of uniformity, the US federal courts would invalidate all state laws that could materially prejudice the general maritime law. In practice, however, state activity in the maritime field was permitted if it was “local in character.” This motivated the states to legislate in maritime areas where the federal law did not cover. Thus, through the US Supreme Court decisions in *Jensen* and *Chelentis*, uniformity of the maritime law was achieved as the state courts would follow federal law in its application.

Although the Chinese approach is not as time consuming as that of the US, the statutory approach does not offer the Chinese courts the flexibility to deal with emergency

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61 244 U.S. 205, at p. 216 (1917).
63 247 U.S. 372 (1918).
64 Mr. Justice Holmes concurred; Justices Brandeis, Clarke and Pitney dissented.
65 See Stevens (n. 59 above), p. 256.
67 See Stevens (n. 59 above), p. 256.
situations, such as maritime pollution. The statute created for specialization unintentionally forms a legal loophole in subject-matter jurisdiction, which minimizes China's ability to deal with maritime pollution crises in a timely manner. Article 7 of the Maritime Procedural Law provides that the following situations are under the exclusive jurisdiction of the maritime courts:

- If there is an action in a dispute over the operations of a coastal port, then the maritime court of the place where the port is located shall have exclusive jurisdiction to hear the case.
- If there is an action arising from pollution damage to sea areas caused by the discharge, spill, or dumping of oil or other hazardous substances from ships, production or operation at sea, or ship demolition or repair, then the following maritime courts have exclusive jurisdiction to hear the case, that is, the maritime court in the area:
  a. where the pollution occurred,
  b. where the harmful consequences existed, or
  c. where pollution prevention measures were taken.

The very attempt to maintain specialization obviously compromises the Chinese maritime law system's flexibility to deal with environmental emergencies. Unlike the US law that allows all federal district courts to hear maritime cases in the first instance, China currently has only ten maritime courts to cover the whole nation. This, together with the exclusive nature of the jurisdiction of the courts as required under the Maritime Procedural Law, makes China quite incapable of handling cases of maritime pollution. Procedurally, it makes it very difficult for the plaintiff in a maritime pollution case to classify the pollution as an industrial tort so as to by-pass the Maritime Procedural Law. Under such a scenario, the defendant would simply present the case as a controversy arising between a local court and a maritime court over jurisdiction, then the case would go through a process of consultation between the two courts. In a case where consultation between the two courts fails, the matter is then to be submitted to their common superior court for final determination of jurisdiction. By the time the proper court reaches its final decision, the environment may already have suffered irreparable damage.

In terms of specialization, however, the Chinese approach may do a better job than that of the US, for two reasons. First, unlike in China, there are no special courts in the US federal system to hear maritime matters only. Second, there are relatively few judges in the

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68 See “Decision on Establishment of Maritime Courts” (n. 18 above).

69 At the 13th Meeting of the Standing Committee of the NPC on December 25, 1999, Jiang Zemin, President of the People’s Republic of China, promulgated the Special Maritime Procedural Law of China, which has been in effect since July 1, 2000.

70 Maritime Procedural Law, Art. 7(1).

71 Maritime Procedural Law, Art. 7(2).

72 Maritime Procedural Law, Art. 10.

73 Ibid.
US who are specialized in maritime law. Christie Helmer, who authored the US part of *Arrest of Ships*, observed that “if a judge who hears an admiralty case has expertise in the area, it happens merely as a matter of chance … few lawyers learn to be admiralty lawyers. And, because judges are ordinarily selected or elected from practicing lawyers, the number of judges who have an understanding of the shipping industry or of admiralty law are relatively few.”

III Maritime arrest

III.A Nature and definition

In the US, a vessel is arrested only when a maritime lien is being foreclosed. This type of lawsuit is known as an *in rem* action: the vessel is considered a defendant. In Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (hereafter “Admiralty Rule”) the ship arrest procedure is laid down, and thus a vessel arrest in the US is sometimes referred to as a “Rule C procedure.”

In China, the procedures for the arrest of vessels are laid down in the Maritime Procedural Law. Previous laws and practices were consolidated and provisions of the International Convention on the Arrest of Ships, 1999 (hereafter “1999 Arrest Convention”) were incorporated.

In the 1999 Arrest Convention, the term “arrest” is defined as “any detention … of a ship by order of a Court to secure a maritime claim.” The 1999 Arrest Convention includes neither the seizure of a ship in execution of a judgment nor arrest for criminal or

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74 *Arrest of Ships* (London: Lloyd’s of London Press, 1985), at p. 81. This is a book published by Lloyd’s of London Press to provide a legal guide to the international shipping industry.


76 *Ibid.*, at p. 83. The plaintiffs arresting a vessel used to be called “libelants” in the US. The US lawyers who practised ship arrest law were called “proctors,” and the lawsuits seeking the arrest of a vessel were called “libels.” However, no special names are now used for a such procedure.

77 The general procedural rules adopted for use in civil cases, including ship arrest laws, are known as the “Federal Rules of Civil Procedure.” The “Supplemental Rules for Certain Admiralty and Maritime Claims” refer to the additional procedural rules that were adopted for handling procedural issues that were thought to be uniquely maritime in nature.


Ibid., Art. 8(3) states: “This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.”

In Art. 1(2) of the 1952 Arrest Convention arrest is defined as “the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.” In comparison, in Art. 1(2) of the 1999 Arrest Convention arrest is defined as “any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship.”

At the 1985 Lisbon Conference, a Draft Convention on the Arrest of Ships was developed and adopted. This became known as the “Lisbon” Draft Arrest Convention.


Art. 18 of the Maritime Procedural Law states: “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.”

Maritime Procedural Law, Arts. 12 and 22.

Maritime Procedural Law, Art. 27, which states: “After ordering to preserve a ship, the maritime court may, with the consent of the maritime claimant, allow continued operation of the ship by means of restraining disposition or mortgaging of the ship.”

See Helmer (n. 74 above), p. 89.
vessel to load or unload cargo or to shift berths. However, in order for a US federal district court to retain jurisdiction over a vessel, the vessel or some form of security posted must remain in the district.

The Chinese Maritime Procedural Law limits the grounds for ship arrest to those maritime claims listed in Article 21. The only three exceptions to Article 21 are stated in Article 22 and concern “the enforcement of a judgment, an arbitration award or other legal documents.” Ship arrest actions on the grounds of other legal documents include:

1. Law of the Territorial Sea and the Contiguous Zone, 1992 (Article 8);
2. Maritime Traffic Safety Law 1983 (Article 19);
3. Port State Control (PSC) programmes for the prevention of maritime accidents and pollution at sea.

Although US maritime legal scholars generally conceded that the term “vessel” is not susceptible to a precise definition, they have found the definition of a “Jones Act vessel” developed in *Bernard v. Binnings Constr. Co.*, an acceptable one. The Jones Act loosely defined a vessel as a floating structure for “transportation of passengers, cargo or equipment from place to place across navigable waters.” Since the 1950s, the US Supreme Court has begun the process of liberalizing the definition of “vessel” for purposes of the Jones Act. One of the elusive questions in US maritime law is how to determine whether a vessel is “in navigation.” The landmark US Supreme Court case broadening the definition of vessel is *Butler v. Whiteman*. In *Butler*, the Supreme Court held that the question about the status of the vessel is one of fact, and its determination is to be left to the finder of the facts (whether a court or a jury). The Supreme Court reversed previous decisions that the trial court had taken the issue from the jury, usurping its function, and had decided the status of the vessel as a matter of law. Since then, the absence of Coast Guard certification no longer is a major

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88 Ibid.
89 *Martin v. The Bud*, 172 F. 2d 295 (9th Cir. 1949).
90 Cf. Art. 22, which states: “No application may be made for the arrest of a ship on account of maritime claims other than the ones specified in Article 21, except for the enforcement of a judgment, an arbitration award or other legal documents.”
92 Ibid., at p. 1268 (1949–90).
93 741 F. 2d 824, 829 (5th Cir. 1984).
94 Ibid., at pp. 828–829.
95 356 U.S. 271, 271–272 (1958) (per curium) (applying a broad reading to term “vessel”).
96 Ibid., at p. 271.
97 Ibid.
factor in determining the status of the vessel. Hence, in *Latus v. United States*, the Court found that the definition applied when an accident occurred before all the repairing work on a vessel was complete, and at a time when the vessel was not in navigation.

In contrast, the Chinese definition of a “vessel” is relatively simple, as it adopts the concept from the 1999 Arrest Convention. In Article 3 of China’s Maritime Code, a ship is classified on the basis of ownership, where “ships” are referred to as “sea-going ships and other mobile units, but … not … ships or craft to be used for military purposes or public service.” The Chinese approach looks to the “purpose” of the mobile unit to determine the status of the “ship,” and such a line of methodology would predictably confront the problem faced by the Fifth Circuit Court in *Ducrepont v. Baton Rouge Marine Enterprises* in the US. The barge in *Ducrepont* was designed and constructed as a cargo vessel but had always been used as a floating platform for the purpose of cleaning, repairing and fleeting barges, and had never been moved from its original location. The Court in *Ducrepont* found that, unless the current use approach was adopted, to determine a vessel status based on the original purpose test would produce an “absurd result”. After the *Ducrepont* case, other federal circuit courts held that if a barge is used (primarily) as a work platform, then it should not retain its vessel status under the Jones Act.

