

## SHIP ARREST IN CHILE

By Leslie Tomasello Weitz\*  
TOMASELLO & WEITZ  
ltomasello@tomasello.cl  
www.tomasello.cl

Almte. Señoret 70, of. 85 - Valparaíso  
Tel: 56 (32) 2252555 – Fax: 56 (32) 2254495  
Av. Nueva Tajamar 555, oficina 201 - Santiago  
Tel: 56 (2) 23611070 – Fax: 56 (2) 23611070



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

The list of privileged credits (i.e. credits which enjoy a special status and may be deemed to be statutory lien) is contained in Articles 844 to 846 of the Code of Commerce. The creditor or title- holder of a listed privileged credit may request the duty Civil Court of the port where the vessel presently is or is expected to arrive to place the vessel under arrest.

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

Chile has neither ratified nor acceded to any of the International Conventions regulating the arrest of ships. However, according to the “travaux préparatoires” of Book III of the Code of Commerce, the drafting committee took into consideration the International Conventions of 1926 and 1967 on maritime liens and mortgages. In any event, the grounds for arrest are found in Book III of the Code of Commerce.

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

There is no other way to arrest a ship other than through the process described in the next answer.

### 4. Are there alternatives e.g. saisie conservatoire or freezing order?

Under the Code of Civil Procedure it is possible to obtain a court ruling ordering the retention of goods. The retention (in this case, of a vessel) requires counter-security from the petitioning party as well as evidence for the petition to be granted. In addition, only a vessel under the ownership of the debtor may be retained.

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

In Chile a vessel may be arrested in order to exercise a privileged credit or to enforce a final judgment that may result in the judicial sale of a vessel. The list of privileged credits is contained in articles 844 to 846 of the Code of Commerce. These are Art. 844: The following credits enjoy the privilege over the vessel, with preference over the mortgages and in the order set down hereunder:

1. Legal costs 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 remunerations and other benefits arising from the contracts of embarkation, in accordance with labour 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 shall apply to the indemnities which are due for death or personal injuries of the servants who may survive ashore, on board or in the water, and always provided that they arise from accidents related directly from the trading of the vessel;
3. The charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of the signaling and pilotage;

4. The expenses and remunerations due in respect of salvage services rendered and general average contributions. This same privilege shall be applied to the reimbursement of expenses incurred by the authority or third parties, in order to prevent or minimize pollution damages or oil spills of polluting 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 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 personal injury to the passengers and crew of these other vessels.

Art. 845: Mortgage credits shall be preferred to those detailed in the following article and shall be regulated by the provisions contained in paragraph 5 of this Title. This same preference shall be applicable to the pledge of minor vessels.

Art. 846: Moreover, the following shall enjoy privilege over the vessel in the order numerated, but in subsequent degree to those indicated in article 844:

1. The credits in respect of the sale price, construction, repair and equipment of the vessel;
2. The credits concerning the supply of products or materials, which are indispensable for the trading or conservation of the vessel;
3. The credits arising from contracts of carriage of passengers, charter parties or carriage of goods, including the indemnities for damages and short delivery of cargo and luggage, and the credits deriving from damages in respect of pollution or other polluting substances.
4. The credits in respect of disbursements incurred by the master, agents or third parties, on account of the owner, for the purpose of trading the vessel, including agency services, and
5. The credits in respect of insurance premiums concerning the vessel, be the hull & machinery or third party liability insurance.

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

Yes, the flag a ship flies is irrelevant provided that the requisites for granting the arrest are met.

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

In the event the vessel is arrested in order to exercise a privileged credit, yes. In case of a retention under the Code of Civil Procedure, no, since only vessels under the ownership of the debtor may be retained.

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

It is possible to arrest a sister ship provided she is under the same ownership, management, or is operated by the same person. In few words, with regard to liability in rem under Chilean law, there is no need to have the connection between the relevant person (the person liable in personam) who also owns the ship to be arrested. As a creditor, you only need to have a credit that falls within the list of privileged credits, which is the basis for arresting a vessel according to the Code of Commerce. Provided that you have a privileged credit, you can arrest either the offending vessel or any sister ship. Under Chilean law, the definition of a sister ship is wider than that under English law. Sister vessels are not only those under the same ownership (as if both vessels are owned by the debtor) but also vessels under the same management and/or operation. Consequently, it is possible to successfully arrest vessel "x" as a sister ship of vessel "y" on condition that both vessels are managed or operated by the same company, and even if they are owned by different companies.

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

In Chile there is no special position in regards to Bareboat and Time - Chartered Vessels. The title holder of a privileged credit may arrest a vessel provided that she is the material object on which the privilege is exercised or if she falls within the definition of a sister ship as mentioned in N° 8 above.

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

No, Courts do not normally require counter-security in order to arrest a ship to exercise a privileged credit. However, the Court may ask for security. In the case of a retention under the Code of Civil Procedure, the Court will require counter-security.

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

Yes, since in Chile it is only possible to arrest invoking a privileged credit or to enforce a final judgment that may result in the judicial sale of the vessel.

