



# VILLAGRÁN LARA

## ATTORNEYS

# Overview of maritime law in Ecuador

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# VILLAGRÁN LARA

## ATTORNEYS

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# Overview of Maritime law in Ecuador



Ecuador is a civil law country traditionally based on statute. The exceptions to this rule are regarding the capacity of the Constitutional Court to issue jurisprudence to be binding generally according to Art. 435, paragraphs 1, 6 and 10. Moreover, the National Court has the duty to generate binding rules of Jurisprudence in case of repeated similar opinions or in case of lack or unclear laws in determined matters. (Constitución del Ecuador 2008).

Anyway, there is no current decision by the Constitutional court or by the judiciary specific to maritime law.

As a tradition, maritime commerce in Ecuador has been regulated according to provisions included in the Code of Commerce and under international conventions in which Ecuador is party. On the other side, maritime law related to state control is based on what is known as the Code of Maritime Police and other regulations in which takes supremely importance the international maritime law in which Ecuador is party.

## Internal regulations

Maritime commerce provisions in the Ecuador Code of Commerce come mostly from the Napoleonic Code but also from the Spanish code. Codes of Commerce are compendiums of all matters of law related to merchants and their relations. The codification of the law in the 19th century was a trend initiated by the Napoleonic France with the Civil Code, 1804 and later with the Code of Commerce, 1807. Many European countries followed this initiative (Tetley 2002).

The Kingdom of Spain enacted their own Code of Commerce in 1829. The Spanish Code of Commerce 1829 was based by its traditional law through the Ordinances of Bilbao, 1737 (Garteiz - Aurrecoa 2011) but also from the Napoleonic Code of 1807 (Lasso 1998). The Spanish Code included provisions related to maritime law in its Third Book named Maritime Commerce. (Código de Comercio de España 1829)

In the early 19th century another trend was present in South America. In 1809, in Quito begun the first intent of independence from Spain, which failed. Anyway, this promoted the ideal of free countries in the whole region. Therefore, in 1810 Mexico and Colombia gained their independence followed by Venezuela in 1811. Ecuador obtained its independence in 1822 and adhered to the Grand Colombia, a country formed by the former colonies of Venezuela and Colombia. The territories that now are part of the Republic of Panama at that moment belonged to Colombia.

Previously, The Grand Colombia on 30 August 1821 approved a Constitution in which it was decided in Art. 188 that previous statutes in force were valid aside from those opposed to the new Constitution or the decrees or other statutes enacted by the Government. This decision ratified the law imposed by the Spanish Empire in the former colonies until new law was developed (Constitución Política de la República de Colombia 1821).

In 1830, Ecuador left the Grand Colombia and on 4 November 1831, the new Ecuador Congress adopted the Spanish Code of Commerce 1829 except for Book V related to administration of justice. The adoption of the Spanish Code as a model was the same for many newly born South American countries as Bolivia, Perú, Costa Rica, Paraguay, and several provinces in Argentina. That was the reason the Spanish Code was considered as a Hispanic Code (Abásolo 2009).

Moreover, the first Code of Commerce of Mexico 1854 was mostly inspired by the Spanish Code and the same with the Code of Commerce of Chile 1865 with the difference that it received equal influence from the French Code among other European legislation. (Abásolo 2009).

Meanwhile, upon independence, Ecuador began to introduce its own legislation based on Chilean law. The Supreme Court prepared a bill of a Code of Commerce approved by the National Convention in 1878. In 1882 the President Ignacio de Veintemilla approved the Bill and the first Code of Commerce of Ecuador was enacted (Alterini 2008). This Code of Commerce was superseded by a new one enacted in 1906 by President Eloy Alfaro. Finally, in 1960 Ecuador approved its current Code of Commerce. As in previous codes the third book refers to maritime commerce with no fundamental changes (Código de Comercio 1960).