It should be noted that, unlike most other socialist countries, China has adopted a new political approach to its ship arrest law. The Chinese courts have extended the definition of ship arrest to cover the arrest of military and public ships when they are engaged in commercial activities. Most socialist countries, in accordance with their political

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100 *Ibid.*


102 887 F. 2d 393, 395 (5th Cir. 1989).


105 *DiGiovanni v. Traylor Bros.*, 959 F. 2d 1119, 1124 (1st Cir. 1989).

106 Z. Jin & Z. Weng, *China Maritime Litigation* (1993; in Chinese), at pp. 400–401. The authors mention the case of Beituo 604, where the court authorized the arrest of a PRC’s Liberation Army ship after it collided with a fishing vessel during the time the army ship was engaged in commercial transport.
philosophy, adhered to the doctrine of absolute immunity, and still do. According to these countries, all acts of the state are *jure imperii*, and all state ships perform an exclusively public service even if they are engaged in operations that in capitalist countries quality as commercial. A. N. Yiannopoulos, law professor of Tulane University, has stated that Western nations tend “to rest the distinction between commercial and non-commercial vessels on a factual-empirical basis rather than the disputed distinction between acts of *jure imperii* and *jure gestionis*. A vessel is commercial, regardless of ownership or possession by the state, when it is engaged in the carriage of goods and persons, that is, when it performs the same function as a privately owned commercial vessel.”

III.B Approach to solving the conflicts of law in maritime arrest: The law of the flag

If a claim against a shipowner is initiated in a country other than the country of the ship’s registration and the claimant eventually seizes the ship in a third country, then it is necessary to determine which country’s law applies. Related issues may further include the claimant’s right is secured by maritime lien and its priority over other claims. As the ranking of maritime liens differs from country to country, such problems involving conflicts of law become major issues to consider when “jurisdiction shopping.”

Since the last two decades of the nineteenth century, attempts have been made to unify the rules relating to conflicts of law. Partial unification was achieved through the 1952 Arrest Convention, which suggested the law of the flag as a possible solution, that is, to apply the law of the country where the ship is registered. The scope of application of the 1952 Arrest Convention is determined in its Article 8(1), which states: “The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.” Any contracting state, however, may also arrest a ship flying the flag of a non-contracting state either for the maritime claims enumerated in Article 1 or for any other claim for which the law of the contracting state permits arrest. Domestic law rather than the provisions of the Convention apply, however, if the ship is flagged in the same country where

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112 Art. 8(2) of the 1952 Arrest Convention.
the claimant has his habitual residence or principal place of business, and if the ship is also arrested in that country.\footnote{113}

The law of the flag, that is, the law of the country where the ship is registered, was suggested as a possible solution. The rationale is that if the creation, extinction, and ranking of maritime liens follow the law of the flag, irrespective of the place where the ship is seized and sold, then maritime creditors will know in advance which order of priorities is applied.

In section 501 of the Restatement (Third) of Foreign Relations Law (1986), the law of the flag is invoked: “A ship has the nationality of the state that registered it and authorized it to fly the state’s flag, but a state may properly register a ship and authorize it to fly the state’s flag only if there is a genuine link between the state and the ship.” Section 502(2) further provides: “The flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship.” While the Restatement (Third) provides the flag state with jurisdiction over matters confined to the vessel, Comment (h) in section 402 indicates that the power does not stem from the concept of the vessel as a floating piece of national territory, but as an independent basis of jurisdiction.\footnote{114}

However, the law of the flag system does have some drawbacks. It is difficult to determine which law should be applied if the ship changes flag. The creation of the maritime lien should perhaps be governed by the law of the flag that the ship flew when the event giving rise to the maritime lien occurred. On the other hand, courts could also determine that ranking should be governed by the law of the new flag.

Some countries have enacted provisions stating that the rights in a ship, including maritime liens, are governed by the law of the flag.\footnote{115} In most countries, however, no specific rule has been introduced by statute, and courts have applied other criteria.\footnote{116}

China has adopted a mixed system. The Chinese Maritime Code provides that the rights in a ship are to be governed by the law of the flag.\footnote{117} Article 271 further specifies that the law of the flag state is to apply to the mortgage on the ship. If the mortgage on the ship is established before or during its bareboat charter period, then the law of the original country of registry of the ship is to apply to the mortgage. However, for maritime liens, instead of choosing the flag system, it is determined in Article 272 that “the law of the place where the court hearing the case is located shall apply to maritime liens.”

\footnote{113} Art. 8(4) of the 1952 Arrest Convention, which provides: “Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.”

\footnote{114} §402 cmt. (h), which states: “The application of law to activities on board a state’s vessels … has sometimes been supported as an extension of the territoriality principle but is better seen as an independent basis of jurisdiction.”


\footnote{116} Ibid.

\footnote{117} See Maritime Code, Art. 270, which states: “The law of the flag State of the ship shall apply to the acquisition, transfer and extinction of the ownership of the ship.”
The two approaches guiding international conflicts of law disputes can be found in Articles 3 of the Maritime Procedural Law and Article 276 of China’s Maritime Code.

### III.B.1 Article 3 of the Maritime Procedural Law

Article 3 provides that when there is an inconsistency between the provisions of the Maritime Code and the international conventions that China has ratified, the foreign conventions shall prevail.

International conventions may apply directly if there is no appropriate domestic law or regulation. Chinese courts may also apply common international practices and commercial usage in the absence of local conventions and domestic practices. The party alleging the application of a common practice or commercial usage bears the burden of proving that the customary rules have been established and accepted by a majority of the international community of nations.

### III.B.2 Article 276 of China’s Maritime Code

Chinese law provides that once an international treaty has been acceded to by China and if the treaty contains provisions that differ from those contained in the Maritime Code, then the provisions of the international treaty apply. A general reservation provision, however, can be found in Article 276 of the Maritime Code. It reserves the right to exclude the application of foreign laws, or international laws or customs where they may jeopardize the public interests of China, which include but are not limited to conflict with the Constitution or Chinese sovereignty, or pose a threat to national security.

In short, the modern development of using flags of convenience and double registries under bareboat charters, which are commonly referred to as “flag shopping,” seems to have tolled the death knell for the law of the flag as a logical solution to conflicts of law. In other

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118 Art. 3 of the Maritime Procedural Law states: “Where any provisions concerning foreign-related maritime actions contained in international conventions entered into or acceded to by the People’s Republic of China are different from those contained in the Civil Procedural law of the People’s Republic of China and in this Law, the provisions of such international conventions shall apply, except those on which the People’s Republic of China has announced reservation.”


121 *See* Maritime Code, Art. 268.

122 Art. 276 of the Maritime Code states: “The application of foreign laws or international practices pursuant to the provisions of this Chapter shall not jeopardize the public interests of the People’s Republic of China.”

words, the law of the flag would no longer be the sole consideration in determining the proper law in any matter of ship arrest. Some Commonwealth judges, such as Lord Denning, have gone further and put forward the suggestion that the law of the flag is not to be held determinative even when all other factors cancel themselves out.\(^\text{124}\) Rather, in order to arrive at a properly applicable law of the ship arrest scenario, it makes sense for the courts to follow “a logical, constant, and consistent process or methodology in each conflict case.”\(^\text{125}\)

### IV International developments

#### IV.A Maritime claims

Ship arrest laws of all nations tend to be concerned with one common issue: Should ship arrest law be based on any type of claim or on specific types of claims only?\(^\text{126}\) The interests of shipowners would be better protected if ship arrest law were based on a definitive and closed list of claims only. Claimants, however, would prefer an open list.

Therefore, during the main debate on Article 1 of the 1999 Arrest Convention, the concerns of the delegates were focused upon the issue whether the list of maritime claims for arresting a ship should be “closed,” as in the 1952 Arrest Convention, or “open” as in the Draft of the Comité Maritime International (CMI).\(^\text{127}\) When opening the 1999 Arrest Convention debate, the CMI delegate, Professor Francesco Berlingieri, reminded the conference that the original CMI proposal had been to abolish the list altogether and simply to use a generic description of maritime claims, but that this had not been accepted at the Lisbon Conference,\(^\text{128}\) which had instead adopted the generic description plus a list connected by the words “such as.” At the beginning of the debate, a substantial majority of the delegates among the Joint Intergovernmental Group of Experts (JIGE)\(^\text{129}\) had favored an open list, whereas those supporting a closed list were in the majority at the Diplomatic Conference. Finally, in a rather hurried lunchtime meeting, at which not all delegations were present (and which was conducted only in English without translation), a compromise package was

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\(^{126}\) Gaskell & Shaw (n. 83 above), at p. 473.

