

# Maritime Liens in Chilean Law

- Comparison with Anglo-Saxon System -

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칠레해상법상의 해상유치권

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## 국문요약

해상운송법은 크게 헤이그 규칙을 모범으로 한 체계와 함부르크 규칙을 모범으로 한 체계로 대별할 수 있다. 전 세계 대부분의 해운·무역 강국은 헤이그 규칙을 수용하고 있는 반면, 칠레는 함부르크 규칙을 받아들인 대표적인 국가에 속한다. 이 논문에서는 칠레 상법상 해상유치권에 대하여 영미법계와 비교 검토하여 그 차이점을 분석하였다.

## I. Introduction

### 1. Definitions

Before we begin the main part of this paper, which is a depiction of Maritime Liens under Chilean Law and how do they compare to Maritime Liens under Anglo-Saxon System it seems useful to define what do we mean by Maritime Liens.

A General Lien is the right which arises by custom in certain trades or professions, or by

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contract between two parties, to retain goods not only until any sum due in respect of them is paid; but also in respect of any sum which may be owing by the owner of the goods to the person in possession of them<sup>1)</sup>.

Maritime Liens are different, and they are defined by doctrine in the following fashion:

a. Right against a ship and the freight she may be earning at the time which gives a claimant power to have the property arrested and, if necessary, realised so that the proceeds may be applied in satisfaction of a claim.

Such lien can be enforced, if the ship is within the jurisdiction of the courts of this country, by having her placed under arrest through the offices of the Admiralty Marshal<sup>2)</sup>.

b. A Maritime Lien is a privileged claim on a ship, or her cargo, or on either both of these and the freight, in respect of service done to, or injury caused by, them<sup>3)</sup>.

In Chilean Law, Maritime Liens are regulated, as most Maritime Law, in the Chilean Code of Commerce, specifically, under article 839 and following articles.

It is important to notice that the Chilean Code of Commerce provides no special legal definition for Maritime Liens, since, they are considered to be only one specific kind within the various liens and In-Rem guaranties that exist in Chilean Civil and Private Law, and which are defined in full detail in the Chilean Civil Code. They are, however, carefully regulated, as we will see onwards. Nevertheless, and solely with the intention to clarify the specific subject-matter which occupies our attention, we will venture a personal definition of Maritime Liens, based in the Chilean Maritime Law:

Maritime Liens belong in the family of In-Rem rights, that is, rights against the thing itself, regardless of its actual owner or tenant. A Maritime Lien is a privileged claim on a ship, necessarily within the cases listed in the Law<sup>4)</sup>, that is to be paid preferentially to those listed after it, and which payment is materially guaranteed by the vessel itself, regardless of her owner or actual tenant, so that, if necessary, she might be arrested, and even realised to satisfy the privileged credits binding upon her.

## 2. Historical Review

Before we begin with the main part of this paper, which is a depiction of Maritime Liens under Chilean Law and how do they compare to Maritime Liens under Anglo-Saxon Legal systems, it

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1) F. N. Hopkins, *Business and Law for the Shipmaster*, Glasgow, Brown Son & Ferguson, London, 1988, p. 61.

2) E. R. Hardy Ivamy, *Payne and Ivamy's Carriage of Goods by Sea*, Butterworth & Co., London, 1976, p. 237.

3) F. N. Hopkins, *op. cit.*.

4) Please note that the list of credits which enjoy legal preference is a Numerous Clauses list, i.e.: The privilege belongs only to those credits expressly listed, and no susceptible to be extended to other credits by means of legal interpretation or analogy.

seems useful to make a summarised review on the history of Maritime Liens, which will help us understand the peculiarities of this form of In-Rem rights.

When reviewing the Law of countries with a long maritime tradition is easy to notice that there are legal rules that provide a preferential treatment to certain kinds of credits, thus allowing them some privilege to be exercised upon the vessel itself and/or its freights. Plus, the holder of a maritime lien is often in a privileged position in comparison to other creditors, thus his credit being paid preferentially.