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

The maritime liens recognized by Chile are only those listed in N° 5 above.

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

All things considered (preparation of the application, preparing free translations of the supporting documents, filing the application for arrest with the Court, notifying the Harbor Master the Court ruling placing the vessel under arrest, etc.), it may take at least two days, and this is subject to N° 14 below.

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

Yes, a POA is mandatory. This occasionally proves to be a problem if the arresting party does not have permanent legal representation in Chile, or if none of its vessels have called at Chilean Ports (in which case the port agent or the master of the vessel may grant the POA.) In this scenario, the POA needs to be granted abroad before a Notary or the Chilean Consulate, and in either case the legalization of a POA may be quite lengthy thereby defeating the natural quickness required in case of an arrest.

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

In general, provided that the petitioning party attaches sufficient documents or evidence that "constitutes a presumption of the right being claimed", the Court must accede to the petition without further formalities. As a result, provided the petitioning party has same evidence, which the Court may deem to be a good presumption of the privileged credit, the Court should grant the arrest. Consequently, other than the POA, no particular original documents need to be attached. However, if original documents are available they should be used. Chile has ratified the Apostille Convention, but internally its application has not been implemented yet.

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

Yes, the substantive claim will normally go to arbitration unless there is an agreement (usually an arbitration clause) submitting disputes to a foreign Court and provided that such an agreement resulted to be enforceable according to Chilean law. In that situation, the Court will not assume jurisdiction.

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

The procedure to release a vessel from arrest is to either present to the Court the exact guarantee (nature and amount) ordered by the Court, in which case the Court has to lift the arrest immediately, or with the agreement of the arresting party, present an alternative guarantee, for instance, a LOU, for the amount ordered by the Court or for a different amount negotiated with the claimant. Alternative guarantees may be presented, but whether they are suitable substitutes is decided by the Court, who will normally submit the situation to the arresting party.

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

Normally, claimants will ask for and the Courts will order a Bank Guarantee or equivalent, such as, a cash deposit.

19. Does security need to cover interests and costs?

The security requested by the arresting party will be an estimation of the amount that they will claim, which normally includes interests and costs.

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

As mentioned before, normally the only condition to lift the arrest of a vessel is to present the exact guarantee (nature and amount) requested in the petition to arrest. These guarantees will be a Bank Guarantee or equivalent. LOUs can be presented, and are accepted by the Tribunals, if they have been agreed with the arresting party to be an acceptable guarantee. The presentation of an LOU as an alternative guarantee without the arresting party's consent will normally result in that the Court will submit the situation to the arresting party, who will have 3 working days to consider their decision.

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

If the guarantee produced is exact in nature and amount as the one requested in the petition to arrest, the Court must lift the arrest immediately. However, sometimes problems are experienced with the bureaucracy of some Courts.

22. Is there a procedure to contest the arrest?

Yes, however this will give rise to an "incidental proceeding" in which the Tribunal will submit the situation to the arresting party, who will have 3 working days to consider the answer, and then the issue will be finally resolved by the Tribunal, which is something that will not happen immediately. In addition, during all this time the ship will remain under arrest until the issue is resolved.

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

Once the arrest has been granted, there is a 10 working day time limit (which may be extended to a maximum of 30) to present the lawsuit along with the petition for the appointment of an arbitrator, as referred in N° 16, and request the arrest to be maintained. This may present a substantial problem when the arrest is obtained in Chile to secure the enforcement of a future judgment or award issued abroad. Namely, if the creditor wants to start substantive proceeding abroad, within the time limit of 10 or eventually 30 working days the creditor will need to prove to the satisfaction of the Chilean Court that granted the arrest, that the relevant substantive proceeding has been started abroad. For this the documentation required abroad to start the proceeding will need to be legalized up to the Chilean Consul abroad. Subsequently,

the documentation will need to be sent to Chile to complete its legalization and then presented (duly translated) to the Court which granted the arrest. If the arrest has been obtained to enforce a foreign judgment or award the exequatur from The Supreme Court is sufficient to comply with this requirement.

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

Yes, especially in case of failure to commence substantive proceedings within the time limit of 10 or eventually 30 working days, this results in the immediate cessation of the arrest and in liability for the arresting party.

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

The possibility to pierce that corporate veil exists. However, there is some very incipient case law that could be invoked to try to pierce the corporate veil.

26. It is possible to have a ship sold pendent lite, if so how long does it take?

No, it is not possible to sell the ship pendent lite, unless the Court authorizes it or the claimant provides his consent.

*\*Leslie Tomasello Weitz is a lawyer and a partner with Tomasello y Weitz, a firm which in addition to its important experience in the field of shipping, presently advises its clients in a wide range of legal, commercial, financial, insurance and taxation matters. The firm has offices in Valparaiso, Santiago and Puerto Montt. He has specialized in maritime law and international trade since he joined the firm. He also litigates insurance and P&I disputes in both arbitration proceedings and before the Civil Court of Chile. He is a professor of Maritime Law with the Law Faculty of the University of Valparaiso from 1997 until present and has been published on maritime and international trade both national and international publications.*