\(^{127}\) The initial impetus to reform the 1952 Arrest Convention came from the Comité Maritime International (CMI). The CMI, the federation of national maritime law associations, has been the promoter of many international conventions in the field of maritime private law, including the 1952 Arrest Convention.

\(^{128}\) At the 1985 Lisbon Conference, a Draft Convention on the Arrest of Ships was developed and adopted. This became known as the Lisbon Draft Arrest Convention.

\(^{129}\) By procedure, the Draft Convention would be submitted to the International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD), which would then set up a Joint Intergovernmental Group of Experts to study the text.
proposed.\textsuperscript{130} The compromise package involved accepting a closed list except for “damage to the environment,” as defined in Article 1(d). It was argued that this was a category of claims that was very difficult to define. Therefore, “open” words (“damage, costs, or loss of a similar nature”) were used in this paragraph alone.\textsuperscript{131}

Although China has not yet ratified the 1999 Arrest Convention, it opted for a closed list of claims as reflected in Article 21 of its Maritime Procedural Law. The listing in the Maritime Procedural Law is longer than the list provided by the 1986 Regulations on the Arrest of Ships Prior to Litigation.\textsuperscript{132} Regarding the wording used, as is indicated by means of the following analysis, the Maritime Procedural Law is in line with the 1999 Arrest Convention. The legislators of the Maritime Procedural Law apparently drafted the law in such a way as to allow the courts greater flexibility in interpretation.

Under China’s Maritime Procedural Law, a maritime claim is only a precondition to arrest. In order to obtain a ship arrest order, other conditions must be met simultaneously. Article 23 of the Maritime Procedural Law provides that a maritime claim gives a right of arrest if any one of the following situations occurs:

1. a shipowner who is subjected to a maritime claim is also the owner at the time of the arrest;
2. a bareboat charterer who is subjected to a maritime claim is either the bareboat charterer only or the shipowner at the time of the arrest;
3. the existence of a maritime claim that gives rise to ship mortgage or to rights of a similar nature;
4. the existence of a maritime claim related to the ownership or possession of a ship.

Similar to that of China, the US maritime law regime is generally compatible with the principles outlined in the international Arrest Convention.\textsuperscript{133} Indeed, the apparent \textit{in rem} jurisdictional issues in the US federal appellate cases have not presented any serious conflict with the 1985 Draft Arrest Convention’s procedures.\textsuperscript{134} As the US legal scholars observed once the presence of the ship was within the jurisdiction, whether it was in the district initially or not, the arrest would “not violate the spirit of the 1985 Draft Convention, even if the precise issue is not covered by its terms.”\textsuperscript{135}

\textsuperscript{130} Gaskell & Shaw (n. 83 above).
\textsuperscript{131} Ibid.
\textsuperscript{132} Art. 1, paras. (1) to (20), Regulations on the Arrest of Ships Prior to Litigation, issued by the Supreme People’s Court in 1986 (Chinese), quoted in Guangzhou Mar. Court, Practice of Maritime Courts 335 (1992), which was repealed by the Maritime Procedural Law.
\textsuperscript{135} Walker (n. 133 above), at p. 231.
In practice, US ship arrest law distinguishes between “arrest” of a vessel and “attachment” of a vessel. A vessel is arrested only when a maritime lien is being foreclosed. While the concept of arrest is uniquely maritime in nature under US law, the concept of attachment is not. For an attachment action, personal maritime liability may exist even without a lien status. Maritime attachment is laid down in Rule B of the Supplemental Rules for Admiralty. It should be noted that, unlike the ship arrest action, the risk to effect an attachment action is much higher as the legal requirements of an attachment action tend to be governed by stricter state laws instead of the maritime standard of malice or bad faith. The US maritime law regime requires the claimant – if he chooses to effect an attachment action based on maritime claims (not a ship arrest action based on maritime lien) and before he institutes the action – to make certain that he has a good claim, that the property belongs to the prospective defendant and that he has carefully followed the judicially prescribed attachment procedures.

IV.B Maritime lien

As mentioned above, ship arrest law in some countries such as the US is based on the foreclosure of a maritime lien. An understanding of the international conventions relates to maritime liens, would therefore be helpful to appreciate the underlying rationale of a country’s ship arrest law. There are three international conventions concerning maritime liens:

- the Maritime Liens and Mortgages Convention, Brussels, April 10, 1926, (hereafter “1926 Convention”), which came into force on June 2, 1931;
- the Maritime Liens and Mortgages Convention, Brussels, May 27, 1967, which is not in force;

China is not a contracting state to any of the three Conventions, but China was one of

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136 See Helmer (n. 74 above), p. 83.
137 Ibid.
138 Ibid., at p. 94.
139 See Schoenbaum (n. 3 above), p. 885.
141 See Helmer (n. 74 above), p. 95.
142 Ibid.
143 Ibid.
the core members of the Drafting Committee of the 1993 Convention. Although China did not ratify or accede to the 1993 Convention, it signed it on August 18, 1994. Hence, it was quite natural for the legislators of the Chinese Maritime Code to consider the 1993 Convention during the drafting process. However, the following differences resulted:

1. Unlike the 1993 Convention, claims for the payment of harbor dues under the 1993 Chinese Maritime Code precede those for the payment of salvage claims.
2. The 1993 Convention is more restrictive in its scope of application.
3. The Chinese Maritime Code has no equivalent for Article 12, paragraphs (2) or (3) of the 1993 Convention.

China also enacted the following two regulations with respect to maritime liens and claims:

1. a regulation relating to the Arrest of Ships before Suing;
2. a regulation relating to the Auction of Seizing Property and Remedies.

As China, the US is not a party to any of the three Conventions, but its approach to maritime liens is not too dissimilar to the 1926 Convention, especially with respect to tort liens, cargo liens, and liens for necessaries.

In practice, what constitutes a maritime lien is defined both by statutory and case law in the US. The claims for which US law commonly recognizes maritime liens against a vessel are:

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146 Ibid., Art. 22.
148 Ibid.
149 Ibid.
150 Ibid.
151 Ibid.
152 See Helmer (n. 74 above), p. 84.
The Max Morris, 137 U.S. 1 (1890), in which it was held that a longshoreman’s personal injuries are a kind of maritime lien.

46 U.S.C. §§190–196 (The Harter Act) and 46 U.S.C. §§1300–1315 (The Carriage of Goods by Sea Act). Art. 1(a) of the 1999 Arrest Convention contains a similar provision for “loss or damage caused by the operation of the ship.” This is a very wide provision and would include damage to property. In the corresponding Chinese provision, the Maritime Procedural Law was drafted only to include damage to property.


46 U.S.C. §§971–975 (The Federal Maritime Lien Act). Article 1(l) of the 1999 Arrest Convention goes further than the 1952 Arrest Convention as regards claims to goods and materials, and covers “provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance.” This extension is of particular benefit to ship managers and others who supply services. In China, the Maritime Procedural Law simply adopts a general expression of “supplies provided” and “services rendered” (Art. 21(12)), to allow for more flexibility in judicial interpretation.

The China, 74 U.S. (7 Wall) 53 (1869).

46 U.S.C. §911 (The Ship Mortgage Act). Mortgage as an arrestable lien represents one of the most controversial issues concerning Article 1(u) of the 1999 Arrest Convention and that of the 1952 Arrest Convention. It now simply refers to “a mortgage or a hypothecque, or a charge of the same nature on the ship,” and the reference to registered or registrable has been dropped. A ship can now be arrested for various forms of debt obligations, including the many forms of charge used in the container leasing industry, where loans are made to shipping companies to buy containers, but charges are taken over by ships in the fleet. In China, the expression of “ship mortgage or rights of a similar nature” (Maritime Procedural Law, Art. 21(21)) carries a comparable legal effect.

The John G. Stevens, 170 U.S. 113 (1898), in which it was held that seamen’s wages constitute an arrestable maritime lien, whereas 46 U.S.C. §606 established that wages of masters of US documented vessels constitute an arrestable maritime lien.

The Sabine, 101 U.S. 384 (1879). Article 1© of the 1999 Arrest Convention goes further than the mere “salvage” claims in the 1952 Arrest Convention by including claims arising from any salvage agreement (e.g. the LOF) and claims for special compensation (e.g. under Article 14 of the 1989 Salvage Convention). In contrast, the Chinese legislators did not go that far, merely opting for the more restrictive expression of “salvage at sea” (in Art. 21(3) of the Maritime Procedural Law).

