

# ARREST OF VESSELS UNDER CHILEAN LAW

## INTRODUCTORY NOTE

Chile is a civil law jurisdiction. Generally speaking, there are first instance civil courts of general jurisdiction which are competent to hear cases, civil or criminal, not reserved to courts of special jurisdiction. (Courts of special jurisdiction may include, among others, criminal courts, children's courts, army courts, courts of limited subject matter jurisdiction and exceptional courts). Their jurisdictional territory is either based on a borough or a group of boroughs. The Appeal Courts essentially handle appellate review of the first instance courts and their territory correspond either to a group of provinces or region. The Supreme Court, which is based in Santiago City, has jurisdiction over the whole country and guarantees the correct and uniform application of the Constitution and laws.

In connection to maritime disputes, and at a first instance level, article 1203 of the Code of Commerce (hereinafter, the "CCom") establishes the general principle that in Chile the resolution of any maritime dispute, including those related to marine insurance, is subject to mandatory arbitration. (One of the relevant exceptions to this rule is that related to oil pollution regulated by the Chilean Navigation law, which are heard in first instance by a minister of the court of appeal of the place where the facts occur).

Having said the above, the Chilean arrest system has taken into account not only the civil law countries experience but also that coming from common law ones.

## 1. SOURCES OF LAW

The fundamental regulations applicable to ship arrest are found in Paragraph 5 of Title VIII of Book III of the CCom denominated "*About the Procedure to Arrest Vessels and its Release*" (articles 1,231 *et seq.*) as well as in the common rules contained in Title IV and Title V of Book II of the Code of Civil Procedure, respectively denominated "*About the Pre-Judicial Measures*" (articles 280 *et seq.*) and "*About the Precautionary Measures*" (articles 290 *et seq.*), which are subsidiary to those of the CCom. In respect to the regulations applicable to the judicial sale of vessels they are found, on one hand, at Paragraph 2 of Title II of Book III of the CCom, denominated "*About the Naval Property*" (articles 831 *et seq.*) in conjunction with the common law rules contained in Paragraph 2 Title I of Book III of the CCP, denominated "*About the Administration of Arrested or Attachments Goods and the Foreclosure Procedure*" (articles 479 *et seq.*), and the regulations contained in Title XVIII of Book III of the same Code, denominated "*About the Action of Dispossession Against Third Parties who Possess a Mortgage Property*" (articles 758 *et seq.*).

## 2. APPLICABLE INTERNATIONAL CONVENTIONS

The International Convention Regarding the Immunity of State-Owned Vessels (Brussels, 10 April 1926 and additional Protocol dated 24 May 1934) was ratified by Chile. On the other hand, the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, 10 May 1952) has not been ratified by Chile although its principles were taken into account by Chilean domestic law.

### 3. COMPETENCY OF COURTS OR OTHER AUTHORITY

The holder of a *privileged credit* on a vessel, established in the CCom or complementary laws (see section 5 below), may resort to the civil court sitting in the place where such vessel is located or to the competent civil court sitting according to the rules provided by Book III of the CCom to request an arrest against such vessel setting sail from the port or place where she is located, with the purpose of guaranteeing the exercise of the *privileged credit* or assuring compliance with a judicial decision that might imply the sale of the vessel in question. The arrest may also be requested in regard to the port or place where the vessel is expected to arrive. Should the court from which the arrest is requested be competent to hear the case upon its merits, it may be requested that the retention or arrest be carried out in any other port where the vessel arrives.

The holder of other credits than those deemed as privileged ones may request the arrest before the competent court as per the general rules set forth by the Courts Administration Code (*Código Orgánico de Tribunales*).

### 4. IMMUNITY OF STATE-OWNED VESSELS

As pointed out in section 2 above, the 1926 Brussels Convention, which denied sovereign immunity to all maritime governmental activities except those of an exclusively non-commercial nature, was ratified by Chile.

### 5. TYPES OF CLAIM FOR WHICH ARREST OR ATTACHMENT CAN BE REQUESTED

Under Chilean Law a vessel may be arrested if the requesting party has a credit that entitles to do so. These credits may be of two types, namely:

- (a) *Privileged credits* as set forth by articles 844, 845 and 846 of the Chilean CCom; and
- (b) Credits other than those mentioned in (a) above.

