

中国扣船制度介绍

Introduction of Ship Arrest in China

向中国法院申请扣押船舶，主要的法律依据是《中华人民共和国民事诉讼法》(以下简称《海诉法》)第3章规定。申请扣船性质上属于财产保全措施，目的在于确保申请人主张的海事请求的实现。《海诉法》第12条规定，“海事请求保全是指海事法院根据海事请求人的申请，为保障其海事请求的实现，对被请求人的财产所采取的强制措施。”成功扣押船舶，将为债权的实现提供强有力的保障，给债权人保护合法权益提供谈判便利。因此，申请法院扣船是海事纠纷中常见的债权保护手段。

The main legal basis for the maritime claimant to apply for arrest of a ship before the Chinese courts is the provision stipulated in Chapter 3 of the *Special Maritime Procedure Law of the People's Republic of China* (hereinafter referred to as the “*Maritime Procedure Law*”). The application for arrest of a ship is in nature a kind of property preservation measures, whose purpose is to ensure the fulfillment of a maritime claim of the claimant. As provided by Article 12 of the *Maritime Procedure Law*, “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 fulfillment of the claim of the maritime claimant”. The successful arrest of a ship would offer a powerful guarantee for the fulfillment of the claim and provide a negotiation advantage for the creditor to protect their legal rights and interests. Therefore, the application for arrest of a ship before the court is a common measure to protect the creditors' rights in the maritime disputes.

1. 管辖权 Jurisdiction

中国将海上运输及与船舶经营有关的纠纷交由海事法院专属管辖，因此，地方法院无权受理船舶扣押案件。地方法院即使为执行生效判决或者其他生效法律文书而需要对船舶实施扣押，仍需要通过海事法院执行。当事人于起诉前申请扣押船舶的，根据《海诉法》第13条规定，应由拟扣押船舶所在地海事法院管辖，且不受当事人之间就海事纠纷达成的诉讼管辖约定或者仲裁协议的约束；如果当事人已经就相关海事纠纷提起诉讼，并在诉讼中提出扣船申请，则由受理

海事纠纷的海事法院管辖。至于海事纠纷源于违约或者侵权，则在所不问。

In P.R. China, disputes regarding the marine transportation and ship operation shall be under the exclusive jurisdiction of maritime courts. Therefore, the district courts do not have the right to entertain cases of ship arrest. Even if the district courts need to arrest a ship for the purpose to enforce effective judgment or other effective legal documents, the arrest of the ship shall also be implemented through a maritime court. In accordance with Article 13 of the *Maritime Procedure Law*, where any party applies for arrest of a ship before instituting an action, the application shall be subject to the jurisdiction of the maritime court of the place where the ship to be arrested is located, and shall not be bound by the jurisdiction agreements or arbitration agreements between the parties in respect of the maritime dispute; where the parties have brought a lawsuit with regard to the relevant maritime disputes and applied for arrest of a ship during the proceedings, the application shall be thus subject to the jurisdiction of the maritime court entertaining the maritime disputes. Regardless of whether the maritime claim originated from tort or contract, it shall also be subject to the jurisdiction of the maritime courts.

目前，中国在广州、厦门、上海、青岛、天津等 10 个城市设立了海事法院。

Currently, China has constituted maritime courts in 10 cities, such as Guangzhou, Xiamen, Shanghai, Qingdao and Tianjin, etc..

