CHAPTER 3

Master and seamen

3.1 The CMC 1992 provides for the general rules of seamen and the special rules pertaining to the master. The Regulations of the PRC on Seamen 2007,[1] as amended in 2013 and 2014 (the "Regulations on Seamen 2014") provide detailed rules regarding the registration, qualification, training and occupational security of seamen as well as the provision of seaman services within the territory of the PRC.[2] In 2015, the National People's Congress Standing Committee of the PRC (the "NPCSC") ratified the 2006 Maritime Labour Convention (the "MLC 2006"), which aims at protecting the rights and interests of maritime workers. The relevant laws regarding seamen in China need to be improved or amended according to the MLC 2006.

Master

3.2 In the Regulations on Seamen 2014, a "master" means a person who has obtained master's qualifications in accordance with the provisions of the Regulations on Seamen 2014 and is responsible for managing and commanding a ship.[3] According to the CMC 1992, the master is responsible for the management and navigation of the ship.[4] The duty of the master in the management and navigation of the ship is not absolved even with the presence of a pilot piloting the ship.[5] The master should also take necessary measures to protect the ship and all persons on board, the documents, postal matters, the goods as well as other property carried.[6] For the protection of persons on board, the Regulations on Seamen 2014 specify that when managing and commanding a ship, the master must ensure the safety of persons on board and those temporarily embarked on board.[7] The master if negligent in protecting the safety of seamen on board is liable in tort for the injury to or death of any seamen.[8] The master's liability will not be discharged even if there is a certain fault of the injured seaman.[9]

1 Decree No. 494 of the State Council of the PRC 2007.
2 Seamen on military vessels shall be administered in accordance with the relevant provisions of the State and the armed forces. Seamen serving on fishing vessels shall be administered in accordance with the relevant provisions of the competent fisheries administration department of the State Council. See art 71 of the Regulations on Seamen 2014.
3 Regulations on Seamen 2014, art 4, para 2.
4 CMC 1992, art 35, para 1.
5 ibid, art 39.
6 ibid, art 35, para 3.
7 Regulations on Seamen 2014, art 22, para 7.
8 *Jiang Hedi v Le Hengguo* (2002) Yong Hai Shi Chu Zi No. 18 (Ningbo Maritime Court).
9 *Liu Lin v Li Yingyuan and Huang Jianbin* (2011) Guang Hai Fa Chu Zi No. 113 (Guangzhou Maritime Court).

3.3 The persons temporarily embarked on board include any person sent by charterers on board for loading/discharge operations. In *Cui Dehai v Jinyang Shipping Company*,[10] an employee of the charterer was sent on board and injured in an accident during the discharge operation. The Tianjin High People's Court held that the master had a duty to ensure the safety of the employee on board and the shipowner had the burden of proof that the master had exercised due diligence in the management of the ship to prevent the occurrence of the accident. Persons temporarily embarked on board also include repairmen who are on board the vessel to conduct repair work. In *The Shipping Corporation of India Co Ltd and United India Insurance Company v Qingdao Beihai Shipbuilding Heavy Industry Co Ltd*,[11] the ship repairmen on board were injured when an accident happened to the ship in the shipyard. The Shandong High People's Court held that the master's duty of management of the ship was not relieved on the basis of the ship repair. The repairer's duties were to repair certain parts of the ship under the supervision of the master. When the master was on board, it was not the repairmen's duty but the master's responsibility to keep the ship safe and ensure the safety of the repairmen. The master is free of responsibility only when he is not on board and if the repairmen control and operate the ship.

3.4 To comply with these obligations, orders given by the master within the scope of his functions and powers must be carried out by other members of crew, passengers and all other persons on board.[12] The Regulations on Seamen 2014 repeat that all persons on board are bound to carry out the orders delivered by the master within the scope of his functions and powers. In addition, the officers should organise their subordinate seamen to carry out the master's orders and supervise the performance of their functions and duties.[13] Should death occur to the master, or should the master be unable to perform his duties for whatever reason, the deck officer with the highest rank shall then act as the master; before the ship sails from its next port of call, the shipowner should appoint a new master to take command.[14]

3.5 The Regulations on Seamen 2014 provide detailed requirements for the master's obligation to manage and navigate a ship. When managing and commanding a ship, the master must meet the following requirements:

(1) ensuring that the ship and seamen carries all certificates, documents and other relevant navigational materials to meet statutory requirements;
(2) formulating the emergency plan and ensuring its effective implementation;
(3) ensuring the seaworthiness of the ship and the competency of the seamen at the commencement of the voyage, ensuring the minimum safe manning for the ship according to the relevant law, and securing the normal watchkeeping of the ship;
(4) implementing the maritime administration's instructions on waterborne traffic safety and prevention and control of pollution from ships, and submitting an accident report to the maritime administration where the ship is involved in a waterborne traffic accident or pollution accident;

10 (2003) Jin Gao Min Si Zhong Zi No. 87 (Tianjin High People's Court) (CA).
11 (2008) Lu Min Si Zhong Zi No. 95 (Shandong High People's Court) (CA).
12 CMC 1992, art 35, para 2.
13 Regulations on Seamen 2014, art 21.
14 CMC 1992, art 40.

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(5) conducting routine training and examination of seamen on the ship, and faithfully recording their service experience and performance in their Seaman's Identity Documents;
(6) being on duty on the bridge or, if necessary, directly commanding the ship, when the ship enters or leaves the port, berths or unberths, or passes heavy traffic zones or dangerous navigational zones, or encounters inclement weather or sea conditions, or suffers a waterborne traffic accident, ship pollution accident, ship security incident or other emergency situations;
(7) ensuring the safety of persons on board and those temporarily embarked on board;
(8) organising the seamen and other persons on board to render rescue operations where the ship encounters an accident threatening the safety of the lives and property on board; and
(9) when the ship is abandoned, taking all measures first to organise the passengers to safely leave the ship, then arranging for seamen to leave, and himself as the master, being the last person to leave and, before leaving the ship, directing seamen to rescue the deck log book, engine log book, oil record book, radio log book, the charts, documents and papers used in the voyage, as well as valuables, postal matter and cash money as far as possible.[15]

3.6 The Regulations on Seamen 2014 emphasise that the master has the power to make independent decisions with regard to the waterborne safety of lives and property, ship security and prevention and control of pollution, and shall assume the ultimate responsibility for such matters. In performing his duties, the master may exercise the following powers:

(1) to determine the voyage plan, or refuse to sail or discontinue the voyage where the ship fails to meet the requirements for safe navigation;
(2) to refuse to carry out illegal instructions by the employer of the seamen or the owner of the ship, or instructions that may threaten the safety of lives, property and the ship or cause pollution to the waters;
(3) to correct or stop the pilot's instruction in a timely manner or, if necessary, to ask for a change of the pilot, when finding the pilot's operating instructions may threaten safe navigation or pollute the waters;
(4) to decide to evacuate the ship when the ship is in distress and the safety of lives on board is seriously threatened;
(5) to decide to abandon the ship if the sinking or destruction of the ship is inevitable, however, he must first report such matter to the owner of the ship for permission, except in an emergency;[16] and
(6) to order incompetent seamen to leave their posts.[17]

3.7 To ensure the safety of the ship and all persons on board, the master is entitled to confine or take other necessary measures against those who have committed crimes or violated laws or regulations on board, and to guard against their concealment, destruction or forging of evidence. The master, having taken those actions, must make a written report

15 Regulations on Seamen 2014, art 22. The 9th requirement is the same as art 38, para 2 of the CMC 1992.
16 It is the same as art 38, para 1 of the CMC 1992.
17 Regulations on Seamen 2014, art 24.

of the case, which shall bear the signature of the master himself and those of two or more others on board, and shall be handed over, together with the offender, to the authorities concerned for disposition.[18]

3.8 The master should make entries in the log book of any occurrence of birth or death on board and should issue a certificate to that effect in the presence of two witnesses. The death certificate shall be attached with a list of personal belongings of the deceased, and attestation should be given by the master to the will, if any, of the deceased. Both the death certificate and the will should be taken into safe keeping by the master and handed over to the family members of the deceased or the organisations concerned.[19]

3.9 After a collision, the master of each of the ships in collision is bound, so far as he can do so without serious danger to his ship and persons on board, to render assistance to the other ship and persons on board. The master of each of the ships in collision is likewise bound so far as possible to make known to the other ship the name of his ship, its port of registry, port of departure and port of destination.[20]

Seamen

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3.10 The term "seamen" in the CMC 1992 means the entire complement of the ship, including the master.[21] The term "seaman" in the Regulations on Seamen 2014 means a person who has obtained the Seaman's Identity Document after being registered in accordance with the provisions of the Regulations on Seamen 2014 including the master, officer and rating (who is any ordinary seaman other than master or officer).[22] As words are not pluralised in Chinese, the terms for "seamen" and "seaman" are the same word. The meaning of seaman in the Regulations on Seamen 2014 emphasises the requirements for the registration and possession of the Seaman's Identity Document.[23]

3.11 In the Regulations on Seamen 2014, the term "officer" means a person who has obtained the relevant qualifications in accordance with the provisions of the Regulations on Seamen 2014, including chief officer, second officer, third officer, chief engineer, second engineer, third engineer, fourth engineer, communication personnel, and other senior technical and administrative personnel serving on board. The term "rating" means seamen other than the master and officers.[24] During the voyage, the master and officers may not resign, leave or suspend their duties without permission.[25] The master and officers of a ship with Chinese nationality[26] should be recruited from among Chinese seamen. In case of an actual need for the posts of officers to be assumed by foreign seamen, the matter shall be reported to the maritime administration[27] for approval.[28]

18 CMC 1992, art 36.
19 ibid, art 37.
20 ibid, art 166.
21 ibid, art 31.
22 Regulations on Seamen 2014, art 4, para 1.
23 For definition of Identity Document, see para 3.14.
24 Regulations on Seamen 2014, art 4, paras 2 and 3.
25 ibid, art 23.
26 For ship's nationality, see paras 2.21–2.14.
27 The authority is the Maritime Safety Administration of the PRC.
28 Regulations on Seamen 2014, art 12.

3.12 According to the Regulations on Seamen 2014, when serving on board, a seaman must meet the following requirements:

(1) carry the valid documents and certificates as specified in the Regulations on Seamen 2014;
(2) keep abreast of the seaworthiness conditions of the ship, security conditions of the trade route, as well as the necessary information about meteorological and sea conditions in the relevant trade zone;
(3) abide by the management systems and watchkeeping provisions of the ship, operate, control and manage the ship according to the rules on waterborne traffic safety and prevention and control of pollution from ships, faithfully complete the relevant statutory documents of the ship, and not conceal, tamper with or destroy the relevant statutory certificates and documents of the ship;
(4) participate in emergency drills and exercises of the ship and implement emergency precautions as required by emergency management of the ship;
(5) abide by the reporting system of the ship and submit a timely report when dangers, accidents, security incidents or other circumstances affecting the navigation safety are found or take place;
(6) make all efforts to rescue people in danger if it would impose no serious danger to himself; and
(7) be prohibited from carrying passengers and cargo on the ship for private purposes or carry contraband.[29]

Registration and qualifications of seamen

Registration

3.13 To apply for seaman registration, the following requirements must be met:

(1) be not less than 18 years old (or not less than 16 years old for those who are on internship or probation on board) but not more than 60 years old;
(2) meet the medical fitness standards for seamen; and
(3) have received basic safety training for seamen and passed the examination held by the maritime administration.

Those who apply for registration as seamen serving on ships of international voyages must in addition pass the professional foreign language examination for seamen.[30]

3.14 The maritime administration should, within ten days from the date of receipt of an application for seaman registration, make a decision whether or not to register the applicant. If the requirements prescribed in the Regulations on Seamen 2014 are met, it should register the applicant and issue the Seaman's Identity Document. However, it will not register the applicant if five years have not elapsed since the revocation of his Seaman's Identity Document in accordance with the law.[31] The Seaman's Identity Document

29 ibid, art 20.
30 ibid, art 5.
31 ibid, art 6, para 2.

is the occupational identity certificate of a seaman. It indicates the seaman's name, address, contact person(s), contact methods and other relevant information. If any item of the Seaman's Identity Document changes, the seaman must go through certain formalities at the relevant maritime administration.[32] The maritime administration will cancel the seaman's registration and make it known to the public if a seaman is found in one of the following circumstances:

(1) to be dead or being declared missing;
(2) to have lost his capacity for civil conduct;
(3) that his Seaman's Identity Document has been revoked in accordance with law; or
(4) he has applied for cancellation of registration on his own volition.[33]

Competency certificate

3.15 A seaman performing navigational or engineering watchkeeping duties must obtain a relevant Seaman's Competency Certificate. To apply for the Seaman's Competency Certificate, he must have met the following requirements:

(1) obtained a Seaman's Identity Document;
(2) met the medical fitness requirements for the seaman's post;
(3) received the relevant competency training and special training; and
(4) have the corresponding qualifications for the seaman's post and a good performance and safety record.[34]

To apply for the Seaman's Competency Certificate, a written application should be submitted to the maritime administration, accompanied with the materials certifying that the applicant meets the aforementioned requirements. Where the applicant meets the requirements and has passed the competency examination held by the maritime administration, the maritime administration will issue a relevant Competency Certificate to him.[35] The Seaman's Competency Certificate indicates the items such as the trade zone (route), type and class of the ship, his position and the validity period of the Certificate, which will match the seaman's competency. The validity period of the Seaman's Competency Certificate may not exceed five years.[36]

Seaman's passport

3.16 A Chinese seaman who enters and leaves China as a seaman or serves on a ship flying the flag of a foreign country should apply for a Seaman's Passport of the PRC at the maritime administration. To apply for a Seaman's Passport, the following requirements must be met:

(1) be a citizen of the People's Republic of China;

32 ibid, art 7.
33 ibid, art 8.
34 ibid, art 9.
35 ibid, art 10.
36 ibid, art 11.

