

SHIP ARREST IN ECUADOR



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1. Please give an overview of ship arrest practice in your country.

For the last 15 years, Ecuador has seen its rules for ship arrest being fully revisited and updated by reference to the most recent international conventions on maritime liens and arrest of ships.

2. Which International Convention applies to arrest of ships in your country?

The arrest of ships in Ecuador is enforced under the Decision No. 487 issued by the Commission of the Nations Andean Community (in its acronym "CAN") labelled under the name of "Maritime Claims (Ship Mortgages and Maritime Liens) and Arrest of Ships" ("Decision 487"). The Decision in its background states to have been drafted inspired on the International Convention on Maritime Liens and Mortgages, 1993 ("MLM Convention, 1993"), and the International Convention on Arrest of Ships, 1999 ("Arrest Convention, 1999"). For all material purposes, (i) the provisions of the Decision 487 are substantially the same as those of the International Convention on Arrest of Ships, 1999 and (ii) the list of maritime liens and their ranks as regulated by the Decision 487 are substantially the same as those of the International Convention on Maritime Liens and Mortgages, 1993.

On February 2004, Ecuador adhered to the International Convention on Maritime Liens and Mortgages, 1993. This Convention was published in the Official Gazette in April 2004, and ultimately entered into force in September 2004.

On March 2014, Ecuador ratified the International Convention on Arrest of Ships, 1999, which entered into force in March 2014.

3. Is there any other way to arrest a ship in your jurisdiction?

No, there is no other way to arrest a ship in Ecuadorian ports other than following the framework contained in the above mentioned International Conventions.

4. Are these alternatives e.g. *saisé conservatoire* or freezing order?

Our Code of Civil Procedure regulates "preventive measures" as a procedural means to permitting the attachment of goods to secure payment of a pending debt through its seizure and subsequent auction. This procedure is very similar to the *saisé conservatoire*. However, this title is virtually deemed as the domestic procedural framework under which the Arrest Convention, 1999 and the Decision 487 are enforced.

Freezing orders are not available under Ecuadorian Law.

5. For which types of claims can you arrest a ship?

In Ecuador, it is possible to arrest a ship in so far as the creditor avails any of the maritime claims listed under article 1 of the Arrest Convention, 1999 (which is materially the same to the list of maritime claims under article 1 of the Decision 487):

- a) loss or damage caused by the operation of the ship;
- b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such

damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);

e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;

i) general average;

j) towage;

k) pilotage;

l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;

m) construction, reconstruction, repair, converting or equipping of the ship;

n) port, canal, dock, harbour and other waterway dues and charges;

o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

p) disbursements incurred on behalf of the ship or its owners;

q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

s) any dispute as to ownership or possession of the ship;

t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;

v) any dispute arising out of a contract for the sale of the ship.

6. Can you arrest a ship irrespective of her flag?

Yes, it is possible to arrest a ship irrespective of her flag as provided by article 8 of the Arrest Convention, 1999, and article 54 of the Decision 487.

7. Can you arrest a ship irrespective of the debtor?

Generally, the arrest is permissible in so far as the conditions set forth in article 3(1) of the Arrest Convention, 1999 and article 41 of the Decision 487 (for which purposes are substantially the same) are fully met.

Particularly, if the maritime is not secured by a maritime lien, the Court must be satisfied that either:

a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or

d) the claim relates to the ownership or possession of the ship.

If the maritime claim is secured by a lien, the arrest can be effected against the debtor (i.e. the shipowner, the demise charterer, the manager or the operator of the ship) irrespective of the fact that it may or may not have proprietary title on the offending ship.

8. What is the position as regards sister and ships in associated ownership?

Sister ships cannot be arrested without having regard to the identity of the debtor. Sister ships may be arrested under article 3(2) of the Arrest Convention, 1999 (for all material purposes, the said conditions are substantially the same as those stated in article 42 of the Decision 487) as long as (i) they are under the ownership of the debtor at the time when the arrest is effected

and (ii) at the time when the claim arose the offending ship was owned, bareboat or time chartered by such debtor. Subject to the same articles, these conditions do not apply to claims in respect of ownership or possession of a ship.

9. What is the position as regards Bareboat and Time-Chartered vessels?

The offending ship if chartered on a bareboat basis may be arrested under article 3(1)(b) of the Arrest Convention (which is substantially the same as article 41(b) of the Decision 487).

If the offending ship is chartered on a time basis and the claim in question is not secured by a maritime lien she cannot be arrested neither under the Arrest Convention, 1999 nor under the Decision 487. If secured by a maritime lien listed in article 4 of the MLM Convention 1993 (which for these purposes is materially the same as article 22 of the Decision 487), the time chartered ship can be arrested under article 3(1)(e) of the Arrest Convention, 1999 (which is materially the same as article 41(e) of the Decision 487).

Under the Arrest Convention 1999 and the Decision 487, it is not possible to arrest sister ships if bareboat or time chartered by the debtor.

10. Do your Courts require counter-security in order to arrest a ship?

As a matter of law, although rather unlikely, the courts are allowed to require counter-security prior to granting a writ of arrest under article 6(1) of the Arrest Convention, 1999 (which is materially the same as article 50 of the Decision 487).

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

The main difference resides in that a maritime claim, if secured by a lien, travels with the ship and may be enforced regardless of whom has proprietary title on the ship at the time when the arrest is effected, for it lies in the nature of a maritime lien to attach (for a limited time) to the offending ship and survive any change of her ownership, flag or registration (article 21 of the Decision 487).

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes. Ecuador recognises the list of maritime liens described in article 4 of the International Convention on Maritime Liens and Mortgages, 1993 (which for material purposes is the same list provided by article 22 of the Decision 487).