A maritime regime’s approach to ranking has an important bearing on the right of a ship mortgagee as an arrest claimant relative to other parties who assert their arrest based upon maritime liens. A maritime lien is a security interest in a vessel. It “developed as a necessary incident of the operation of vessels,”¹⁶² and it “arises in favor of the creditor by operation of law … and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds.”¹⁶³ The concept of preferred maritime lien¹⁶⁴ is also different from that of a preferred maritime mortgage.¹⁶⁵

IV.C.1 China’s approach to ranking

Chapter II of China’s Maritime Code deals with traditional proprietary rights attached to a vessel. Such rights include:

1. ownership;¹⁶⁶
2. ship mortgage;¹⁶⁷
3. maritime liens;¹⁶⁸
4. possessory liens.¹⁶⁹

According to Article 25, the possessory lien includes “the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof.”¹⁷⁰

Two aspects should be noted in China’s approach to ranking. First, the term “possession” has been incorporated; that is, the existence of a possessory lien depends upon the physical possession of a vessel.¹⁷¹ Second, the parties eligible for this lien are legislatively limited to “ship builders” and “ship repairers.”¹⁷¹ In this respect, the Chinese Maritime Code follows Article 7 the International Convention of Maritime Liens and Mortgages (hereafter...

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¹⁶² Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 9 (1920).
¹⁶³ Ibid.
¹⁶⁴ §31301(5) of Title 46 of the U.S.C.S. defines a preferred maritime lien.
¹⁶⁵ §31322(a), Title 46 of the U.S.C.S. defines a preferred mortgage.
¹⁶⁶ See Maritime Code, Ch. II, §1, Arts. 7–10.
¹⁶⁷ Ibid., §2, Arts. 11–20.
¹⁶⁸ Ibid., §3, Arts. 21–30.
¹⁶⁹ Ibid., §3, Art. 25.
¹⁷⁰ Henry R. Zheng, China’s Civil and Commercial Law (Hong Kong: Butterworth & Co (Asia), 1988). Zheng notes that this feature of a possessory lien is also recognized in Chinese civil law, of which Chinese maritime law is a special branch.
¹⁷¹ See Maritime Code, Ch. II, §3, Art 23.
“Maritime Lien Convention”), 172 which limits the rights of ship repairers and ship builders. The only difference between the Chinese Maritime Code and the Maritime Lien Convention is that the Chinese drafters used the term “possessory lien,” whereas in the Maritime Lien Convention the term “right of retention” is employed.173

The right of the ship mortgagee has been defined as “the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of the auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee secured by the mortgage of that ship,”174

Ship mortgages are a popular means of ship financing, and the underlying motive for such financial arrangements is to set up the ship mortgagee’s preferential right to the value of the ship mortgaged. In China, a distinction is made between a mortgage on “immovable” property and one on “movables” or “chattel.”175 The most significant difference between the two concerns the question whether the right to possess is transferred after the mortgage has been attached to the vessel.176 An immovable mortgage does not require the transfer of possession, whereas a chattel mortgage does.177 Therefore, under Chinese law, a ship, although a chattel, is treated as an immovable.178 Accordingly, there is no need to transfer possession of a ship when it is mortgaged.179

In terms of priority, the Chinese Maritime Code explicitly and unconditionally ranks the possessory lien above the ship mortgage.180 The legal implication here is that, when the actual value of a vessel cannot satisfy the debt owed to both the ship mortgagee and the possessory lien holder, the ship repairer, as the possessory lien holder, will get paid first.181

According to the Chinese Maritime Code, the priority of a possessory lien over ship mortgage is not conditioned upon the timing of these two rights.182 In other words, the right of the ship repairer will prevail over that of the ship mortgagee, regardless of whether the contract of repair accrues before or after the filing of the mortgage on the ship. It makes sense

173 Ibid., at p. 358. See also Maritime Code, Ch. II, §2, Art. 25.
174 See Maritime Code, Ch. II, §2, Art. 11.
176 Ibid.
177 Ibid.
178 Ibid. The necessity for a registration is a good example of the ship’s status as an immovable.
179 Ibid.
180 See Maritime Code, Ch. II, §3, Art. 25.
181 Ibid.
182 Ibid.
economically because the ship repair costs should not exceed the difference between the ship’s value before and after the repair for the reason that those expenses should be equivalent to the corresponding increase in the ship’s value. Therefore, the right of the ship repairer, secured by a possessory lien upon the vessel under the Chinese Maritime Code, should be limited to this “added value” and theoretically does not affect the right of the ship mortgagee to the value of the main part of the vessel.  

In practice, the priority of a possessory lien over ship mortgages has led to unfairness, a situation that was not contemplated by the drafters of the Chinese Maritime Code. The PRC maritime courts have been confronted with the conflict between past possessory ship liens and ship mortgages. The fact that the repair charge is susceptible to deceptive maneuvers potentially undermines the economic justification for the priority system. For example, a conspiring shipowner and ship repairer could “loot” the mortgagee by either fraudulently raising repair costs or repairing the vessel extensively and unnecessarily. At the core of this deceptive scheme, the ship repairer exercises a possessory lien upon the vessel pursuant to Article 25 and utilizes the priority as the ship repairer to recover repair charges from the sold value of the ship. Consequently, the ship mortgagee cannot fully recover his money because the repair charge is nearly equivalent to the actual value of the vessel, which leaves little money after satisfying the possessory lien.

IV.C.2 The US approach to ranking

In contrast, US maritime liens have long been regarded as substantive rights, not as procedural remedies referred to in statutes on jurisdiction, as they are in most British Commonwealth countries. The US maritime liens have been codified in the Commercial Instruments and Maritime Liens Act. It supersedes any US state statute purporting to create an enforceable maritime lien by civil action, and it explicitly states that federal maritime lien law preempts the corresponding state actions.

A preferred maritime lien may arise out of many causes. Damage may be caused to


\[184\] Ibid.

\[185\] See Tetley (n. 13 above), p. 1930.

\[186\] This statute is sometimes also called the Maritime Commercial Instruments and Liens Act or, using older titles, the Federal Maritime Liens Act or the “Ship Mortgage Act of 1920 as amended.”

\[187\] See 46 U.S.C.S. §31307 (2003), which states: “This chapter supersedes any State statute conferring a lien on a vessel to the extent the statute establishes a claim to be enforced by a civil action in rem against the vessel for necessaries.”

\[188\] Ibid.

\[189\] See §31301(5) of Title 46 of the U.S.C.S., which defines a preferred maritime lien as:

A maritime lien on a vessel –
a shipper’s cargo during maritime transport, not only from the physical, but also from the “financial unseaworthiness” of the vessel.\textsuperscript{190} A claim in tort, for example, would entitle the shipper to the status of preferred maritime lien if damage was caused by the owner’s negligent conduct.\textsuperscript{191} The concept of preferred maritime lien is particularly important to US bankers and legal professionals because, when they are employed to prepare various documents in connection with marine mortgages, they would be entitled to a preferred maritime lien,\textsuperscript{192} a claim superior to the mortgages they prepared. The legal rationale is based on the fact that they are performing a service “necessary”\textsuperscript{193} to the lawful operation of vessels.

Of all US maritime liens,\textsuperscript{194} the preferred maritime lien has priority.\textsuperscript{195} In the US, preferred maritime liens rank above preferred ship mortgage liens.\textsuperscript{196} Case law is in line with this approach; for example, the Fifth Circuit Court has held that preferred maritime liens arising from damage to cargo are tort liens that take priority over preferred ship mortgage liens.

\textsuperscript{190} Ibid. See also the Fifth Circuit Court’s holding in Associated Metals and Minerals Corp. v. Alexander’s Unity MV, 41 F. 3d 1007 (5th Cir. 1995). In that case, the ship’s cargo was damaged as a result of exposure to seawater. The vessel was arrested in New Orleans because of a number of outstanding debts. The District Court had characterized the damage to Associated Metals’ cargo as not only because of a breach of contract of carriage by the vessel but also because of “financial unseaworthiness” of the vessel. \textit{Ibid.}, at 1010.

\textsuperscript{191} \textsection 31301(5)(B) of Title 46 of the U.S.C.S., which defines a preferred maritime lien as a maritime lien on a vessel for damage arising out of maritime tort.

\textsuperscript{192} See \textsection 31322(a)(3)(B), Title 46 of the U.S.C.S., which states: “A preferred mortgage is a mortgage, whenever made, that covers a vessel for which an application for documentation is filed that is in substantial compliance with the requirements of 46 U.S.C.S. \textsection 12101 et seq. and the regulations prescribed under that chapter …”


\textsuperscript{194} Preferred maritime liens include the wages of the crew and their master; salvage (including contract salvage); damages arising from maritime torts; and the wages of a stevedore (in other words, a longshoreman) when employed directly by the shipowner, master, manager, or certain agents; 46 U.S.C.S \textsection 31326 (2003).

\textsuperscript{195} 46 U.S.C.S \textsection 31326 (a) and (b) (2003), which states in part:

(a) When a vessel is sold in a civil action in rem brought to enforce a maritime lien, any claim in the vessel existing on the date of sale is terminated, and the vessel is sold free of all those claims.