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(2) hold the Seaman's Competency Certificate for serving on ships of international voyages or undertaking a definite seafaring mission abroad; and
(3) not be prohibited from leaving the country by any laws or administrative regulations.[37]

The maritime administration will, within seven days from the date of receipt of the application, make a decision to approve or not to approve such application and, if it decides to approve the application, issue a Seaman's Passport to the applicant; or, if it decides not to approve, it will notify the applicant in writing and give reasons.[38]

3.17 The purpose of the Seaman's Passport of the PRC is to serve as a document for a Chinese seaman on a mission abroad to prove his identity as a citizen of the PRC. Where the Seaman's Passport is lost, stolen or damaged, an application for issuance of a new passport can be made to the maritime administration. Where the seaman is abroad, he may apply for such issuance to the embassy or consulate of the PRC. The validity period of the Seaman's Passport does not exceed five years.[39] A seaman holding the Seaman's Passport of the PRC enjoys the requisite rights, and is entitled to pass freely in other countries and regions in accordance with local laws, relevant international treaties, and the maritime or shipping agreements signed between the PRC and the relevant countries.[40]

Guarantee of profession for seamen

Benefits

3.18 Seamen and their employers are covered by work injury insurance, medical insurance, old age insurance, unemployment insurance as well as other social insurance in accordance with the relevant laws and provisions of the PRC, and they should pay premiums on time and in full in accordance with law. The seamen's employers should buy special life and health insurance and provide relevant protective measures for seamen who serve on ships traveling to or through war zones or epidemic areas or ships carrying toxic or hazardous substances.[41]

3.19 The living and working areas of seamen on board shall conform to the requirements for a suitable living environment, safe operations and the protection of seamen as prescribed by the national criteria for ship survey. The seamen's employers should provide seamen with the necessary articles for daily use, occupational protective articles and medical supplies, establish the health records for seamen, and carry out regular medical examinations for seamen to prevent and control for occupational injuries or diseases. The employer of seamen should provide timely medical treatment for sick or injured seamen serving on board and, if a seaman is found to be missing or dead, should make proper subsequent arrangements in a timely manner.[42]

37 ibid, art 15.
38 ibid, art 16.
39 ibid, art 17.
40 ibid, art 18.
41 ibid, art 25.
42 ibid, art 26.

3.20 Employers of seamen should sign labour contracts with the seamen in accordance with the laws and regulations on labour contracts as well as the international treaties regarding seamen's labour and social security that the PRC has concluded or acceded to. There are three types of employment contracts for seamen in China. The first is the employment contract between a shipowner and seamen, which is a formal employment contract. The second is a temporary employment contract between a shipowner and seamen, which is a kind of service contract. The last is a tripartite contract between a shipowner, seamen and an employment agency under which the seamen have an employment contract with the agency and are sent to the shipowner for work on board. The relevant laws and regulations governing the first kind of employment contract include the Labour Law 1994, the Labour Contract Law 2012 and the Regulations on Seamen 2014.[43] The laws governing the latter two kinds of employment contract are the General Principle of the Civil Law and the Contract Law.[44] The relevant international treaty governing such employment contracts is the Maritime Labour Convention 2006.[45] An employer may not recruit a person who has not obtained the certificates prescribed by the Regulations on Seamen 2014 to work on board a vessel.[46]

Repatriation

3.21 When serving on board, a seaman may ask for repatriation in any of the following circumstances:

(1) the seaman's labour contract expires or is terminated in accordance with law;
(2) the seaman is incompetent to perform the duties of his post on board;
(3) the ship is lost;
(4) the ship travels to a war zone or an epidemic area without consent of the seaman; or
(5) the employer of seamen or the owner of the ship is unable to continue to fulfil its legal or contractual obligations for its seamen by reason of bankruptcy, sale of the ship, change in ship's registration or other reasons.[47]

3.22 A seaman may choose the place of repatriation from among the following places:

(1) the place where he is recruited or he first assumes his post on board;
(2) the place of residence or registered permanent residence of the seaman, or the ship's registry; or
(3) a place agreed upon by the seaman and the employer of seamen or the owner of the ship.[48]

The employer of seamen must pay for the cost of repatriation of its seamen, including the seamen's traveling expenses, reasonable expenses for accommodation, food and medical

43 *Qiao Zhenshan v Dalian Tianmiao International Shipping Agency Co Ltd* (2010) Liao Min San Zhong Zi No. 99 (Liaoning High People's Court) (CA).
44 *Cheng Songpeng v Zhang Jianfei* (2011) Yong Hai Fa Zhou Shang Chu Zi No. 98 (Ningbo Maritime Court).
45 For discussion of the MLC 2006, see paras 3.23–3.25.
46 Regulations on Seamen 2014, art 27.
47 ibid, art 31.
48 ibid, art 32.

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CHAPTER 10

Sea towage contracts

10.1 In the CMC 1992, a sea towage contract is a contract whereby the tug owner undertakes to tow an object by sea with a tug from one place to another, and the tow party pays the towage. Towage in the CMC 1992 does not include the towage service rendered to ships within the port area.[1] Furthermore, maritime towage services between the ports of the PRC shall be undertaken by ships flying the national flag of the PRC, except as otherwise provided for by laws or administrative rules and regulations. No foreign ships may engage in the maritime towage services between the ports of the PRC unless permitted by the competent authorities of transport and communications under the State Council.[2]

10.2 Sea towage contracts in Chinese shipping practice are always based on standard form of towage, e.g. CHINATOW of China Ocean Engineering Corporation and BIMCO's TOWCON and TOWHIRE. A sea towage contract must be between tug and tow. Where a tug owner tows a barge owned or operated by him to transport goods by sea from one port to another, it shall be deemed as an act of carriage of goods by sea, and not a towage.[3] The CMC 1992 requires that a contract of sea towage shall be made in writing.[4] Although a sea towage contract is not a named contract in the Contract Law 1999, the general principles of the Contract Law 1999 can apply to the sea towage contract except where the CMC 1992 has special rules for the sea towage contract.

Third parties to sea towage contracts

10.3 Normally, a tow owner directly enters into a sea towage contract with a tug owner. In some special cases, a sea towage contract may be concluded between a tug owner and a third party rather than a tow owner. Meanwhile, the third party can enter into another contract with the tow owner for the towage service. Of course, it is the tug owner who actually provides towage service for the tow owner. When the object of towage is damaged due to the fault of the tug, a question may arise that whether the tug owner or the third party shall be liable for the damage to the object of towage. This question has been examined in *Huatai Property Insurance Co Ltd Shanghai Branch v Shanghai Safe Shipping Enterprises Co* (*Huatai v Safe Shipping*).[5] In this case, the defendant entered into a towage contract

1 CMC 1992, art 155.
2 ibid, art 4.
3 ibid, art 164.
4 ibid, art 156.
5 (2004) Hu Hai Fa Shang Chu Zi No. 5 (Shanghai Maritime Court).

based on BIMCO TOWCON form with Yantai Salvage Bureau. It was agreed that the tow owner hired the vessel *Beihai 102* from Yantai Salvage Bureau to tow a FPSO vessel[6] *Hai Yang Shi You 111* of the tow owner for a trial trip. In the contract between the tow owner and the defendant, it was agreed that the defendant was responsible for the towage with the same tug *Beihai 102*. The vessel *Hai Yang Shi You 111* collided with another vessel during the towage. It was not disputed that the vessel *Beihai 102* was liable for the damage to the vessel *Hai Yang Shi You 111* due to the collision. The insurer of the vessel *Hai Yang Shi You 111* exercised the right of subrogation against the defendant.

10.4 In the Shanghai Maritime Court, the insurer claimed that the defendant as the contractual party to the towage contract should be liable for the damage to the tow. The Shanghai Maritime Court, however, did not recognise the defendant as the party to the towage contract. It was understood that, although the defendant was the contractual party to the contract with the insured tow owner, Yantai Salvage Bureau was actually the party who provided the towage service for the tow owner. The Shanghai Maritime Court interpreted that the contract between the defendant and the tow owner was not the basis of the insurer's claim, but an evidence of Yantai Salvage Bureau's status as the performing party in the towage. Therefore, Yantai Salvage Bureau was the actual party to the towage contract and the defendant was not liable for the damage to the tow.

10.5 This interpretation may not completely comply with the principle of privity of contract. However, the same tug in the two contracts *Huatia v Safe Shipping* may indicate that the defendant may have been acting as an agent of the tow owner only. If the name of the tug were not identified in the contract between the defendant and the tow owner, it is uncertain and difficult to anticipate whether, in Chinese courts, the defendant as a third party who does not actually provide towage service is considered as the contractual party rather than the agent in the towage contract. When a third party exists in the chain of towage contract, the tow owner may choose to claim against the tug owner directly in tort since there is no contractual relation between them.[7] However, it seems that a safe solution for the tow owner is to claim against both the third party and the tug owner for joint liability.

10.6 If necessary, the tow owner may claim against all relevant parties involved in the towage service and the Chinese courts will find the liable person for the damage to the tow. In *Lin Xianjun and Chen Qianping v Hainan Lingao Kunshe Shipping Company and Others*,[8] the tow owner entered into a towage contract with the first tug owner but the first tug owner did not provide the agreed tug for towage service. Instead, the second tug owner, according to the agreement between the first tug owner and the second tug owner, provided the second tug to tow the object in the towage contract. The tow sank in the towage due to the unseaworthiness of the second tug. The tow owner claimed for the damage to the tow against the defendants including the first tug owner, the real owner of the second tug, the registered owner of the second tug and the bareboat charterer of the second tug. It was found by the Guangzhou Maritime Court that the first tug owner did not exist in the

6 A FPSO vessel refers to a Floating Processing Storage and Offloading vessel. A FPSO vessel can be a conversion of an oil tanker or can be a vessel built specially for the application.
7 *China Pacific Insurance Co Ltd Shanghai Branch v Shenzhen Wanpeng Shipping Co Ltd* (2001) Hu Hai Fa Shang Chu Zi No. 12 (Shanghai Maritime Court).
8 (2002) Guang Hai Fa Chu Zi No. 37 (Guangzhou Maritime Court).

registration of the local authority. Therefore, the tow owner could only claim against other defendants in tort. The Guangzhou Maritime Court ultimately found that the bareboat charterer actually controlled the second tug and provided the towage service to the tow owner. Therefore, it was held that the bareboat charterer of the second tug should be liable for the damage to the tow.

Seaworthiness of tug and tow

10.7 Under the CMC 1992, seaworthiness of the tug and tow is not absolute. On the one hand, the tug owner shall, before and at the beginning of the towage, exercise due diligence to make the tug seaworthy and towworthy and to properly man the tug and equip it with gears and tow lines and to provide all other necessary supplies and appliances for the intended voyage. On the other hand, the tow owner shall, before and at the beginning of the towage, make all necessary preparations therefore and shall exercise due diligence to make the object to be towed towworthy and shall give the tug owner a true account of the object to be towed.[9]

10.8 The tow owner also needs to provide the certificate of towworthiness and other documents of the object to be towed issued by the relevant survey and inspection organisations.[10] If the tow owner fails to provide the necessary certificates and documents, he shall be liable for the damage to the tug owner even if the towage is not performed. In *The Zhao Qing Gong 1111*,[11] the tug owner agreed to tow the vessel *Zhao Qing Gong 1111* for a coastal voyage from Fujian Fuzhou to Guangdong Sihui and the tow owner agreed to pay the towage. The towage contract provided that the tow owner was responsible for the certificate of towworthiness. The tow owner paid RMB 80,000[12] as the first instalment of towage fee. The tug owner sent the tug from Xiamen to Fuzhou but could not contact the tow owner. Thus the towage contract was not performed. The tow owner claimed against the tug owner for return of the paid instalment of towage fee. It was found that the tow owner failed to provide the certificate of towwothiness because the tow vessel *Zhao Qing Gong 1111* was an inland water vessel only. The tug owner argued that the cost of fuel for the return voyage of the tug was more than RMB 80,000 which was the damage to the tug owner because of the tow owner's breach of the towage contract. The Guangzhou Maritime Court held that it was the tow owner, not the tug owner, who breached the towage contract and, therefore, dismissed the tow owner's claim.

Force majeure in sea towage contract

10.9 The general principle of force majeure in contract law applies to the sea towage contract in the CMC 1992. Where the object towed cannot reach its destination due to force majeure or other causes not attributable to the fault of either party, unless the towage contract provides otherwise, the tug owner may deliver the object towed to the tow party or its

9 CMC 1992, art 157.
10 ibid, art 157, para 2.
11 (2012) Guang Hai Fa Chu Zi No. 269 (Guangzhou Maritime Court).
12 RMB is an abbreviation of Renminbi. RMB is official money in the PRC.

agent at a place near the destination or at a safe port or an anchorage chosen by the master of the tug, and the contract of towage shall be deemed to have been fulfilled.[13]

10.10 If, before the commencement of the towage service, due to force majeure or other causes not attributable to the fault of either party, the towage contract cannot be performed, either party may cancel the contract and neither shall be liable to the other. In such event, the towage fee that has already been paid shall be returned to the tow party by the tug owner, unless otherwise agreed upon in the towage contract.[14] If, after the commencement of the towage service, due to force majeure or other causes not attributable to the fault of either party, the towage contract could not be performed, either party may cancel the towage contract and neither shall be liable to the other.[15]

Towage fee and duress

10.11 The payment of the towage fee is an important obligation of the tow owner in a towage contract. Where the tow owner fails to pay the towage fee or other reasonable expenses as agreed, the tug owner shall have a lien on the object towed under the CMC 1992.[16] If the tow owner refuses to pay the towage fee relying on duress, he has the burden to prove the existence of the duress. In *Zhoushan Yuntong Shipping Co Ltd v Zhejiang Qianhong Marine Co Ltd*,[17] although the towage fee was fixed to be RMB 1.25 million, the tug owner required a further RMB 200,000 for the towage. Because the tow lost power before the towage, the tow owner agreed to pay the further towage fee. After the towage service, the tow owner refused to pay the further towage fee and argued that he had to agree to pay the further towage fee at the request of the tug owner in duress, because otherwise both the tow and the crews and goods on board the tow would be in danger. This argument was refused by the Ningbo Maritime Court. The Ningbo Maritime Court pointed out that the tow owner could cancel the towage contract if he refused to pay the further towage fee. It was found that the tow was still safely anchored and had kept the correct anchoring position before and during the towage. Therefore, the tow owner failed to prove the existence of duress and was liable for the payment of the further towage fee as was agreed.

Liabilities and immunities

10.12 The liability regime of towage in the CMC 1992 is based on the fault of parties. This liability regime applies only if and when there are no provisions or no different provisions in this regard in the sea towage contract. In the course of the sea towage, if the damage suffered by the tug owner or the tow owner was caused by the fault of one of the parties, the party in fault shall be liable for compensation. If the damage was caused by the faults of both parties, both parties shall be liable for compensation in proportion to the extent of

13 CMC 1992, art 160.
14 ibid, art 158.
15 ibid, art 159.
16 ibid, art 161.
17 (2008) Yong Hai Fa Shang Chu Zi No. 152 (Ningbo Maritime Court).