When it comes to liens and other privileges, there seems to be a tendency to reduce them, while restoring the relevance of marine mortgage, which, with so inflated liens, had lost its prestige as an accessory In-Rem right<sup>5)</sup>.

The origins of maritime liens are lost in the midst of time. However, it is believed that they first begun around the XII Century, time in which the growing relevance of maritime trade made it necessary to create some kind of guarantee for creditors facing the fact that seagoing vessels usually departed for long voyages, without any of today's navigational aids (i.e.: Radar, Telecommunications, etc.), plus there was the frequent risk of piracy, and the lack of knowledge of many new marine routes, recently discovered, to which vessels often directed their adventurous voyages.

Under such conditions, the concept of Maritime Venture was born to designate a marine voyage. The implementation and eventual success of such voyage was possible through the material and/or monetary aids of persons, institutions and enterprises who provided the necessary funds and labour with the aim to obtain some profit when the voyage was concluded. It is only fair, however, to acknowledge that these Mecenases<sup>6)</sup> were somewhat enthusiastic about the whole concept of Adventure and Discovery often involved in those voyages.

By providing the necessary funds, they became involved in the risks arising from the Maritime Venture, thus, when the vessel returned to the port of its departure, and there were profits, these were shared as previously agreed. On the contrary, if there were only losses, a privilege was born for those who provided labour and funds which were directly employed in the voyage, thus this credits having a preference in relation with other credits against the vessel, which had their origin in a situation different from the Maritime Venture itself.

In modern times, maritime credits and, particularly, maritime liens, are not intended to ensure the Maritime Venture's success, but, instead, they aim to provide a solid base to the shipping business and its access to credit, within an international economy in which maritime transport still plays (and will still play for a long time) a role of a major relevance<sup>7)</sup>.

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5) F. Garcia Infante, *Derecho del Transporte Maritimo*, Ed. Universitarias de Valparaiso, Valparaiso, 1993, p. 161.

6) Expression often used to designate a rich person who provides financial aid for artists, adventurers, scientists and researchers.

## II. Maritime Liens In Chilean Law

As it has been said, both under Chilean and Anglo-Saxon legal systems, Maritime Liens are privileged claims on a ship, and even her freight, in respect of service done to or injury caused by, them. It is also widely accepted that Maritime Liens cannot be constituted against foreign State-Owned vessels or vessels requisitioned by competent authority for public purposes<sup>7)</sup>.

Prior to a detailed study on the subject, let's say that the principal maritime liens recognised by the English Law are those in respect of disbursements of the master, salvage, wages, and damage done by the ship to another ship or property as a result of negligent navigation or simple lack of skill.

Also, we notice that, from the list above, it is possible to distinguish with main sources for maritime liens: Those which arise ex-contracto and those which arise ex-delicto. We will see that this classification is also possible when it comes to Maritime Liens under Chilean Law.

Maritime Privileged Credits are listed in the Chilean Law under articles 844 and following articles of the Chilean Code of Commerce.

### 1. Article 844 of the Chilean Code of Commerce

The original text of the articles says:

Art 844- Los siguientes créditos gozan de privilegio sobre la nave, con preferencia a los hipotecarios y en el orden de prelación que se indica:

1° Las costas judiciales y otros desembolsos causados con ocasión de un juicio, en interés común de los acreedores, para la conservación de la nave o para su enajenación forzada y distribución del precio;

2° Las remuneraciones y demás beneficios que deriven de los contratos de embarco de la dotación de la nave, en conformidad con las normas laborales y del derecho común que regulan la concurrencia de estos créditos, y los emolumentos de los prácticos al servicio de la nave.

Del mismo privilegio gozan las indemnizaciones que se adeuden por muerte o lesiones corporales de los dependientes, que sobrevengan en tierra, a bordo o en el agua, y siempre que sean producidas por accidentes que tengan relación directa con la explotación de la nave;

3° Los derechos y tasas de puerto, canales y vas navegables, y los derechos fiscales de señalización, practica y pilotaje;

4° Los gastos y remuneraciones por auxilios en el mar, y por contribución en avera gruesa. Del mismo privilegio goza el reembolso de gastos y sacrificios en que hubiere incurrido la autoridad o terceros, para prevenir o minimizar los daños por contaminación o de derrames de hidrocarburos u otras sustancias nocivas al medio ambiente o bienes de terceros, cuando no se hubiere constituido el

7) F. Garcia Infante. op. cit..

