Paper Title: United States Maritime Attachment Procedures and the impact in Venezuelan law

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Content of the paper:

I. Provisional Remedies. General overview.

The provisional remedies constitute a fundamental tool within a legal action or an arbitration process. These type of reliefs have been defined in civil law as those remedies tending to secure the material execution of a judgment or award (1).

In many jurisdictions, trials tend to be longer than expected, even in oral processes. Hence, in order to secure the potential right to win, the claimant in a process may ask the court to use its jurisdictional power to order certain remedies over the defendant's assets. One of the main purposes in doing so, is to prevent the defendant to sale or transfer his assets which would entrain the frustration of a possible enforcement order after a judgment.

Also known as "injunctions reliefs" the provisional remedies are also used to obtain an attachment over a specific good, especially when the property or use of said good is the main subject of the process. A seized vessel, a bank account frozen, a prohibition to sale a building; these are remedies that commonly constitute an effective tool in a process to open a place for a settlement, as the defendant would normally do everything in its power to see his assets free of burdens. Should the defendant have no choice, the ways to have a free disposal of the attached goods it to seek for vacate the order or, at least, exchange the remedy for a sufficient bond or bank guarantee.

I.1 Principles.

The provisional remedies do not represent the final judgment or the final award in a case. There are limits, requirements and procedural principles to be respected:

i) All remedies must be accessory to a main process,

ii) Remedies must be an instrument to seek for justice – and not the procurement of justice itself-,

iii) They are accessory of a principal action; thus they are automatically lifted should the main process has finished;

iv) They constitute a procedural security granted to avoid a possible future unenforceable judgment;

v) They must be proportional to what is claimed on the merits and cannot outrageously harm the defendant's property. For instance, an Arbitrator could not order an attachment of all the defendant's assets valued in USD$ 1,000,000.00 when the total quantum of the main claim is valued in USD$ 5,000.00;

vi) In general, in every jurisdiction, a relief is requested and ordered by the Court without a prior notice to the defendant – latin principle of in audita altera pars – so the defendant cannot sale the goods beforehand, for instance.

vii) There are many jurisdictions that forbid an injunction against a number of goods such as expected salaries, public interest assets, against the domicile, among others.

I.2 Procedural requirements. Elements.

In most of jurisdictions, a provisional remedy is discretionary to the Judge of the Arbitrator. It is not sufficient to argue that the process will take long time and that the defendant is reluctant to pay. Thus, the claimant must convince the court that the injunction is patent because a valid claim exists and that there is a real risk that a favorable judgment or award becomes frustrated. In civil law jurisdictions, in order to obtain a remedy, the claimant must normally demonstrate two different elements: 1. The fumus bonis iuris – a claimant's valid legal right to sue - and 2. the periculum in mora – a real risk that the duration of the process would frustrate the execution or enforcement of a judgment or award (2) -.

In some cases, the party can also claim that the relief proceeds not because the process will take time, but because there is a real risk that the good subject to the claim have a risk to be lost or sold, or that a potential activity from the defendant will inevitably cause a damage – periculum in damni – that could never be relieved with the final decision.

For instance, let's think of a vessel about to be scrapped. A claimant is asking the recognition of his property over said vessel before a court. Allegedly, the scrapping contract has been signed by the scrap yard and a third party other than the claimant. So, the claimant sues the alleged owner in order to vindicate his property and further use of the vessel; but this will be pointless if the vessel is scrapped. Therefore, the claimant requests the Tribunal for the prohibition and suspension of the scrapping operation of the vessel, at least during the process. A bill of sale, a registration document and the disputed scrapping contract can lead the Court to grant the order if the Court considers that the claimant may have a valid right to sue - fumus bonis iuris – and that there is a real risk of getting nothing should the vessel is lost.

I.3 Nominate vs. Innominate remedies.