(b) Each of the claims terminated under subsection (a) of this section attaches, in accordance with their priorities to the proceeds of the sale, except that –

(1) the preferred mortgage lien has priority over all claims against the vessel; …

\textsuperscript{196} 46 U.S.C.S \textsection 31326 (b)(a)(1) (2003) provides that “the preferred mortgage lien has priority over all claims against the vessel.”
liens.\textsuperscript{197}

It should be noted that, in order to determine ranking under US maritime law, the timing of the lien is a determining factor. Since a preferred mortgage lien has priority over all claims against the vessel except for preferred maritime liens arising before the mortgage, a vessel’s service provider would have priority over the preferred ship mortgagee only if he filed the lien before the mortgage. In other words, if a lien of “necessaries” arises after the creation of a ship mortgage, then the ship mortgagee would have priority. In order to resolve priority, it is to be determined which lien occurred earlier, the lien of “necessaries” or the “preferred ship mortgage.”

\textbf{IV.C.3 Evaluation}

The US approach has obvious advantages over that of the Chinese Maritime Code. One advantage is that the risk of a ship’s financier being “looted” by a ship mortgagor and ship repairer is minimized. If the ship’s mortgage occurs before the lien of “necessaries,” a ship mortgagee will have priority over the ship repairer. This means that the ship mortgagee can recover his loan from the foreclosure first, regardless of the repair costs. In effect, under US law the ship mortgagee is immune to the fraudulent maneuvers of a ship mortgagor and repairer.

In addition, the Ship Mortgage Act establishes a “duty of disclosure” owed by the ship mortgagor to the ship mortgagee in the event that the ship mortgage occurred after the lien of “necessaries.”\textsuperscript{198} This duty requires that all existing liens known to the mortgagor be disclosed to the mortgagee prior to the execution of the mortgage.\textsuperscript{199} The mortgagor also has a duty not to incur further liens without the mortgagee’s consent.\textsuperscript{200} This duty functions as a warning to the ship mortgagee of the pre-existing lien upon the ship to be mortgaged, and thus reminds a prudent lender of the potential commercial danger inherent in the transaction. Therefore, if a ship mortgage occurs after the lien of “necessaries,” the ship mortgagee, through the mortgagor’s duty of disclosure, will know of a vessel’s pre-existing liens and be able to adjust the terms of the loan accordingly.

\textbf{V Procedure}

\textbf{V.A In personam action}

Although both \textit{in personam} and \textit{in rem} proceedings involve seized vessels, the \textit{in personam} action is filed against the owner personally. The generally accepted approach is that, even if a

\begin{flushright}
\textsuperscript{197} Associated Metals & Minerals v. Alexander’s Unity MV, 41 F. 3d 1007 (5th Cir. 1995).
\textsuperscript{198} 46 U.S.C. §31323.
\textsuperscript{199} 46 U.S.C. §31323(a), which states that, upon the request of the mortgagee, the mortgagor is to disclose in writing the existence of any obligation known to the mortgagor on the vessel to be mortgaged.
\textsuperscript{200} 46 U.S.C. §31323 (b).
\end{flushright}
court can find subject-matter jurisdiction, it cannot exercise its ship arrest power without personal jurisdiction. The US settled this jurisdictional issue before the end of the Second World War. In *International Shoe Co. v. Washington*,\(^{201}\) the US Supreme Court held that, in order to subject a defendant who is not present in court to a judgment in *personam*, due process requires that (1) the defendant has a certain minimum contact with the court; and (2) the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”\(^{202}\)

China’s Law of Civil Procedure recognizes the action in *personam*; for example, a pre-judgment security can be obtained by means of a request for “custody of property” if the judgment becomes impossible or difficult to enforce,\(^{203}\) for example, when the defendant moves the assets outside the jurisdiction.

Unlike US maritime law, however, Chinese laws deal only with relations between or among persons (natural or juristic), not with those between persons and property. Hence, the requirement that the arrested party must be specified when filing the application for ship arrest has often caused difficulties for the claimant in the past.\(^{204}\) Although the new regulation under the Maritime Procedural Law has remedied the procedure by allowing the claimant to file an application when the identity of the defendant is unknown to the arresting party,\(^{205}\) the action is still brought against the unnamed owners, not the vessel.\(^{206}\) For example, Article 23(1) of the Maritime Procedural Law provides that the precondition to arrest a ship is when there is an unsatisfied liability of a maritime claim by the shipowner.\(^{207}\)

Under both the US and the Chinese laws, bringing the wrongful shipowners to court is the common goal of in *personam* proceedings. In the US, the purpose of an in *personam* action is to compel the owner to appear by seizing the vessel. Therefore, one necessary precondition of an in *personam* action with respect to any admiralty or maritime claim is that

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201 326 U.S. 310, 316 (1945).

202 Ibid., at p. 316.


205 See Art. 25 of the Maritime Procedural Law, which states: “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.”

206 See Li (n. 23 above), p. 661.

207 In other words, the maritime court may not arrest the ship when “the shipowner who is liable for the maritime claim” is no longer the owner of the ship at the time of arrest.
“the defendant shall not be found in the jurisdiction.”

When the vessel is seized, it may be released and substituted for security, or it may later be sold to satisfy a judgment. Since the ultimate liability rests with the shipowner, if the proceeds of the sale of the vessel do not satisfy the judgment, the owner remains liable for the balance of the amount.

V.B In rem action

In the US, an action in rem against a ship must be based on a maritime lien. A maritime lien on the vessel, therefore, is a prerequisite to starting an action in rem.

A maritime lien attaches to a ship from the moment the claim arises, and travels with the ship into whatever hands it passes. Unlike the English law that follows a procedural theory and according to which the in rem lawsuit is merely regarded as a device to bring a wrongdoer to court, American courts supposedly adopt a true personification theory, rooted perhaps more in continental theory than in English notions, and US legal scholars have long been in agreement about viewing the action as being against the ship for its wrong independent of the owner’s fault.

Procedurally, when an in rem action is initiated under US law, no individual is personally named as a defendant, and thus the court does not exercise in personam jurisdiction. Instead, as an action in rem, a vessel or thing is itself treated as the offender and is made the defendant by name or description. Yet, the US district courts do not “have

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208 Bay Casino, LLC v. M/V Royal Empress, 5 F. Supp. 2d 113, 121 (E.D. N.Y. 1998); see also Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner, 724 F. 2d 1161, 1163 (5th Cir. 1984).


210 Ibid., at p. 122.

211 Case note “Personification of Vessels” (1963–1964) 77 Harv. L. Rev. 1122.

212 Navieros Inter-Americanos, S.A. v. M/V Vasilia Express, 120 F. 3d 304 (CA1 P.R. 1997).


214 The Rebecca, 20 Fed. Cas. 373 (No. 11619) (D. Me. 1831) (analogizing maritime liens to hypothecations in Roman law).

215 See Gilmore & Black (n. 111 above), pp. 483–484.

216 R.M.S. Titanic, 171 F. 3d at 957 (which explains the difference between in personam and in rem jurisdiction, and demonstrates that salvage actions involve in rem jurisdiction).

217 James Moore et al., Moore’s Federal Practice Vol. 29, 3d edn. (New York: Matthew Bender, 1997), at §702.01. As Moore’s Federal Practice indicates, “proceedings in rem, which in effect make the ‘offending res’ the defendant, are derived from the ancient maritime codes promulgated in the coastal towns of the eastern Mediterranean before the rise of the Roman Empire and, like maritime attachment and garnishment, were part of the general maritime law adopted by the United States.”
the power to command that any ship to [sic] appear before a court sitting in admiralty."218 The US in rem proceedings are "grounded on the principle that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."219 As a result, the Supreme Court has emphasized that a court may only exercise in rem jurisdiction if "the property in dispute is generally in the possession of the Court, or of persons bound to produce it, or its equivalent."220 Only then does the court "have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world."221

The major difference between the two countries has been the extent of the recovery allowed in an in rem action. According to English law, once a shipowner appears as a claimant of the vessel and defends this claim on its merits, his potential liability is not limited to the value of his ship.222 Therefore, if the owner is liable as a person, then any of his ships may be "libeled,"223 and thus the proceedings resemble rather a quasi in rem action against the shipowner than an in rem action against the vessel. In contrast, US courts, without reference to personification or to any theory of origin, generally have adhered to the limited liability concept of in rem actions,224 allowing additional recovery only when the ship has been released for inadequate security.225

However, in Hine v. Trevor (1867) Justice Miller argued that an in rem action was not a common-law remedy, but an action under civil law.226 As a civil-law country, however, Chinese maritime legal scholars have generally agreed that there is no recognition of in rem action or related procedures227 under the Chinese maritime regime. Lixing Zhang, Professor

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218 R.M.S. Titanic, 171 F. 3d, at 961.

