

Realistic Dilemma and Improvement Path of Maritime Injunction

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Abstract: *In China, the maritime injunction system has been in operation for more than 20 years since the entry into force of the "Special Maritime Procedure Law of the People's Republic of China" (hereinafter referred to as the " Maritime Procedure Law "). It is a creative provision for the preservation system of civil procedure law, which is applied to the field of maritime practice and aims to protect the legitimate rights and interests of applicants in " emergency situations. " Based on the discussion of the nature and function of maritime injunction, this paper makes an empirical study on the data of maritime injunction judgment documents and typical cases of maritime injunction in the past three years, analyzes the problems existing in the specific application of the system in current maritime disputes from the current situation of practice, and puts forward some suggestions on the constituent elements and procedure setting of the application of maritime injunction system.*

Keywords: *Maritime injunction; Maritime disputes; Prevent damage; Program settings*

1. Introduction

A The establishment of maritime injunction system in China can be investigated from two aspects : the transplantation of foreign legal system and the reform of legal system based on legal practice. On the one hand, the setting of the system comes from the fact that in the context of globalization, when China is deeply involved in international trade, in order to avoid the expansion of the loss of the parties, it is difficult to make a reasonable judgment or the reasons for the judgment are not sufficient in the process of maritime court resolving maritime disputes. For example, at the end of the 20 th century, the Guangzhou Maritime Court invoked the advance execution system and the property preservation system to resolve the parties ' maritime claims, but it did not meet the situation that the parties had difficulties in production and operation as stipulated in the advance execution system or the property preservation system was made for property rather than ' behavior '. In many maritime disputes, the judicial organs have a very far-fetched judicial dilemma in the existing legal system. On the other hand, the creation of the system from the United Kingdom 's ' Mareva ban ' and civil law countries ' false sanctions ' system structure experience. The former means prohibiting the defendant from selling, disposing of or otherwise dealing with money or property or transferring it outside the UK before the relevant order or judgment is made. The latter is an interim ruling against the disputed legal relationship to prevent the claims can not be achieved, while strictly requiring the applicant to advance proceedings. In comparison, the maritime injunction pays more attention to the protection of the interests of the claimant in case of emergency, and the interest measurement of the legislative purpose is more inclined to the applicant. At the same time, the maritime injunction requires the respondent to act actively, which will change some of the substantive legal relations of the parties to the maritime dispute. It is not a purely procedural measure, nor does it stipulate the applicant 's obligation to promote litigation, and has the quasi-trial characteristics of directly resolving disputes.

2. Analysis on the Practice of Maritime Injunction

2.1. The nature and function of maritime injunction

Article 51 of China 's " Maritime Procedure Law " stipulates that the definition of maritime injunction has such an expression, that is, " ordering the respondent to act or not as a compulsory measure. " The legal nature of the compulsory measures mainly has the following different views in theory : ' act preservation theory ', ' execution order theory ', ' independent attribute theory '.^[1]Some scholars believe that it is an urgent trial procedure.^[2]In the practice of maritime courts, maritime injunction cases are

classified as " preservation of non-litigation acts. " From the perspective of the legislative purpose of preventing damage expansion, it has the same purpose as preservation, but it is not a pure preservation act. From the perspective of its effectiveness, it has a strong similarity with " advance execution, " that is, without the final judgment of the legal relationship between the two parties, it is required to apply for the performance of the delivery of bills of lading, delivery of goods and other acts. In this regard, the theory of independent attributes is more reasonable.