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Traffic Safety Law 1983, which includes relevant issues in respect of collisions of ships, such as navigation, berthing and operations, safety protection, investigation and handling of traffic accidents and legal liability. However, it is understood as an administrative law for the safe management of ships by governments. Therefore, both the CMC 1992 and the COLREGs 1972 apply to disputes over the collision of ships in judicial practice.[10]

Ships in collision

11.3 "Ships" in the collision of ships in the CMC 1992 include those non-military or public service ships or craft that collide with the ships generally defined in the CMC 1992.[11] The ship as a general concept in the CMC 1992 means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage, including ship's apparel.[12] However, the provisions regarding the collision of ships in the CMC 1992 do not apply to disputes over collision between military vessels or official vessels in commercial activities and others ships for the collision of ships in the CMC 1992.[13] Furthermore, the collision of ships in the CMC 1992 does not include collision between the inland water ships.[14]

11.4 The COLREGs 1972 applies to all vessels on the high seas and in all waters connected therewith navigable by seagoing vessels.[15] The word "vessel" includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.[16] The Collisions Convention 1910 applies to the compensation for damages caused to vessels, or to any things or persons on board thereof due to a collision that occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation in whatever waters the collision takes place.[17]

11.5 Where a ship has caused damage to another ship and persons, goods or other property on board that ship, either by the execution or non-execution of a manoeuvre or by the non-observance of navigation regulations, even if no collision has actually occurred,[18] the provisions regarding collision of ships in the CMC 1992 shall apply.[19]

Liabilities in collision

General principles

11.6 The three general rules of legal liability are established by the Collisions Convention 1910. First, if a collision occurs that is accidental or of an uncertain cause, the damages

10 *Ding Hanshou and Others v Liu Xiaoyun* (2015) Min Shen Zi No. 1205 (SPC) (Retrial).
11 CMC 1992, art 156, para 2.
12 ibid, art 3.
13 Minutes of the Second National Working Conference on the Trial of Foreign-Related Commercial and Maritime Cases 2005 (the "Minutes of the Second National Working Conference 2005"), art 128.
14 Provisions on Vessel Collisions 2008, art 1.
15 COLREGs 1972, art 1, para 1.
16 ibid, art 3, para 1.
17 Collisions Convention, art 1.
18 For example, the damage caused by waves due to the short distance between two ships.
19 CMC 1992, art 170. Article 13 of the Collisions Convention 1910 provides the same extension of application.

are borne by the party that suffers them.[20] Second, if a collision occurs that is the fault of a party, the party at fault is liable for the damages that were caused.[21] Last, if a collision occurs that is the fault of more than one party, the parties at fault are liable in proportion to the faults respectively committed (if it is not possible to determine the proportional fault, the liability is apportioned equally between the parties at fault).[22] The general rules of legal liability in the Collisions Convention 1910 apply where the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law.[23]

11.7 The general rules in the Collisions Convention 1910 are the same to those in the CMC 1992. First of all, neither of the parties shall be liable to the other if the collision is caused by force majeure or other causes not attributable to the fault of either party or if the cause thereof is left in doubt.[24] Second, if the collision is caused by the fault of one of the ships, the one in fault shall be liable therefor.[25] Last, if the colliding ships are all in fault, each ship shall be liable in proportion to the extent of its fault; if the respective faults are equal in proportion or it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships shall be apportioned equally.[26]

11.8 Force majeure in the Contract Law 1999 means objective situations that cannot be foreseen, avoided or overcome.[27] In judicial practice, Chinese courts apply the same concept of force majeure in disputes over collision of ships although there may be tortious liability and not contractual liability in such disputes. In *Shanghai Dongfang Dredging Engineering Co Ltd v Hudong Shipbuilding Co Ltd*,[28] the defendant's ship suffered a force 10 gale, which broke the cables for anchoring the ship; it collided with another ship when it crossed the Huangpu River in a short period of time. It was found that the meteorological department did not forecast the disastrous weather in this case. Because the claimant failed to prove that the defendant had not made great efforts in good faith to avoid overcoming this disaster, the defendant was not liable for the collision due to the disastrous weather as a force majeure.

Proportion of liability

11.9 Where the colliding ships are all at fault for the collision at sea or in other navigable waters, the liability and the proportion thereof shall be analysed in the context of the COLREGs 1972. In principle, more fault mean more liability. If the ships in the collision have the same or are at similar fault, the liability of their shipowners shall be divided equally in proportion. Otherwise, the shipowner who is at more fault bears more liability. In *Maoming Maonan Xinghua Petroleum & Chemical Co Ltd v Fujian Shishi Xinda Shipping Co Ltd and Others*,[29] both of the ships in the collision failed to maintain a proper look-out by sight,

20 Collisions Convention 1910, art 2.
21 ibid, art 3.
22 ibid, art 4.
23 ibid, art 5.
24 CMC 1992, art 167.
25 ibid, art 168.
26 ibid, art 169, para 1.
27 Contract Law 1999, art 117, para 2.
28 (1999) Hu Gao Jing Zhong Zi No. 423 (Shanghai High People's Court) (CA).
29 (2002) Guang Hai Fa Chu Zi No. 139 (Guangzhou Maritime Court).

failed to proceed at a safe speed, and failed to properly use the radar equipment and thus violated rules 5, 6 and rule 7 (b) of the COLREGs 1972. Apart from the same violations, one of the ships also failed to take avoiding action consisting of an alteration of course towards a vessel abeam or abaft the beam in ample time and thus violated rule 19 (d) (ii) of the COLREGs 1972. Because one of the ships had violated the COLREGs 1972 more, that ship was held to bear 60 per cent of the liability for the collision.

11.10 Where the violations of the COLREGs 1972 by the parties in the ships collision are similar, Chinese courts may take into account the primary cause of the collision for determining the proportion of liability. Whether an action is a primary cause of the ships' collision is subject to the discretion of judges based on the facts of the accident. In *Beihai Honghai Shipping Co Ltd v Orient Overseas Container Line (U.K.) Ltd and Others*,[30] the stand-on ship *OOCL Europe* collided with the give-way ship *Xinghai 668* and both ships violated rules 5, 6, 7 (a) and 8 of the COLREGs 1972. It was found that *Xinghai 668* in the crossing situation did not take early and substantial action to keep well clear until the last two minutes before the accident, which violated rule 16 of the COLREGs 1972, but *OOCL Europe* altered course to port for *Xinghai 668* on her own port side even when it was found that *Xinghai 668* altered course to starboard so as to involve risk of collision that violated rule 17 (c) of the COLREGs 1972. The court of first instance concluded that the wrong action of *OOCL Europe* was the primary cause of the ships' collision and thus should bear 60 per cent of the liability for the collision.[31]

11.11 However, the SPC disagreed with this conclusion in the retrial of this case. It pointed out that the wrong action of *Xinghai 668* was the primary cause of collision although the wrong actions of *OOCL Europe* were also an important factor. Therefore, the SPC held that *Xinghai 668* should bear 60 per cent of the liability for the collision. The SPC seems to have indicated that the collision may not have happened if the *Xinghai 668* took early and substantial action to keep well clear in the crossing situation even if *OOCL Europe* ultimately took the wrong action to alter course to port. If this approach is correct, it may then be necessary to examine whether *OOCL Europe* had a last clear chance to avoid the collision if it had taken the right action.[32] If *OOCL Europe* had a last clear chance to avoid the collision when it found that *Xinghai 668* altered course to starboard, *Xinghai 668* should not bear any liability, or at least not more liability than that of *OOCL Europe*. If there was no last clear chance, the equal proportion of liability may be appropriate because it is hard to conclude which action contributed to the collision more.

11.12 In reality, ships may not follow the COLREGs 1972 but take actions by mutual agreement. In this circumstance, Chinese courts still apply the COLREGs 1972 for determining the proportion of liability. In *Jiangsu Weilun Shipping Co Ltd v Miranda Rose Co Ltd*,[33] before both ships *Miranda Rose* and *Weilun 06* reached consensus, they should "intersect at red lights"[34] when crossing each other. However, *Miranda Rose* first proposed an "intersection at green lights" and *Weilun 06* agreed to the proposal although this proposal violated the give-way obligation under the COLREGs 1972. Under this special circumstance, there was no "give-way vessel" or "keep-way vessel" under the COLREGs 1972. Nevertheless, after reaching consensus on intersection in green lights, both parties believed that the other party would give way to it and they failed to conduct an effective observation on the situation of the waters and fully estimate the current occasion and risks of collision. They also did not take action until immediate danger was formed, and finally failed to avoid the collision. Although there was a mutual agreement between the ships, the Shanghai Maritime Court determined the liabilities for the ships collision according to the COLREGs 1972 without consideration of the mutual agreement that violated the COLREGs 1972. Because of the identical wrong courses of action, it was held that the two ships should bear liability in equal proportion.

30 (2012) Min Ti Zi No. 142 (SPC) (Retrial).

31 (2009) Guang Hai Fa Chu Zi No. 4, 292; (2010) Yue Gao Fa Min Si Zhong Zi No. 86, 87 (Guangdong High People's Court) (CA).

32 The last clear chance doctrine is widely attributed to the English case of *Davies v Mann*, 152 Eng. Rep. 588 (1842).

33 (2010) Hu Hai Fa Shang Chu Zi No. 24 (Shanghai Maritime Court), Guiding Case No. 31.

34 The lights in the term of "intersect in red lights" in this case referred to the "sidelights", which mean a green light on the starboard side and a red light on the port side. See rule 21 (b) of the COLREGs 1972.

Causation in tort

11.13 For tortious liability in collision cases, the general principles of tort law apply. Causation is a condition of tortious liability in the judicial practice of ship collision cases even though Chinese statute law does not expressly require this condition. In *Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG and Rickmers-Linie GmbH & Cie KG v CS Marine Co Ltd*,[35] one of the issues in the dispute over the ships' collision was the causation between the collision and the explosion of one of the colliding ships, *Rickmers Genoa*. Because of the collision, a flood of water poured into the No. 1 cargo hold of *Rickmers Genoa*. The cargo of magnesium desulfurisation agent within containers reacted with the water and hydrogen was released, which caused the explosion. In the chain of causation, the Shanghai Maritime Court pointed out that the collision was the origin of the explosion, the reaction between the water and the cargo was the condition of the explosion, and both the collision and the reaction caused the explosion. Without the collision, the reaction as the condition of the explosion would not have happened and the explosion would not have thus occurred. Therefore, it was held that there was causation in law between the ships' collision and the explosion on *Rickmers Genoa*. For liability in tort, it is necessary to examine both the causation in fact and the causation in law. In this case, there was only causation in fact. In other words, the damage due to the explosion was too remote.

11.14 The test of remoteness is foreseeability.[36] If the damage is not foreseeable, it is too remote. In *Xing Yulin v Qinzhou Port Yunshunda Shipping Co Ltd*,[37] the ship *Tailianda* collided with a first ship and kept reversing until a second collision with a second ship. The Shanghai Maritime Court pointed out that the first collision was an obvious cause of the second collision. However, it was just causation in fact, but not causation in law. In

35 (2009) Hu Gao Min Si (Hai) Zhong Zi No. 239 (Shanghai High People's Court) (CA).

36 There is no such requirement in Chinese statute law. See English case *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No. 1))* [1961] AC 388. In this case the defendant was not held liable for fire damage because it was not foreseeable, whereas, in *Overseas Tankship (UK) Ltd v The Miller Steamship Co (The Wagon Mound (No. 2))* [1967] 1 AC 617, the same defendant was held liable for the fire damage based on the same facts in the claim from a different plaintiff, as the risk was foreseeable although it was very small.

37 (2013) Hu Hai Fa Shang Chu Zi No. 51 (Shanghai Maritime Court).

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fact, *Tailianda* did not lose its power after collision but was still under control. In the view of the Shanghai Maritime Court, *Tailianda* should not have kept reversing, leading to the second collision, but instead should have stopped and anchored in a safe water. Therefore, it was not the first collision but the continuous reverse of *Tailianda* that caused the second collision. So the liabilities in the two collisions should be separate and the first colliding ship was not liable for any damage to the second colliding ship in the second collision. If both the causation in fact and the causation in law are satisfied, the liable person is liable for the damage caused to others in tort. In *Qinhuangdao Jinrun Shipping Co Ltd v Fujian Guanhai Shipping Co Ltd*,[38] the ship *Guanhai 308* collided with a first ship in a crossing situation causing its bow to alter course to starboard and collided again with a second ship in the overtaking situation two minutes later. It was held that, from the perspective of causation, the first collision was the direct and primary cause of the second collision.[39] Since the causation was satisfied, the first colliding ship should be liable for the compensation from *Guanhai 308* to the second colliding ship according to its proportion of liability in the first collision.[40]

Compensation for damages

Compensation in general

11.15 There is no compensation if neither of the parties is liable to the other.[41] If the collision is caused by the fault of one of the ships, the one at fault shall be liable for compensation of the loss of the other one.[42] If each ship is liable in proportion to the extent of its fault, the ships in fault are liable for the damage to the ship, the goods and other property on board pursuant to the proportions. Where the cargos on board are damaged when both the colliding ships are at fault, the cargo interests may claim against the carrying vessel for breach of contract, or claim against one or both of the colliding vessels for compensation in tort.[43] Where damage is caused to the property of a third party, the liability for compensation of any of the colliding ships does not exceed the proportion it shall bear. If the ships in fault have caused loss of life or personal injury to a third party, they shall be jointly and severally liable. If a ship has paid an amount of compensation in excess of its proportion, it has the right of recourse against the other ship at fault.[44]

11.16 The property loss or losses of a third party means the loss or losses directly caused by the vessel collision to the properties other than goods on the vessels or properties carried by crew, passengers, or other personnel on the ships that are all in fault.[45] The

38 (2014) Hu Hai Fa Shang Chu Zi No. 44 (Shanghai Maritime Court).

39 The question in a situation like this was not whether the negligence, which caused the collision, was continuing, but whether the effect of the collision – which such negligence caused – was continuing. See English case *The Calliope* [1970] 1 Lloyd's Rep 84.

40 However, the compensation to the second colliding ship was not raised by *Guanhai 308*, so this point was not discussed in the judgment of this case.

41 CMC 1992, art 167.

42 ibid, art 168.