2. 申请 Application

根据《海诉法》第 15 条规定，申请人要求扣押船舶，必须向海事法院提交符合要求的书面申请。申请书应载明海事请求事项、申请理由、保全的标的物以及要求被申请人提供担保的数额，并附有关证据。申请理由是指产生海事请求的基本事实、被申请人的责任及申请保全所依据的法律。申请需要附送的证据是指能够证明产生海事请求事实、被申请人的责任、待扣船舶情况等方面的初步证据，法院对当事人申请扣押船舶的证据的要求低于当事人在实体纠纷中的举证责任。

Pursuant to Article 15 of the *Maritime Procedure Law*, a maritime claimant who wishes to apply for arrest of a ship shall file an application in writing with a maritime court. In the application, the particulars of the maritime claim, reasons for application, subject-matter to be preserved and the amount of security required shall be specified with relevant evidence attached. The reasons for application mean the basic facts, the responsibility of the person against whom the application is made and the laws subject to which the preservation is applied for. And the evidence required to be attached to

the applications refer to prima facie evidence that could prove the fact causing the maritime claim, the responsibility of the person against whom the application is made and the condition of the ship to be arrested. The court's requirement for evidence upon the claimant to apply for arrest of a ship is lower than the claimant's burden of proof in the substantial disputes.

3. 审查 Examination

申请人提出扣船申请后，海事法院将对提交的材料进行审查。这主要包括以下内容：

Where an application for arrest of a ship is made, the maritime court shall examine the supporting documents submitted by the claimant. The key points that shall be verified include but not limited to:

3.1 申请扣船的事由必须属于法律规定的可以扣押船舶的海事请求。

The maritime claim for which the application for arrest of a ship is made shall be one of the maritime claims with respect to which an application may be made for arrest of a ship.

《海诉法》第 21 条借鉴了《1999 年国际扣船公约》的规定，规定了二十二项可以要求扣押船舶的海事请求，包括船舶营运造成的人身或财产损失、租船、海难救助、共同海损、船舶抵押权、船舶买卖等海事请求。第 22 条进一步规定，除为执行判决、仲裁裁决以及其他法律文书，非属于第 21 条规定的海事请求，不得申请扣押船舶。

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

3.2 拟扣押船舶属于法律规定的可扣押的船舶。

The ship that the claimant applies to arrest shall be a ship that may be arrested pursuant to laws.

按照《海诉法》第 23 条的规定，可以扣押的船舶为当事船和姐妹船。

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

海事法院可以扣押当事船舶的情形包括：1) 船舶所有人对海事请求负有责任，并且在实施扣押时是该船的所有人；2) 船舶的光船承租人对海事请求负有责任，并且在实施扣押时是该船的光船承租人或者所有人；3) 具有船舶抵押权或者同样性质的权利的海事请求；4) 有关船舶所有权或者占有的海事请求；5) 具有船舶优先权的海事请求。原则上，申请扣船需要提供相应的船舶信息，比如船舶登记证书。但申请扣押当事船舶，不能立即查明被请求人名称的，根据《海诉法》第 25 条规定，仍不影响申请扣船，此时可以以船舶作为被申请人。

The maritime court may arrest the ship concerned in any of the following circumstances: 1) the ship-owner is liable for the maritime claim and is the owner of the ship at the time of arrest; 2) the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer or owner of the ship at the time of arrest; 3) a maritime claim that gives rise to ship mortgage or to rights of a similar nature; 4) a maritime claim related to ownership or possession of a ship; and 5) a maritime claim that gives rise to maritime lien. In principle, where an application of arrest of a ship is made, particulars of the ship shall be submitted, such as ship registration certificate. However, as per Article 25, a maritime claimant who wishes to apply for arrest of the ship concerned but cannot promptly ascertain the name of the person against whom the application is made may still apply for its arrest, and in such circumstance, the ship may be regarded as the person against whom the application is made.