Now, what is the scope within which the Judge or the Arbitrator can act? Apart from the respect of certain legal and procedural principles aforementioned, there are a number of remedies that the Judge or Arbitrator can take. Some of the remedies are expressly written in a law or a Treaty: arrest, attachment and garnishment, for example. Those remedies are called by civil law as "nominated remedies". However, due to their discretionary power, judges or arbitrators can

decide whether a particular case need a particular precautionary remedy not expressly provided by law: those remedies are called in civil law as "Innominate Remedies" (i.e., the prohibition to scrap a vessel, as mentioned before) (3).

For instance, in Venezuela, the Code of Civil Procedure provides three nominated remedies for civil cases: attachment, sequestration and prohibition to sale. As to the innominate measures, civil courts and Venezuelan Arbitrators can order whatever number of measures they consider to secure a claim (4).

I.4 Rights of the defendant. Procedure before the courts.

Although in most of cases, a remedy is granted without the notice of the defendant, once an injunctive relief is requested, granted and enforced, the defendant has a number of procedural and defense rights in every jurisdiction. The defendant suffers, in most of cases, a decrease in his income or his rights. Therefore, international conventions and local laws provide the possibility to ask the Court for a vacate (5).

In civil law, the defendant can make a formal opposition to the remedy in a first instance court (6), an appeal before a superior Court and even a cassation action before a Supreme Court. Defendant is allowed to argue a number of defenses such as i) that there were no legal grounds - fumus bonis iuris and / or periculum in mora -, ii) that he owns the attached assets but he is not the real defendant – hence lack of quality -, iii) that the injunction is not proportional; iv) that the injunction is not necessary as there are other remedies more appropriate to satisfy the rights of the claimant.

In civil law, the provisional procedures are carried out as an independent process: a request, an admission act followed by an order, an opposition act, an evidence stage and a judgment. Furthermore, different legislations provide the possibility for the defendant to post a guarantee or a bond to exchange the attachment (7).

I.5 Provisional remedies in Arbitration Procedures.

The international law of arbitration grants the arbitrator the power and the jurisdiction to order provisional remedies (8). Most legislations stipulate a procedure where the Arbitration Court ask the help of the judiciary in order to enforce provisional (and executive) orders. However, the right of opposition will depend on the Arbitration Court chosen by the parties.

Moreover, the UNCITRAL Model Law on International Commercial Arbitration provides the scope for the intervention and the assistance of the judiciary in arbitration cases, which includes the procedure to order provisional remedies. Indeed, article 17 of the UNCITRAL Model Law, provides the possibility for the Arbitration court to order provisional remedies when required, and the option for the claimant to post a sufficient guarantee to obtain the injunction order. In addition, article 27 provides that, in order to execute an injunction, the Arbitration court may request the assistance of a judicial court, in which case the provisional remedy process will be substantiated according to the rules of said court.

In Venezuela, the Regulations of the Chamber of Arbitration of Caracas provide the procedure to ask, process and execute a provisional remedy (9). In case of land property, public registry offices must be notified. In case of attached moneys, the bank acts as a garnishee. In case of movable goods, the Arbitration Court will ask the cooperation of the judiciary. In maritime cases, the Port Captaincy where the ship is located will be notified and will finally enforce the attachment (10).

II. Provisional remedies in Maritime Law Procedures.

As in other fields of law, maritime law has its own nominate and innominate preventive injunctions. All kinds of remedies are normally asked in maritime processes over the defendant's assets and especially against vessels.

It has been a regular practice over the years that a vessel leaves a port without having complied with her obligations derived of a breach of contract of carriage or a charter party, or sometimes port authority rights, torts and other damages. The most effective measure to remedy the vessel's obligations is to arrest her. As the maritime trade is regularly international, it is quite common that the creditors chase a vessel (or her sister –ship) over the world and arrest her when she reaches a port. However, not all credits can be subject to a Tribunal / Arbitration order of arrest. There are international and local regulations that provide the reasons why a vessel can be seized.

II.1 Arrest of ships.