Besides, in 1945 the Code of Maritime Police was enacted. A new codification was approved in 1960 which is the current code with further amendments until today. This is a body of laws that confers judging authority to the Harbour Master and the Jury of Captains to decide in case of maritime incidents. The Harbour Master is an officer of the Ecuador Navy while the Jury of Captains is composed of a panel of five members: the Harbour Master and four members appointed in a case by case basis in a random selection by the local Commander of Ecuadorian Navy. The requirement to be appointed as member is to be a current officer of the Navy or the Merchant Marine of Ecuador. The Jury of Captains is presided by the Harbour Master. (Código de Policía Marítima 1960)

The Code of Maritime Police in Section II concedes to the Harbour Master jurisdiction to decide minor penal offences within his territorial area, and also related to maritime incidents between vessels less than 50 tons. with no loss of human lives. The Jury of Captains has authority to decide all major cases of maritime incidents in which the Harbour Master has no authority to decide.

Penalties can range from fines to detention. These duties are now in question due to the constitutional changes as it will be explained.

In addition, the Code states in Art. 22 that cases involving ocean-going ships or the death or disappearance of a person need to be consulted to the Military Court. This an organism now extinguished but initially depending from the Ministry of Defence (Código de Policía Marítima 1960).

Be it as it may, recent fundamental changes to the law of Ecuador have impacted the Code of Maritime Police. The Constitution of Ecuador 2008, Art. 168, para. 3 in accordance with the democratic principle of separation of powers states that jurisdiction is only to be exercised by the judiciary. The administration of justice is forbidden to members of other powers (Constitución del Ecuador 2008). The status under the Code of Maritime Police is that the President of the Republic appoints the Harbour Master under request by the Ministry of Defence, and the Jury of Captains is composed by individuals not members of the Judiciary.

Despite, Harbour Masters and Juries of Captains in Ecuador still continue deciding cases. Besides, the Organic Judiciary Code 2009 extinguished the Military Court, originally dependent from the Ministry of Defence, meaning that all appeals and consultations are sent to the National Court of Justice with the outcome of different criteria from said Court. This has impacted appeals and consultation processes.

Anyway, any lawsuit in relation to claims for damages that is a result of marine incidents is to be submitted before a Civil and Commercial law judge as stated in Arts. 239 of the Organic Judiciary Code. Ecuador currently does not have maritime courts but there is a provision in Art. 241 of the mentioned Code that allows the Council of the Judiciary to designate judges for specialized matters. (Código Orgánico de la Función Judicial 2009)

Besides, a new Code for Civil Procedure is in force from 2016, the General Organic Procedure Code, also known as COGEP, with fundamental changes from a written system to an adversarial oral system with new developments that affect ways on how complaints and evidence need to be filed and handled, including service of process to defendants, all of that providing impact in the legal scenario. A general principle is that evidence is to be presented or announced in the statement of claim. (COGEP 2015)

### International sources of law

Ecuador is party to several international conventions. Some of them are now mentioned.

Basically, in 2012 Ecuador ratified the accession to the United Nations Convention on the Laws of the Sea (UNCLOS 1982), also known as the Constitution for the seas.

As for the named four pillars of maritime law regulation, Ecuador is party to The International Convention for the Safety of Life at Sea (SOLAS 1974) and its 1988 Protocol which relates to minimum safety in relation to construction, equipment and operation of merchant vessels.

Besides, it is party to the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78), including Annex 1 (oil and oily waters), II (Noxious Liquid Substances Carried in Bulk by tankers), III (Harmful Substances Carried by Sea in Packaged form), IV (Sewage from ships), and V (Garbage from ships), not being party of the Annex VI (air pollution by ships).

In addition, Ecuador is party to The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 1978), but non party to the 1995 amendments. The same occurs with the STCW-F which was created in relation to fishing vessel personnel.

Finally, Ecuador is not party to The Maritime Labour Convention MLC 2006 nor to the Work in Fishing Convention 2007. Anyway, in relation to the MLC the Constitutional Court in March 2017 approved its terms. Therefore, the Convention is pending to be approved by the legislature.

