

SHIP ARREST IN PERU

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

a. Introduction:

Peru is a country lacking specific maritime laws. Ergo, when it comes to trying cases of this nature, one must rely on international treaties, doctrine and local laws currently in place. Moreover, the term *arresting a ship* is inapplicable in this country regardless the objective being achieved. Peru has a handful of maritime attorneys who can be referred to as such only by the length of time they have been exercising in this specialty. Given the intricacies that practicing law in a country that lacks formal local regulation entirely can represent a challenge to say the least. The concept of *arresting a ship* in Peru is non-existent per se, it must be done through a preliminary injunction that if requested *out of process* may be obtained in a few days' time, but achieving this monumental task on its own can prove to be a costly, tedious and complex temporary solution. The other option to requesting an injunction is to do so within the judiciary proceeding, but in Peru, if the courts are not on strike, holidays or month-long vacation, then this may take several months to achieve. In summary, placing a do not move order on a ship is a viable option, but documents need to be in place that can readily be legalized at the Peruvian Consulate in the plaintiff's jurisdiction or by apostille and immediately couriered to Peruvian counsel for official translation whilst the claim is being drawn up.

b. Legal proceedings in the Peruvian judicial system are classified into two large groups: "Contested" and "Uncontested". In this regard, maritime claims are processed within the so-called contentious (contested) proceedings, which, in turn, are sub-classified into: cognizance proceedings; summary proceedings; expeditious proceedings; and claimed proceedings based on amount.

The typical procedure characterizing maritime claims in these kinds of legal proceedings is the following: claim (lawsuit); preliminary pleas and points of defense; responding to preliminary pleas; evidentiary hearing and controversial issues, allegations, and judgment.

The time-scale can range from three to five years in the High Court, mainly due to legal backlog.

The legal basis governing the various judicial proceedings and their respective time-scales are stipulated in the Peruvian Civil Procedural Code (from Articles 475 to 607).

c. The Peruvian arbitration system has been strengthened due to the crisis that is afflicting the traditional justice system. It is widely used in deciding maritime claims, provided that a valid arbitration clause is in place. The time-scale for the final resolution is about eight months. The legal basis governing both the proceeding and time-scale in the arbitration is stipulated in Executive Decree No. 1071 – Law Governing the Arbitration, in force and included in the Peruvian legal system since September 1st, 2008. However, in the case of institutional arbitration proceedings, such as the Lima Chamber of Commerce (CCL) or the American Chamber of Commerce of Peru (AMCHAM), they are regulated by their respective regulations of arbitration and additionally by the above-referenced Arbitration Law and the Civil Procedural Code, in that order of preference.

d. Conciliation is a prior step that claimants must follow to be able to initiate legal action. However, reaching a mutually agreeable solution in this procedure, in maritime matters, is rare.

With regards to the time-scale applied to maritime claims in the conciliation proceedings, it is necessary to specify that the proceeding can last up to one month.

e. The legal basis governing both the proceeding and time-scale in the conciliation is stipulated in Law No. 26872 – Law of Conciliation, in force in Peru since November 13th, 1997 and Supreme Executive Decree No. 004-2005-JUS-Regulations of the Conciliation Law.

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

- a. International Convention on the Arrest of Ships, Geneva 1999
- b. Santiago Declaration
- c. The Hague Rules
- d. Convemar
- e. Cartagena Agreement
- f. Decision 487
- g. Decision 532

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

The precautionary measure of placing a lien on the ship is a solid option that goes hand in hand with filing a formal claim before the pertinent authorities. This however leaves a great deal up for interpretation, as it requires counsel to approach the court presiding over the case for an *ex parte* meeting with the judge to explain the case. However, this is an option that is widely used and mostly accepted in the event the defendant has incurred debts with companies or government agencies located within the Peruvian territory. I would add that limiting this task to debts incurred in Peru only would be erroneous as we have been able to detain and hold vessels for debts with foreign entities in Peruvian waters just as well.

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

Only precautionary measure.

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

- a. Debts,
- b. Criminal activities,
- c. International arrest warrants,
- d. Suspicion of illegal trafficking or
- e. Human trade, etc.

6. Can you arrest a ship irrespectively of her flag

Yes, in accordance with the Convention of 1999.

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

Yes, if it can be demonstrated that there is just cause and a pre-existing debt that is currently part of an active proceeding in Peru.

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

Although not customary, a sister ship or any other property for that matter can be arrested if the property can be demonstrated to be that of the debtor.