In 1952, the International Convention Related to the Arrest of Sea-Going Ships defines an arrest as the detention of a ship by judicial process to secure a maritime claim. Moreover, the Convention limits the reasons of an arrest to a "maritime claim", which causes are provided in a numerus clausus list (11). The causes are mostly related to ventures at sea, such as damages caused by a ship, salvage fees, claims related to a contract of carriage, charter party or use of the vessel, towage, pilotage, among others. Therefore, a Tribunal from a party of the Convention can only order an arrest when at least one of the maritime claims is claimed. In 1999, a new International Convention on arrest of ships was adopted. The list of maritime claims is updated and expanded to new realities. It is very important for the claimant to clearly determine that the vessel or a sister ship was indeed operated or owned by the defendant at the moment that the maritime claim was born (12).

II.2 Decision 487 of CAN.

Regarding the South American Region, the Decision 487 of the Comunidad Andina de Naciones, stipulates the rules for Maritime Guarantees and the Preventive Attachment of Ships. With a 2002 amendment, this Convention develops the causes for an arrest of a ship due to a "maritime claim" and their provisions form part of South American local regulations in that matter. The causes of maritime claims are similar to those of the 1952 /1999 Convention. However, this Convention stresses the need of cooperation of the regional maritime tribunals from the State parties (13).

II.3 Comparative Law.

We can conclude that one of the key points for an arrest of a vessel is to determine which valid reasons can lead a claimant to ask for it and a Tribunal to grant it.

In France, for instance, the saisie conservatoire, is a preventive remedy to secure a possible final enforcement and sale of a ship. In English law, the law and the precedent have established the difference between a maritime claim and a maritime lien which is patent when an injunction is requested. Regarding the enforcement of maritime claims, we can find several rules and jurisprudence on i) enforcements, ii) actions in rem in respect of collisions, iii) arrest of ships and iv) freezing injunctions, which consist in an in personam action aiming to secure assets for the satisfaction of a legal right and "to prevent a defendant from taking action designed to frustrate subsequent orders of the court." (14). As well, commonwealth countries and those countries with a marked influence of English law, stipulate that the arrest of a vessel is mostly provided through an action in rem, - although actions in personam can activate other kinds of attachments over the defendant's assets-.

Moreover, a remedy in arbitration that is commonly applicable in maritime arbitration in London is the "anti-suit injunction, "where a party to a London arbitration agreement commences or threatens to commence proceedings elsewhere in breach of the arbitration agreement, the other party to the agreement may apply to the English Courts for an anti-suit injunction, to restrain the first party for commencing or pursuing the proceedings elsewhere, provided the proceedings in a court of a State which is neither an EU member State nor Lugano Contracting State. The English Courts have a discretion to prevent parallel arbitration and court proceedings at the outset by granting an anti-suit injunction to restrain the respondent in the arbitration proceedings from commencing or pursuing foreign court proceedings in breach of the arbitration agreement where it is just and convenient to do so". (15)

III. Venezuelan Law.

In 2001, a set of maritime laws were adopted in Venezuela. Regarding the provisional remedies, the Law of Maritime Trade provides two special remedies: the attachment of a vessel and the prohibition of sailing (16). Although a Maritime Procedural Law was also adopted in 2001, the procedure before the Maritime Tribunal is developed following the rules of the Code of Civil Procedure: claim, admission, execution of the remedy, opposition, evidence stage and a final judgment subject to appeal and cassation.

In any case, a nominate remedy can be asked by a claimant in a maritime arbitration procedure (17), such as an attachment of assets, sequestration or prohibitions of sale, which means that in Venezuela, the arrest of a vessel is not the only injunction relief that a claimant has.

III.1 Preventive arrest of ships. -

Article 92 of the Law of Maritime Trade defines a ship arrest as the immobilization or restriction to sail over a ship, as a result of a provisional remedy ordered by a Maritime Tribunal within the

Local Aquatic Jurisdiction and as supported by a maritime claim. Article 93, defines the causes of a maritime claim in similar terms such as defined by the Decision 487 of the CAN. The Tribunal's order is notified to the Port Captaincy where the vessel is, in order to forbid her departure. It is indeed possible for the defendant to post a bond or sufficient guarantee to get the vessel released. This guarantee is agreed between the parties of by the Judge, should the parties cannot set an amount. Moreover, the Venezuelan law prohibits a second arrest of a ship for the same maritime claim.

