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Chile

Shipping

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This country-specific Q&A provides an overview of shipping laws and regulations applicable in Chile.

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Chile: Shipping

1. What system of port state control applies in your jurisdiction? What are their powers?

The government agency responsible for port state control is the General Directorate of Maritime Territory and Merchant Marine (DIRECTEMAR). Its main powers can be summarized as follows:

- Ensuring the safety of navigation and the protection of human life at sea, controlling compliance with the national and international provisions on these matters; looking after the signaling of the Chilean coast and sea-lanes; and looking after the merchant navy maritime telecommunications;
- Controlling and overseeing the ships and naval artifacts material to ensure its efficiency and seaworthiness condition;
- Ensuring compliance with laws, regulations and other provisions related to the technical and professional issues relating to the Chilean merchant navy;
- Monitoring and ensuring compliance of public order and discipline onboard vessels and naval artifacts;
- Sanctioning crew members for professional misconduct / lack of due diligence or faults against the public order, safety and discipline;
- Enforcing safety measures in connection with vessels, naval artifacts port operations and, generally, maritime, river and lake activities;
- Initiating a maritime enquiry into accidents and losses involving vessels or persons in Chilean territorial waters, channels, lakes or navigable rivers to determine the causes and the parties responsible, and to establish the professional, technical and disciplinary liabilities that may apply.
- Exercising maritime police faculties;
- Ensuring the preservation of the marine environment.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

Wreck removal:

Chile is not a party to the Nairobi International Convention on the Removal of Wrecks 2007. Wreck removal is regulated by Title VIII, paragraph 4 of the Chilean Navigation Law.

Pollution:

Under Chilean law there are generally three main potential scenarios in connection to civil liability for damages resulting from the spillage of hydrocarbons and other hazardous substances:

- Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo, which is subject to the International Convention on Civil Liability for Oil Pollution Damage 1992;
- Spillage of hydrocarbons from vessels not carrying oil in bulk as cargo, which is subject to the International Convention on Civil Liability for Oil Pollution Damage 1969 and the supplementary norms set forth by the Navigation Law (this is extended to spillage of other hazardous substances); and
- Damage to the marine environment due to spillage or pouring of contaminating substances caused by land installations, which is subject to the Navigation Law.

Chile is a party to the 1992 Civil Liability Convention. According to Decree 43/2015, Chile enjoys the benefit of the first layer of the international compensation regime up to 89.7 million special drawing rights (SDR). However, Chile has yet to approve the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, together with the 2003 Protocol to the 1992 Fund Convention (Supplementary Fund Protocol).

In this respect, some time ago Parliament suggested to the president that a draft agreement to the 1992 Fund Convention (which has yet to be approved) be adopted. At the moment, there are on-going industry efforts to at least approve the 1992 Fund Convention.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

The cap on the sulphur content of fuel oil used in our

domestic territorial waters is that established in the MARPOL Convention. The enforcement of these requirements is carried out by the local representative of the vessel's flag state authority and the sulphur content is verified according to the bunker delivery note certificates for the bunker's supply.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

Collision

Article 1116 *et seq* of the Commercial Code sets out the main regulations applicable to collisions. The Chilean Navigation Law and the Collision Rules (1972) also apply.

Salvage

Salvage is regulated by Book 3, Title 6, paragraph 5 of the Commercial Code, denominated 'Services rendered to a vessel or other property in damage' (article 1,128 *et seq* of the code). These rules are based on the *Comité Maritime International's* draft International Convention (Montreal 1981) and the London International Convention on Salvage 1989.

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

Tonnage Limitation

The Chilean regulations that refer to tonnage limitation (i.e., Articles 889 to 904 of the Commercial Code) are inspired by both the international conventions signed in Brussels in 1957 (the 1957 Convention) and in London in 1976 (the 1976 Convention). With respect to the tonnage limitation figures, the Commercial Code follows the lines of the 1976 Convention. In addition, it is important to note that the Commercial Code establishes a specific set of procedural provisions in connection with the constitution and distribution of the corresponding limitation fund.

The claims subject to limitation are as follows:

1. death or personal injury and damage to property aboard;
2. death or personal injuries caused by any person for whom the owner is responsible, whether on board or on shore (in the latter

case, his or her acts must be related to the operation of the ship or to the loading, discharging or carriage of the relevant goods);

3. loss or damage to other goods, including the cargo, caused by same person or people, grounds, places and circumstances given in (b); and
4. resulting liability related to the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit pursuant to this regime are as follows:

1. the shipowner as defined by Chilean regulations;
2. the shipowner's staff;
3. liability insurers;
4. the operator, carrier, charterer and the ship's proprietor, if a different person or entity than (a); and
5. individual employees of (d), including the master and members of the crew, if sued.