43 Provisions on Vessel Collisions 2008, art 6.

44 CMC 1992, art 169, paras 2 and 3.

45 Minutes of the Second National Working Conference 2005, art 131.

loss of life or personal injury to a third party includes the personal casualties of crew, passengers, and other personnel on the collided ships.[46] In judicial practice, where parties to disputes over ship collision have lodged lawsuits for disputes over the collision of ships, a maritime court will suspend the trial of disputes over losses caused by the collision to the properties of a third party and resume the trial after the conclusion of the dispute over the collision.[47]

Compensation for damage to property

11.17 The compensation for damage to property caused by the ships' collision is subject to the Provisions on Compensation for Vessel Collisions 1995. Damage to property includes the physical damage to property, consequential expenses and loss, the reasonable expenses and loss for avoiding or minimising the damage and the loss of expected prospective interest.[48] In Chinese judicial practice, the prospective interest is the reasonable loss that could be reasonably anticipated by the liable person.[49] The loss of penalty paid to a third party is not a reasonable prospective interest because it cannot be anticipated by the liable person in a collision.[50]

11.18 The compensation for damage to the ship includes the compensation for the whole damage and for partial damage. Whole damage to a ship includes the loss of value of the ship including bunkers on board, ship's apparel and other properties on board, seamen's wages, repatriation fees and other reasonable expenses. Partial damage to a ship includes the temporary and permanent repair cost, auxiliary expenses and maintenance cost. The damage to a ship also includes reasonable salvage remuneration, expenses for investigation, rescue and removal of shipwreck, the costs for setting the wreck mark, salvage reward, loss of hire or freight for the current voyage, contribution to general average, loss due to detention of ship and other reasonable costs and expenses.[51]

11.19 The compensation for damage to the property on board includes the loss or devaluation caused by the loss of or damage to the property, reasonable cost for repair or treatment, reasonable cost for salvage, rescue and removal of the property, contribution to general average and other reasonable costs and expenses.[52] The compensation for damage to the onshore installations caused by the collision with ships includes the whole loss of installations or the repair cost for the partial damage and reasonably expected prospective interest before installations can be used as usual after repair.[53] If the owner of the damaged installations violates the principle of good faith and deliberately delays the repair, the owner shall be liable for the loss of prospective interest so caused.[54]

46 ibid, art 132.

47 ibid, art 133.

48 Provisions on Compensation for Vessel Collisions 1995, art 1.

49 It also lacks the causation in law, namely the foreseeability in tort claim. See paras 11.13 and 11.14.

50 *China Huadian Engineering Co Ltd v CONTI JORK Shipping Ltd* (2009) Jin Gao Min Si Zhong Zi No. 369 (Tianjin High People's Court) (CA).

51 Provisions on Compensation for Vessel Collisions 1995, art 3.

52 ibid, art 4.

53 ibid, art 5.

54 *Shanghai International Port (Group) Co Ltd and Shanghai East Container Terminal Co Ltd v KSF6 International SA and Hyundai Merchant Marine Co Ltd* (2012) Min Shen Zi No. 1401 (SPC) (Retrial).

Compensation for personal injury

11.20 According to the Interpretation on Compensation for Personal Damage 2003,[55] compensation for personal injury includes:[56]

(a) in the event of injury: expenses paid for medical treatment and loss of income due to absence from work, including medical expenses, nursing expenses, travelling expenses, accommodation expenses, board expenses in hospital, and necessary expenses for food;
(b) in the event of disability due to injury: necessary expenses, cost for additional needs in living and loss of income due to inability to work, including disability compensation, expenses of disability aids, living expenses of dependants, as well as necessary expenses of recovery, nursing, and continuing treatment actually occurred in follow-up treatment;
(c) in the event of death: the compensation for injury before death, funeral expenses, living expenses of any dependants, death compensation expenses, travelling expenses and accommodation expenses paid and the loss of income due to absence from work incurred by the relatives of the victim in collision for funeral arrangements as well as other reasonable expenses.

11.21 Where a victim or a close relative of the deceased suffers mental distress, and the compensation claimant files an action with a people's court claiming compensation for mental distress, such compensation shall be determined according to the Interpretation on Compensation for Mental Distress 2001.[57] The right to claim compensation for mental distress shall not be transferred or succeeded, unless the person obligated to compensate has promised in writing to make financial compensation or the compensation claimant has filed an action with a Chinese court.[58] The compensation for mental distress includes the compensation for disability, death and other forms of damage.[59] For the purpose of compensation, the claimant must prove that the mental distress is serious.[60] If the claimant fails to prove the seriousness of mental distress, the claim for mental distress compensation may not be considered when the personal injury has been compensated.[61]

11.22 The amount of compensation for mental distress shall be determined based on the following factors:[62]

(1) degree of the infringer's fault, unless the law provides otherwise;
(2) the means and place of the harm and the manner of the act of harm;
(3) consequences of the act of tort;
(4) the benefits obtained by the liable person;

55 Fa Shi [2003] No. 20 (SPC).
56 Interpretation on Compensation for Personal Damage 2003, art 17.
57 Fa Shi [2001] No. 7 (SPC).
58 Interpretation on Compensation for Personal Damage 2003, art 18.
59 Interpretation on Compensation for Mental Distress 2001, art 9.
60 Tort Liability Law 2009, art 22.
61 *Zhu Xindong v Shen Zhouhang and Others* (2015) Qing Hai Fa Hai Shi Chu Zi No. 116 (Qingdao Maritime Court).
62 Interpretation on Compensation for Mental Distress 2001, art 10.

(5) the liable person's financial ability to bear the liability; and
(6) average living standard in the area where the court accepting the case is located.

Liable persons

11.23 The liabilities for compensation arising out of a ship collision shall be borne by the owner of the ship or by the bareboat charterer if the collision occurs during the period of bareboat charter and the bareboat charter is registered.[63] In principle, a shipowner shall mean the person who has been legally registered as the shipowner. Where a ship is not legally registered, the shipowner shall mean the person actually in possession of such ship.[64] However, in some special circumstances, the legally registered shipowner may not be the liable person in the collision of ships. In Chinese practice, a ship owned by the beneficial owner may be registered by another person with the person's name. The reason for this special practice is the registration requirement in law. The real owner may not be qualified to register his ship as the shipowner, and thus the ship is registered by others to satisfy the requirement of ship registration. Therefore, this special practice is not based on an agency agreement or management agreement between the real beneficial owner and the registered owner, but on a special agreement that is for registration purpose only. So the registered owner is not an agent or the manager of the ship. Except the registration, the real beneficial owner controls and is responsible for everything of the ship. In this circumstance, only the real beneficial owner is recognised as the liable person for collision of ships and the registered owner does not bear joint and several liability.[65]

11.24 In international shipping practice, the ship's Nationality Certificate is the most important piece of evidence for identifying the shipowner. In *Tokio Marine & Nichido Fire Insurance Co Ltd v PT Djakarta Lloyd (PERSERO)*,[66] the defendant was identified as the shipowner through the ship's registration information from the website of Lloyd's Register in the court of first instance.[67] The defendant argued that it was just the ship's technical manager, and, although the defendant's name was on the ship's seal, it was just for technical management of the ship. The ship's Safety Certificate and Compliance Certificate showed that the defendant was the ship's technical manager. The court of appeal pointed out that, as international shipping practice, the ship's Nationality Certificate was valid evidence of ownership of the ship. According to the ship's Nationality Certificate, the defendant was not the shipowner or responsible manager.

11.25 In China, the bareboat chartering shall be registered at the ship registration authority. No ship bareboat chartering shall have legal effect against a third party unless registered.[68] So, if a bareboat charter is not legally registered,[69] the owner of the bareboat chartered ship

63 Provisions on Vessel Collisions 2008, art 4.
64 Minutes of the Second National Working Conference 2005, art 130, para 2.
65 *Zhoushan Tongtu Engineering Co Ltd v Dandong Jixiang Shipping Co Ltd and Dandong Marine Shipping Co Ltd* (2001) Yong Hai Shi Chu Zi No. 109 (Ningbo Maritime Court).
66 (2010) Hu Gao Min Si (Hai) Zhong Zi No. 198 (Shanghai High People's Court) (CA).
67 (2008) Hu Hai Fa Shang Chu Zi No. 49 (Shanghai Maritime Court).
68 Regulations on the Registration of Ships 2014, art 6.
69 The registration of a bareboat charter in foreign jurisdictions may be recognised if it is proved that the bareboat charter has been legally registered overseas according to the relevant foreign law. See *Guangdong Yudean Shipping Co Ltd v Hiro Shipping Inc and Others* (2012) Min Shen Zi No. 23 (SPC) (Retrial).

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cannot argue that the bareboat charterer is liable for compensation in the ship collision. In other words, the charterer of the unregistered bareboat charter is not a liable person for ship collision unless he agrees to bear the liability. However, the unregistered charterer will be held jointly and severally liable with the shipowner in the ship collision action against both of them.[70] Furthermore, where the colliding ships are all at fault, if the owner of one ship chooses to claim against an unregistered bareboat charterer of the other ship for the compensation of his loss without requiring to add the owner of the chartered ship for the claim, the claimant shall not deny the bareboat charterer's capacity as a subject in the counterclaim against him.[71]

11.26 Where the ship operator or manager is at fault in the ship collision, the operator or manager shall be held jointly and severally liable with the shipowner or the bareboat charterer,[72] without prejudice to the circumstance where subjects bearing liability may seek reimbursement among themselves.[73] Of course, the ship manager who is held liable shall have the authority from the shipowner for the management of the ship and for dealing with the matters of ship collision.[74]

Burden of proof and evidence

11.27 Under the Collisions Convention 1910, it is mandated that all legal presumptions of fault in regard to liability for collision are abolished.[75] The SPC has abolished the legal presumptions of fault. The liabilities due to the fault in the ships collision are identified on the basis of evidence. In *Panama Trade Expansion Shipping Company and Hong Kong Weilin Sailing Co Ltd v Zhong Xiaoyuan and Zhuhai Anti-Smuggling Office* (*The Trade Expansion*),[76] a fishing boat was hit and sank and 21 people fell overboard. The ship causing the accident did not rescue any person overboard but left the accident waters. The owners of the fishing boat and Zhuhai Anti-Smuggling Office that requisitioned the fishing boat claimed against the "liable" shipowner of the "liable" ship *Trade Expansion* causing the accident.[77] Both the court of first instance and the court of appeal held that the "liable" shipowner was liable for the loss of the fishing boat and the death of the people due to the collision.[78]

11.28 In the retrial of *The Trade Expansion*, the SPC pointed out that the claimants should bear the burden of proof. In fact, all evidence that allegedly proved that *Trade Expansion* was the liable ship causing the accident was indirect evidence. It was found that there was no collision trace and damage at the bow of *Trade Expansion*, the adherent paint

70 *Nantong Tianshun Shipping Co Ltd v Tianjin-Kobe International Marine Shipping Co Ltd and Yangzhou Yuyang Shipping Co Ltd* (2001) Guang Hai Fa Shang Chu Zi No. 109 (Guangzhou Maritime Court).
71 *Hong Kong Changxin Shipping Service Co Ltd v Hachiuma Steamship Co Ltd* (2010) Hu Gao Min Si (Hai) Zhong Zi No. 74 (Shanghai High People's Court) (CA).
72 *Rongcheng Huajin Aquatic products Co Ltd v Seaspan Ship Management Ltd and CSCL Ningbo Shipping Co Ltd* (2002) Qing Hai Fa Shi Hai Shi Chu Zi No. 60 (Qingdao Maritime Court).
73 Minutes of the Second National Working Conference 2005, art 130, para 1.
74 *China Pacific Property Insurance Co Ltd Yangzhou Central Branch v Jiangsu Far East Shipping Co Ltd and PICC P&C Co Ltd Jiangsu Branch* (2005) Hu Hai Fa Shang Chu Zi No. 10 (Shanghai Maritime Court).
75 Collisions Convention 1910, art 6, para 2.
76 (1996) Jiao Ti Zi No. 4 (SPC) (Retrial).
77 The claimants also include Zhuhai Anti-Smuggling Office which requisitioned the fishing boat.
78 (1994) Guang Hai Fa Shang Chu Zi No. 10 (Guangzhou Maritime Court); (1994) Yue Fa Jing Er Shang Zi No. 147 (Guangdong High People's Court) (CA).

drawn from the left stroke-side of *Trade Expansion* was totally different from the paint on the fishing boat and *Trade Expansion* did not make a sharp left turn or slow down when it passed the incident waters. It was also found that the relative situations of the position of collision as claimed by the claimants, the sinking position of the fishing boat, and the position where the persons were rescued did not conform to local tides at that time. More importantly, it was found that there was another container ship coming from Hong Kong passing the incident waters when the collision occurred. Basically, there was a lack of evidence to determine that *Trade Expansion* was the liable ship causing the accident. Therefore, the SPC revoked the judgments of the first instance and the second instance of this case and dismissed the claim from the claimants.

11.29 *The Trade Expansion* was the first case about the dispute over ships' collision that was tried by the SPC. It was of guiding significance in the judicial practice of how to apply indirect evidence to determine collision occurrence. When direct evidence is insufficient, the collision can be determined only when such indirect evidence is interactive and constitutes a complete chain of evidence. Where the cargo interests of the cargoes on the colliding vessels or a third party claim for compensation for any loss to the cargoes or other property against either or both of the colliding vessels, the burden of proof of the proportion of the degree of fault shall lie with the colliding vessels. If no evidence is furnished without justifiable reasons, either of the colliding vessels shall bear all liabilities for compensation or both vessels shall bear joint and several liabilities.[79] The evidence includes, but is not limited to, legally binding judgments, rulings, mediation decisions and arbitration awards including the judgments, rulings, mediation decisions and arbitration awards made by foreign authorities as submitted by the colliding vessels.[80] A judgment from the court of first instance may not be a legally binding judgment if any party in the dispute appeals. However, such a judgment could still be considered as evidence of the proportion of the degree of fault if the decision of the court of appeal or the settlement of the parties does not change the proportion of the degree of fault in the judgment of the court of first instance.[81]

11.30 Where the parties to the dispute over a ship's collision have reached an agreement on the proportion of the degree of fault, they are liable for the loss of the third party according to the agreed proportion, without prejudice to the lawful interests of the third party. Where the parties have only reached an agreement on the mutual compensation amount without specifying the proportion of the degree of fault, they are liable for the loss of the third party according to the proportion on the basis of the compensation amount, without prejudice to the lawful interests of the third party.[82]

11.31 During the trial of cases involving disputes over a collision, Chinese courts shall not produce the evidence obtained through evidence preservation upon application by the parties concerned or collected from relevant authorities through investigation until the parties concerned have completed producing all evidence and issued the statement on the

79 *Bank of China Insurance Co Ltd Fujian Branch v Fangchenggang Fuhang Shipping Co Ltd and Yangpu Bihai Shipping Co Ltd* (2013) Xia Hai Fa Shi Chu Zi No. 36 (Xiamen Maritime Court).
80 Provisions on Vessel Collisions 2008, art 8. The foreign judgments, rulings, mediation decisions and arbitration awards shall be subject to examination in accordance with the procedures set forth in art 267 and art 268 of the Civil Procedure Law 2012.
81 *Taizhou Jinglong Bulk Cements Co Ltd v Anhui Tengda Shipping Co Ltd* (2008) Yong Hai Fa Shang Chu Zi No. 77 (Ningbo Maritime Court).
82 Minutes of the Second National Working Conference 2005, art 135.