In relation to maritime commerce, Ecuador is party to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague-Visby Rules). Multimodal transportation (including transportation by sea) related to consignments to or from the Andean Countries is regulated under Decisions 331 and 393 of the Andean Community.

Previously, as a regional intention to unify the law, several South American countries, signed in 1928 the Sanchez de Bustamante Code for Private International Law. Ecuador ratified this Code in 1933 with the reserve that it was accepted in all parts not in opposition to the Constitution and the law. The Code includes in its third title provisions related to maritime commerce (Bustamante Code 1928).

In regard to collisions, Ecuador adhered to the COLREGS - International Regulations for Preventing Collisions at Sea 1972, but not in the case of The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910 (The Brussels collision convention).

Concerning arrest of ships and maritime liens Ecuador is party to the International Convention on Arrest of Ships, 1999; The International

Convention on Maritime Liens and Mortgages, 1993 and to the Maritime liens and arrest of ships regulations 487 and 532 by the Andean Community.

### LEGISLATION ON MARITIME LAW IN ECUADOR

Ecuador is party to international conventions related to maritime law, and due to its membership in the Andean Community formed with Colombia, Peru and Bolivia, there are a number of regulations that are part of the legislation of Ecuador which also has some local statute, as follows:

#### a. Brussels Conventions:

- The International Convention for the unification of certain rules of law relating to Bills of Lading and protocol of signature "Hague Rules 1924"
- Protocol to amend the International Convention for the unification of certain rules of law relating to Bills of Lading "Visby Rules"

#### b. IMO conventions:

- Convention on the International Maritime Organization (IMO CONVENTION 1948);
- International Convention for Civil Liability for oil pollution damage (CLC 1969)
- International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974);
- Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1988);
- Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972);
- Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, (MARPOL 73/78);
- Annex III to MARPOL 73/78;
- Annex IV to MARPOL 73/78;
- Annex V to MARPOL 73/78;
- Protocol of 1992 to amend the International Convention on Civil Liability of oil pollution damage, 1969 (CLC Protocol 1992)
- International Convention relation to the intervention on the high seas in cases of oil pollution casualties, 1969 (Intervention 1969)
- Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for compensation for oil pollution damage (FUND PROT 1992)
- International Convention on Salvage, 1989 (SALVAGE 1989)
- International Convention on Oil Pollution preparedness, response and co-operation 1990 (OPRC 1990)
- Protocol on preparedness, response and co-operation to pollution incidents by hazardous and noxious substances, 2000 (OPRC-HNS 2000)
- Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 (SUA 1988)
- Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 1988 (SUA PROTOCOL 1988)
- Convention on Facilitation of International Maritime Traffic, 1965, as amended (FAL 1965);
- International Convention on Load Lines, 1966 (LL 1966);
- Protocol of 1988 relating to the International Convention on Load Lines, 1966, as amended (LLPROT 1988);
- International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969);
- Convention on the International Mobile Satellite Organization, as amended (IMSO C 1976);
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 1978);
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, as amended (OPRC 1990);

#### c. United Nations and United Nations/IMO Conventions:

- United Nations Convention on the Laws of the Sea (UNCLOS 1982)
- International Convention on Maritime Liens and mortgages, 1993
- International Convention on Arrest of Ships, 1999

#### d. UNESCO Conventions:

- UNESCO Convention on the Protection of the Underwater Cultural Heritage

#### e. International Labour Organization Conventions:

- Medical Examination (Fishermen) Convention 1959
- Fishermen's Articles of Agreement Convention 1959

#### f. American Conventions:

- Convention on International Private Law - Code Sanchez de Bustamante, 1928

#### g. The Andean Community legislation:

- Decision 288, Freedom of access to cargo with origin and destination by sea inside the sub region, 1991
- Decision 314, Freedom of access to cargo transported by sea and policies for the development of the Merchant Marine of the Andean Group, 1992
- Decision 331, related to Multimodal Transport, 1993
- Decision 390, modifications to the Decision 314 related to Freedom of access to cargo transported by sea, 1996
- Decision 393, related to amendment to the regulations for Multimodal Transport, 1996
- Decision 422, Regulations for the common application of the reciprocity principle in the transportation by sea, 1996
- Decision 487, related to Maritime liens and arrest of ships, 2000
- Decision 532, amendment to decision 487 related to Maritime liens and arrest of ships, 2002
- Decision 609, related to common recognition to titles for the seaman