Limitation in connection with civil liability for damage derived from the spillage of hydrocarbons and other hazardous substances

The spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is subject to the CLC Convention 1992. On the other hand, the spillage of hydrocarbons from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances, is subject to the terms of the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law (among others, it extends the limitation benefit to the owner, proprietor and operator).

Carriage of goods by sea

Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case, the carrier's liability is limited to an amount equal to 835 SDRs per package or other shipping unit, or 2.5 SDRs per kilogram of gross weight, if the latter is higher. (Article 992 of the Commercial Code). In the case of delayed goods the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the respective contract of carriage by sea (Article 993 of the Commercial Code). It is worth noting that the above rules do not include either the interest on the value of the damaged goods or judicial costs.

Passengers

Under the Chilean regulations that refer to passage contracts, liability can be limited in the following cases:

1. passenger's death or personal injury: the maximum liability amount is obtained by multiplying 46,666 SDRs by the numbers of passengers that the vessel is authorised to carry with a maximum equal to 25 million SDRs; and
2. damage to property on board: up to 1,200 SDRs unless higher limits were agreed in writing.

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there on the right to arrest or detain (for example, must there be a "maritime claim", and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

Chile has not ratified any international convention regarding the arrest of ships. However, the fundamental regulations applicable to ship arrest that are found in Book III, Title VIII, paragraph 5 of the Commercial Code 'About the Procedure to Arrest Vessels and its Release' (article 1,231 et seq) are loosely based on the principles set forth under the International Convention Relating to the Arrest of Seagoing Ships (Brussels, 10 May 1952).

Under Chilean law, a vessel may be arrested if the requesting party has a credit that entitles it to do so. These credits may be of two types, namely:

- privileged credits as set forth by articles 844, 845 and 846 of the Commercial Code; or
- credits other than those mentioned in the first point above.

Under Chilean law, there is no statutory definition for privileged credits. However, they may be defined as those that give rise to a maritime lien and allow for requesting an arrest as per the special rules set forth by Book III, Title VIII, paragraph 5 of the Commercial Code, 'About the

Procedure to Arrest Vessels and its Release' (article 1,231 et seq). Articles 844, 845 and 846 of the Commercial Code establish and distinguish the following groups of privileged credits.

Credits of article 844 of the Commercial Code

- 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;
- the remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily injuries of the surviving employees ashore, on board or in the water, and always provided that they stem from accidents related directly to the trading of the vessel;
- the charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of signalling and pilotage;
- the expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred by the authority or third parties, in order to prevent or minimise pollution damages or hydrocarbon spills or other contaminating 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 Chilean Law of Navigation; and
- 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 bodily injury to the passengers and crew of these other vessels.

Credits of article 845 of the Commercial Code

Mortgage credits on large vessels (i.e., vessels over 50 GT) and secured credits on minor vessels (i.e., vessels up to 50 GT).

Credits of article 846 of the Commercial Code

- Credits in respect of the sale price, construction, repair and equipping of the vessel;
- credits in respect of supply of products or materials that are indispensable for the trading or conservation of the vessel;
- credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances;
- credits in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service; and
- credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

The privileged credits of article 844 enjoy privilege over the vessel in the order enumerated in 'Credits of article 844 of the Commercial Code', above, with preference over mortgage credits and the privileged credits of article 846. Mortgage credits are preferred to those of article 846, which in turn follow the rank indicated under 'Credits of article 846 of the Commercial Code' above.

In this respect, it is worth noting that the privileged credits established by the aforementioned provisions have preference and exclude all other general or specific privileges regulated by other legal bodies, when referring to the same goods and rights. However, the rules regarding priorities and privileges in matters of pollution or for avoiding damages from spills of hazardous substances, which are established in international treaties in force in Chile and in the Navigation Law, have preference over the provisions of Book III, Title III of the Commercial Code ('About Privileges and Naval Mortgage') in the specific matters to which they refer.

The lien on the ship granted by a privileged credit can be exercised not only against the actual ship to which the privileged credit relates, but also against a ship in the same ownership or a ship in the same administration or operated by the same person. In this respect, according to article 882 of the Commercial Code, the shipowner or "armador" is the 'person or corporation, whether or not the proprietor of the vessel, who trades or dispatches it under his name'. the same article defines the operator as

'the person who is not the owner but who executes transport and other vessel exploitation contracts according to a power of attorney granted by the former, assuming liability therefrom'. On the other hand, as regards ship administration or management, these concepts are not expressly defined in the Commercial Code.

Under Chilean law a bareboat charterer has the status of the shipowner with same rights and obligations.

Regarding the possibility to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration, Chilean regulations do not contain any provisions prohibiting that possibility.

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of attorney to authorise you to act?