8) E. R. Hardy Ivamy. op. cit..

fondo de limitacin de responsabilidad que se establece en el ttulo IX de la Ley de Navegacin, y

5° Las indemnizaciones por daos, prdidas o averas causados a otras naves, a las obras de los puertos, muelles o vas navegables o a la carga o equipajes, como consecuencia de abordajes u otros accidentes de navegacin, cuando la accin respectiva no sea susceptible de fundarse en un contrato, y los perjuicios por lesiones corporales a los pasajeros y dotacin de esas otras naves.

The article's heading paragraph clearly establishes that the credits listed thereunder enjoy a priority, and are to be paid even before a mortgage credit.

Such credits are:

1.-Judicial costs and other costs and expenses caused with the occasion of a trial against the vessel, in the creditor's general interest, to ensure the vessel's safety or aimed to the realisation of the ship and the sharing of the results<sup>9)</sup>.

Paragraph N. 1 grants a first priority to all those expenses arising from the legal procedures necessary to arrest and/or realise the vessel, as well as any costs arising from legal procedures and law suits originated because of the vessel. This can be explained by the long tradition in Roman-Law-Based Legal Systems to ensure the costs of trial, therefore, though not directly caused by the vessel's fault, this is a kind of cost or expense which will necessarily arise as we deal with Maritime Liens.

2.-Wages owed to the master and vessel's crew, in accordance with labour law and any other law regulating these credits, as well as any remuneration due to pilots for services rendered to the ship.

The same privilege is enjoyed by due indemnities owed for death or injury of seamen, both caused on board the vessel or while in port, and with the only limitation of their cause being related with operations on the vessel.

Paragraph N. 2 introduces us in the field of indemnities owed to the crew, originated in injury caused to them. It is very interesting to notice that, within this category, we can see both credits belonging within the group of Liens Ex-Delicto, such as indemnities owed for the death or injury of seamen, and credits belonging in the group of Liens Ex-Contracto, such as Pilot's remunerations, and wages owed to seamen and master.

The Chilean Law, however, put these credits together, for there is a common factor among them: They are all based, directly on indirectly, in labour relations between the vessel and the creditors. Following an international tendency, labour relations and the protection of workmen are very important principles for the Chilean Law, thus justifying, in my opinion, these kind of credits ranking second, only after trial expenses.

3.-Port fees, as well as fees for the use of channels and navigation ways, and taxes and fees for

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9) Free translation of the Chilean Code of Commerce. Article 844 and following articles. This is a free translation done for academic purposes only, and is not to be used as an official legal source. It may be quoted without any further responsibility for the translator.

signals and pilotage.

Paragraph N. 3 includes only credits originated Ex-Contracto, as well as Govt. taxes arising therefrom.

4.-Wages and expenses for salvage operations, as well as contribution to General Average. The same privilege is enjoyed by any reimbursement of costs and expenses incurred by any authority or any third party in order to prevent or reduce pollution damage for the spillage of oil or any other substance harmful to the environment or property before the liability limitation fund is constituted in accordance to Paragraph IX of the Navigation Law.

Following what already seems to be a tendency in International Law, Chilean Law grants a privilege to those credits which cause is somewhat related with operations aimed to save the vessel and to prevent it from incurring in further damage to third parties, thus reducing the ship's eventual liability.

The Chilean Law seems to accept the principle that the lien of subsequent salvors has priority over a damage lien of earlier date, because the salvors have preserved the property for the benefit of all other creditors.

5.-Indemnities owed to third parties arising from damages, losses or average caused to other vessels, port constructions, navigation ways, or cargo and luggage, as a consequence of collision or other navigation accidents, as well as indemnities owed from personal injuries suffered by either passengers and/or the crew of such other vessels.

