

SHIP ARREST IN VENEZUELA

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

Rules related to the arrest of ships in Venezuela have significantly improved with the enactment of the Law on Maritime Commerce (LMC) published in the Official Gazette No.38, 351 dated 5th January 2006. To some extent, the notion of an action in rem has been included in the LMC, in the sense that actions can be exercised against the ship and her Master, without being necessary to make mention of the owners (art. 15 LMC), whereas the writ can be served by handing it over to anyone onboard the ship, and even by fixing one cartel in the ship in the presence of two (2) witnesses, if there is no anybody onboard (art.110 LMC). The arrest or the prohibition from sailing will be carried out by notification effected by the court to the Port Captaincy where the vessel is found. In urgent cases, the legislation allows to inform prohibition from sailing by electronic means, as prescribed by article 104 of the LMC.

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

Arrest of ships under Venezuelan law is governed by the provisions contained within the LMC, incorporating very much the 1999 International Convention of Arrest of Ships.

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

Together with the exercise of the arrest of a ship in the terms allowed by law or "preventive embargo", art. 103 of the LMC includes another mechanism to guarantee a maritime claim according to which the holder of a maritime claim in respect of a ship may request from the competent court a "precautionary measure of prohibition from sailing", in order to guarantee the existing maritime claim. The court shall agree on the petition without mayor formality, provided evidence is submitted from which it can be inferred presumption of the right that is claimed. If this evidence is not sufficient, the court may request a guarantee to decree this precautionary measure.

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

Following a ruling by the Supreme Court of Justice in 2004 it has been held that the arrest or preventive embargo does only proceed in the event of maritime claims as listed by the law. In case of credits different than those regarded as maritime claims then the prohibition from sailing is available pursuant the rules of the Civil Procedure Code.

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

Article 93 of the LMC contains the list of maritime claims giving rise to an arrest (embargo preventivo) of ship:

- 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 for 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;
- e. - Costs or expenses relating to the raising, removal, recovery, destruction or the rendering armless 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. - Boating (Lanchaje);
- L.- Pilotage;
- m. - Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- n. - Construction, reconstruction, repair, converting or equipping of the ship;
- o. - Port, canal, dock, harbor and other waterway dues and charges;
- p. - 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;
- q. - Disbursements incurred on behalf of the ship or its owners;
- r. - Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- s. - Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- t. - Any dispute as to ownership or possession of the ship;
- u. - Any dispute between co-owners of the ship as to the employment or earnings of the ship; and,
- v. - A mortgage or a "hypothèque" or a charge of the same nature on the ship.

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

Yes. As per art. 13 of the LMC domestic maritime courts are competent to know of proceedings involving a foreign flag ship in cases where according to domestic legislation it can be arrested, unless there is an arbitration agreement or attributing competence to another jurisdiction, in which case the arrest will be granted for the purposes of obtaining a guarantee to execute the eventual arbitration award or judicial decision.

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

Yes, it is possible to arrest a ship irrespective of the debtor being national or foreign.

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

The provisions set by the LMC allows the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship, but not one in associated ownership.

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

As per art. 95 of the LMC the arrest of the bareboat ship is possible if the bareboat charterer by the time the maritime claim arose is obliged by virtue of the relevant credit. Time-Chartered ships, however, may be subject to a preventive measure of prohibition from sailing.

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

Art. 97 of the LMC states that the court, as a condition to grant the arrest of the ship, may request to the claimant the submission of a guarantee in the amount and subject to the conditions determined by the former, for the claimant to answer for the damages that may cause as a consequence of the arrest. Usually, this guarantee may take the shape of a bond equivalent to 30% of the claim amount as a maximum legal costs, plus the double of the said claim amount.

As per art. 98 of the LMC the defendant may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, except in cases in which a ship has been arrested in respect of any of the maritime claims related to ownership or co-owners disputes. In these cases, a bond or a Letter of Undertaking issued by a reputable P&I Club can be used if acceptable by claimants.

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

In practice there is no difference, other than for the purposes of the priorities in the concurrence of credits.

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

The LMC has incorporated the main provisions of the 1993 Convention on Mortgages and Maritime Liens. Consequently, the country does recognize maritime privileges or liens on a ship.

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

Petition of arrest has to be filed before the First Instance Maritime Court, and formalities can be arranged preferably 96 hours in advance, provided needed documentation is available.