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

The bareboat chartered is only for charter; its specific purpose is freight cargo. The Time-chartered is a charter party. Either ship can be detained and held under a Do Not Sail order if a court order so mandates it.

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

Yes, based on Articles 608, 610 and 613 of the Peruvian Procedural Civil Code, counterclaims are mandatory and represent a percentage of the outstanding amount allegedly owed.

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

The judicial proceedings will be the same for both.

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

Yes. International Convention on Maritime Liens and Mortgages.

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

Company documents that attest to the debt (invoices, Charterparty, amounts, wire transfers, etc) can be legalized at the Peruvian Consulate or they can be Apostilled, either way, they then need to be officially translated into Spanish In Peru. There must also be a Power of Attorney (POA) enacted in our favor, which must be done at the Consulate. Please note that any documents procured at a Peruvian Consulate, upon arrival in Peru must be further legalized before the Peruvian Ministry of Foreign Affairs in Lima thus adding to the time. These must then be registered locally at the Lima Public Records. As a result of all these steps, clients must start this process as soon as possible in order to have them completed in time. All but the POA can be obtained in 72 hours and even less depending on the circumstances and while pending a litigious process.

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

Yes, POA is necessary as well as all supporting documents that would lead to a ship detention. These documents are be BL, Invoices, Charter party, etc. Power of Attorney will be provided to client on the day they contact and retain our services but they will process it internally.

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

No original documents are ever needed, that is why the court requests legalizations by way of Peruvian Consulate or Apostille services to ensure the copies adhere to the originals. These documents are needed in order for the court to issue a final ruling but given the time constraints, we file claims with copies while the client is legalizing copies of the originals.

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

Yes, as long as all documentation support the claim then the court will issue a Do Not Sail order awaiting the start of the case or further indication from outside courts.

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

In order for the Sail block to be lifted, the court that issued the block in the first place has to be the one that lifts it. This can only take place once the reason that initiated the block in the first place has been satisfied, i.e. an outstanding debt has been paid, ship has been turned over to its rightful owners, etc.

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

In principle, the arrested vessel may be released on the offering of a bank guarantee in the amount for which the arrest was issued in the first place.

Otherwise, a release can also occur when all debts and commitments between the defendant and the plaintiffs have been satisfied accordingly

19. Does security need to cover interest and costs?

If that makes up part of the agreement then yes. Other times the debtor agrees only to a written agreement but this is entirely between the parties, all the courts need to know is if the plaintiff is desisting in his endeavors at recovering a debt.

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

No, since Peru has no specific maritime law it needs to only go by that which is stated in the Peruvian Civil Code and international treaties.

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

The court order indicating the release of the vessel can be issued in two to five days, however, this order needs to go through various channels which may add additional time to complete the process.

22. Is there a procedure to contest the arrest?

The defendant, in responding to the initial claim can assert a lack of validity to the invoices, the BL, and even question the Charterparty itself in order to cast a shadow of doubt to the claim. We have seen many courts prefer to discard an initial claim in fear of starting an international debate while others actually go through the due diligence process in order to determine who has a better right.

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

Legal action starts with the granting of the arrest of the ship, which can take place in two forms: *out of process* or *within the process*. In the foremost the claimant must initiate legal actions by filing the claim immediately after said arrest has been granted, while in the latter the lien is granted as a result of the legal proceedings initiated by the plaintiff.

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

The claimant is asked to deposit a counterclaim with the court to assure damages in the event of a wrongful arrest. However, if the defendant can through the judicial proceedings demonstrate that it was in fact a wrongful claim then the affected party can file for additional damages and loss of income against the claimant.

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

Corporate veils can only be lifted through judicial orders, which must be ratified by a local judge in the event the order is foreign.

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

Yes it is possible but under two conditions: only through a court order from a local judge and only if the buyer is fully aware that the ship being sold is currently undergoing a legal proceeding.

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Dr. Montebianco was raised in the United States and spent his formative years between Oregon and New York. Later in life he travelled to Europe where he lived, studied and graduated from Chelsea University in the UK with an advanced degree in International Business Administration.

Dr. Montebianco later returned to Peru where he worked as a foreign business consultant assisting franchises set up operations in Peru as well as throughout South and Central America. While successful at this venture, Dr. Montebianco bridged the gap between designing the business plan and executing it by attending law school and focusing his studies on corporate law and international trade.

Nowadays, Dr. Montebianco is member of the New York State Bar and the Managing Partner of a very successful law practice both in Lima and in New York that specializes in Maritime, Mining, Corporate and International Law as well as other specialties handled by his growing number of associates; he however still handles maritime cases personally.