The most essential and important function of maritime injunction is to prevent the occurrence or expansion of losses in maritime disputes and to protect the legitimate rights and interests of both maritime claimants and respondent in emergencies. Under the adverse impact of the ' novel coronavirus pneumonia epidemic ' in the domestic and foreign economic forms, China, as the world 's second largest economy with prosperous domestic and foreign trade and a large number of civil subjects in economic life, has also frequently encountered maritime disputes. The function of maritime injunction is particularly prominent at present. The ' (2021) Liao 72 Xing Bao 16 ' issued by the Supreme People 's Court in 2021 is a typical case of the application of maritime injunction under the influence of the epidemic. After the application of the injunction is approved, the dispute over container late fees between the two parties is shelved, and the respondent is required to deliver the goods in time. In order to avoid a more serious impact on the legitimate rights and interests of the applicant, the deadlock of the circulation stop is broken. At the same time, the applicant is required to provide a cash guarantee that exceeds the amount of the delay fee requested by the respondent, and also provides a guarantee for the settlement of the maritime disputes between the two parties in the next step.

Some scholars have also pointed out that maritime injunctions have new functions of countering foreign anti-suit injunctions and the extension of jurisdiction,^[3] giving full play to the ' Oriental experience ' of China 's maritime injunctions, helping to efficiently resolve foreign-related maritime disputes, reducing the judicial costs of both parties, protecting the legitimate rights and interests of both parties, improving the judicial authority of China 's judicial organs in the field of international maritime economy, and establishing a fair and just, judicially efficient image of a big country. For example, in the typical case of Wuhan Maritime Court in 2017, through the combination of maritime injunction and mediation, the applicant revoked the extraterritorial arbitration request, and the respondent was exempted from the extraterritorial arbitration with high economic cost and difficulty. It not only guarantees the applicant to put the ship into normal operation as soon as possible, but also reflects the fair judgment and judicial equality of China 's judicial organs in the field of international economic disputes according to law. Through the ' Oriental experience ' of mediation, both parties to the dispute are exempted from litigation, and the legal claims of both parties are met at the critical point of interest balance with the lowest economic cost.

2.2. The judicial application status of maritime injunctions

By searching the legal database of ' Peking University magic weapon ' with ' maritime injunction ' as the key word, there are 17, 21 and 26 judicial documents collected in the past three years from 2020 to 2022, a total of 64, showing an increasing trend year by year. Judging from the results of the judgment, there are 38 decisions made by the maritime court to grant the applicant 's request for maritime injunction. The types of requests involved include the delivery of 13 original bills of lading and the delivery of 25 goods under the bill of lading. In addition, there are 24 rulings for the applicant to apply for the withdrawal of maritime injunctions, and 2 procedural notices on maritime injunctions. Among the cause of action of these judicial documents, only 4 are " application for maritime injunction, " 1 is " transport contract dispute, " and 59 are " administrative " or " administrative enforcement. "

The maritime injunction judicial documents included in the database reflect two characteristics. First, the licensing rate is high. Although the number of such cases is less than that of other special procedures, the court is strict in the filing stage and prudent in applying the system. However, once the case is filed, the court considers that it meets the legal conditions of the maritime injunction, which is indeed ' urgent ', and the applicant provides cash guarantees or other guarantees sufficient to protect the actual loss and potential loss of the respondent. Generally, it will shelve other disputes of the parties, give priority to ensuring the avoidance and expansion of the applicant 's loss, and make a ruling to approve the maritime injunction ; the second is the confusion of application. Maritime injunction is aimed at the maritime disputes of the parties. In China 's ' Provisions on the Causes of Civil Cases ', the cause of action of maritime special procedures has clarified the cause of action of ' application for maritime injunction ', but many maritime courts have determined the cause of action as ' administration ' or ' administrative injunction ' in the judgment documents, that is, there is a lack of unity in understanding the nature of maritime injunction. The confusion of the application is also reflected in the fact that after the court

approves the maritime injunction, the parties will quickly resolve the dispute through settlement agreements, court mediation and other forms, and then apply for the withdrawal of the maritime injunction, and most of the cases The court ruled that after approval, the procedure fee for the maritime injunction was no longer charged. In this view, the maritime injunction seems to have become a 'catalyst' for the resolution of maritime disputes, and its function has alienated.