Under Chilean law the general rule is that either individuals or corporations are required to be represented by counsel. Depending on the circumstances, a power of attorney is not necessarily required but security may be requested.

8. What maritime liens / maritime privileges are recognised in your jurisdiction? Is recognition a matter for the law of the forum, the law of the place where the obligation was incurred, the law of the flag of the vessel, or another system of law?

See answer to question 6 above.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessities?

See answer to question 6 above.

10. Are sister ship or associated ship arrests possible?

The lien on the ship granted by a privileged credit can be exercised not only against the actual ship to which the privileged credit relates but also on a ship in the same

ownership or a ship in the same administration or operated by the same person.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

Under Chilean regulations an arrest based on privileged credits is subject to the following conditions:

- the arresting party must invoke one or more of the privileged credits enumerated in question 6. In this respect, it is important to note that, except for the regulations related to pollution or for avoiding damages from spills of hazardous substances, the maritime privileges preclude any other general or special privilege regulated by other laws in connection with the same goods. The maritime privileges also confer upon the creditor the right to pursue the vessel in whosoever's possession she may be;
- the arresting party must attach antecedents that constitute presumption of the right being claimed; and
- if, in its discretion, the court considers that the antecedents attached are not sufficient or the petitioner states they are not yet available to him or her, the court may require that counter-security be provided for the eventual damages that may be caused if, subsequently, it is found that the petition lacked basis.

It is noteworthy that when an arrest has been decreed as a prejudicial precautionary measure, the petitioner is obliged to file his complaint requesting that the decreed arrest remains in force within a time period which, in principle, is ten days, but which may be extended for up to a total of thirty days, provided there is a sound basis to do so. The non-fulfilment of this obligation means the cancellation of the arrest and liability for the damages which may have been caused, on the irrefutable presumption that the proceedings for the arrest were fraudulent. This applies both to an arrest based on privileged credits as well as other credits.

In addition, if the arrest was wrongful, fraudulent or lacked a legal basis, the defendant may claim damages in separate ordinary proceedings subject to the general rules set forth by the CCP.

12. How can an owner secure the release of the

vessel? For example, is a Club LOU acceptable security for the claim?

For a long time, protection and indemnity insurance (P&I) club letters of undertaking were accepted only if agreed by the claimant (e.g. an arrest petitioner), mainly due to the fact that the Chilean courts were not familiarized to them. However, recently our courts have accepted a letter of undertaking even with no prior approval from the claimant. This is a positive development, as Chilean courts seem to finally be aligned with international practice whereby a letter of undertaking is accepted by the courts as sufficient security.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

First, the Commercial Code establishes that the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Chilean Code of Procedure ("CCP") for the judicial sale of real estate. In this respect, if the claim for which the vessel was arrested is not resolved or the vessel is not released against security, the plaintiff must wait until final judgment to force the sale of the vessel through the executory process as per the specific rules set forth by the CCP at Title I of Book III, denominated "*About the Executory Process*" (Articles 434 et seq.). In this respect, the administration of attached property is incumbent upon a depositary. Any subject with respect to the administration of attached property to arise between the performer and the debtor whose property is attached and the depositary is heard at oral hearings that take place with whoever is in attendance. Upon the service of notice of the auction, the attached vessel shall be sold, pursuant to the rules contained in the CCP.

14. Who is liable under a bill of lading? How is "the carrier" identified? Or is that not a relevant question?

In 1982, Chile ratified the United Nations Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules"), which were in force internationally as of November 1, 1992. Additionally, the Chilean legislature included them in the Commercial Code in 1988 (Paragraph 3rd of Title V of Book III), with minimal changes (the "Chilean adoption of the Hamburg Rules").

Chilean law recognises a basic distinction between the 'carrier' (also known as the 'contractual carrier') and the

'actual carrier'. The former is defined as 'any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper' (article 975, No. 1 of the Commercial Code) and the latter as 'any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted' (article 975, No. 2 of the Commercial Code).

The above distinction has very much simplified the identity of the carrier problem, as anyone who issues a bill of lading as a principal may be treated as a contractual carrier. This applies even to freight forwarders if they issue their own 'house' bill of lading and, as a matter of Chilean practice, many cargo claims are normally based on these documents alone.

In this respect, where the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier nevertheless remains responsible for the entire carriage. The carrier is jointly and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his or her staff and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him or her.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

The Chilean adoption of the Hamburg Rules is compulsory applicable regardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. In this respect it is worthy to note that "paramount" clauses have been held as unwritten by our Supreme Court as they would be contrary to public order rules of law.¹

As regard bills of lading issued under a charterparty, the applicable law is subject to the principle of freedom of contract. Nonetheless, a bill of lading issued in compliance with a charter party is under the Chilean adoption of the Hamburg Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer.