Under Chilean law there is no statutory definition for *privileged credits*. However, they may be defined as those which give rise to a maritime lien and allow for requesting an arrest as per the special rules set forth by Paragraph 5 of Title VIII of Book III of the CCom, denominated "*About the Procedure to Arrest Vessels and Its Release*" (articles 1231 *et seq.*). Articles 844, 845 and 846 of the CCom establish and distinguish the following groups of *privileged credits*:

#### A. Credits of article 844 of the CCom:

- 1° Legal cost and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield;

- 2° The remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law which regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities which are due for death or bodily injuries of the servants who survive ashore, on board or in the water, and always provided that they stem from accidents related directly with the trading of the vessel;
- 3° The charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of signaling and pilotage;
- 4° The expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred by the authority or third parties, in order to prevent or minimize pollution damages or hydrocarbon spills or other contaminating substances to the environment or third party property, when the fund of limitation of liability has not been constituted as established in Title IX of the Chilean Law of Navigation; and
- 5° The indemnities for damages or losses caused to other vessels, to port works, piers or navigable waters or to cargo or luggage, as a consequence of the collision or other accidents during navigation, when the respective action is not susceptible to be founded upon a contract, and the damages in respect of bodily injury to the passengers and crew of these other vessels.

B. Credits of article 845 of the CCom:

Mortgages credits on large vessels (i.e. vessels over 50 gross tons) and secured credits on minor vessels (i.e. vessels up to 50 gross tons).

C. Credits of article 846 of the CCom:

- 1° Credits in respect of the sale price, construction, repair and equipping of the vessel;
- 2° Credits in respect of supply of products or materials, which are indispensable for the trading or conservation of the vessel;
- 3° Credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect to contamination or the spilling of hydrocarbons or other contaminating substances;
- 4° Credits in respect of disbursements incurred by the Master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service, and
- 5° Credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third party liability.

The *privileged credits* of article 844 enjoy privilege over the vessel in the order enumerated in "A" above with preference over mortgage credits and the *privileged credits* of article 846. Mortgage credits are preferred to those of article 846, which in turn follow the rank indicated in "B" above.

In this respect, it is worthy to note that the *privileged credits* established by the above mentioned provisions have preference and exclude all other general or specific privileges regulated

by other legal bodies, when referring to the same goods and rights. However, the rules regarding priorities and privileges in matters of pollution or for avoiding damages from spills of hazardous substances, which are established in international treaties in force in Chile and in the Navigation Law, have preference over the provisions of Title III of Book III of the CCom ("*About Privileges and Naval Mortgage*") in the specific matters to which they refer.

## 6. OTHER SPECIFIC PRECONDITIONS TO ARREST OR ATTACHMENT

### 6.1. Arrest based on *privileged credits*

In this case the arrest is subject to the following preconditions:

- (a) The arresting party must invoke one or more of the *privileged credits* enumerated in section 5 above. In this respect it is worthy to note that, except for the regulations related to pollution or for avoiding damages from spills of hazardous substances, the maritime privileges preclude any other general or special privilege regulated by other laws in connection with the same goods. The maritime privileges also confer upon the creditor the right to pursue the vessel in whosoever possession she may be.
- (b) The arresting party must attach antecedents that constitute presumption of the right being claimed.
- (c) If the court estimates that the antecedents attached are not sufficient (court's discretionary faculty) or the petitioner states they are not yet available to him, the court may require that counter security be provided for the eventual damages that may be caused if, subsequently, it is found that the petition lacked basis.

### 6.2. Arrest based on Other Credits

An arrest requested by invoking a credit other than privileged ones is subject to the general rules set forth by the CCP regarding *pre-judicial* and *precautionary* measures.

If the arrest is requested as a *pre-judicial precautionary* measure, i.e. a measure to secure the results of the exercise of the upcoming action against the debtor, the measure to be petitioned is the "prohibition from sailing", which is subject to the following preconditions:

- (a) existence of qualified and serious grounds for requesting the measure;
- (b) the value of the vessel upon which the precautionary measure falls must be determined, and
- (c) security deemed as satisfactory by the court to cover the damages which may come up or fines which may be levied must be granted.

The "prohibition from sailing" may be also requested as a *precautionary measure* together with filing the principal action itself. In this case for obtaining the measure it is necessary that either the defendant's wealth do not provides enough guarantee or that there are grounds to consider that he will try to conceal his assets. In addition, the claimant must provide supporting documentation to evidence at least a serious presumption of the right being claimed and counter security if requested by the court (discretionary faculty). In this respect it is worthy to note that, when dealing with serious and urgent cases, the court may grant the measure without the required supporting documentation, for a term not longer than 10 days, until such documentation is submitted. In such a case the court must necessarily require counter security.

Having said the above, under Chilean practice it is unusual to petition an arrest in accordance to the general rules of the CCP as it faces more technicalities than an arrest based on the special system established by the CCom for *privileged credits*.