219 Ibid., at p. 957 (quoting Pennoyer v. Neff, 95 U.S. 714, 722 (1877)). In fact, the absence of the property in question from the court’s jurisdiction might preclude the exercise of jurisdiction over the property. See, e.g., Associated Metals & Minerals Corp. v. S.S. Portoria, 484 F. 2d 460 (5th Cir. 1973) (holding, inter alia, that where proper process against a vessel was not issued, the vessel was not arrested).


221 R.M.S. Titanic, 171 F. 3d, at 964 (citing Darlak v. Columbus-Am. Discovery Group, Inc. 59 F. 3d 20, 22–23 (4th Cir. 1995)).

222 The Joannis Vatis (No. 2), [1922] p. 213; The Dictator, [[1892] p. 304 (dictum).

223 Administration of Justice Act, 1956, 4 & 5 Eliz. 2, c. 46, §3(4). In the US, maritime judges can use the term “libel” to describe a ship arrest action. For example, Judge Chesnut – in Todd Shipyards Corp. v. The City of Athens, 83 F. Supp. 67 (Maryland, 1949), at p. 71 – said that “The SS ‘City of Athens’, a trans-Atlantic passenger-cargo ship, was libelled in the Port of Baltimore …”


225 Case note “Personification of Vessels” (n. 211 above), at p. 1124.

226 The Hine v. Trevor, 71 U.S. 555 (1867); see also The Moses Taylor, 71 U.S. 411 (1867).

227 See Li (n. 23 above), p. 661.
of Law at Peking University, stated: “In civil[-law] countries, the theory of the *in rem* proceeding is unfamiliar, and the law normally puts restrictions upon the right to attach a vessel prior to the adjudication of a claim. Similarly, the *in rem* proceeding is unfamiliar in China, although the practice of attaching vessels for securing maritime claims exists.” The rationale is that, in the matter of liability, the owner and his property cannot be separated. In other words, it seems speaking in riddles to say that a shipowner will not be liable for any debt or wrongdoings, but that his vessel will be.

In the US, a claimant could bring an *in rem* action against the vessel itself as a defendant under Supplemental Rule B. The legal reasoning is based on the fact that the vessel attached would be an auxiliary to an *in personam* claim because the vessel is a piece of property belonging to the defendant. Under an *in rem* action, the arrest warrant could extend only to the vessel. In *in rem* proceedings, the owner of the vessel bears no personal liability. The vessel is sold to satisfy the lien. If the proceeds of the sale of the vessel do not cover the lien, the owner is not liable for the balance.

Supplemental Rule C provides for an action *in rem* to “enforce any maritime lien.” It allows an *in rem* and an *in personam* cause of action to be tried in the same proceedings, where appropriate. When a maritime lien attaches, the plaintiff may pursue an *in rem* action against the vessel and he may also bring an *in personam* action against the defendant who is allegedly liable in contract, tort, etc. The two rules may be invoked simultaneously.

One of the special features of the US maritime procedures is that both maritime

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228 Lixing Zhang, “Shipping Law and Practice in China: Legal Analysis of the Draft Maritime Code and Maritime Jurisdiction” (Spring, 1990) 14 *Mar. Law* 209, at p. 235. For specific rules on the prejudgment attachment of vessels, see the Provisional Regulations governing the Vehicle and Vessel License Plate Tax promulgated by the Administrative Council of the Central People’s Government on September 13, 1951; the Regulations for Taxation on the Transportation Incomes of Vessels of Foreign Nationality, Ministry of Finance of the PRC on June 21, 1974; and the Announcement concerning Taxation on the Revenue of Foreign Freight and Passenger Ships, promulgated by the Ministry of Finance of the PRC on April 30, 1982.

229 *See* Zhang (n. 228 above).


231 *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F. 3d 304 (CA1 P.R. 1997).


attachment and arrest in rem are subject to the “due process” safeguards of the Fifth and Fourteenth Amendments of the US Constitution.  

It is well accepted that a maritime lien on the property arrested is required to support the underlying cause of action. Thus, the only basis for the arrest of a vessel in rem is the enforcement of a maritime lien in favor of the party suing the vessel and seeking the arrest. In order to carry out a maritime arrest, a plaintiff bears the burden of showing that he is entitled to a maritime lien; if he cannot do so, the arrest fails and must be dissolved. It should be noted that the properties subject to maritime lien law are not static; the next section will deal with two new areas of legal development, namely the extension of ship arrest right based on the status (container leaser) of a person as the arrest claimant and on the nature of property (freights in bank account) as the subject of maritime arrest.

VI Approaches to new issues

VI.A Container lessors’ right of ship arrest

The right of container lessors to arrest a vessel is extremely important to international trade because approximately 90 percent of the world’s cargo is moved by ocean-going sea containers. There are many nations such as the United Kingdom that rely almost exclusively on sea container trade.

The US receives about 46 percent of its trade imports by containers. Although 46

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238. See Tetley (n. 13 above), pp. 1938–1940.


241. Fed. R. Civ. P. Supp. Rule E(4)(f), which states that the plaintiff “shall be required to show why the arrest or attachment should not be vacated”.


243. *Ibid*. Countries such as the Netherlands, Singapore, Japan, and South Korea carry out the majority of their trade through sea transport. For example, South Korea conducts approximately 99.7 percent of its trade through its seaports. See Seung-Kuk Palik & Prabir K. Bagchi, “Process Reengineering in Port Operations: A Case Study” (2000) 11 *Int’l J. Logistics Mgmt.* 59, at p. 59.

244. See “Statement by U.S. Customs Commissioner Robert C Bonner: Hearing on U.S. Customs FY 2003 Budget Request House Appropriations Committee Subcommittee on Treasury, Postal Services, and General Government” (February 27, 2002), available at [http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb272002.xml](http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb272002.xml), which indicates that the US Customs increased security at its borders and implemented measures such as the Container Security Initiative (CSI), the Customs-Trade Partnership Against Terrorism (C-TPAT), and the Operation Green Quest (OGQ) to international container trade. The C-TPAT is a counter-terrorism measure.
percent may not seem significant, in 2001 alone more than 214,000 vessels and 5.7 million sea containers entered the 102 US seaports.\textsuperscript{245} In the US, although a container lessee’s maritime lien against a vessel is enforceable, it is seldom used in consequence of the \textit{Foss} case in 1987.\textsuperscript{246} In \textit{Foss}, a container lessee was not able to enforce a maritime lien of about USD18 million worth of container rentals because the time charterer lessee argued that he intended the containers to be “furnished” to a fleet indiscriminately and not to a particular vessel.

The \textit{Foss} decision had taken a serious look at Justice Brandeis’s opinion in the \textit{Piedmont Coal} decision,\textsuperscript{247} a case decided more than half a century ago. Justice Brandeis went into great detail explaining why coal could not be “furnished” to a fleet of vessels.\textsuperscript{248} In these two cases, goods had not been delivered directly to any particular ship. In \textit{Piedmont Coal}, the coal had been delivered to a corporation owning a fleet of vessels, which then allocated the fuel to its vessels as needed. In \textit{Foss}, containers were delivered at different times to a variety of locations, including the charterer’s container yards and the manufacturer’s plants. In neither case was there any attempt to designate the particular vessel to receive any portion or component of the goods. Under these circumstances, both courts held that no maritime lien arose because no goods had been “furnished.” As Charles D. Brown, Chair of the Committee on Marine Financing of the US Maritime Law Association remarked:

\begin{quote}
The problem with the \textit{Piedmont Coal} case is that nobody can figure it out. So our courts just gave it up instead of working on an open list, and we have to consider how to “furnish” under an open list for necessaries in the US. Such a list can grow like a constitution without amending our lien law every time some new necessary appears. So containers are necessaries under general admiralty law. That’s a given. All the cases have decided that. Now, we can’t furnish the container to a vessel because of practice. We should have been able to do this by general admiralty law, but now after the \textit{Foss} case, we’re set in cement just because it upholds the \textit{Piedmont Coal} case …\textsuperscript{249}
\end{quote}

The \textit{Foss} Court held that the container lessees’ right in such a factual context was to be within the arena of the US Congress, not of the judiciary. The container lessee eventually convinced the US Congress to specifically insert the word “container” in the definition of originating from a security model designed to prevent commercial shipments from being used to smuggle illegal drugs. The OGQ is a customs-led multi-agency task force to investigate and attack terrorist financing.

\begin{itemize}
\item \textsuperscript{245} See Lee (n. 242 above).
\item \textsuperscript{246} \textit{Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.}, 808 F. 2d 697 (9th Cir. 1987).
\item \textsuperscript{247} \textit{Piedmont & George’s Creek Coal Co. v. Seaboard Fisheries Co.}, 254 U.S. 1 (1920).
\item \textsuperscript{248} Ibid.
\end{itemize}
“necessaries” in §3101(4) of title 46. From that time onwards, if a container is carried aboard by a vessel, the container leaser would have a maritime lien for a necessary so long as the container is on the vessel.