#### h. National Statute related to Maritime law: - Code of Commerce, 1960

- Code of Maritime Police, 1960
- General Statute for Ports, 1970
- Sea and river transportation Statute, 1972
- Oil Terminals Administrative Statute, 1977
- National Port Administration Regime Statute, 1979
- Statute for support to the National Merchant Marine, 1979
- Statute for facilitation of exports and transport by sea, 1992
- Statute for fishing and fishing development, 2005
- Statute for the Special Regime of the Province of Galapagos, 2015

# Foreign Judgments as source of Constitutional law in Ecuador



A concept known as Constitutional Block had its origins in France in 1971. The objective was to recognize constitutional force to those fundamental rights not included in the text of the French Constitution of 1958. (Caicedo 2009). With this in mind, the Constitutional Court of Ecuador formalized in 2010 a system of sources of constitutional law, adopting the principle of legal plurality. This system includes the Constitution of Ecuador as the compulsory source. Previous constitutions of Ecuador and constitutions from other countries are to be considered as reference.

International Conventions related to human rights in which Ecuador is party are considered binding regulations and consequently direct source. Not binding instruments as decisions and reports from Intergovernmental organizations, committees and international networks of civil society are to be taken in consideration to help to provide judicial reasoning.

Moreover, comparative international jurisprudence by courts of human rights are considered sources as well as jurisprudence of constitutional courts of the region when they contain precedents. Doctrines of local or foreign law are to be used to illustrate the juridical arguments in a decision that will create a precedent. Besides, decisions that do not create precedent can be taken in consideration as an exception. (PCO 2010).

Notably, the Ecuador Constitutional Court has based many of its decisions in previous judgments by foreign courts, as those from Colombia, Spain and Germany. The following are three examples of decisions in which the reasoning included foreign jurisprudence:

First, in 29 September 2009 with the case Omnibus BB the Court issued the Judicial Reasoning Test based in a judgment from the Supreme Court of Justice of Colombia (Case OMNIBUS BB 2009). This Test with the elements of logic and understandable reasoning constitutes the main fundament for many sentences from the Constitutional Court of Ecuador (Villagran 2016).

Second, in 8 May 2012 the Constitutional Court of Ecuador in the case María Bermeo et.al., as a reference for their decision, used a previous judgment from the Constitutional Tribunal of Spain in another matter related to judicial reasoning (Case Maria Bermeo et.al. 2012).

Third, in 3 July 2014, in the case Delia Tacuri, through binding jurisprudence the Court issued rules of constitutional law in matters of the emergence of personal data protection. The justification by the Court included a reference to a previous judgment by the Federal Constitutional Court of Germany regarding the 1983 census act. The principle is related to privacy. Every person has the fundamental right to determine the disclosure of its personal information (Case Delia Tacuri 2014).

Besides, submissions to foreign judgments for the interpretation of constitutional matters is not an exclusive particularity of the Constitutional Court of Ecuador. The use of foreign decisions in constitutional courts is a common practice by many countries, also known as judiciary transnational dialogue promoting the creation of a consensus in determined matters of constitutional law (Brito 2010). This is the so called fifth method of constitutional interpretation proposed by Peter Häberle, the comparison of Constitutions as a comparison of cultures (González 2012).

# Subrogation actions and prescription in Ecuador

Amendments to the Ecuador Code of Commerce 1960 were introduced to Title XVII Insurance, also known as the Insurance Statute. This is a modification to the rules of Insurance introduced in 1963 in the Code of Commerce. Art. 26 states that actions derived from the insurance contract prescribe in two years counted from the event that gave rise to those actions (Código de Comercio, 1960).