海事法院可扣押的姐妹船是指对海事请求负有责任的船舶所有人、光船承租人、定期租船人或者航次租船人在实施扣押时所有的其他船舶，但与船舶所有权或者占有有关的请求除外。《海诉法》第 23 条同时规定，从事军事、政府公务的船舶不得被扣押。

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

3.3 申请扣船必须提供符合要求的担保。

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

尽管《海诉法》第 16 条规定，海事法院受理海事请求保全申请，可以责令海事请求人提供担保。尽管此处规定的是“可以”而不是“应当”提供担保，但在扣船实践中，中国法院几乎无一例外的要求申请人提供扣船担保。根据《海诉法》第 75 条规定，担保的方式及数额由海事法院决定。第 73 条规定，担保可以是现金或者保证、抵押等。扣船实务中，法院一般接受的担保包括现金及中国国内银行或者国内保险机构出具的担保。具体数额则由法院自由裁量，应相当于因申请扣船可能给被请求人造成的损失为限，实务中，法院有要求提供不低于拟扣押船舶 30 天的租金数额，也有根据要求被申请人提供担保的金额的一定比例提供扣船担保。

Although Article 16 of the *Maritime Procedure Law* provides that the maritime court, having entertained an application for preservation of a maritime claim, may (which is stipulated as “may” rather than “shall”) enjoin the maritime claimant to provide security, in the practice of arresting ships, all of the Chinese courts require the claimant to provide a security for the arrest of a ship. As provided in Article 75 of the *Maritime Procedure Law*, the type and amount of the security provided by a maritime claimant shall be determined by the maritime court. And according to Article 73, the type of security includes cash, guarantee, mortgage or pledge. In the practice of arresting ships, generally the courts accept deposit in cash, and a letter of guarantee issued by the Chinese domestic banks or domestic insurance institutions. The specific amount shall be determined by the court, whose cap shall be equivalent to the losses that may be sustained by the person against whom the application is made due to the application of ship arrest. In practice, the court may require the security not less than the amount of 30-day hire loss of the ship to be arrested, or may require the claimant to provide the security as per certain proportion of the security amount that the person against whom the application is requested to provide

被申请人为了使船舶尽快获释，可以提供申请人要求的担保，即以提供担保的方式换得船舶释放。该担保替代船舶作为实现海事债权的保障。被请求人提供担保的方式和数额，根据《海诉法》第 75 条规定，由请求人与被请求人协商，协商不成的，由海事法院决定。被请求人提供担保后，根据《海诉法》第 18 条规定，海事法院应当及时解除船舶扣押。如果被请求人不提供适当的担保，根据《海诉法》第 29 条规定，海事请求人可以在提起诉讼或者仲裁后，申请法院拍

卖船舶以实现债权。请求人诉前扣押船舶的，应当在扣船后 30 天内提起诉讼或者仲裁，否则，海事法院将裁定释放船舶。

In order to release the ship as soon as possible, the person whom the application is made may provide the security requested by the claimant. In other words, he/she should acquire the release of ship by providing a security. Such security is regarded as a substitute for the ship to ensure the realization of maritime claims. In accordance with Article 75 of the **Maritime Procedure Law**, the type and amount of the security provided by a person against whom the claim is made shall be determined through consultation by the maritime claimant and the person against whom the claim is made; if consultant fails, the matter shall be determined by the maritime court. And according to Article 18 of the *Maritime Procedure Law*, where a person against whom a claim is made provides security, the maritime court shall lift the arrest of ship promptly. If the person against whom a claim is made fails to provide proper security, in accordance with Article 29 of the *Maritime Procedure Law*, the maritime claimant, having brought an action or applied for arbitration, may apply to the maritime court for auction of the ship. In the case that the claimant applies for arrest of ship prior to proceedings, a lawsuit or arbitration shall be filed within 30 days as of the arresting of the ship, otherwise, the maritime court will render the order to release the ship.

