

# 中国扣船制度

## SHIP ARREST IN CHINA

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

### 1. 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 People's Republic of China ("PRC"), disputes relating to maritime transportation and ship operation will be subject to the exclusive jurisdiction of Maritime Courts. A District Court does not have the power to arrest ship. Where a District Court needs to arrest a ship for the purpose of enforcing judgments or other effective legal documents, arrest of the ship has to be enforced by a Maritime Court. Under Article 13 of the Maritime Procedure Law, where any party applies for arrest of a ship prior to instituting an action, the application will be subject to the jurisdiction of the Maritime Court of the place where the ship to be arrested is located notwithstanding the fact that the parties may have reached any jurisdiction agreement or arbitration agreement in respect of the maritime dispute. However, if the parties have already instituted a lawsuit with regard to a maritime dispute, the application for arrest of a ship during such proceedings shall be filed with the Maritime Court hearing the maritime dispute. It is irrelevant whether the dispute is arising from tort or breach of contract.

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

## 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。

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

arrested. The Court's requirements for evidence from the claimant to apply for ship arrest are lower than his burden of proof in the resolution of the dispute.

### 3. 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 will examine the supporting documents submitted by the claimant. The key points that have to be verified include but not limited to the following:

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

《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. Such maritime claims include, *inter alia*, loss of life or personal injury and loss of or damage to property caused by ship operation, chartering of a ship, salvage at sea, general average, ship mortgage, sale and purchase of a ship sale. Article 22 further stipulates that no application may be made for arrest of a ship on account of maritime claims other than the ones specified in this Article 22, except for enforcement of a judgment, an arbitration award or other legal documents.

3.2 拟扣押船舶属于法律规定的可扣押的船舶。

The ship to be arrested shall be a ship that may be arrested pursuant to the relevant 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 can be the ship concerned or 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。中国法并没有英美法对物诉讼 ( Action in rem ) 的概念，原则上，申请扣船需要提供相应的船舶及被申请人的信息，比如船舶登记证书用以显示船籍及所有人信息。但是申请扣押当事船舶，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，这一规定又带有对物诉讼的影子。

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

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

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

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 relating to

ownership or possession of the ships. Article 23 of the Maritime Procedure Law also stipulates that no ships engaged in military or governmental services will be subject to arrest.

需要说明的是，中国法要求被扣押财产必须属于被请求人所有，因此，申请扣押船舶的效力并不能及于船载货物。当然，如果申请人对船舶及其载运的货物均有请求权（例如，救助人可以要求船舶所有人和货物所有人支付救助报酬），则可以申请法院扣押船舶及船载货物，但需要分别递交申请书。

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

通常情况下，如果请求人仅有权扣押船舶，则扣船并不能限制船舶在港区内的货物正常装卸工作，只是船舶不得离开被扣地点。然而，由于被扣船舶不得离开扣押地，因此，当货物目的港非扣押地时，船上货物的继续运输将受到影响。

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

### 3.3 申请扣船必须提供符合要求的担保。

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

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

#### **4. 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；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。

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

## 5. 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。

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

## 6. 防止船舶被扣 Prevention of ship arrest

正因为扣押船舶会使得船东陷入极为不利的处境，因此，如何防

止船舶被扣，成为船东关心的问题。在英美法下，船东可以委托律师在船舶预计挂靠港口向法院申请预先登记通知 ( Admiralty Registrar, 拉丁语为 Caveat )，即事先向法院出具书面保证将接受任何扣船传票的送达并及时向法院缴付保释担保 ( bail )，以对抗任何针对船舶的扣船请求。然而，中国法并没有类似上述预先登记的制度，因此，遭遇扣船，除了向申请人提供担保外，船东难有其他办法。

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

## 7. 错误扣船 Wrongful 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 is designed in the spirit of equal importance of the interest of the claimant and the interest of the respondent. The claimant is required to provide security for potential losses that may arise from wrongful arrest. Article 20 of the Maritime Procedure Law provides that a maritime claimant shall indemnify the respondent or any interested person for losses incurred by his wrongful application for preservation of maritime claims. There is no clear legal position as to whether subjective malice or gross negligence is constitutive element for wrongful application for ship arrest. In practice, whether the application for ship arrest is legitimate usually depends on whether the claimant's maritime claim will be supported in the litigation



or arbitral process. If the claimant loses the law suit or arbitration, the Court will usually decide that the application for ship arrest is wrongful and order the claimant to indemnify the respondent or the interested person for any losses incurred. Such losses include all maintenance expenses and disbursements incurred when the ships are berthed due to arrest, hire losses due to the arrest and the expenses arising from provision of security by the respondent for release of the ship.