First, the maritime court to make a maritime injunction referee, in case of emergency the applicant may suffer losses or losses further expansion oriented. According to the seven typical permitted cases in the database of 'Peking University magic weapon', maritime injunction aims at preventing the deterioration of the situation and promoting the benign development of maritime trade and economic activities. Maritime trade is different from general civil and commercial trade. Its legal relationship involves many parties of legal relationship, such as parties to the transaction, shippers, carriers, consignees, etc., and it is often bulk trade. Whether it is the value of the goods themselves or the cost of transportation or the cost of custody, the amount is often high, especially when it comes to international trade. This feature is particularly prominent. Typical cases of maritime courts often adopt transportation costs and late fees for shelving disputes. Typical cases reflect the characteristics of approving the applicant's maritime injunction request, so that it can carry out normal business activities and ensure the healthy operation of the market. Then organize both parties to take into account the legitimate demands of the respondent through mediation, reconciliation and other forms; in addition, there has also been a phenomenon that judges use their discretion to carry out judicial renewal. The most distinctive is that the application is based on the lien stipulated by law. In the face of the applicant's failure to pay repair costs or rents, they exercise their own lien in accordance with the law and lien on the applicant's goods, ships, etc. In such cases, the maritime court measures the conflict between the statutory requirements 'need to correct the behavior of the respondent in violation of the law or the contract agreement' and 'in case of emergency, no immediate maritime injunction will cause damage or expand the damage', and pays more attention to avoiding losses in emergency situations. In particular, the goods involved, such as 'liquefied petroleum gas', are related to the public interest. Even if the respondent is a normal exercise of civil rights, the behavior is legal, but considering the emergency, market risk, public interest and other factors, the maritime injunction will also be approved. The respondent is required to immediately deliver the goods or deliver the ship.

Second, it is necessary to provide guarantees. The "Peking University Magic" database contains 46 maritime injunction rulings from 2021 to 2022. Among them, 30 rulings have made an application for maritime injunction granting the applicant, of which 5 states that the applicant is guaranteed by the guarantee letter of the insurance company, and 25 states that the applicant is guaranteed by cash. 19 rulings express the amount of cash guarantee of the applicant in this case. In these rulings permitted by maritime injunction, the applicant has provided cash guarantee or guarantee letter of insurance company, and it seems that providing guarantee has become the 'weather vane' of maritime court review and a necessary condition; furthermore, the applicant's obligation to provide guarantees is extremely strict. In the judgment documents containing the specific amount of cash guarantees, the amount of guarantees provided by the applicant is mainly concentrated in 20% to 50% of the fees for overdue use that the applicant should bear, which is higher than the respondent's claim. The minimum is also more than about 5%, and the highest guarantee fee is about 3.6 times the respondent's claim. However, China's 'Maritime Procedure Law' stipulates that 'may' order the applicant to provide security, and the amount of security provided for the 'maritime claimant shall be equivalent to the loss that the application may cause to the respondent. That is to say, whether the applicant provides a guarantee is not a mandatory requirement. The court can make a decision according to the situation. At the same time, the amount of the guarantee should be limited to the amount claimed by the respondent. The maritime injunction should be made and immediately executed within 48 hours. In this short period of time, the respondent's loss is less likely to have such a huge increase, and whether it has the entity's creditor's rights and the amount of the creditor's rights without the court's judgment should be in an uncertain state. Therefore, in judicial practice, it is necessary for the applicant to provide strict guarantees, which is suspected of violating the provisions of the Maritime Procedure Law.

3. Realistic Dilemma of Maritime Injunction

3.1. The Dilemma of Legal Requirements

There are three constitutive elements of maritime injunctions stipulated in China's Maritime Procedure Law, including "specific maritime claims," "correction of violations of legal provisions or

contractual agreements " and " emergency. " From the perspective of legal provisions, its dilemma is reflected in the ambiguity of the constituent elements in legislation. In the process of application, it is easy to cause the problem of different judgment scales and excessive discretion.