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CHAPTER 20

Preservation of maritime claims

Introduction

20.1 According to article 12 of the Special Maritime Procedure Law (the "SMPL"), the preservation of maritime claims means the compulsory measures taken by a maritime court on the application of a maritime claimant against the property of the person against whom a claim is made, for the purpose of ensuring satisfaction of the claim of the maritime claimant.

20.2 The rules in relation to the preservation of maritime claims are set out in chapter III of SMPL as well as Part 2 of the Interpretation of the Special Maritime Procedure Law of the Supreme People's Court[1] (the "Interpretation of the SMPL").

20.3 The preservation of maritime claims is a special method of preservation, and the relevant rules are different from those for general litigation set out in the Civil Procedure Law of People's Republic of China (the "CPL"). For example, in accordance with article 100 of the CPL, with regards to property preservation in general litigation, a people's court may make determination on an application of a party concerned or it may take the initiative to make a determination according to its own authority. In contrast, preservation of maritime claims must be applied for by the party concerned.[2]

Procedures and requirements for applying preservation of maritime claims

Jurisdiction

20.4 The preservation of maritime claims, as a procedure in relation to maritime disputes, should be submitted to the maritime court at the place where the property subject to preservation is located.[3]

20.5 The jurisdiction of a maritime court for preservation procedures is not restricted by any jurisdiction agreements or arbitration agreements entered into between the parties.[4] Even if the applicant commences proceedings or arbitration in a foreign country, the maritime court will also accept the application, provided that the subject matter to be preserved is within the jurisdiction of China.[5]

1 Promulgated by the Supreme People's Court on 6 January 2003 and came into effect on 1 February 2003.
2 SMPL, art 12.
3 SMPL, art 13.
4 SMPL, art 14.
5 Interpretation of SMPL, art 21.

20.6 For the preservation of maritime claims, the place where the property is located is generally considered to be the place where the vessel or the cargo is located. If the cargo has been removed by the carrier out of the jurisdiction of the maritime court, the applicant can make the application to the local people's court where the cargo is located.[6]

20.7 Where legal proceedings or arbitral proceedings have not yet been commenced in respect of a maritime dispute, any party may bring an action in respect of the maritime claim in the maritime court that adopts measures for preservation of the maritime claim. A party may also commence action at another maritime court that has jurisdiction, unless a jurisdiction agreement or arbitration agreement has been reached between the parties otherwise.[7]

Application form

20.8 Generally, a written application needs to be submitted to the maritime court. In the application, the particulars of the maritime claim, reasons for the application, subject-matter to be preserved and the amount of security required must be specified, along with evidence attached.[8] In judicial practice, a maritime court usually requests the claimant to submit an original written application. However, in especially urgent situations, some maritime courts may accept an application by other means, such as by fax, but in such situations the court would request the applicant to promptly provide the original application form.[9]

20.9 Generally, the name of the person against whom the preservation application is made also needs to be specified in the application submitted to the maritime court. However, there might be certain circumstances where the applicant cannot identify the respondent in time, for example, when the respondent is a shipowner. Under such circumstances, the applicant can simply list the respondent as the owner of a certain vessel. Article 25 of the SMPL clearly provides that 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.

Evidence

20.10 Given that in most circumstances the application for preservation is made urgently and the applicant does not have enough time to obtain sufficient evidence, the maritime court generally does not have strict requirements on evidence. The relevant documentary evidence attached to an application document need only be preliminary, so long as it is sufficient to prove the existence of the maritime claim and the necessity to make a preservation of maritime claim.

6 Interpretation of the SMPL, art 20.
7 SMPL, art 19.
8 SMPL, art 15.
9 Han Lixin, Yuan Shaochun, Yin Weimin, *Maritime Litigation and Arbitration* (1st edn, Dalian Maritime University Press, 2007).

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Security

20.11 The maritime court, having entertained an application for preservation of a maritime claim, may require the claimant to provide counter-security.[10]

20.12 This is different from the security requirements for the preservation for general civil and commercial litigation. Under the CPL, after the action has been commenced, a counter-security must be provided when applying for pre-litigation property preservation. The applicant may be ordered to provide a counter-security when the application is made in the process of a legal action.[11] Under the SMPL, whether security is needed in the application for preservation during either period all depends on the court's discretion.

20.13 However, it should be noted that when the method of preservation is to arrest a ship, the court shall order the claimant to provide counter-security, unless the claimant applies for arrest of the vessel due to disputes over crew labour contracts or compensation for personal injuries suffered at sea or in waters connecting the sea, and the facts are clear and the relationship of rights and obligations are undisputed.[12]

20.14 The security provided by a maritime claimant should be submitted to the maritime court.[13]

20.15 The mode and amount of security provided by a maritime claimant shall be determined by the maritime court. The mode and amount of security to be provided by the respondent may be agreed between the claimant and the respondent, failing which the matter shall be determined by the maritime court.[14] The issue of maritime security is discussed in detail in Chapter 23.

Order of preservation and discharge of the preservation

20.16 An application for preservation of a maritime claim is usually made on a tight timeline, since there may be a possibility that the ship or cargoes that the application for maritime preservation is made against may be moved out of the maritime court's jurisdiction. As a result, the SMPL requires the maritime court to make a determination whether or not to grant the order of preservation within 48 hours after accepting the application[15] in order to avoid the ship to be arrested from leaving its jurisdiction, or the cargoes to be arrested from being resold or disposed of.

20.17 No hearing is required before the court renders such an order. The court shall only conduct an examination on the formalities of the application, and the scope of examination mainly includes: whether there is a valid maritime claim, whether the evidence submitted by the claimant is authentic or not, whether it is necessary to take the preservation measures, and whether the counter-security provided by the claimant is reliable or not.

20.18 Any party who is dissatisfied with the order of preservation may, within five days after receiving the order, apply for review of the decision not more than once. The

10 SMPL, art 16.
11 CPL, arts 100 and 101.
12 Provisions of the Supreme People's Court on Several Issues concerning the Application of Law to the Arrest and Auction of Vessels (the "Provisions of Ship Arrest and Auction"), art 4.
13 SMPL, art 74.
14 SMPL, art 75 and 76.
15 SMPL, art 17.

maritime court upon receipt of such application should render the result of the review within five days.

20.19 It should be noted that the execution of the original order of preservation is not suspended during the period of reviewing such order by the maritime court.[16]

20.20 Apart from the party against whom the preservation order is made, if an interested third party is of the view that the order of the maritime court causes damage to its own interests, it may raise an objection to the maritime court. The maritime court shall examine the objection and discharge the preservation order against the property it considers that the reasons are justified.[17] Unlike the objection raised by the respondent himself, there is no express time limit for raising an objection by an interested third party.

20.21 If the maritime court grants the order of preservation, the order shall be executed immediately. If the preservation order is to arrest a vessel, the general procedure would be for the officer for enforcement to go on board the vessel to deliver the ruling and the order of arrest to the master and read the contents to him.

20.22 After the preservation order has been executed and the relevant property has been arrested, there are three circumstances where the maritime court will discharge the preservation of maritime claim:[18]

a. *The party against whom the claim is made has provided security*
The amount of the security requested for the preservation of a maritime claim by a maritime claimant from a person against whom the claim is made shall be equal to the amount of his credit, but shall not exceed the value of the property preserved.[19] The claimant may negotiate with the party against whom the claim is made on the method and amount of the security. The security provided by the party against whom the claim is made may be submitted to the maritime court, or to the maritime claimant. After the security is provided, the person providing the security may, for any justified reason, file an application to the maritime court to reduce, modify or discharge such security. The abovementioned justified reasons include where: (1) the amount of the guarantee requested by a maritime claimant is excessive; (2) the party against whom the claim is made has taken another effective mode of guarantee; (3) the maritime claimant's right to claim has been extinguished.

b. *The claimant fails to bring a lawsuit or commence arbitration within the time limit required by the law*
After the preservation measures have been taken, the claimant must promptly bring a lawsuit or commence arbitration to realise its maritime claims. The reason is that the court only examines the formality of the application before making the order. If the preservation is applied wrongfully, the other party may face huge financial losses. In accordance with the provisions of article 25 of the Interpretation of SMPL, the time limit on the arrest of ships is 30 days, while that of arrest of cargoes or other property is 15 days. If the maritime claimant fails to

16 SMPL, art 17.
17 SMPL, art 17.
18 SMPL, art 18.
19 SMPL, art 76.

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bring a lawsuit or commence arbitration within the abovementioned time limit, the maritime court shall discharge the preservation order and return the security in a timely manner. However, if the claimant and the defendant have reached an agreement on the period of the preservation measure, the maritime court may order the recognition of such an agreement in accordance with the claimant's application.

c. *A party concerned or an interested party has justified reasons to file an application to discharge the preservation of maritime claim*
If the disputes have been resolved through settlement between the parties, or the claimant is of the view that the preservation is wrongfully made or no longer necessary, or the defendant or the interested party has evidence to prove that the preservation was applied wrongfully, the maritime court will discharge the preservation upon examining the parties' application.

Liability for wrongful application

20.23 If it is established that the preservation application was wrongfully made, the claimant should compensate the party against whom the claim is made or an interested party for the corresponding loss incurred due to maritime preservation. The purpose of this rule is to protect the legal interests of the party against whom the claim is made and to avoid the maritime claimant from abusing the preservation procedure.[20]

20.24 The two major types of preservation for maritime claims are the arrest of the vessel and the attachment of the cargo. Claims for losses resulting from a wrongful application for the arrest of a vessel may include various maintenance charges and expenses incurred during the period of berth when the ship is detained, the loss of hire during the period of arrest and the expenses incurred by the defendant to provide security to release the arrest of the ship.[21] If the cargoes on board the vessel were wrongfully attached, the loss shall be actual loss directly caused by the cargoes' wrongful attachment, which generally includes loss of cargoes, loss of profit, storage fees, interests and, etc.[22]

20.25 If the court is of the view that the claimant is not entitled to the maritime claims or the defendant is not liable for the maritime claims, the preservation may be treated as a wrongful application and the claimant shall be liable for the relevant losses.

20.26 If the subject matter of the preservation of maritime claim is wrongful, the claimant may also be liable for the loss caused by wrongful preservation. There are strict limitations on the scope of property of preservation of maritime claim. In accordance with the provisions of the SMPL, the scope of the arrest of ships is limited to ships owned by the defendant or bareboat chartered by the defendant, while the scope of arrest of cargoes on board is limited to cargoes owned by the defendant. Arrested property that falls outside the scope of the preservation law provisions are deemed to be wrong subjects of preservation, and hence may amount to wrongful preservation.

20 SMPL, art 20.
21 Interpretation of the SMPL, art 24.
22 Yuan Faqiang, *Maritime Procedure Law* (1st edn, Peking University Press, 2014) 63.

Arrest of ships

General introduction to ship arrest

20.27 Ship arrest is a major method for the preservation of maritime claims. There are several international conventions on ship arrest, including the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the "1952 Arrest Convention") and the International Conventions on Arrest of Ships 1999 (the "1999 Arrest Convention"). China is not a contracting State to either of them.

20.28 Currently, the rules in relation to ship arrest in China are set out in section 2 of chapter III of the SMPL, section 2 of the Interpretation of the SMPL and the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law to the Arrest and Auction of Vessels (the "Provisions of Ship Arrest and Auction 2015"),[23] which was promulgated by the Supreme People's Court on 28 February 2015 and which came into effect on 1 March 2015.

20.29 The SMPL and relevant provisions have made reference to relevant international conventions and international practices and combined them with the maritime trial practices of the Chinese courts. This has established a system of arrest of ships in China. Unlike some common law jurisdictions, there is no concept of an *in rem* claim in China. The system of ship arrest in China is similar to that of other civil law systems, which interpret the arrest of ships as actions *in personam*.

20.30 With regard to the jurisdiction arising from the arrest of ships, on the one hand, it is established that a court that has ordered the arrest of the ship has jurisdiction over the case; on the other hand, the jurisdiction of other courts over the case is not excluded. Meanwhile, where the two parties agree on a jurisdiction, the agreed jurisdiction takes priority.

"Fixed arrest" and "live arrest"

20.31 The SMPL sets out two ways to arrest a vessel, which are generally defined as a "fixed arrest" or "live arrest". A "fixed arrest" means that during the arrest period, the ship may not depart from the port, or be brought into use. A "live arrest" is another method taken to limit the rights over a particular ship. While a shipowner may retain the possession or the use of the arrested ship, it may be prevented from exercising certain other rights over the arrested ship, such as the right to transfer ownership

20.32 According to article 27 of the SMPL, after ordering to preserve a ship, the maritime court may, with the consent of the maritime claimant, allow for the continued operation of the ship by means of a restraining disposal or mortgaging of the ship. As a result, the "live arrest" will only apply with the consent of the claimant.

20.33 However, since the vessel still operates while under "live arrest", there are some risks to the vessel being damaged or being arrested by other courts. The most critical problem is that the maritime court and the claimant do not have effective control over the vessel under arrest. In order to reduce the risks associated with "live arrests", and to further improve the system of "live arrest" and provide full protection to the interests of maritime

23 Fa Shi [2015] No. 6.

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claimants, the law limits "live arrest" to allow for the vessel to sail on domestic routes to finish its current voyage.[24] Further, since article 4 of the CMC provides that maritime transportation and towage services between the domestic ports shall be undertaken by ships flying the national flag of the People's Republic of China, it seems that the "live arrest" will only apply to vessels flying Chinese flag in practice.

Conditions for ship arrest

20.34 Ship arrest is a method of preservation of claim that applies to only a limited number of claims. The restriction on the scope for where ship arrest can be applied to maritime claims mostly protects the interests of shipowners. This encourages shipowners to invest more human resources and material resources into the shipping industry. Furthermore, this regime can help to avoid or minimise incidences of the abuse of ship arrest or wrongful arrest, and to maintain the thriving and healthy development of the shipping market.

20.35 In accordance with articles 21 and 22 of the SMPL, ships may not be arrested for the purposes of preservation unless the claim falls within any of the following categories:

(1) loss of or damage to property caused by ship operation;
(2) loss of life or personal injury in direct connection with ship operation;
(3) salvage at sea;
(4) damage or threat of damage caused by a ship to the environment, coast or relevant interested persons; measures adopted to prevent, diminish or eliminate such damage; compensation paid for such damage; expenses for reasonable measures actually adopted or to be adopted to restore environment; losses caused by such damage to or likely to a third party; and damage, expenses or losses of a similar nature as those specified in this subparagraph;
(5) expenses related to re-floating, removal, reclamation or destruction of a sunken ship, wreck, ship run aground, abandoned ship or to making them harmless, including the expenses related to re-floating, removal, reclamation or destruction of the objects that have remained or no longer remain on board the ship or to make them harmless, and expenses related to the maintenance of an abandoned ship and her crew;
(6) agreement in respect of employment or charting of a ship;
(7) agreement in respect of carriage of cargoes or passengers;
(8) cargo (including luggage) carried by a ship or loss or damage relating thereto;
(9) general average;
(10) towage;
(11) pilotage;
(12) provision of supplies or rendering of services in respect of ship operation, management, maintenance or repair;

24 Article 29 of the Interpretation of the SMPL provides that "where a maritime court allows a ship upon which preservation is imposed to continue the operation in accordance with the provisions of Article 27 of the SMPL, it is generally limited to allowing a ship sailing on a domestic route to finish its current voyage."