The victims of damage or personal injury caused by the vessel find themselves in a good situation, for their credits against the vessel belong within the first group of credits listed in the Law. This shows the importance to the Chilean Law of no unlawful harm should be caused and remain without a fair indemnity.

## 2. Article 845 of the Chilean Code of Commerce

Art 845- Los créditos hipotecarios serán preferidos a los que se enumeran en el artículo siguiente, y se regirán por las disposiciones del párrafo 5 de este título.

De igual preferencia gozarán los créditos caucionados con prenda sobre naves menores.

Art 845- Mortgage Credits will be paid prior to those listed in the following article, and will be governed by rules on paragraph 5 in this Title.

The same priority will be enjoyed by credits with In-Rem guarantee constituted on a small ship or boat.

Again, the Chilean Law, following the international tendency of simplifying Maritime Liens, shows a renewed relevance for Maritime Mortgage, which is now only after two prior categories of credit enjoying a better privilege.



### 3. Article 846 of the Chilean Code of Commerce

Art 846- Adems, gozan de privilegio sobre la nave, en el orden en que se enumeran, en grado posterior a los indicados en el articulo 844, los siguientes:

1° Los crditos por el precio de venta, construccion, reparacion y equipamiento de la nave;

2° Los crditos por suministros de productos o materiales, indispensables para la explotacion o conservacion de la nave;

3° Los crditos originados por contratos de pasaje, fletamento o transporte de mercancas, incluyendo las indemnizaciones por daos, mermas y faltantes en cargamentos y equipajes, y los crditos derivados de perjuicios por contaminacion o derrames de hidrocarburos u otras sustancias nocivas;

4° Los crditos por desembolsos hechos por el capitn, agentes o terceros, por cuenta del armador, para la explotacion de la nave, incluyendo los servicios de agencias, y

5° Los crditos por primas de seguro respecto de la nave, sean del casco o de responsabilidad.

Art 846.- The credits listed below also enjoy a preference, and are to be paid in the same order they are listed, only after those credits listed in article 844:

1.- Credits for balance of buying price, reparation fees, and equipment for the vessel.

2.- Credits for products or materials supplies, required for running the vessel or keeping her safe.

3.- Credits caused in contracts of passenger carriage, charterparties, or carriage of cargo by sea, including any indemnity due for damage or loss of cargo and/or luggage, as well as credits derived from pollution damages.

4.- Credits for any expense incurred by the shipmaster, its agents or any third party, for the adequate running and operation of the vessel, including agencies' fees, and

5.- Credits for insurance policies' premiums, either hull and machinery or civil liability insurance.

Article 846 includes a long list of credits which may exist against the vessel. We also notice that all of these belong in the group of Liens Ex-Contracto. For example: Any balance of buying price due to the seller of the vessel. It clearly shows that this credit was born in a contractual situation. The same applies to all other credits listed under this article.

When reviewing the different forms of Maritime Liens, we found that there is a special protection for some credits, while there is a weaker legal protection of some other credits: Credits born in contractual circumstances are presumed to have been born with the creditors' knowledge of the debtor's financial situation, therefore, it seems only fair that credits originated in salvage situations, or those generated by means of damage caused may enjoy a better privilege than those voluntarily acquired by creditors who were in a good position to asset the risk they were incurring.

### III. Notes On In-Rem Procedure Under Chilean Law

In Chile I had learnt that, in Chilean Law Practice, the enforcement of Maritime Liens is not a difficult task: Judges are now somewhat familiar to Hamburg Rules and Chilean Law governing Maritime Liens.

Plus, there is a rather good understanding of the situation of small cargo owners, whose possibilities of obtaining a fair indemnity when their cargo has been lost or damaged, depend solely on the Courts' interpretation of the Law.

Even ship agents, who might be in a better position to solve their claims upon commercial basis, have come to understand this and even a few of them have had their claims against foreign shipping companies settled in Court, after arresting a vessel in order to obtain a Letter of Undertaking issued by the ship's P&I Club, or another similar guarantee for their credit.

Cargo Insurers are probably the most frequent claimants and beneficiaries of Maritime Liens as they are established in Chilean Law, and they have enjoyed the better position they are under Hamburg Rules.