7. DEFINITION OF 'VESSEL'

The CCom defines the term "vessel" as "any principal construction intended for navigation, regardless its class and dimension". This term comprises the hull, machinery and fixed or moveable appurtenances on the vessel.

8. EVIDENCE REQUIRED TO SUPPORT AN ARREST APPLICATION

*See 6.1 and 6.2 above.*

9. SISTER SHIPS

The lien on the ship granted by a *privileged credit* can be exercised not only against the actual ship which the *privileged credit* relates but also on a ship in the same ownership or a ship in the same administration or operated by the same person.

10. DEMISE OR TIME-CHARTERED VESSELS

First, it must be noted that according to Chilean law a demise or bareboat charterer is deemed as owner for all legal purposes.

Having said the above, an arrest can be executed on a chartered vessel as far as it is comprised in one of the alternatives pointed out in section 9 above. In this respect, under Chilean law the *privileged credits* give the creditor the right to pursue the ship in whosoever possession it may be, and pay himself with the proceeds thereof, with preference over the other creditors, according to the order established by the CCom (*see 5 above*). In addition, we recall that the holder of the privilege may, in exercising his right of pursuit, request the arrest of the ship wherever she may be, in conformity with the special arrest rules set forth by the CCom.

11. FORM OF APPLICATION

Arrest of a vessel is commenced by filing an arrest petition at any of the competent courts as per section 3 above. The complaint which initiates the proceedings must comply with the following requirements:

- (1) Compliance with all formal requirements related to the presentation of a suit as per Chilean general procedural regulations, which implies (i) to specify the court; (ii) to identify the claimant, his representatives and the nature of such representation; (iii) to state the facts surrounding the case and the applicable laws, and (iv) to make precise and clear petitions for the court's decision.
- (2) In case of arrest based on *privileged credits*, when the arrest is requested as a *preliminary precautionary measure*, the petitioner must indicate the substantive action he intends to file later on and briefly state his grounds for such action. If the action does not concern the holding or possession of the vessel but rather the collection of some pecuniary service, the petitioner must indicate the amount and form of guarantee he considers sufficient to secure the outcome of the action. If the petition is filed simultaneous to, or during the course of, the substantive suit, the petitioner must indicate in such petition his claim in respect of the amount of the guarantee and the manner of its constitution.

- (3) As pointed out in section 6.1 above, in case of arrest based on *privileged credits*, the arresting party must attach antecedents that constitute presumption of the right being claimed and eventually counter-security.

12. PRE-ARREST SECURITY FOR CLAIM NOT REQUIRED

*See sections 6.1 and 6.2 above.*

13. REPRESENTATION BY COUNSEL AND POWER OF ATTORNEY

Under Chilean law the general rule is that either individuals or corporations are required to be represented by a counsel. Depending on the circumstances, a power of attorney is not necessarily required.

14. PRE-ARREST COURT HEARING

Under Chilean law no judicial hearing on the application to arrest a vessel is required.

15. BAIL OR SECURITY BY DEFENDANT

Under Chilean law, as soon as the requested guarantee has been given, the court must lift the arrest without further proceedings. It shall proceed in the same manner should the parties be in agreement on such matters. The court may also decide upon the sufficiency of the guarantee that the respondent offers or process this matter incidentally.

In this respect, there are no specific rules so a court may have ordered that a cheque be made, but, finally, may instead accept a deposit, bank guarantee or otherwise. P&I club letters of undertaking are accepted only if agreed by the parties. In all cases, the guarantee may not exceed the value of the detained vessel. Such a guarantee replaces the vessel as the exclusive object of the respective privilege.

16. COURT HEARINGS AND PROCEEDINGS SUBSEQUENT TO ARREST

In case of an arrest based on a *privileged credit* and provided that the conditions mentioned in section 6.1 above are met, the court must accede to the petition without any formality. In doing so, the court must analyze quickly the antecedents submitted, granting the petition without hearings or service of the arrest order to the affected party. The court's analysis for granting an arrest usually takes from few hours up to one day. However, if the arrest is petitioned with occasion of a credit other than a privileged one and under the general rules of the CCP, which is seldom, the corresponding granting may take several days due to several procedural technicalities that are necessary to follow. These obstacles are not found under the special arrest system set forth by the CCom for *privileged credits* and thus in practice this is the system normally followed and used.