(13) construction, re-construction, repair, refurbishment or equipment of a ship;
(14) dues or expenses for ports, canals, docks, harbours or other waterways;
(15) crew's wages and other moneys, including repatriation expenses and social insurance premium payable for the crew;
(16) expenses paid for a ship or a shipowner;
(17) insurance premium for a ship (including protection and indemnity calls) payable by or paid for a shipowner or bareboat charterer;
(18) commission, brokerage or agency fee related to ships payable by or paid for a shipowner or bareboat charterer;
(19) a dispute over ownership or possession of a ship;
(20) a dispute between joint owners of a ship over the employment or earnings of the ship;
(21) ship mortgage or rights of a similar nature; and
(22) a dispute arising out of a ship sale contract.

20.36 It is worthy to note that the above restrictions on the types of claim are only applied when the purpose of arresting is for the preservation of a maritime claim. If the vessel is arrested for the enforcement of a judgment or an arbitral award, there are no such restrictions on the type of claims.

20.37 Apart from the restrictions on the range of the claim, the SMPL also sets out rules in respect of the kinds of ships that may be arrested.

20.38 According to article 23 of the SMPL, the claimant can only proceed against the actual ship in connection with which the claim arose in any of the following circumstances: 1, the shipowner is liable for the maritime claim and is the shipowner at the time of arrest; 2, the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer or the shipowner at the time of the arrest; 3, the maritime claim involves ship mortgage or rights of the same nature; 4, the maritime claim is relevant to the ship's ownership or possession; and 5, the maritime claim involves a maritime lien on the ship.

20.39 Similar with many other jurisdictions, Chinese law also allows for the arrest of a "sister ship", which is any ship that belongs to the same shipowner at the time when the ship is arrested. Paragraph 2 of article 23 of the SMPL provides that "the maritime court may arrest other ships owned, at the time of arrest, by the shipowner, bareboat charterer, time charterer or voyage charterer who is liable for the maritime claim, except for claims relating to the ownership or possession of a ship". The "other ships" referred therein include all sister ships owned by the party liable for the maritime claim of the claimant.

20.40 Another requirement for ship arrest is that the preservation must be necessary. It must be an urgent situation where if there is no immediate arrest of a ship it will cause irreparable damage to the interests of the claimant. If the application for arrest is made during existing legal proceedings, there must be a risk that the judgment will be difficult to enforce in the future, or that the judgment liability will unlikely be satisfied.

20.41 There is no definition of "necessary" or "urgent" in the relevant law. Generally speaking, if the vessel is owned by a small single vessel company or the shipowner has a bad reputation, the court may consider preservation necessary. In addition, ships owned by a foreign party may satisfy this condition. Given that the duration that a ship owned by a foreign party stays at a Chinese port is usually short, and that the ship may never return once she leaves, it would usually be less likely that a foreign-owned vessel will wait for

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enforcement and remain in the jurisdiction until after the judgment.[25] Furthermore, if the claimant can prove to the court that the defendant shipowner or bareboat charterer is trying to sell the vessel, the court may also take such facts into account in making an arrest order.

Re-arrest and multiple arrest

20.42 Re-arrest refers to the arrest of the same ship for the same maritime claim, while multiple arrests means that more than two arrests are made on the same ship at the same time based on different maritime claims.

20.43 Article 24 of the SMPL provides that no maritime claimant may, on account of the same maritime claim, apply for arrest of a ship that was once arrested, except in any of the following circumstances:

(1) where the person against whom the claim is made fails to provide sufficient security;
(2) it is likely the surety cannot perform the obligations under the security in full or in part; or
(3) the maritime claimant agrees, on reasonable grounds, to release the arrested ship or to return the security provided, or the claimant cannot, by reasonable grounds, stop the release of the arrested ship or the return of the security provided.

20.44 In practice, the re-arrest of a ship is in fact extremely rare. A court would usually require the defendant to provide sufficient amounts of security before releasing the arrested ship.

20.45 The other question arising in situations of re-arrest is whether the claimant is allowed to arrest the sister ship for the same maritime claim. There is no clear rule on this question under the SMPL or its interpretation. Generally speaking, it may be reasonable to arrest a sister ship of the ship that has already been arrested if the claimant still need to take further action to preserve its claim.

20.46 In contrast, multiple arrests of the ship are allowed in China. Multiple arrests of a ship means that more than two arrests are made on the same ship based on different maritime claims. According to article 2 of the Provisions of Ship Arrest and Auction 2015, a maritime court may, based on the applications by different maritime claimants, take measures to arrest a ship that has already been arrested by itself or another maritime court. This is different from the relevant rules in respect of the preservations under the CPL for general civil and commercial cases, which provides that properties that have already been seized or frozen shall not be seized or frozen repeatedly.[26]

Compulsory auction of ship

20.47 There are two types of compulsory auction of ships, namely compulsory auction of ships in a preservation procedure and compulsory auction of ships in an enforcement procedure. This section will mainly discuss the compulsory auction of vessels in

25 Yuan Faqiang, *Maritime Procedure Law* (1st edn, Peking University Press, 2014).
26 CPL, art 103.

a preservation procedure. The relevant rules of this procedure are set out in section 2 of chapter III of the SMPL and the Provisions of Ship Arrest and Auction 2015.[27]

20.48 The compulsory auction of ships in a preservation procedure means a compulsory measure taken in the course of preservation of maritime claims in which the court sells a ship arrested in accordance with the law, by means of auction pursuant to the statutory procedures based on an applicant's application. The sale proceeds of the ship are kept to ensure the satisfaction and enforcement of a valid judgment or an arbitral award that will be made in the future. The auction of ships is in fact a change in the form of security used for preservation.

Conditions for compulsory auction of ships

20.49 The conditions for compulsory auction of ships are set out in article 29 of the SMPL. Where on the expiry of the time limit for ship arrest, a person against whom a claim is made fails to provide security and it is not appropriate to keep the ship under arrest, the maritime claimant, having brought legal action or commenced arbitration, may apply to the maritime court ordering the ship arrest for an auction of the ship.

20.50 An application for a compulsory auction of a ship must be made by the party concerned to a maritime court arresting the ship. Article 29 of the SMPL provides that such application shall be made by the claimant. Further, article 30 of the Interpretation of SMPL also provides that if the claimant does not make such application, the court may also auction the ship on the basis of the respondent's application. If the shipowner believes that he is unlikely to win the case, in order to avoid costs associated with keeping a ship under arrest he may still wish to have the ship auctioned.

20.51 Commencing litigation or arbitration proceedings is another requisite condition for conducting a compulsory auction of a ship arrested before a lawsuit. Despite the fact that a compulsory auction of ships is an extension of an arrest of a ship, when compared with an arrest, an auction has a greater impact on the defendant. As a result, this procedure is not invoked easily.

20.52 In addition, the time limit for the arrest of a ship for the preservation of a maritime claim is 30 days. A claimant may only file an application for auction of a ship to a maritime court on the expiry of the said period.[28] The law also permits that the period of the arrest of a ship may be extended if a maritime claimant brings a lawsuit or commences arbitration within 30 days, and applies for an arrest in the course of the litigation or arbitration.[29] However, for the purposes of applying for an auction, the period is set at the statutory period of 30 days.

20.53 The most important requirement for an auction of a ship is that the defendant must have failed to provide security. The purpose of an arrest is not for a compulsory auction of a ship, but instead to obtain enough security for the claimant to realise his maritime claim. Therefore, if the party against whom the claim is made provides security for the purpose of releasing an arrested ship, the maritime claim will be satisfied later by that security. Given

27 These provisions will also apply to auction of ship for satisfaction of debts in the execution procedure.
28 SMPL, art 28.
29 SMPL, art 28.

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CHAPTER 26

Maritime arbitration, conciliation and recognition and enforcement of foreign arbitration awards and foreign judgments

Introduction

26.1 Maritime arbitration has a long history, which has developed in step with worldwide maritime trade. A large number of maritime disputes are referred to arbitration in London, of which a notable amount is administrated under the terms of the London Maritime Arbitrators Association. London, as one of world's largest maritime disputes resolution centres, is a preferred choice for the seat of arbitration and is usually used as a standard choice in the major standard forms of charterparties and bills of lading.

26.2 With the development of the shipping industry in China, increasing numbers of Chinese shipping companies began to be involved in maritime disputes. Occasionally these companies will choose to conduct arbitration in China in order to avoid the high legal costs for arbitration in foreign countries such as England.

26.3 The main maritime arbitration institution, the China Maritime Arbitration Commission (the "CMAC"), was established in China in 1958. The CMAC focuses on the resolution of contractual and non-contractual maritime disputes arising from, or in the process of, transportation, production and navigation by or at sea, in coastal waters and other navigable waters adjacent to sea, by arbitration.

26.4 There is now no restriction that maritime disputes can only be referred to the CMAC for arbitration. Thus other major arbitration commissions in China can also handle maritime arbitrations.

26.5 Conciliation (mediation) is another dispute resolution method available for solving maritime disputes. Same as with other civil disputes, the court can conduct conciliation between the parties at trial upon the agreement of the parties.[1] The arbitral tribunals are also allowed to arrange conciliation during the arbitration.[2] In addition, there is a special kind of mediation procedure for certain maritime accidents, known as the maritime administrative mediation. This kind of mediation is conducted by a competent authority of the government.

26.6 This chapter will also discuss the recognition and enforcement of foreign court judgments and arbitration awards in China. Generally speaking, it is easier to recognise and enforce a foreign arbitration award than a court judgment in China, since China is a contracting State to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award (the "New York Convention"). The recognition and enforcement of

1 Chapter 8 of the CPL.

2 Arbitration Law, art 51. Some of the arbitration rules also set out certain requirements for conciliation during arbitration, for example, arbitration 52 of the Arbitration Rules of CMAC.

a foreign court judgment is mainly made based on bilateral treaties entered into between China and other countries.

Review of the Arbitration Law of People's Republic of China (the "Arbitration Law")

Types of arbitration

26.7 Unlike in many other countries, there is no concept of an ad hoc arbitration in China. The only type of arbitration available in China is an institutional arbitration. Thus, article 16 of the Arbitration Law requires that a valid arbitration agreement must choose a valid arbitration commission.

The Arbitration Law and its judicial interpretation

26.8 The Arbitration Law is the major legislation regulating arbitration in China. The Arbitration Law was promulgated on 31 August 1994 and was later revised in 2009. The Arbitration Law provides detailed rules in relation to the arbitration institution, the arbitration agreement, the arbitration procedure, the setting aside of an arbitral award, and the enforcement of an arbitration award. The Arbitration Law also contains a special chapter that provides for the relevant rules of foreign-related arbitration.

26.9 All contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organisations can be referred to arbitration in China and such arbitrations are regulated by the Arbitration Law. Maritime arbitrations are generally regulated by the Arbitration Law, the Maritime Code of People's Republic of China (the "CMC") and the Special Maritime Procedure Law (the "SMPL") together with the arbitration rules of the arbitration institutions.

26.10 Another major legislation that regulates arbitration in China is the "Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China" (the "Interpretation of Arbitration Law"). This judicial interpretation was promulgated by the Supreme People's Court (the "SPC") on 23 August 2006 and came into effect on 8 September 2006, providing interpretations for certain unclear issues in the Arbitration Law.

Valid arbitration agreement

26.11 Maritime arbitration agreements can generally be divided into two types, namely arbitration clauses and the separate arbitration agreements.[3]

26.12 Article 16 of the Arbitration Law sets out the rule for a valid arbitration agreement, which will also apply to a maritime arbitration: an arbitration agreement shall contain three elements, including an expression of intention to apply for arbitration, the matters for arbitration and a designated arbitration commission.

3 See art 16 of the Arbitration Law, which provides that an arbitration agreement shall include the arbitration clauses provided in the contract and any other written forms of agreement concluded before or after the disputes providing for submission to arbitration.

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26.13 Among the three requirements, the last one, i.e. an agreement for a designated arbitration commission, is sometimes omitted by some foreign-related arbitration agreements as there is generally no such requirement in other countries that allow for ad hoc arbitration. However, it should be noted that under certain circumstances an arbitration agreement can be considered valid even if there is no designated arbitration commission. For example, where parties have reached a supplementary agreement or an arbitration institution may be identified through the agreed arbitration rules in the agreement.[4] In addition, if an arbitration agreement provides that arbitration shall be conducted by an arbitration institution at a certain place, and there is only one arbitration institution at that place, although the name of the arbitration institution is not identified, such arbitration institution can be deemed the agreed-upon arbitration institution.[5]

26.14 The Arbitration Law also provides that the establishment of an arbitration commission needs to be registered with the administrative department of justice of the relevant province. As a result, there was an issue of the validity of the arbitration agreement if the parties had agreed that the arbitration should be conducted in China but administered by a foreign arbitration institution not registered in China. However, this issue has now been considered by the SPC in a recent case, *Anhui Longlide Packing and Printing Co., Ltd v BP Agnati S.R.L.*[6] In this case, the arbitration agreement provided that any disputes were to be submitted to arbitration by the International Chamber of Commerce (the "ICC") and the place of arbitration was to be Shanghai. A dispute arose as to whether this arbitration agreement was a valid one. This case was reported to the SPC for their review and it was held that since the three elements of a valid arbitration agreement under article 16 of the Arbitration Law had been satisfied, the arbitration clause was valid. According to this response from the SPC, it seems that there is no longer a restriction for a foreign arbitration institution to conduct arbitrations in China and the validity of such arbitration agreements may be upheld.

26.15 Apart from the requirements set out in article 16 of the Arbitration Law, article 17 provides three circumstances where an arbitration agreement will be considered as an invalid one, including where the agreed matters for arbitration exceed the range of arbitrable matters as specified by law, where one party that concluded the arbitration agreement has no capacity for civil conduct or has limited capacity for civil conduct or where one party has coerced the other party into concluding the arbitration agreement.