13. What lapse of time is required in order to arrest a ship since the moment the file arrives to your law firm?

Should the procedural conditions set forth in the Arrest Convention, 1999 or the Decision 487 are fully met, an application of arrest is to be filed in the Civil and Commercial Court of the Ecuadorian port where the ship has or is about to call. Upon submission of the application, it can take between 3-5 days for the Court to process the application and grant the writ for arrest.

14. Do you need to provide a POA or any other documents of the claim to the Court?

Under our law, the submission of a POA is not a prerequisite for the granting of a writ for arrest; however, the court will provide a term within which the claimant is expected to file the POA (usually 10-15 days counting from the date when the arrest is effected).

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when they are needed?

Under article 1 of the Decision 487, the condition of a shipowner must be evidenced on the basis of the public records filed in the primary ship registrar, e.g. a certificate of ownership and encumbrances.. Since normally a ship registrar is run by a public office, such a certificate should be legalised by an Apostille. It is not strictly necessary that the application of arrest be accompanied with this certificate; however, the Court will expect its presentation during the probatory stage (which is open for 3 days upon execution of the order of arrest).

Generally, any document issued by foreign public entities must necessarily be legalised by an Apostille.

The POA will need to be notarised and legalised by an Apostille.

Under our law, it is not possible to file in Court documents electronically.

Under our law, any document written in a language other than Spanish must be translated into Spanish to be considered as valid evidence in Court.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

It depends on whether the parties have agreed to submit their disputes/differences to arbitration or to the decision of a foreign court.

Should they have agreed so, the local Courts would be prevented from acknowledging jurisdiction to hear the principal claim on the merits under article 2(3), 7(1) of the Arrest Convention, 1999 (which is materially the same as article 38 and 52 of the Decision 487). However, under article 7(3) of the Arrest Convention, 1999 (which is materially the same as article 53 of the Decision 487), the Courts would be allowed to determine a period within which the claimant should file its principal claim before the competent Court or the relevant arbitral tribunal, failing which the local Court is allowed to order the release of the ship.

However, in the absence of such an agreement for the resolution of disputes, local Courts are allowed to acknowledge jurisdiction to hear the principal claim under article 7 of the Arrest Convention, 1999 (which is materially the same as article 52 of the Decision 487). Under section 923 of the Code of Civil Procedure, the claimant is required to file the principal claim on the merits within 15 working days counting from the moment the writ of arrest was enforced, failing which the Court is allowed to order the release of the ship and condemn the claimant to pay damages.

17. What is the procedure to release a ship from arrest?

The defendant must provide sufficient security covering the amounts matter of the claim (pursuant to sections 905, 919 of the Code of Civil Procedure, section 44 of the CAN Decision No. 487 and section 4 of the International Convention on the Arrest of Ships 1999).

18. What type of security needs to be placed for the release?

The security can be filed in the form of a mortgage, or in the form of a bond issued by an insurance company or a bank domiciled in Ecuador. Bonds issued by insurance companies or banks not domiciled in Ecuador are not accepted.

19. Does security need to cover interests and costs?

Since under sections 905 and 919 of the Code of Civil Procedure courts must ensure that the security sufficiently covers the credit, courts are allowed to fix the value of the security by including potential interests accruing to the debt and the costs.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

Since P&I LOUs are not provided by companies domiciled in Ecuador, they usually do not qualify as sufficient security to release the ship.

21. How long does it take to release the ship?

The law does not provide terms for the release of the ship; however, as a matter of practice, once security is posted in court, it takes 2-3 days to the court to issue the writ of release.

22. Is there a procedure to contest the arrest?

Yes, there is a procedure to contest the arrest and is regulated under sections 897 to 923 of the Code of Civil Procedure.

23. Which period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

If the parties have not submitted their disputes to arbitration or to the resolution of a foreign court, under section 923 of the Code of Civil Procedure the courts are allowed to grant a term of 15 working days for the claimant to file the principal claim on the merits.

If the parties have agreed to submit their disputes to arbitration or to the decision of a foreign court, the Courts have the discretion to determine a period within which the claimant must submit its principal claim before the competent Court or the relevant arbitral tribunal.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes. Ecuadorian Courts are allowed to determine the extent of damages which a claimant may be condemned to pay if found to have applied for an arrest without legal justification. This is regulated by article 6 of the Arrest Convention, 1999 (which for this purposes is materially the same as articles 50, 51 of the Decision 487). As regards the measure of indemnity, under our law damages may include loss of profits and loss of chance.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Although our Companies Law allow the courts in certain circumstances to pierce and lift the corporate veil of companies, this possibility is restricted to Ecuadorian companies and subject to the results of a substantive trial pursued for this specific purpose. Therefore, Ecuadorian Courts will not be ready to pierce or lift the corporate veil in arrest procedures.

26. Is it possible to have a ship sold *pendente lite*; if so how long does it take?

Under our law, Courts are not allowed to order the sale of a ship *pendente lite*.

**Dr. José Modesto Apolo is the principal senior partner of Apolo Law Firm. He specializes in maritime and port law with a vast and widely-regarded legal practice of more than 40 years, having throughout assisted and worked closely with the main players of Ecuadorian maritime industry and continually provided legal services to international clients and law firms. He presently sits as President of the Ecuadorian Maritime Law Association, as Vice-President of Ecuador of the Iberoamerican Maritime Law Institute and as Titulary Member of the Committee Maritime International. He teaches maritime law regularly at the Universidad de Especialidades Espíritu Santo and is a permanent speaker in local and international panels. He promoted the creation of the Ecuadorian Shipowners Association, the Ecuadorian Shipping Agencies Association, the Ecuadorian Maritime Chamber and the Ecuadorian Association of Private Terminals, where he permanently provides advice to its members.*