First of all, with regard to ' specific maritime claims ', the law does not define it, nor does it limit the scope of maritime claims by listing them, and cannot give clear guidance to the parties to maritime disputes. However, on the contrary, in the provisions of the Maritime Procedure Law on the application for arrest of ships, the applicable types of maritime claims are specifically stipulated, and 22 types of maritime claims are clearly listed. There are two defects in this way. First, the maritime claimant does not know that it can use the system to avoid or reduce its own losses more quickly and fall into more complicated litigation or arbitration procedures in the case of de facto compliance with the application for maritime injunction, paying a higher judicial cost ; second, within the same law, for ' maritime claims ' one system to be express, another system is not detailed, easy to cause discord within the law, but also prone to ambiguity, that is, whether the application for arrest of the ship 's maritime claims is also an application for maritime injunction maritime claims ?

Secondly, with regard to ' conduct ', although the legislation clearly stipulates that maritime injunctions correct acts that ' violate legal provisions or contractual agreements ', which seems to have a strong legislative technical and legal basis, such provisions do not fully meet the requirements of judicial practice. Maritime injunction is aimed at torts and maritime contracts involving maritime disputes, rather than all illegal acts and civil contracts. It only intervenes in some links and cannot play a role in the whole process. It is suspected to expand the scope of application of maritime injunction by general provisions. Moreover, making such a limit of scope cannot cover cases where a maritime injunction is applied in value measurement, for example, ' (2016) E 72 Xingbao No.1 ruled the dispute over the ship repair contract of Zijinshan Shipyard ', which breaks through this element. For the legal exercise of the lien by the respondent, the court still makes the decision to approve the maritime injunction. The judge here focuses on avoiding the applicant 's greater operating losses far exceeding the respondent 's maintenance costs. That is to say, the current legal provisions ignore this kind of ' lien ' as a typical exception. Although the respondent 's behavior is legal and in line with the contract agreement, allowing it to exercise its rights substantially causes more serious harm to the applicant 's interests, which should also be corrected by maritime injunction.

Finally, with regard to " urgent circumstances, " this provision takes into account the urgency of time and the urgency of results. However, from the various rulings, the reasons for the ruling of this part are too simple and less convincing. It is not difficult to trigger such a connection between the parties. The referee determines that the situation is indeed urgent in accordance with the applicant 's guaranteed guarantee. There are also cases where the referees are different. In the case of the same case, one case has ' illegal extraction of goods ' and the other case does not have this sentiment. The court has determined that the situation is urgent, and the judge 's discretion here is too large.

In addition, we can also understand this dilemma from a holistic perspective, and understand the meaning of the text.^[4] It seems that the applicant can easily meet the conditions. However, the maritime injunction has the function of changing some of the substantive legal relations, ordering the parties to perform certain acts to correct the parties ' illegal and breach of contract. The amount of the subject matter of the maritime commercial dispute is high, the change of the substantive legal relationship, and the economic cost between the parties is extremely high. Once the ruling is flawed, the legitimate rights and interests of the respondent cannot be effectively protected. Therefore, more stringent provisions should be made for a strong and fast legal system.

3.2. The Dilemma of Program Setting

The application procedure of maritime injunction stipulated in China 's " Maritime Procedure Law " can be summarized as " written application, providing evidence, and making a written decision within 48 hours. " The most significant feature of its existence is that it does not construct a legal link for equal debate between the two parties. The respondent is unable to fully respond, often through the applicant 's side of the word, that is, through approval. The confrontation between the respondent and this can only be based on the application for reconsideration, a postpositional relief procedure. There is an imbalance in time and space between the two parties, and their right to defend cannot be exercised in time. Maritime injunction has the characteristics of changing the legal relationship of some entities of the parties, requiring the respondent to act actively, and its legitimate rights and interests are at risk of irreversible loss. Even if the legislative purpose is to avoid the loss of the applicant 's interests or the expansion of the loss in an emergency, the respondent should be given equal judicial participation. There is a clear

legislative gap on this issue, with the respondent either relying on the court to require the applicant to provide a sufficient amount of security to hedge against the risk of an error in the determination, or seeking relief by taking advantage of a reconsideration that does not stop the execution of the determination during the reconsideration.