26.16 That the parties to the arbitration agreement must be "qualified" refers to the requirement that parties who conclude the arbitration agreement must have capacity for civil acts. Thus an arbitration agreement concluded by persons without or with limited capacity for civil acts is invalid. To determine whether the person has capacity or not, different criteria are adopted according to whether the person is a natural person or a legal person. Under the conflict laws of China, the natural person's civil capacity for concluding an arbitration agreement is determined according to the law of habitual residence. The legal person's civil capacity for concluding an arbitration agreement is determined according to its domestic law, namely the law of its place of registration or the location of the headquarters of the legal person.[7]

4 Interpretation of the Arbitration Law, art 4.
5 Interpretation of the Arbitration Law, art 6.
6 (2013) Min Si Ta Zi No. 13 (SPC).
7 Law of the People's Republic of China on Application of Laws to Foreign Related Civil Relations, art 12 and art 14.

26.17 An arbitration agreement must be a true and voluntary declaration of intention of the parties to submit to arbitration. If one party adopts the use of fraud, duress or any other means to force the counter party against their true will to sign an arbitration agreement, such arbitration agreement is invalid.

26.18 In addition, the contents of the arbitration agreement must be legitimate. The scope of arbitrable matters is referred to in articles 2 and 3 of the Arbitration Law. Article 2 provides that disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organisations as equal subjects of law may be submitted to arbitration. In contrast, article 3 sets out the disputes that cannot be submitted to arbitration, including (1) disputes over marriage, adoption, guardianship, child maintenance and inheritance; and (2) administrative disputes falling within the jurisdiction of the relevant administrative departments according to law.

26.19 Apart from the circumstances as set out in the Arbitration Law, the Interpretation of the Arbitration Law also provides several other circumstances where an arbitration agreement will be considered invalid. For example, where the parties agree on two arbitration commissions in the agreement or where the parties agree in the arbitration agreement that disputes may be resolved either through arbitration or by court, the arbitration agreement will be deemed invalid.[8]

26.20 There is also a form requirement of valid arbitration agreement, which is that the arbitration agreement must be made in written form.[9] Such written forms may include an arbitration clause in a contract, or any other agreement on arbitration concluded in the form of letter or by electronic text.[10] The New York Convention also has the same requirements[11] and thus makes it not only important for the commencement of arbitration but also for the recognition and enforcement of the arbitration award.

26.21 As to foreign-related arbitration agreements, there is an "Inside Review Regime" on the validity of arbitration agreement in China, which requires a lower court that considers the arbitration agreement an invalid one to report the case for the higher court's review. This is the *Notice of the Supreme People's Court Concerning Some Issues on Disposal of Foreign-related Arbitration and Foreign Arbitration*[12] (the "Notice") published by the SPC in 1995, which provides that:

> As to all the foreign related, Hong Kong, Macau or Taiwan related commercial, maritime or admiralty disputes, in the event that the contract contains an arbitration clause or the parties reach an arbitration agreement after the disputes have arisen, and the People's Court considers that an arbitration clause is invalid, ceases to be valid or cannot be performed due to uncertainty, it shall be reported to the High People's Court for a review first; if the High People's Court agrees with the lower courts, the High Court is then required to report to the Supreme People's Court for its confirmation. Without the confirmation from the Supreme People's Court, the court shall not exercise its jurisdiction.

26.22 The second section of the Notice also requires the lower courts to report their decisions for refusing to recognise and enforce arbitration award to the higher courts and

8 Interpretation of the Arbitration Law, art 5 and art 7.
9 Arbitration Law, art 16.
10 Interpretation of the Arbitration Law, art 1.
11 New York Convention, art II.
12 Fa Fa [1995] No. 18, published on 28th August 1995.

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the SPC. It appears that since China is a contracting State to the New York Convention, and the judicial decisions made by PRC court should strictly follow the requirements of the Convention, such decisions of refusal to recognise and enforce an award should only be reviewed and finally decided by the SPC based on this regime. This procedural requirement can effectively reduce the mistakes and inconsistencies of the decisions of lower courts regarding this issue, as well as protect the interests of the parties that have agreed on an arbitration clause. This also helps to ensure the due performance of the New York Convention in China.

Arbitration proceedings

26.23 According to article 21 of the Arbitration Law, the parties applying for arbitration shall fulfil the following conditions.

There must be an arbitration agreement

26.24 An arbitration agreement is the foundation of an arbitration and is the basis for the parties to authorise an arbitration institution to resolve the dispute. Only when there is an arbitration agreement between the parties, can an arbitration institution accept an arbitration case and can arbitrators hear the case. Article 4 of the Arbitration Law provides that the parties adopting arbitration for dispute settlement shall reach an arbitration agreement on a mutually voluntary basis and an arbitration commission shall not accept an application for arbitration submitted by one of the parties in the absence of an arbitration agreement.

26.25 At the same time, the arbitration agreement is the basis for excluding the jurisdiction of the courts.[13] However, it shall be noted that if a party commences proceedings in court and the other party does not raise any objection about the jurisdiction of the court before the first hearing, it would operate as a waiver and the court would then have jurisdiction over disputes even if the parties had a valid arbitration agreement.[14]

There must be a specific claim with facts and argument on which the claim is based

26.26 When the parties apply for arbitration in accordance with the arbitration agreement, they must raise a specific claim with facts and arguments on which the claim is based. The "claim for arbitration" refers to the particular problems to be solved by arbitration and the purpose to be achieved when the claimant requests an arbitration commission for arbitration, namely the claimant's substantive claims. The aforesaid facts and arguments refer to the underlying facts and corresponding argument on which the claimant applies for arbitration. The "facts" refer mainly to the facts on which the dispute arises, namely the objective factual situation, while the "argument" primarily refers to the related legal provisions.

The arbitration must be within the jurisdiction of the arbitration commission

26.27 The arbitration matters agreed by the parties in the arbitration agreement must be within the arbitration matters permitted and allowed by the Arbitration Law and the rules of the relevant arbitration commission.

13 Arbitration Law, art 5.
14 Arbitration Law, art 26.

26.28 Article 22 of the Arbitration Law also stipulates that the party applying for arbitration shall submit to an arbitration commission the arbitration agreement, an application for arbitration and copies of the respective documents. An arbitration application shall state clearly the basic information of the parties, the arbitration claim and the facts and reason on which it is based, and the evidence, the source of the evidence and the names and domiciles of witness.[15]

26.29 After the claimant applies for arbitration to the arbitration commission, it does not immediately signify the beginning of the arbitration proceedings. Only from the date after the applicant's application for arbitration is reviewed by the arbitration commission, and the commission has accepted and issued a notice of arbitration, can the arbitration proceedings begin.

Arbitrators and arbitration tribunal

26.30 The arbitrator is the host and the inquisitor of the arbitration case, and is the basic element in the composition of the arbitration institution. Foreign laws may have no strict conditions or limits to the qualifications of arbitrators. Because one of the inherent characteristics of arbitration is that the selection and appointment of arbitrators entirely depends on the will of the parties, so long as the parties agree, the law does not set a limit on the nationality, work or legal experience, and others factors of the arbitrators. Instead, parties may determine and authorise the qualifications of arbitrators, and the appointment of participants in various economic, trade and legal activities is not only allowed, but may be encouraged.

26.31 In contrast, the Arbitration Law in China makes very detailed provision about a prospective arbitrator's qualifications. Article 13 of the Arbitration Law provides that the arbitrators must fulfil at least one of the following conditions: (1) have been engaged in arbitration work for at least eight years; (2) have worked as a lawyer for at least eight years; (3) have been a judge for at least eight years; (4) are engaged in legal research or legal teaching and in senior positions; or (5) have legal knowledge and are engaged in professional work relating to economics and trade, are in senior positions or of the equivalent professional level.

26.32 As to the formation of the arbitration institution, the Arbitration Law provides that the arbitration tribunal can be composed by one arbitrator or three arbitrators. Generally, this would depend on the agreement of parties. In addition, sole arbitrator tribunals are generally applied to expedited arbitration procedures in disputes over small amounts. The standard for the application of the expedited arbitration procedure is variously based on the arbitration rules of the different arbitration institutions. For example, the Arbitration Rules of CMAC provide that the expedited procedure would apply to any disputes where the amount in dispute does not exceed RMB 2,000,000.[16] In contrast, the standard of the China International Economic and Trade Arbitration Commission is RMB 5,000,000.[17]

Hearings

26.33 Article 41 of the Arbitration Law provides that the arbitration commission shall notify the two parties of the date of the hearing within the time limit provided by the

15 Arbitration Law, art 23.
16 Arbitration Rules of CMAC, art 61.
17 Arbitration Rules of CIETAC, art 56.

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Arbitration Rules. Either party may request to postpone the hearing within the time limit provided by the Arbitration Rules if there is a genuine reason. The arbitral tribunal shall decide whether to postpone the hearing. According to the Arbitration Rules of CMAC, the notification shall be made no less than 20 days before the date of the hearing.[18] A proper notification of the hearing is important for the enforcement of a foreign-related arbitration award as one of the possible reasons of refusing to recognise and enforce an arbitration award in the New York Convention is that the party against whom the award is invoked was not given proper notice of the arbitration proceedings.[19]

26.34 At the beginning of the hearing, generally two things should be done: first, the presiding arbitrator or the sole arbitrator should check the basic situation of the parties and their agents in the case and announce the cause of action; second, they should announce the list of persons in composition and persons on record to the arbitral tribunal, and inform the concerned parties of their rights and obligations, and ask whether the parties apply for withdrawal of the composition of the arbitral tribunal.

26.35 The parties shall submit evidence of the facts on which their claim, defence and counterclaims are based. The arbitral tribunal may undertake investigations and collect evidence on its own initiative, if it deems it necessary.[20] The evidence shall be presented during the hearing and may be examined by the parties.[21]

26.36 For specialised matters, an arbitral tribunal may submit for appraisal to an appraisal organ agreed upon by the parties or to the appraisal organ appointed by the arbitral tribunal if it deems such appraisal to be necessary. According to the claim of the parties or the request of the arbitral tribunal, the appraisal organ shall appoint an appraiser to participate in the hearing. Upon permission of the arbitral tribunal, the parties may question the appraiser.[22]

26.37 Unlike in some other jurisdictions,[23] the Arbitration Law does not entitle the arbitration tribunal to make an order to preserve evidence directly and even if the arbitration rules entitle the tribunal to grant certain emergency relief, such orders made by the tribunal may not be enforceable by the PRC court.[24] The order of preservation of evidence can only be granted by the court in China. However, it is provided in article 46 of the Arbitration Law that where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence and the arbitration commission shall submit his application to the basic people's court in the place where the evidence is located. Similarly, parties can also apply for property preservation if it may become impossible or difficult for the party to enforce the award and such application shall be submitted by the arbitration commission to the people's court in accordance with the Civil Procedure Law of the

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18 Arbitration Rules of CMAC, art 41.
19 New York Convention, art V s 1(b).
20 Arbitration Law, art 43.
21 Arbitration Law, art 44.
22 Arbitration Law, art 44.
23 For example, the Arbitration Ordinance of Hong Kong (Cap.609) provides that emergency relief granted by the emergency arbitrator in relation to preserve evidence that may be relevant and material to resolving the dispute is enforceable in the same manner as an order or direction of the court that has the same effect with the leave of the court.
24 For example, art 27 of the Arbitration Rules of CMAC provides that the emergency arbitrator may grant an emergency relief and such order has binding authority on the parties. However, there is no provisions in the PRC law provides that such order will be enforced by the court.

People's Republic of China (the "CPL").[25] For maritime arbitrations, the application may be submitted to the maritime court at the place where the evidence is located[26] as discussed in the previous chapter in respect of maritime evidence preservation.

26.38 The parties are also allowed to apply for property preservation or preservation of maritime claim, for example, to arrest a vessel. The arbitration commission shall submit the application of the applicant to the maritime court of the place where the property is located, or the domicile of the defendant or other court that has jurisdiction, and if the party applies for property preservation or preservation of maritime claim before the beginning of arbitration proceedings, he shall make such application in accordance with the CPL or other regulations and file the application with the maritime court or any other court of the place where the property subjected to preservation is located[27] as discussed in the previous chapter in respect of the maritime claims preservation.

26.39 The arbitration proceedings might be suspended under certain circumstances. The suspension of the arbitral proceedings is not stipulated in the Arbitration Law, but is reflected in the arbitration rules of the related arbitration commission. Generally, the situations that may cause a suspension of arbitration include where (1) the parties decide to settle disputes among themselves;[28] (2) the dispute needs to be resolved based on the results of another case that has not yet been concluded; (3) one of the parties is unable to participate in the proceedings for justified reasons, etc.

Enforcement and setting aside of domestic arbitration award

26.40 In arbitration proceedings, if parts of the facts involved have already become clear, the arbitration tribunal may first make an award in respect of such partial facts.[29] According to article 55 of the Arbitration Rules of CMAC, such partial awards have binding authority on the parties and would have no impact on issuing the final arbitration award if such partial award is not performed by the parties.

26.41 An arbitration award should specify the arbitration claim, the facts of the dispute, the reasons for the decision, the results of the award, the allocation of arbitration fees and the date of the award. If the parties agree that they do not wish for the facts of the dispute and the reasons for the decision to be specified in the arbitration award, the same may be omitted. The arbitration award shall be signed by the arbitrators and sealed by the arbitration commission. An arbitrator with dissenting opinions as to the arbitration award may sign the award or choose not to sign it.[30]

26.42 An arbitration award starts to have binding authority from the date it is issued and the parties are not allowed to appeal such award. If a party refuses to perform an arbitration award, the other party may apply to the court to enforce the same. However, under

25 Arbitration Law, art 28.
26 Arbitration Rules of CMAC, art 23.
27 Arbitration Rules of CMAC, art 23.
28 According to art 49 of the Arbitration Law, if a settlement agreement has been reached, the parties may apply to the arbitral tribunal for an award based on the conciliation agreement, or may withdraw the arbitration application. However, it should be noted that if a party repudiates the settlement agreement after the application for arbitration has been withdrawn, he may apply for arbitration again in accordance with the original arbitration agreement.
29 Arbitration Law, art 55.
30 Arbitration Law, art 54.

the following circumstances, the court may refuse to recognise and enforce a domestic arbitration award:[31]

(a) the parties have had no arbitration clause in their contract, nor have they subsequently reached a written agreement on arbitration;
(b) the matters dealt with by the award fall outside the scope of the arbitration agreement or are matters that the arbitral institution has no power to arbitrate;
(c) the composition of the arbitration tribunal or the procedure for arbitration contradicts the procedure prescribed by the law;
(d) the evidence based on which the arbitration award is made was falsified;
(e) the other party concealed evidence from the arbitration institution that would have been sufficient to affect the impartiality of the arbitral award;
(f) the arbitrators have committed embezzlement, accepted bribes or committed malpractice for personal benefits or perverted the law in the arbitration of the case; or
(g) the enforcement of such arbitration award is against the public interest.