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

Power of Attorney will be needed to appear in court, together with any public or private document, accepted invoice, charter-party, bill of lading or similar document proving the existence of a maritime claim.

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

The Law on Maritime Procedures (published in the Official Gazette Extraordinary No.5, 554, dated 13th November 2001) allows the use of the electronic Power of Attorney; for the purposes of submittal and admission of a lawsuit or any other petition, representation of the plaintiff may be proved by written or electronic means, provided it is accompanied by a guarantee of 10,000 units of account; however, this must be later replaced by the formally granted POA. All supporting documentation must be submitted in original duly notarized with the Apostille formalities as per the 1961 Hague Convention and translated into Spanish by public translator.

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

According to art. 100 of the LMC the Court granting the arrest or receiving the guarantee to allow the release of the ship will be competent to deal with the merits, unless the parties have validly agreed to submit the matter to arbitration or to a foreign jurisdiction.

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

A writing of opposition to the arrest (embargo or prohibition from sailing) must be submitted, either before the serving of the writ or within the three days following it. An eight days period is then opened to promote evidence, at which time the court should take a decision on the second day. This decision is subject to appeal before the Superior Maritime Court.

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

Security may take the shape of a bond issued by an insurance company or a bank of recognised solvency, as well as a cash deposit.

19. Does security need to cover interest and costs?

Procedural rules only prescribe that the security must be equivalent to 30% of the claim amount for legal costs (interest included), plus de double of the said claim amount.

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

LOUs by reputable P&I Clubs can be used before the maritime courts, provided it is acceptable to the opponent party or claimant. Even so, it is a matter of discretion for the court.

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

Difficult to give a precise time frame, since this may depend upon the facts of the specific case. Bearing in mind that maritime courts work only by court days, so excluding the non working days and weekends, the release could take not less than 13 days.

22. Is there a procedure to contest the arrest?

The Law on Maritime Commerce refers to the opposition as the mechanism to contest the arrest; however, the governing provisions are prescribed by the Civil Procedural Code and some others of the maritime legislation.

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

Art. 14 of the LMC states that the court shall suspend any anticipated arrest granted prior to legal proceedings, if within the following ten (10) running days to be counted from the date of the arrest was effected, the lawsuit is not filed. This happens when the arrest is requested by way of petition for prohibition from sailing without filing the lawsuit with arrangement to art. 10 and 103 of the LMC. If granted the arrest or submitted the guarantee to release the ship, the Court is not competent to deal with the merits a period of time shall be given for the lawsuit to be brought either in the competent court or arbitration as per art. 101 of the LMC.

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

Eventual damages for wrongful arrest are prescribed by article 99 of the LMC, according to which the court which grants the arrest of a ship, will be competent to determine the extent of liability of the claimant, for any loss which may be incurred by the defendant as a result of the arrest in consequence of:

- a) the arrest having been wrongful or unjustified; or
- b) excessive security having been demanded and provided.

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

Although it has been accepted in some employment cases, this has had little development and there are no precedents in the maritime field at the moment.

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

Art. 106 of the LMC states that after 30 continuous days following the arrest of the ship, without the shipowner not attending to proceedings, the court at the request of the claimant, may order the anticipated auction of the ship, subject to the claimant submitting sufficient guarantee, provided the claim exceeds the 20% of the value of the ship and it is exposed to ruin, obsolescence or deterioration.

**Mr. José Alfredo Sabatino Pizzolante holds a Law Degree from the University of Carabobo (Venezuela). He studied at the University of Wales, College of Cardiff, where he obtained an MSc in Port and Shipping Administration as well as an LL.M in Maritime Law. Currently he is a Partner of Sabatino Pizzolante Abogados Marítimos & Comerciales, a law firm specializing in Maritime, Port and Customs Law, and a Professor at the Universidad Marítima del Caribe (Caracas). Mr. Sabatino Pizzolante has wide experience on P&I matters. He is also a Legal Advisor to the Venezuelan Shipping Association, President of the Venezuelan Association of Maritime Law, Executive Vice-President of the Venezuelan Association of Port Law, Titular Member of the Comité Maritime International and the Iberoamerican Institute of Maritime Law. He has extensively written on the Venezuelan maritime law subject, attending many international seminars and congress as speaker.*