3.3. Maritime injunction abuse risk

The ambiguity and generality of maritime injunction legislation, the lack of debate between the two parties in the procedure setting and the characteristics of written review, there are certain legal loopholes and the risk of abuse. Here, the possible problems are : first, the applicant has the maritime injunction as a tool to form favorable conditions in the consultation between the two sides. Through the above analysis of the maritime injunction judgment documents, after most of the maritime injunctions are approved, the applicant applies for the withdrawal of the maritime injunction on the grounds of reconciliation and mediation, and the court will no longer charge the application fee and other related fees. In addition, compared with ' emergency ', the court focuses more on whether the applicant provides a guaranteed guarantee. Then, the parties to the maritime dispute can ' use ' the maritime injunction to seek such a path : after the maritime dispute occurs, the situation faced by the applicant is not particularly urgent, but by providing a high cash guarantee, applying for a maritime injunction, using it as a springboard to obtain ' legitimacy ', seeking favorable conditions in the subsequent dispute resolution, and requiring the respondent to make the transfer of interests. This is undoubtedly a serious violation of the legislative purpose and spirit of maritime injunction. Second, there is a risk of damaging the interests of the respondent. Although the maritime injunction requires the applicant to provide certain evidence, the respondent cannot fully express its own defense because of its too simple review process and lack of relief procedures. However, after approval, the implementation is rapid and effective, directly changing the legal relationship of some entities of the parties, which is likely to cause irreparable consequences and damage the interests of the respondent.

4. The improvement path of maritime injunction legal system

4.1. Maritime injunction abuse risk

Detail specific maritime claims. In this regard, the scope of maritime claims applicable to maritime injunctions can be clarified by combining enumeration and bottom-up clauses. On the one hand, through the analysis of the data of the maritime injunction ruling, it is found that the maritime injunction involves more and more universal maritime claims, and makes such a provision that ' the parties can apply for a maritime injunction if they have the following maritime claims '. In addition to the most common maritime claims for the delivery of goods, the issuance of delivery bills of lading, the return of ships, and the extraction of goods, there are also the following new types of maritime injunctions in trial practice, such as the return of ship 's belongings, the inspection of ships or goods, the illegal detention of ships, the exclusion of the right to use the sea, and the return of the wrongful delivery of third-party goods. It is necessary to summarize and classify the maritime claims with the same nature or relevance, and make corresponding legislative provisions based on the diversification of maritime claims in practice, so that the parties can easily use and provide a clear basis for the judicial organs to make decisions ; on the other hand, the limitation of legislative technology makes it impossible to fully cover all maritime claims that should be subject to maritime injunctions. It is also necessary to prevent ' black swan ' events such as the ' novel coronavirus pneumonia epidemic ' and give the necessary space for the initiation of maritime injunctions.

4.2. Perfecting the Procedure Setting of Maritime Injunction

First, based on the principle of procedural equivalence between the two parties, we should construct a procedural system in which the respondent can also express his opinions and defend at the same time and in the same space. However, considering that the situation of maritime injunction cases is indeed urgent, it is not possible to refer to the general civil procedure. In terms of efficiency, the legalization of the hearing procedure is feasible. The practical data of the application of the hearing procedure reflects that there is indeed a risk of error in the court 's use of only written review. The hearing procedure can allow both the applicant and the respondent to fully express their opinions. The court can organize the two parties to exchange opinions on some of the facts of the case affected by the act of maritime injunction requirements, without involving other disputes between the two parties. After the strict review

of the pre-hearing procedure and the remedy of the post-hearing procedure, the court makes a ruling that it is more reasonable than the pure written review. To ensure that the referee is fair, open and transparent, it also properly safeguards the procedural rights and legal substantive rights of the respondent.