26.43 The reasons for refusing to enforce a domestic arbitration award are different from the reasons for refusing to enforce foreign arbitration awards, which is decided based on the New York Convention. If the court refuses to enforce a domestic arbitration award, the parties are allowed to apply for arbitration again or commence court proceedings to solve disputes. In addition, the parties can apply to the court to set aside the arbitration award based on the abovementioned reasons.[32] The application for setting aside the arbitration award must be made within six months from the date of receipt of the arbitration award.[33] After receiving the application for setting aside the arbitration award, the court may order the arbitral tribunal to re-arbitrate the case.[34]

Maritime arbitration and the CMAC

The CMAC and the arbitration rules of CMAC

26.44 The major arbitration institution for maritime disputes is the China Maritime Arbitration Commission (the "CMAC"). The CMAC was founded by the China Chamber of International Commerce and includes the Shanghai Sub-Commission, Fishery Dispute Resolution Centre, Shanghai Maritime Conciliation Centre, Logistics Dispute Resolution Centre and a number of liaison offices. The head office of CMAC is in Beijing. It has also established a Hong Kong Arbitration Centre in 2014.

26.45 The CMAC will accept the following disputes upon the parties' application:[35]

(a) disputes arising from charterparties, contracts of multimodel transport, bills of lading, waybills or any other transport documents in connection with carriage of goods by sea or waters, or carriage of passengers;

31 CPL, art 237.
32 See art 58 of the Arbitration Law; see also arts 17 to 22 of the Interpretation of the Arbitration Law.
33 Arbitration Law, art 59.
34 Arbitration Law, art 61.
35 Arbitration Rules of CMAC, art 3.

(b) disputes arising from the sale, construction, repair, chartering, financing, towage, collision, salvage or raising of ships or other offshore mobile units, or from the sale, construction, chartering, financing of containers;
(c) disputes arising from marine insurance, general average and ship's protection and indemnity;
(d) disputes arising from the supply or security of ship's stores or fuel, ship's agency, seamen's labour service or port handling;
(e) disputes arising from exploitation and utilisation of marine resources or pollution damage to marine environment;
(f) disputes arising from freight forwarding, non-vessel operating common carriage, transport by road, rail or air, transport, consolidation and devanning of containers, express delivery, storing, processing, distributing, warehouse distributing, logistics information management, or from construction, sale and leasing of tools of transport, tools of carrying and handling, storage facilities, or from logistics centres and distribution centres, logistics project planning and consulting, insurance related to logistics, tort or others related to logistics;
(g) disputes arising from fishery production or fishing; and
(h) other disputes submitted for arbitration by agreement between the parties.

26.46 However, there is no restriction that the arbitration in relation to the above dispute must be administrated by the CMAC if they are referred to arbitration. The parties are allowed to agree to submit maritime disputes to other arbitration institutions.

26.47 The current Arbitration Rules of CMAC were revised in 2014 and came into force on 1 January 2015. In the latest amendment, the new version of Arbitration Rules of the CMAC also adds an additional chapter that provides for special rules of arbitration in Hong Kong.

26.48 In order to follow the recent development of international maritime arbitration, the new version adds a few articles about the procedures to be taken when there are more than two parties or two arbitrations involved in the maritime disputes, such as joinder of additional parties, consolidation of arbitrations, etc.

26.49 According to article 18 of the Arbitration Rules of CMAC, the parties to the arbitration can apply to the arbitration commission to join an additional party to the existing arbitration provided that prima facie the additional party is bound by the arbitration agreement. However, this clause does not allow an additional party itself to apply to join the arbitration proceeding. Under such restrictions, an additional party might need to commence a separate arbitration if he wants to claim against the parties to the existing arbitration. In this regard, the arbitrations might be consolidated in order to save time and costs.

26.50 Upon the satisfaction of either of the following conditions set out in article 19 and upon the application of a party, the arbitration commission may consolidate two or more arbitrations into one:

(a) all of the claims in the arbitration are made under the same arbitration agreement;
(b) the claims in the arbitration are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature;

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(c) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of the principal contract and the ancillary contracts; or

(d) all the parties to the arbitrations have agreed to consolidation.

26.51 There are some special provisions of the CMAC relating to the preservation for maritime claims,[36] maritime injunction[37] and the establishment of a limitation fund for a maritime claim.[38] However, even where the application was made to the arbitration commission, such applications shall be submitted by the arbitration commission to the relevant courts that have jurisdiction and only the courts are entitled to make these orders. If the parties want to make such applications before the commencement of arbitration proceedings, the application should be made to the relevant court directly.

26.52 Chapter 5 of the Arbitration Rules of CMAC applies to those maritime arbitrations administered by the Hong Kong Arbitration Centre of CMAC. The place of arbitration is Hong Kong. It is important to note that the relevant arbitration law regulating such arbitration is the Hong Kong Arbitration Ordinance instead of the Arbitration Law, and such arbitration would be considered to be held in Hong Kong.[39]

A special issue for maritime arbitration – the validity of an arbitration clause in the bill of lading

26.53 As mentioned in the previous chapter on the conflict of laws, a valid arbitration agreement under the Arbitration Law of PRC needs to show the true intention of the parties to submit disputes to arbitration. Thus it is arguable whether an arbitration clause contained in a bill of lading will bind the consignee in such a bill of lading. In some other circumstances, the bill of lading itself does not contain an arbitration clause, but simply states that the clauses of the relevant charterparty will be incorporated into the bill of lading. Under a charterparty, the legal relationship between an owner and a charterer is governed by the charterparty while under a bill of lading the cargo receiver and the carrier's legal relationship is usually governed by the terms and conditions of the bill of lading. Most shipowners are anxious to ensure that their liability as a carrier is not extended by issuing bills of lading by the charterers. In order to avoid this, they insist on the inclusion of a clause incorporating the terms of the charterparty in such bills. In addition, another reason for bills of lading to incorporate terms from charterparties is to bind receivers or purchasers to pay freight and demurrage, even if they are not parties to the charterparty. Such incorporation may also provide shipowners with a lien enforceable against the cargo receivers.

26.54 The validity of such arbitration clauses incorporated into the bill of lading is extremely important, since it may decide which jurisdiction the case is to be referred to and may have certain levels of impact on the final result of the dispute. After disputes have arisen, cargo receivers will typically seek to commence proceedings against the carriers

36 Arbitration Rules of CMAC, art 23.

37 Arbitration Rules of CMAC, art 25.

38 Arbitration Rules of CMAC, art 26.

39 Arbitration Rules of CMAC, art 71; s 5(1) of the Hong Kong Arbitration Ordinance (Cap 609) provides that "Subject to subsection (2), this Ordinance applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, if the place of arbitration is in Hong Kong."

in the jurisdiction where the goods are delivered mainly based on three reasons. First, it is their home jurisdiction. Second, it might be because they do not have knowledge of the arbitration clause that may have to be incorporated into the relevant bills of lading. Third, there might be an action against the vessel and security has been obtained at the local court. Accordingly, it might be convenient to continue the court proceeding there. While the carriers might bring an objection to the jurisdiction and argue that an arbitration agreement exists between the parties. Arbitration clauses are rarely found in bills of lading themselves and, hence, by incorporating the arbitration clause of the charterparty into the bills of lading, it is possible for a ship owner to challenge the jurisdiction of the local court.

26.55 The China Maritime Code and the Arbitration Law set out no provision to regulate the validity of such arbitration clauses. This issue was discussed in the *Explanations concerning Relevant Issues of Foreign Related Commercial and Maritime Trial Practice* published by the Fourth Civil Court of the SPC (the "Explanation").[40] According to article 98 of the Explanation, after the clauses of the charterparty are incorporated into the bill of lading, the relation between the carrier and the holder of the bill of lading shall be regulated by the bill of lading, instead of the charterparty; unless the incorporation clause expressly states that the arbitration clause, jurisdiction clause and applicable law clause shall be incorporated into the bill of lading, those clauses shall not bind the holder of the bill of lading.

26.56 However, in practice, it seems that the Chinese courts are reluctant to recognise the validity of such arbitration clauses. In recent years, the SPC has issued several replies for various cases to set out restrictions for the validity of arbitration clauses in bills of lading.

Incorporated from voyage charters rather than time charters

26.57 It appears that the SPC takes the view that a bill of lading cannot incorporate the clauses in a time charter.

26.58 In *Tianjin Iron and Steel Group Co., Ltd and PICC Tianjin v Niagara Maritime S.A.*,[41] the defendant Niagara Maritime S.A. (the "Niagara") entered a time charter with the Vale International S.A. (the "Vale") for the vessel MV Jiayun (the "Vessel"). The time charter provided that all disputes arising from this time charterparty were to be submitted to London under the terms of the London Maritime Arbitrators' Association and the charterparty was governed by English law. For this particular voyage, the receiver was Tianjin Iron and Steel Group (the "Tianjin Iron"). The master of the vessel signed a Congenbill, which was marked with "to be used with charterparties" on the face of the bill of lading. In addition, on the back of the bill of lading, it stated that "All of the terms, conditions, liberties and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." A dispute arose, and Tianjin Iron and its insurer PICC Tianjin commenced the proceedings before the Tianjin Maritime Court. The defendant Niagara challenged the jurisdiction of the Tianjin Maritime Court. Niagara argued that the arbitration agreement in the time charter was incorporated into the bill of lading, thus any dispute should be decided by arbitration in London.

40 The Fourth Civil Court of Supreme People's Court is especially in charge of supervising and guiding the foreign related commercial and maritime trail in the country. The court published several Guidance and Explanation on the issues related to the practice of commercial and maritime trail.

41 [2011] Min Si Ta Zi No. 12 (SPC).

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26.59 The Tianjin Maritime Court held that the arbitration clause in the time charter was not successfully incorporated into the bill of lading. The case was submitted for the SPC's review in accordance with the Inner Review Regime. In the Reply of SPC, the SPC took the view that the "charterparty" mentioned on the front page of the Congenbill 1994 should refer to a voyage charter, instead of a time charter. Further, the front page of the bill of lading neither expressly indicated the date of the charterparty, nor the incorporation of a specific arbitration clause. As a result, the arbitration clause in the time charterparty was not duly incorporated into the bill of lading and thus Tianjin Maritime Court had jurisdiction of the case.

General statement of incorporation of a charterparty and an arbitration clause on the reverse side are not enough

26.60 In another case, *Chongqing Xinpei Food Co. Ltd v Strength Shipping Corporation, Liberia*,[42] the front page of the bill of lading was marked with "the bill of lading to be used with charterparties" and "Charterparty dated 30th March 2004" is incorporated. On the revised side of the bill of lading, the bill of lading stated that "All terms and condition, liberties and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." In the Reply of the SPC regarding this case, the SPC took the view that the incorporation of the arbitration clause stated on the reverse side of the bill of lading and the general wording "to be used with charterparties" on the front page of the bill of lading did not successfully incorporate the arbitration clause. Thus the SPC held that Wuhan Maritime Court had jurisdiction to the case.

The date of the charterparty and the party names shall be mentioned

26.61 In *China Pacific Property Insurance Co. Ltd Shanghai Branch v Sunglide Maritime Ltd., Ocean Freighters Ltd. and the United Kingdom Mutual Steam Ship Assurance Association*,[43] it was marked on the face of the bill of lading that "All terms, (including arbitration clause) conditions as incorporated herein as if fully written, anything to the contrary contained in this bill of lading notwithstanding." It appears that an arbitration clause on the front page of the bill of lading had met the requirements set out in the previous Replies of the SPC mentioned above. However, the SPC took the view that the date and the parties' names should be stated and hence it is uncertain which charterparty should be incorporated into the bill of lading. Accordingly, the arbitration clause was deemed as not successfully incorporated.

The arbitration clause in a bill of lading does not bind the subrogated insurer

26.62 The SPC held in the case *PICC Xiamen Branch v Chinese Polish Joint Stock Shipping Company*[44] that an arbitration clause in a bill of lading does not bind the subrogated insurer. The SPC took the view that an arbitration clause was a clause independent from the main terms of the contract, and the independent arbitration clause should have been negotiated between the relevant parties of the bill of lading. The right of subrogation simply transfers the substantive right of the bill of lading to the insurer. The procedural issue,

42 [2006] Min Si Ta Zi No. 26 (SPC).
43 [2008] Min Si Ta Zi No. 50 (SPC).
44 [2004] Min Si Ta Zi No. 43 (SPC).

i.e. the applicability of the arbitration clause, did not bind the insurer, unless the insurer expressly accepted this clause.

The arbitration clause in a bill of lading does not bind the holder of the bill of lading

26.63 In the case *Beijing Ellison Import Export Co. Ltd v Solar Shipping Angtrading S.A. and Songa Shipholding Pte Limited*,[45] the SPC answered the question about whether the arbitration clause in the bill of lading binds the consignee. The SPC gave a negative answer. It was held by the SPC that a valid arbitration agreement must represent the parties' true intention, but the arbitration agreement in the bill of lading was only the intention of the carrier. Since the bill of lading holder did not participate in the negotiation of the arbitration agreement, the arbitration agreement would not bind the consignee.

26.64 However, it shall be noted that this Reply of the SPC was published in 2007. There have been a few later cases regarding the incorporation of arbitration clauses into the bill of lading and the SPC did not use this reason to dismiss the objection to jurisdiction in those cases. However, it would not be unexpected that if the requirements for valid incorporation are all satisfied, the SPC might use this reason, i.e. lack of intention to arbitrate, to dismiss the objection to the jurisdiction of the Chinese courts over a dispute in respect of the bill of lading.

26.65 It seems that the validity of arbitration clauses in the bill of lading is still an outstanding question and needs to be clarified by future legislation and regulations. Currently, based on the replies issued by SPC, it might be difficult to challenge the jurisdiction of the Chinese courts based on an arbitration clause contained in or incorporated in the bill of lading.

Conciliation/mediation

Conciliation by court

26.66 Apart from arbitration, there is another dispute resolution method known as conciliation. According to the CPL and the Arbitration Law, both the courts and arbitral tribunals are allowed to arrange conciliation upon the parties' agreement during the proceedings.

26.67 Chapter 8 of the CPL and chapter 6 of the Interpretation of the CPL set out the rules for conciliation conducted by the court. The conciliation is arranged based on the free will of the parties and the court cannot force the parties to discuss and settle the dispute. In addition, there is no restriction that the conciliation must be conducted after a hearing. The court is allowed to proceed to conciliation directly after the acceptance of the case upon both parties' agreement provided the case is a straightforward matter and the facts of the case are clear.[46]

26.68 There are certain kinds of disputes that cannot be resolved by conciliation, including cases subject to special procedures, cases subject to procedures for urging the

45 [2007] Min Si Ta Zi No. 14 (SPC).
46 Interpretation of the CPL, art 142.

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