Having said that, in case of arrest based on *privileged credits* the person who establishes the guarantee or is affected by it may at any time request, for good reasons, that the guarantee be modified, reduced or lifted. The procedures for lifting the arrest do not impair the right of the petitioner to later allege or enter the motions or defenses he sees fit. They are also not considered a waiver of the right to limit responsibility according to the provisions of article 889 et seq. of the CCom. The motion objecting to a retention or arrest as well as the motion objecting to the amount or form of the guarantee are considered an incidental motion which does not suspend the effects of

the contested resolution. The request for modification, reduction or lifting of a guarantee substituting for an arrest shall also be treated as incidental. In this respect it is worthy to note that the general rules on preliminary and precautionary measures set forth by Titles IV and V of Book II of the CCP apply in respect of anything not provided for by the special regulations related to arrest based on *privileged credits* or in absence of agreement by the parties. It must be noted that, these special provisions do not exclude the exercise of other precautionary measures in common law that may be available to a creditor to secure the outcome of his action or in cases which do not deal with a credit that enjoys privilege over a vessel.

17. COSTS AND ADVANCES FOR COURT PROCEEDINGS AND CUSTODY

Except for the costs related to the fees of the service processor who informs the Maritime Authority of the arrest and performs service of process against the person whom the arrest is requested, as per section 18 below, there are no court fees to be paid. In cases where it is anticipated that the vessel will remain under seizure for a substantial period of time it may be necessary to request the court to appoint a depositary, which may imply additional costs.

18. ENFORCEMENT OF ORDER OF ARREST

The arrest or retention of a vessel is carried out by service to the maritime authority in the place where the vessel is, or by official letter or notification to the Director General of the Maritime Territory and the Merchant Marine, should the vessel not be within the jurisdiction of the court that decreed such measure. Previous service to the person against whom the measure is requested is not necessary.

In urgent cases, the court may communicate the arrest via telegram, telex or other reliable means. In the case of a preliminary proceeding, the person against whom the arrest is requested must also be notified within a period of 10 days counted from the resolution that granted such measure. This period may be extended by the court for good reason. The lack of service within the aforesaid period or the last of its extensions shall cause the automatic forfeiture of the decreed arrest, which is communicated by the court directly to the maritime authority.

19. SERVICE OF THE ORDER OF ARREST

*See section 18 above.*

20. TIME ELEMENT

*See section 16 above.*

21. APPEAL BY DEFENDANT

Notwithstanding what it was expressed in section 16 above in connection to the modification, reduction or lifting of the guarantee and motion to object the arrest or the amount or form of the guarantee, the defendant may appeal subject to the general rules set forth by the CCP.

22. FORCED SALE IN THE ARREST PROCEDURE



The CCom establishes that the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the CCP for the judicial sale of real estate. In this respect, if the claim for which the vessel was arrested is not resolved or the vessel is not released against security, the plaintiff must wait until final judgement to force the sale of the vessel through executory process as per the specific rules set forth by the CCP at Title I of Book III, denominated "*About the Executory Process*" (articles 434 et seq.). In this respect, the administration of attached property is incumbent upon a depositary. Any subject matter with respect to the administration of attached property to arise between the performer and the debtor whose property is attached and the depositary is heard at oral hearings that take place with whoever is in attendance. Upon serving notice of the auction, the attached vessel shall be sold, pursuant to the rules set forth under the CCP.

### 23. CLAIMS FOR DAMAGES BY THE OWNER OF ARRESTED VESSEL

First, it is worthy to note that when an arrest has been decreed as a *prejudicial precautionary* measure, the petitioner is obliged to file his complaint requesting that the decreed arrest remain in force within a time period which, in principle, is 10 days, but which may be extended for up to a total of 30 days, provided there is sound basis to do so. The non-fulfillment of this obligation means the cancellation of the arrest and liability for the damages which may have been caused, on the irrefutable presumption that the proceedings for the arrest were fraudulent. This applies both to arrest based on *privileged credits* as well as other on credits.

In addition, if the arrest was wrongful, fraudulent or lacked basis, the defendant may claim damages in separate ordinary proceedings subject to the general rules set forth by the CCP.

### 24. *Extinction of maritime privileges*

Regardless of the extinguishment of the credits that originated them, maritime privileges terminate when:

- 1° More than one year has passed from the date of the origin of the respective credit. Such period is not susceptible to any interruptions or suspensions except in favor of the creditor who may have obtained the legal retention or judicial seizure of the good subject to privilege, or by the creditor that could not previously enforce his *privileged credit* because of a legal impediment;
- 2° The vessel is sold judicially, either voluntarily or involuntarily, after the registration thereof in the pertinent registry, or after 30 consecutive days have passed from the date of the auction, whichever period is shorter, and
- 3° In the case of the voluntary conveyance of the vessel, after 90 consecutive days have passed from the date of the registration of the transfer.

The provisions in numbers 2° and 3° above do not preclude the right of the privileged creditors to exercise their preference upon the unpaid balance of the price, should there be one.

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