Secondly, the perfection of relief procedure should adopt the form of execution defense. At present, the legislation stipulates that the respondent has the right to apply for reconsideration, but the implementation of the maritime injunction is not stopped during the application period. Some scholars have proposed to extend the time of reconsideration, review in court, and second review.^[5] The rationality of this setting is that it can guarantee the follow-up procedural relief of the respondent, provide the respondent with sufficient opinions in the procedure, and can revoke the maritime injunction that is indeed wrong. The disadvantage is that this will cause the complexity of the procedure, which is inconsistent with the legislative purpose of the maritime injunction, and does not fully consider the emergency nature of the substantive relationship of the maritime injunction. Therefore, the relief to the respondent should start from the perspective of execution, and the execution defense procedure can be set up. The negative impact of the maritime injunction is that if the referee is wrong, it will cause irreparable damage to the respondent. Therefore, the implementation of the defense procedure is set up, and the respondent can indeed provide evidence to prove that the implementation of the maritime injunction The loss caused by far exceeds the possible loss of the applicant who does not implement the maritime injunction and maintains the original state, so the implementation of the maritime injunction should be suspended ; or the respondent also provides counter-guarantee, requesting the settlement of disputes between the two parties through ordinary civil procedures, it should be considered whether the linking mechanism between maritime injunction and ordinary civil procedures should be established.

Finally, exploratory pilot dispute mediation mechanism convergence. The guiding cases show that under the epidemic situation, maritime disputes occur frequently, and the number of applications for maritime injunctions has increased sharply. In this regard, taking into account the reality of China 's tight judicial resources and great pressure on the work of judicial organs, after the maritime injunction is made, the timely mediation amount of maritime disputes between the parties should be tried in practice to realize the diversion of cases and protect the legitimate rights and interests of both parties.

4.3. Strictly require the applicant's obligations

Considering the risk of abuse of maritime injunctions, it is necessary to strengthen the applicant 's obligation setting. First of all, it is clear that the applicant needs to fulfill the obligation to fully and truly disclose the facts of the case. In addition to preliminary evidence, other evidence should be provided to enable the court to have a more comprehensive understanding of the facts of the case. If the applicant 's own behavior has serious breach of contract or illegal behavior, the adverse consequences it should bear should not be passed through the implementation of the maritime injunction to the law-abiding, honest and trustworthy respondent ; secondly, the applicant is required to promote the development of litigation procedures to resolve relevant maritime disputes between the two parties. The maritime injunction focuses on protecting the interests of the applicant in emergency situations. After the implementation of the maritime injunction, the situation faced by the applicant is no longer urgent, and the realization of the claim of the respondent depends on the final judgment after the facts of the case are heard through the civil procedure. Therefore, the applicant should actively cooperate with the follow-up civil procedure. In the maritime injunction procedure, the recognition of the relevant facts and the recognition of the claims of the respondent should be directly cited in the follow-up procedure to determine the facts of the case ; finally, the mandatory guarantee obligation, which is an effective barrier to the protection of the legitimate rights and interests of the respondent. Admittedly, forcing the applicant to provide a guarantee may cause the judge to focus only on the review of the guarantee and ignore the investigation of the ' emergency of the situation ', but what should be required is to strengthen the judge 's argument in the judgment document. It is necessary to force the applicant to provide a guarantee to prevent the remedy of the respondent after the wrong maritime injunction causes irreparable damage to the respondent.

5. Conclusion

Through the empirical study of maritime injunctions in judicial practice, there are practical difficulties in the legal constituent elements and procedural settings in the operation of maritime injunctions, and there is also a risk of abuse. Under the influence of the " new type of coronavirus, " maritime injunctions have become a legal system that effectively prevents losses and avoids the expansion of losses. Therefore, in terms of statutory requirements and procedural settings, we should absorb the useful experience and

effective measures of maritime courts in carrying out maritime injunction practice in recent years, and improve the legislation of maritime injunctions, so as to better play its due role, achieve the legislative purpose, and provide a good institutional guarantee for civil subjects to participate in domestic and foreign maritime economic life.

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