Regarding a Venezuelan Arbitration Process in Maritime Law, the applicable law will depend on the arbitration clause and the agreement of the parties. However, once an arrest is ordered and executed by the Judiciary / Port Authority, the procedure for an arrest remains subject to Venezuelan law by virtue of the principle lex fori regit processum.

III.2 Prohibition of sailing. -

According to our experience, it is possible to seize a vessel for reasons different that those provided as "maritime claims". In such cases, the claimant can ask for an arrest or other remedy over de defendants assets by posting a bond. The Maritime Judge or the Arbitration Tribunal is able to order a restriction of prohibition of sailing of the ship or can even order that the vessel can continue operations but within a specific water jurisdiction. This possibility is construed by the interpretation of the article 103 of the Venezuelan Law of Maritime Trade.

III.3 Preventive measures in Maritime Arbitration Procedures. -

Articles 26 and 28 of the Commercial Arbitration law provide the possibility for an Arbitration Court to order any injunction relief as necessary. When ordered, a cooperation process is carried out with the Judiciary and, in Maritime law, with the Port Captaincy Authorities.

The Judiciary is at the end in charge of the execution of the remedy. However, the Venezuelan Chamber of Arbitration "CEDCA" has created emergency Arbitration Tribunals which will habilitate time to hear and order the necessary remedies and save time.

Before the Emergency Arbitration Tribunals were created, the case "Astivenca" (a Venezuelan shipyard) provided the possibility for a claimant in arbitration to attend before the Judiciary, ask for a relief, by proving that a valid arbitration agreement was signed but that the Arbitrators were not yet appointed. Again, the urgency of the injunction could not wait for the parties to appoint their arbitrators. Henceforth, the Judiciary can order an attachment whilst the parties are in the process of appointing their arbitrators (18).

III.4 Example of the procedure: In the case of Banco Activo (2012), a bank financed several contracts with a ship operator to make touristic trips from the land to the Island of Margarita. The contract had an arbitration clause and a ship mortgage was registered before the Venezuelan Ship Registry. The bank filed an arbitration action before the and asked for an attachment of the vessel, based on a maritime claim as provided in article 92 of the Law of Maritime Trade - an execution of a ship's mortgage is a written cause of a maritime claim -.

The Arbitration Court admitted the claim and ordered the attachment of the vessel. The order was passed to the Maritime Court and said court noticed the Port Captaincy where the vessel was moored and finally attached the same. The bank had in parallel the burden of registry the ship arrest before the Ship Registry (19).

IV. United States Law. A perspective of a non-United States attorney. -

IV.1 Procedural law. -

The United States Federal Rules of Civil Procedure provide in its Title VIII the "Provisional and Final Remedies" in a civil procedure (20). Rule 64.b develops the specific kind or remedies: arrest, attachment, garnishment, replevin, sequestration and other equivalent remedies. Rule 65 stipulates the entire procedure for injunctions and restraining orders.

Regarding the maritime cases, the Federal Rules provide a specific chapter related to the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions. Those rules will govern the universe of maritime relief injunctions that can be executed by the Federal Courts when handling maritime or admiralty cases. Specifically, Rule B regulates the In Personam Actions, attachment and garnishment, Rule C regulates the actions in rem, Rule D covers the Possessory, Petitory and Partition Actions, Rule E points out the actions in rem and quasi in rem, Rule F stipulates Limitation of Liability and Rule G the forfeiture actions In rem.

IV.2 Commentaries on the Rule B. -

The rule B is referred to actions in personam based on the attachment and garnishment of the goods, tangible or intangible, of the defendant, due to a maritime law action. This relief is granted only if: i) The defendant is not found within the District. Ii) the action must contain a request for attachment of the defendant's assets and a detailed amount of money, iii) the action must be a valid prima facie maritime claim; iv) the attachment must be secured in the hands of a garnishee named in the process and v) There are no equity reasons to not enforce or attach. Hence, after the request, the Judge will verify whether the injunction proceeds and will dictate an order authorizing the attachment (Rule E), granting a period of time in which the garnishee will state as to whether he / she has the assets in his power.