Nevertheless, my personal experience is that the mere existence of maritime liens is a good allied to cargo claimants, who usually do not have to bring the case to Court in order to obtain a negotiated indemnity.

The usual procedure is as follows:

Once the actual damage or loss of cargo is verified, and the insurance indemnity is paid, the Insurance Company obtains a subrogation form duly signed by the assured.

With the subrogation form, the Insurance Company initiates negotiations with P&I Clubs, either directly or through their representatives and correspondents in Chile. If negotiations succeed, there is no need to actually arrest a vessel, and the claim is usually settled in a friendly fashion.

If, on the contrary, there are no basis for a friendly settlement, then the usual procedure is to arrest a vessel, obtain a Letter of Undertaking from P&I representatives, and bring the case to Court.

A practical example can be quoted<sup>10</sup>: On March 1st, 1998, Embotelladora Andina, a Chilean soft drink producer, imported from Mexico a cargo of 12,532.50 metric tons of refined sugar, which were shipped on board M/V Millie from Manzanillo, Mexico, to San Antonio, Chile.

The vessel delivered the cargo with a shortage of 2,817 metric tons.

A writ was presented on behalf of the consignee to the 1st Court of San Antonio, Chile, on March 15th, requesting the arrest of M/V Mille, in the following terms:

Article 984 of the Chilean Code of Commerce establishes that: The carrier should be liable for

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10) Case concerning the transport of 12,532.50 metric tons of refined sugar, on board M/V MILLIE. Heard on the 1st Court of San Antonio, Chile on March 15th, 1998



any damages arising from the lost (non-delivery) or damage to cargo, as well as any delay in delivery, as long as the cause of such damage, loss or delay occurred while the cargo was under his custody

It is clear that in this case cargo has not been delivered, and should that delivery take place in future, this already means a delay in delivery. We may point out that Article 985 of the Chilean Code of Commerce defines delay in terms of cargo not being delivered within the time that, considering the circumstances, it would be reasonable to expect from a diligent carrier...

Article 915 of the Chilean Code of Commerce establishes that The shipmaster has, on behalf of the carrier (shipowner) the custody of the cargo, and is obliged to its adequate delivery in the port of destination.

As for the ship arrest, the following was said:

Article 846 N.3 of the Chilean Code of Commerce establishes a privilege on the credits born from contracts of carriage of goods by sea. Likewise, Article 844 N. 5 of the same Law, establishes a privilege on credits against the vessel which arise from non-delivery of cargo.

Article 1231 of the Chilean Code of Commerce authorises the bearer of a privileged credit against the vessel to exercise his right by requesting the competent Court of any port where the vessel is, to arrest her in order to assure the exercise of his rights.

The same Article establishes that the requested Court must grant this request with no delay, as long as the request itself is supported by enough evidence as to legally presume the true of the alleged credit.

Finally, and according to articles 1234, 1235 and 1236 of the Chilean Code of Commerce, the requesting party must announce in its writ the nature of the action to be deduced against the vessel, shipowner and shipmaster, and for which assurance is requesting the vessel's arrest.

#### IV. Conclusion

After comparing the legal regimes governing Maritime Liens under Anglo-Saxon and Chilean Law, we may conclude that there are no substantial differences between them.

There is, however, a difference of a major relevance: The human factor: Perhaps even more relevant than the Law's wording is the person who has the responsibility of applying the Law to a certain case: The Judge. This is by no means a critic to Judges in Chile, nor to Judges in any other Country, however, it must be borne in mind what the Judges' general attitude towards certain claims is. This might sound a bit theoretical, but I believe it to be true: Judges are influenced by numberless factors, as human beings they are. Among these factors, there is the Nation's tradition as a Shipping Nation or as a Cargo Nation. Chile has been historically a Cargo Nation, which, together with other elements, influences Judges in making a Pro-Cargo

interpretation of the Law.

Nevertheless, this is not to be taken as a universal rule: Each case is unique and is to be judged upon its own facts and applicable Law.

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