However, new issues have arisen under the new regulation. As Charles D. Brown pointed out, if there is a blanket fleet or container lease covering thousands of containers that might have a duration of, say, five years, would the use of one container subject to the master lien trigger a maritime lien equal to the aggregate hire for the entire fleet on the particular vessel? Is the container leaser going to get a maritime lien on a specific vessel that carries, employs, or otherwise uses one container, when he has, say, a USD 40 million maritime lien incurred by a time charterer on a USD 10 million container vessel and the lien arose, say, five years ago? Are containers stacked at a container port waiting for a vessel deemed to be “used” by such a vessel? In short, without the judiciary’s effort in quantifying the new law, the statutory approach in extending the new right to the container leaser would trigger more problems than it intends to solve.

Chinese law, in contrast, recognizes a container leaser’s maritime lien upon a vessel. China followed the 1999 Arrest Convention to cover liens arising from equipment supplied (including containers) to the ship for its “operation, management, preservation or maintenance” as arrestable maritime liens. In addition, Chinese law follows the 1999 Arrest Convention, and does not require the charge attached on a vessel to be registered or to be registrable.

The legal implication is that a ship can be arrested for a variety of types of debt obligation, including those charges used in the container leasing industry, where loans are made to shipping companies to buy containers and it makes no difference whether the container to be serviced belongs to a particular vessel or to a fleet. In other words, even if containers are rendered to a shipping corporation owning a fleet of vessels, it is not necessary to designate any particular vessel to receive any portion or component of the containers. This is because the general wording in Article 21(21) of the Maritime Procedural Law, i.e., “supplies provided” and “services rendered,” would allow the Chinese courts wide discretion in judicial interpretation.

The procedure for arresting a vessel is set forth in the 1986 Specific Provisions on Prejudgment Attachment of Vessels (hereafter “1986 Specific Provisions”), under which any claimant requesting the arrest is to make an application in writing and provide sufficient

250 46 U.S.C.S. §3101(4) states: “Persons who lease containers on the order of the owner or any other person authorized under section 31341(a) of this title are deemed to have provided such containers to each vessel that carries, employs, or otherwise uses the containers in connection with the service performed by the vessel.”

251 Admiralty Law Institute (n. 249 above), at p 363.

252 Art. 1(1)(l) of the 1999 Arrest Convention; see also Maritime Procedural Law, Art. 21(12).

253 Art. 1(1)(u) of the 1999 Arrest Convention.

254 See Maritime Procedural Law, Art. 21(21).

255 Maritime Procedural Law, Art. 21(12).
evidence to the maritime court for the arrest. The maritime court will look for evidence that indicates elements of good faith. In China, before a ship arrest warrant is issued, approval must be obtained from the Chief Judge of the maritime court. In certain emergency circumstances, a ruling for arrest is to be made within forty-eight hours. Following international practice, the maritime court will offer the arrested party the opportunity to post sufficient security to obtain the release of the vessel. However, such a release must be approved by the Chief Judge.

Under both the 1982 Law on Civil Procedure and the 1986 Specific Provisions, the container leaser is responsible for all losses incurred as a result of any error made in the application for arrest. The 1986 Specific Provisions also authorize the maritime court to instruct the arresting party to provide security prior to making the ruling for arrest. Moreover, if the action is not brought within thirty days, the arrested party may apply for the release of the ship or of the security provided. The underlying rationale is to avoid abuse of the remedy of arrest, as Chinese maritime legal scholars generally agree that ship arrest tends to cripple ship financing, the essential sources of support to a strong merchant marine.

Similar to the US statutory approach, the corresponding Chinese provisions await judicial interpretation as the statute does not stipulate whether posting security by the claimant is a precondition to attachment. Besides, the 1986 Specific Provisions do not specify the types of security that will be acceptable, and this is left for the maritime court to decide.

VI.B Freights in bank account as the subject of maritime arrest

In maritime parlance, “freight” is “the price or compensation paid for the transportation of goods by a carrier.” Whether a court can issue a writ of maritime arrest on the freights in a bank account has been the issue of legal dispute in the US for many years.

By statute, Rule C(1) gives the federal court the power to order the arrest of the vessel

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256 See Zhang (n. 228 above), at p. 209. In accordance with the basic principles of China’s 1982 Law on Civil Procedure and with international practice relating to the attachment of vessels, and to enforce the substantive right of maritime claimants, the Trial Committee of the Supreme People’s Court adopted the Specific Provisions on Prejudgment Attachment of Vessels on January 31, 1986. Ibid., at p. 235.

257 Ibid., at p. 236.

258 Ibid.

259 Ibid.

260 Art. 200.

261 See Zhang (n. 228 above), at p. 236.

262 Ibid., at p. 237.

263 Ibid.

or “other property” that is the subject of the action.265 And traditionally, a charterer has a maritime lien against a vessel for breach of the charter party.266 But what about the freights due for shipment of the cargo which is still in a bank account?

US maritime law makes a distinction between the unpaid freights and the paid freights. The unpaid freights are considered “incidental to and indistinguishable from the vessel.”267 On the other hand, paid freights are not considered a part of the vessel; in Galban Lobo Trading Co. v. The Diponegaro,268 Judge Ryan reasoned that once the freight is paid, it can no longer be viewed as part of the ship. Before Diponegaro, throughout the long history of the US maritime regime, there have been only two cases in which the court had enforced the right of the cargo damage claimant to assert a maritime lien to arrest the freights.269 Judge Ryan observed that the enforcement of a maritime lien against freights for cargo loss or damage is neither mentioned nor provided for in the Admiralty Rules or of the US Supreme Court.270

Under US law, the offending ship is considered to be the wrongdoer, and it is bound to make compensation for the wrong done.271 The court in The Neponset later took the approach that “freight is regarded as belonging to the vessel, and the lien attaches to it as if it were a part of the ship, like the tackle.”272 If there is a maritime lien on the freight as part of the ship, then the measure of the lien is the extent of the lien on the ship itself.

In Diponegaro, the shipper brought an in rem action to arrest both the ship and the freight that was “prepaid” to the shipowner’s agent. Judge Ryan held that, although the cargo owner had a lien on the ship itself, he would have no lien on the money paid for the transportation of his goods, because the freights had become a fund separate from the ship itself.273 In other words, the Diponegaro decision upheld the historically recognized extension that unpaid freight is to be considered part of the ship.

Instead of focusing on the timing of the freight paid as an approach to solving the problem, some US circuit courts consider the status and conduct of the parties. For example, in situations where a vessel owner attempts to hold a shipper liable for unpaid freight after the

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265 Fed. R. Civ. P. Supp. Rule C(1). Rule C(3)(a)(ii) provides that a federal court may issue the ship arrest warrant if “the conditions for an in rem action appear to exist” from the face of the verified complaint.


267 Ibid., §31, p. 3, n.5.


269 Freights of The Date, 63 F. 707 (D.C.S.D. N.Y. 1894); The City of Athens, 83 F. Supp. 67 (D.C. Md. 1949).


271 The John G. Stevens, 170 U.S. 113, 122 (1897).

272 The Neponset, 300 F. 981, 990 (D.C. Mass. 1924).

shipper has attempted to pay through a freight forwarder, the US courts have adopted two different approaches.\textsuperscript{274}

The first approach imposes a rather strict liability on the shipper unless he can show that the vessel owner releases it from the obligation to pay.\textsuperscript{275} The Fifth Circuit Court replaced the agency analysis with a stricter standard that looked to the vessel owner’s intent to release the shipper.\textsuperscript{276} The agency analysis was rejected because a freight forwarder is an independent contractor who performs services for the benefit of the shipper, and the shipper would not exercise control upon the freight forwarder, an element necessary to constitute agency.\textsuperscript{277} For the stricter standard, the courts relied on the terms of the bills of lading providing for the shipper’s liability for freight charges, regardless of payment to a freight forwarder.\textsuperscript{278}

The second approach is based on the theory of equitable estoppel. Under the equitable estoppel standard, a shipper is not liable for the payment of freight charges when that shipper, in reliance on the representation of the carrier, reasonably believed that the carrier released it from its obligation to pay freight.\textsuperscript{279} In Olson Distributing Systems, Inc. v. Glasurit America, Inc.,\textsuperscript{280} the Sixth Circuit Court held that, where a carrier had issued bills of lading indicating that the freight was prepaid, the shipper could not be required to double-pay the freight charges when a freight forwarder had not remitted payment to the carrier.\textsuperscript{281}

The Sixth Circuit Court also considered the time of freight payment a significant issue to determine whether ship arrest power is to extend to freight money in a bank account. The Court found the “prepaid” marking was critical because such an indication led the shipper, believing that the carrier had received payment from the freight forwarder, to refrain from paying the carrier directly.\textsuperscript{282} The Southern District Court of New York adopted this reasoning, looked to the presence of “freight prepaid” on the bills of lading, and held that such a marking estopped the carrier from arguing that the shipper was liable for unpaid

\textsuperscript{274} \textit{Strachan Shipping Co. v. Dresser Indus., Inc.}, 701 F. 2d 483 (5th Cir. 1983).