The rule allows the claimant to file an action in personam against an individual who is not found within the District but that has property or goods within it. This is not an action in rem (over a good) such as it is the arrest of a ship. Instead, this maritime action is against a person and the main reason to execute the attachment is because there is a risk that the defendant will never be found but he happens to have assets to attach (21).

The procedure of the Rule B considers the right of the defendant to ask the Court to vacate or dismiss the attachment. The Judge can vacate the order using his discretion, should he notices that the claimant has failed to prove that the attachment was necessary to obtain personal jurisdiction over the defendant and / or secure a potential judgment. The defendant can ask for the exchange of the attachment by posting a bond. Once held the hearing as provided in the Rule

E, the parties can submit their written considerations as to the maintenance or dismissal of the attachment.

But, what defenses can the Defendant argue? He must prove the inequity of the attachment or that the attachment is illegal or against public order rules. He can also argue that the attachment is useless or even establish grounds on the merits (i.e. the defendant has fulfilled his obligations or paid). Most importantly, according to our experience, the Defendant must attack the very arguments that gave reason to the claim, which are in fact those limits provided by the Rule B procedure. He must prove that there is no place or legality at all for carrying out the Rule B procedure. For instance, the defendant can argue that there is not a valid prima facie action against him; that the claim is not about maritime or admiralty law at all or that the claimant has already obtained sufficient guarantees to secure his claim.

Logically, the attachment will be dismissed if there are not traceable assets of the defendant within the District. However, future rights of payment or intangible goods can be put on the hands of a garnishee and, therefore, can be subject to attachment.

Regarding the motives of equity upon which the attachment must be vacate, a remark from the Case Aqua Stoli v. Gardner and Smith must be made (22). Among other reasons, this precedent considers that the attachment can be vacated if the defendant can be subject to the same claim in a more appropriate jurisdiction – theory of the forum non conviniens-; or if personal jurisdiction between the parties can be treated in another District Court.

V. Rule B and its application in a Venezuelan Procedure.

Even when Federal Courts have total jurisdiction in Maritime cases and over the assets of the parties located within a United States district, there are some remarks that can be argued against granting an attachment with the sole completion of the Rule B Limits.

Example 1. In Venezuela, there are public order regulations, especially regarding the insurance market. It can be a valid maritime claim the fact that a Marine Insurer has denied the coverage of an insured peril over a Vessel, which could give the insured a right to sue. However, in Venezuela, before a Tribunal enforces an attachment against a Marine Insurance Company, the Insurance Super intendancy must be appointed and notified (23). However, in the United States, if the Rule B limits are followed, a Federal Judge or Arbitrator can order an attachment of the accounts of the Venezuelan Marine Insurance Company within a United States District and without any obligation to notice the defendant or any other third party different that the garnishee. This could clearly affect the Venezuelan Insurance market.

Example 2. In a case of a maritime collision, a Venezuelan claimant who owns a Venezuelan registered vessel aims to sue another Venezuelan Vessel's owner for damages. The claimant finds out that the defendant has a big bank account in the United States. So, the claimant proceeds to sue the Venezuelan defendant in a District Court and has her assets attached and garnished. However, every single aspect of the case is related to Venezuela: The parties, the vessels, the domiciles, the place of the accident and there is even a Maritime Court and Venezuelan Injunction processes that can be executed in Venezuela. Notwithstanding the above, the claimant

choses to litigate in the United States as the impact and damages over the rights of defense of the defendant will be harmed. If the Rule B limits are filled, the Federal United States Judge can simply order an attachment and garnishment of the bank account of the Defendant.