4. 裁定 Order

《海诉法》第 17 条规定，海事法院接受扣船申请后，应当在 48 小时内作出裁定；对于符合法定扣船条件的，海事法院裁定准许采取扣船措施，同时责令被请求人提供担保；对不符合海事请求保全条件的，裁定驳回申请；海事法院一旦裁定准许扣押船舶，应当立即执行。当事人对裁定不服的，可以在收到裁定书之日起五日内申请复议一次。海事法院应当在收到复议申请之日起五日内作出复议决定。复议期间不停止裁定的执行。

As provided by Article 17 of the *Maritime Procedure Law*, the maritime court, having accepted an application shall make an order within 48 hours; where the conditions for the ship arrest are satisfied, the maritime court shall render the order to approve the execution of ship arrest measure and order the claimant to provide the guaranty; where the conditions for the preservation of the maritime claim are not met, it shall make an order to reject the application; once the court orders to approve the ship arrest, the arrest shall be executed forthwith. Any party who is dissatisfied with such an order may, within 5 days after receipt thereof, apply for review not more than once. The maritime court shall give the result of the review within 5 days after receipt of the application therefore. Execution of the order shall not be suspended during the period of review.

5. 执行 Enforcement

海事法院在作出准予扣船裁定的同时，还要发出扣押船舶命令，并派执行人员向船长送达裁定书和扣押船舶命令。海事法院同时向海事局发出协助执行通知，要求海事局在扣押期间不办理船舶离港手续。海事法院扣押外籍轮船的，会通知边防检查站、海关等部门，要求边防检查站派员驻船监护，为此，边防部门将每天收取一定的看船费用。

The maritime court shall issue a ruling to allow arrest of the ship and an order for arresting the ship, and shall send execution judges to serve the said ruling and order to the master. In the meanwhile, the maritime court may send a notice to the maritime safety administration for assistance in execution, requiring the maritime safety administration not to handle formalities for the ship's departure from port at the time of arrest. Where the maritime court arrests a foreign ship, it shall notify such departments as the station of frontier inspection and the customs and require the station of frontier inspection to send officers to supervise onboard. Therefore, the frontier inspection authorities would charge certain supervision fees per day.

6. 错误扣船 Wrong arrest of ships

中国扣船制度坚持保护扣船申请人与被申请人利益并重，要求扣船申请人提供扣船担保，保证赔偿因申请扣船错误造成的损失。《海诉法》第 20 条规定，海事请求人申请海事请求保全错误的，应当赔偿被请求人或者利害关系人因此所遭受的损失。判断申请人扣船错误，是否以申请人具有主观恶意或者重大过失，法律并没有明确。在司法实践中，认定扣船请求人正确与否的依据是其海事请求能否成立，即其海事请求在相关实体纠纷的诉讼或者仲裁中是否获得支持。如果扣船请求人在相关实体纠纷诉讼或者仲裁中败诉，法院就认定其申请扣押船舶错误，须赔偿被申请人或者其他利害关系人的损失。申请扣押船舶错误造成的损失，包括因船舶被扣押在停泊期间产生的各项维持费用与支出、船舶被扣押造成的船期损失和被申请人为使船舶解除扣押而提供担保所支出的费用。

China's system on arrest of ships attaches equal importance to the interest of the claimant who applies for arrest of the ship and the person against whom the application is made. Requiring the claimant to provide security for arrest of the ship is to ensure that the losses arising from wrong arrest can be compensated. Article 20 of the *Maritime Procedure Law* stipulates that a maritime claimant who has wrongly

applied for preservation of a maritime claim shall indemnify the person against whom the claim is made or the interested person for the losses thus incurred. Laws do not expressly specify whether the claimant has wrongly applied for arrest of the ship should be subject to whether the claimant filed wrong application with intention or had significant faults. In the judicial practice, to judge whether application for arrest of ships is proper is based on whether the claimant's maritime claim could establish, i.e., whether his maritime claim has obtained support in the litigation or arbitration of relevant substantive dispute. In the case that the claimant failed in the litigation or arbitration of relevant substantive dispute, the court will determine he has wrongly applied for arrest of ship and shall indemnify the person against whom the application is made or the interested person for the losses thus incurred. Losses caused by wrong application for arrest of the ship include all maintenance expenses and disbursements incurred when the ships are berthed due to arrest, hire loss due to arrest and the expenses the person against whom the application is made has paid for provision of the security for release of the ship.