\textsuperscript{275} \textit{Ibid.}, 701 F. 2d at p. 483. The Eleventh Circuit Court also adopted this standard, as appears from the ruling in \textit{Nat’l Shipping Co. of Saudi Arabia v. Omni Lines, Inc.}, 106 F. 3d 1544 (11th Cir. 1997).


\textsuperscript{278} \textit{National Shipping Co. of Saudi Arabia v. Omni Lines, Inc.} 106 F. 3d 1544, 1547 (11th Cir. 1997).

\textsuperscript{279} See Lynch (n. 276 above), p. 608.

\textsuperscript{280} 850 F. 2d 295 (6th Cir. 1988), at p. 296.

\textsuperscript{281} \textit{Ibid.}, at pp. 295–297.

\textsuperscript{282} \textit{Ibid.}
freight charges.\textsuperscript{283}

\section*{VII Legislative reviews of the 2003 New Practice Direction}

As mentioned above, China has ten maritime courts. This inevitably leads to different interpretations of the law. On January 6, 2003, the Chinese Supreme People’s Court issued a practice direction relating to the interpretation of certain provisions of the Maritime Procedural Law (hereafter “2003 Practice Direction”), which took effect on February 1, 2003.

In China, the Supreme Court’s power of interpreting laws is provided for in Article 127 of the PRC Constitution, which establishes it as the highest judicial organ of the nation and also grants it the power to supervise the administration of justice by lower courts. On the basis of this power, the Supreme Court has laid down certain rules in practice directions, which are not covered by existing legislation. This section is solely devoted to those aspects of the Maritime Procedural Law that were reviewed in the 2003 Practice Direction.

\subsection*{VII.A Arrest of property by the maritime courts}

Although the Maritime Procedural Law provides that a claimant may apply to the maritime court for arresting property belonging to a respondent for securing maritime claims, it does not define the kind of property that may be attached except for a vessel or a cargo loaded on board the vessel.\textsuperscript{284} In the 2003 Practice Direction, property is defined as including a ship, cargo on board a vessel or under the control of carriers, and the ship’s bunkers and materials. For all other types of property, the claimant must follow the rules relating to attachment in the PRC Law of Civil Procedure. For example, if the arresting party wants to attach the freight payable to the owners from the shipper, according to the Law of Civil Procedure, it has to give a counter-security up to the amount of the claim.

\subsection*{VII.B Arbitration agreement}

The Maritime Procedural Law provides that attachment by the maritime courts is not subject to the parties’ arbitration agreement.\textsuperscript{285} In the 2003 Practice Direction, a much wider interpretation is given to the Maritime Procedural Law, stating that, if the property is located in China, even if the claimant has initiated arbitration proceedings in a foreign country, he may still apply to the court to have the property arrested in China.

\begin{itemize}
\item \textsuperscript{283} Mediterranean Shipping Co. v. Elof Hansson, Inc., 693 F. Supp. 80 (S.D. N.Y. 1988), at p. 85.
\item \textsuperscript{284} See Maritime Procedural Law, Art. 44, which states: “A maritime claimant may apply for attachment of the cargo carried by a ship to ensure fulfilment of his maritime claim.”
\item \textsuperscript{285} Art. 14 of the Maritime Procedural Law states: “Preservation of a maritime claim shall not be bound by the jurisdiction agreement or arbitration agreement reached between the parties to an action in respect of the maritime claim.” See also Maritime Procedural Law, Art. 53, which states: “A maritime injunction shall not be bound by the jurisdiction agreement or arbitration agreement reached between the parties in respect of the maritime claim.”
\end{itemize}
VII.C Compensated losses for wrongful arrest

Under the Maritime Procedural Law, the arresting party has to provide counter-security in order to compensate the other party if the final decision points to a wrongful arrest. The Maritime Procedural Law does not, however, specify what losses will be compensated. The 2003 Practice Direction provides that if the arrest of a vessel was wrongful, the arresting party is to compensate the owners for the losses that the owners may have suffered during the period of the arrest, including the owners’ expenses, loss of use, and the cost of providing security.

VII.D Auction of the arrested vessel

Article 31 of the Maritime Procedural Law only contains provisions for the arresting party to apply when auctioning the arrested vessel. Under the 2003 Practice Direction, the arrested party is allowed to apply for an auction when the claimant fails to do so.

Under Article 31 of the Maritime Procedural Law only the arresting party may withdraw the application for auction. In the 2003 Practice Direction, the right of withdrawal is extended to other interested parties provided that all expenses for preparing the auction are paid by them. Finally, the 2003 Practice Direction also provides that either the arresting party or other interested parties can apply for suspension of the auction (no later than seven days to the auction date). This enables a mortgagee bank to negotiate a settlement with the arresting party.

In short, some provisions of the Maritime Procedural Law are too general or ambiguous, and have led to different interpretations by different maritime courts. The shipping community is served better by the 2003 Practice Direction’s clarification of the Maritime Procedural Law.

VIII Conclusion

A longitudinal study of developments in ship arrest law should cover sufficient time so that developmental processes, continuities, and changes can be discerned. The developments in the ship arrest laws of China and the US, though showing quite different approaches, seem to indicate that they have succeeded in incorporating the best features of both the common-law and civil-law traditions. The ship arrest provisions in the Chinese Maritime Code and Maritime Procedural Law have dramatically reformed the system of ship arrest in China. China has substantially adopted the provisions of the 1999 Arrest Convention. As an international treaty endorsed by legal professionals in both the common-law and civil-law jurisdictions, China’s adoption of the 1999 Arrest Convention represented an effort to harmonize its ship arrest practice with that under the international regime. Besides, the role of the judiciary in improving a unified system of Chinese maritime law, and in particular its ship arrest law, is expected to increase as time goes by. This is significant for the protection of the interests of those concerned. China has even extended the scope of arrest to cover military

286 Maritime Procedural Law, Art. 78.
and public ships when engaging in commercial activities. Although this may enhance the risk of ships getting arrested, the requirement of counter-securities may make creditors more cautious about initiating proceedings to have a ship arrested.

The US, through the effort of its federal judiciary over the last two centuries, seems to have taken the best features of both the common-law and the civil-law aspects in dealing with ship arrest. A distinctive feature of admiralty law in the US is the availability of in rem proceedings of ship arrest. This action is codified in the Supplemental Rules for Admiralty under Rule C. The action in rem treats the arrested vessel as the defendant in the action. This approach is unique, and at the heart of US maritime law. The notion of suing a ship is considered a legal fiction in many jurisdictions, but is central to the remedies in US maritime law.

International ship arrest is still subject to the domestic maritime law in which the ship arrest takes place. A country’s substantive law predominantly defines the success of a ship arrest. In theory, the substantive law of a jurisdiction may recognize the validity of the claim, but the order of priorities may place that claim below many others. In practice, once the ship is sold to satisfy the judgment, there may be no money left in the fund derived from the sale after the higher priority claims have been paid out. This latter case leaves the claimant successful on the merits, but with no real recovery of monies and his lien extinguished. Therefore, understanding the variables, such as the law of the contracting state, the flag of the vessel and the type of claim, will determine to what country a claimant should look to file his claim.

As China and the US are the world’s two hegemonic maritime nations, their ship arrest laws would affect the finality of many international maritime trade disputes. To understand the uncertainties of the two regimes would be critically important as to where the arrest proceedings be initiated. Claimants have naturally begun to seek out the most beneficial forums for arrest, while shipowners continue to seek a regime to minimize their liabilities; a comparison of the Chinese and US approaches to ship arrest models would help maritime traders select the most “friendly” jurisdiction.

Finally, with the clarification of various Chinese ship arrest provisions in the 2003 Practice Direction, a mortgagee bank will be given the opportunity to negotiate a settlement with the arresting party. Looked at it more broadly, China has established a set of principles governing ship arrest laws that contain generally accepted rationales in international conventions. It is continuously being developed based on a balanced consideration of the interests, not only of the primary arresting and arrested parties, but also of additional parties.

290 See Schoenbaum (n. 3 above), p. 895.
291 See Healy & Sharpe (n. 8 above), pp. 129–130.
such as container lessors and mortgagee banks.

If convenience and speed continue to be insisted on in the exploration and study of ship arrest laws, then only research on a case-by-case, black-letter-law approach will be emphasized. If such is the case, we will miss the fruitful big picture of understanding its developmental processes, continuities, and changes in ship arrest law. Fishing may provide maritime law researchers with an apt analogy: If a line is cast only into the shallow waters of a nearby pond, only little fish will be caught. For the big fish, it is necessary to venture out into deep water.