Conclusion. -

Although a Rule B procedure is totally legal as provided in United States Law, there are some special circumstances that the Judge or the Arbitrator must bear into account. In our particular point of view, Rule B can be used by foreign litigators as a forum shopping procedure to seize or attach any assets in the United States, even when the grounds of the case have no relationship whatsoever with the United States. In our view, the Federal Judge or the Arbitrator must deeply examine the grounds and motives of the action or remedy, since in some cases, we can face a case of forum non conviniens. We finally consider appropriate to sustain our view with what was ruled in the Aqua Stoli Case:

> (…) We hold that, once a plaintiff has carried his burden to show that his attachment satisfies the requirements of Supplemental Rule B, a district court may vacate an attachment only upon circumstances not present in this case. Circumstances that may justify a vacatur can occur where 1) the defendant is present in a convenient adjacent jurisdiction; 2) the defendant is present in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for a judgment..
>
> (…)
>
> Accordingly, defendants motion to vacate the attachment order is granted. In addition, because this action serves no purpose other than to facilitate the attachment order that has now been vacated, the complaint is hereby dismissed with prejudice. Clerk to enter judgment.

Footnotes:

1. Carnelutti (1994) Rafael Ortiz (1999)

2. Rengel Romberg (1989) Medidas Cautelares Innominadas Revistas ICDP. Pag 92

3. Cabrera, D. F. (2014). Estudio a las medidas cautelares innominadas, en vigencia del código general del proceso. Pag 27

4. Venezuelan Code of Civil Procedure. Article 588. Official Gazette number 4.209. September 18th 1990.

5. Inter-American Convention On Execution Of Preventive Measures. Article 4. August 5th 1980

6. Venezuelan Code of Civil Procedure. Article 589.

7. Venezuelan Code of Civil Procedure. Article 602.

8. UNCITRAL Law Model on International Commercial Arbitration (1985). Article 17, consulted on: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

9. General Rules Of The Arbitration Centre Of The Chamber Of Caracas. November 12th, 2012 consulted on: https://arbitrajeccc.org/wp-content/uploads/2019/09/RGCACC-ing.pdf

10. Venezuela Law of Maritime Trade, Article 104. Official Gazette number 38.351, January 5th, 2006.

11. International Convention Relating to the Arrest of Sea-Going Ships. Article 1. March 19th, 1999. Consulted on: https://unctad.org/en/PublicationsLibrary/aconf188d6_en.pdf

12. Ibidem. Article 3 number 2.

13. Decisión 487 Comunidad Andina de Naciones. Amended by Decision 537. Article 37 and 38. Consulted on: http://intranet.comunidadandina.org/Documentos/gacetas/Gace625.PDF

14. Derby & Co Ltd and Others v Weldon and Others (Nos 3 and 4) (1990) Ch 65 (CA), quoted by Michael Tsimplis, Maritime Law.

15. Yvonne Baatz, the Conflict of laws. Maritime Law, Fourth Edition (2018).

16. Venezuela Law of Maritime Trade. Article 93 and Article 103.

17. International Convention Relating to the Arrest of Sea-Going Ships. Article 7. May 10th , 1952)

18. Decision number 1067 Astivenca Astilleros de Venezuela C.A. vs Empresas Oceanlink Offshore III A.S.y Oceanlink Offshore Consulted on http://www.oas.org/es/sla/ddi/docs/Venezuela-Astivenca%20Astilleros%20de%20Venezuela,%20C.A.%20c.%20Oceanlink%20Offshore.pdf

19. Decision number 070-12 dated May 21st, 2012 Consulted on Memoria Arbitral II pubished by the CEDCA on 2014.

20. United States Federal Rules of Civil Procedure. December 1st 2014. Consulted on: https://www.uscourts.gov/sites/default/files/Rules%20of%20Civil%20Procedure.

21. Llinas Carlos. Supplemental Rule B; The Power to Attach a Foreign Defendant´s Property in The United States. “The American Association for Justice Admiralty Law Newsletter”. Summer 2017.

22. Aqua Stoli Ltd V. Gardner Smith Pty Ltd.

23. Law of the Insurance Activity Article 144 number 2. Official Gazette number 6.220 March 16th 2016. Consulted on: http://www.sudeaseg.gob.ve/?post_type=document&p=3260

Short biography:

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