Footnote(s):

¹ *A.J. Broom vs. Exportadora* – Supreme Court of Chile. Case No. 683-98.

16. Are jurisdiction clauses recognised and enforced?

See our answer to questions 15 above.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

As pointed in our answer to question 15 above, under Chilean law charter parties are subject to the principle of freedom of contract and thus an arbitration clause should be given effect.

In addition, under Chilean law the general principle is that the hearing of any dispute derived from acts, events or contracts creating maritime commerce or navigation, is subject to mandatory arbitration.

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted – by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

See our answer to question 14 above.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

Foreign judgments and arbitral awards are enforced through exequatur. This process is contemplated in the CCP under which judgments issued in a foreign country shall have in Chile the force granted to them in existing treaties; for their enforcement, the procedures set out by Chilean law shall be followed unless they have been modified by such treaties. If there are no treaties related to this matter, Chile shall grant to the judgment the same force granted to Chilean judgments by the jurisdiction originating the judgment. If the judgment comes from a jurisdiction that does not enforce Chilean judgments, it shall not be enforced in Chile. If none of the previous rules may be applied, foreign judgments shall be enforced in Chile provided that:

- they contain nothing contrary to the laws of the republic, except those procedural rules to which the case would have been subject in Chile shall not be considered;
- they are not contrary to national jurisdiction;
- the party against whom enforcement is sought was duly served with process, except that such party may still be able to allege that for other reasons it was prevented from making a defence; and
- they are not subject to appeals or further review in the country of origin.

A duly legalised copy of the judgment, officially translated into Spanish, if necessary, must be presented to the Chilean Supreme Court in order to begin the exequatur process. In the case of arbitral awards, its authenticity must also be certified by attestation of a High Court of the originating jurisdiction.

Notice of the enforcement request must be served on the party against whom it is sought. Such party shall have a period of 15 days, extended depending on where it is domiciled, to respond. An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court entertains the matter in a hearing at which the parties may make oral statements.

After enforcement is allowed, the judgment must be presented to the competent civil court to commence an executive proceeding (under which the defendant's assets can be foreclosed, if applicable).

In respect of foreign arbitral awards, a law on international commercial arbitration, based on the UNCITRAL Model Law, was passed in the year 2004 (law 19.971). Article 35 of that law regulates the recognition and enforcement of foreign arbitral awards. Article 36 lists the defences that can be asserted against enforcement and regulates orders of stay. Chile is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In this respect, Chilean courts have enforced all foreign arbitral awards that comply with the rules set out in the law for enforcement.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

Under Chilean law, the general principle is that any action

relating to maritime disputes is time-barred in two years. In case of cargo claims this period commences on the day on which the carrier has delivered the goods or part thereof. If there is no delivery, the period is counted from the end of the last day on which the goods should have been delivered. In this context, actions for indemnity by a person held liable may be instituted even after the expiration of the limitation period if instituted within 6 months. The time allowed is counted as of the person instituting such an action has settled the claim or has been served with process in the action against himself. Under Chilean practice cargo claimants normally sue anyone that may fall within the carrier and actual carrier definitions. Therefore, carriers must be aware of this provision particularly in the actions for indemnity they may have against other carriers, stevedores, ship agents, freight forwarders, or any other party that may have responsibility thereof.

In this respect, it is worth noting that actions relating to passage contracts, freight, general average and contributions are time-barred after six months.

In addition, in case of collision actions the two-year period is extended to three years if the responsible vessel was not arrested or detained while in Chilean jurisdictional waters, provided that the vessel abandoned them without calling to a Chilean port after the collision.

As regards rights of compensation and obligations arising from the spillage of hydrocarbons from vessels not carrying oil in bulk as cargo and spillage of other hazardous substances, according to the Navigation Law they become time-barred unless an action is brought thereunder within three years from the date when the damage occurred or the acts that allow to request reimbursement occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Regarding customs fines, they become time-barred within 3 years.

21. Does your system of law recognize force majeure, or grant relief from undue hardship?

Regarding the concept of force majeure or fortuity, article 45 of our Civil Code states (free translation) that it "*refers to an unexpected event that is impossible to avoid, ...*". In addition, the Royal Academy of the Spanish Language "*fortuitous*" is defined to be (free translation): "*that combination of circumstances that cannot be foreseen or*

avoided".

Under Chilean law the fortuitous event must be:

- Irresistible, i.e. that it cannot be avoided by the affected party;
- Unforeseeable, namely, it arises despite the precautions that would normally be expected from the

party obliged to take them; and

- non-imputable, i.e. it must derive from a cause out of the parties' control and with no fault.

In order to succeed with a defence based on force majeure, the three above-mentioned conditions must be met, which implies a factual analysis by the pertinent court on case-by-case basis.

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