Besides, Art. 38 of those amendments states that the insurer who has compensated the insured acquires ipso jure all the rights of the insured against any third party that caused the damage limited on the amount paid by the insurer. It is also mentioned that the third party is able to oppose the claim by the insurer with the same defenses that he could have applied against the insured (Código de Comercio, 1960).

Regarding subrogation recoveries from insurers, civil judges of National Court of Ecuador demonstrate different approaches leading to some kind of uncertainty



In *La Union v Panalpina*, the National Court in 10 May 2011, considered that by the nature of the subrogation action, prescription was the same related to the right to the insured to sue. The judges dismissed the pretension by the claimant to have the two years prescription time stated by The Insurance Statute.

Similarly, in 13 July 2012 the civil chamber of the National Court in the case *Ecuadoriano Suiza v Hamburg Sud* declared that in subrogation claims the insurer acquires all rights and privileges from the aggrieved party, including the rules for prescription, which according to The Hague Visby rules is one year. Moreover, judges included in their opinion that from the moment that the loss was paid, until the moment that the case was filed, prescription has passed in excess, meaning that they agreed to consider extinctive prescription from the moment the insurer paid for the loss which is consistent with the *actio nata* principle.

In contrast, in 12 November 2012 with the case *Ecuadoriano Suiza v Maersk del Ecuador* the chamber declared that even when the prescription for a direct claim by the aggrieved entity is one year, the claim by the insurer against the carrier is originated in subrogation rights according to the Insurance Statute, which states two years as prescription for every situation derived from insurance agreements.

It is to say that in this decision the defendant raised the prescription defense, alleging that the claim was time barred according to The Hague-Visby rules, but the judges ruled different from what had been decided in other cases and considered that the specific prescription term related to relations between insurers and insureds were applicable.

Ecuador is a civil law country, and decisions by the National court do not create a precedent unless specific cases. Anyway all decisions are considered by judges as important references.

## The cases:

*La Union v Panalpina*, 149-2007 (National Court of Justice of Ecuador, Civil Chamber, 10 May 2011).

*Ecuadoriano Suiza v Hamburg Sud*, 554-2011 (National Court of Justice of Ecuador, Civil Chamber, 13 July 2012).

*Ecuadoriano Suiza v Maersk del Ecuador*, 139-2007 (National Court of Justice of Ecuador, 12 November 2012).

# Extinctive prescription: origins and doctrine



Prescription is a Roman law legacy. Comes from the Latin *praescriptio*, composed word of the terms *prae* and *scribere* which means prior to be written (Opala 1971). Charles P. Sherman mentions that under Roman law prescription consisted in a preliminary allegation before addressing the main issue in a trial. Sherman cites that there were many kinds of prescription but the most important were those related to acquisition or extinction of a right by lapse of time (Sherman 1911).

Prescription is currently present in both civil and common law countries involving two different approaches in legal relations due of the time lapse: Acquisition and extinction (Opala 1971). The initial principle for extinctive prescription was that the right of actions were perpetual known as *actiones perpetuae*.

Roman Emperor Theodosius II introduced in A.D. 424 the modification of this principle in exchange of *temporales actiones* recognizing extinctive prescription, with the regular period of prescription in 30 years (Zimmermann 1996). Emperor Justinian improved the rules on prescription and included the principles of *actio nata*, and the stipulation that lapse of time needs to be continuous. He also introduced the causes of suspension of prescription. (López 2003).

The Catholic Church influenced changes in the principles of prescription, as with the requirement of good faith or *bona fide*. Canon Codes from 1512 and 1983 ratified this: "No prescription is valid if is not based on good faith, not only at the beginning but also during all the lapse of time required." (López 2003).

Besides, the *bona fide* requirement is the purported basis that prescription is to be alleged by the party who wants to benefit from it. As a result, a judge cannot award prescription without this previous allegation, and therefore if a party does not invoke it then there is no prescription. That is the reason why it is considered a potestative right (Valle 2005).

Parties that are willing to invoke prescription need to be very clear in exposing their pretensions both in the facts and motives. Judges can apply the law according to the principle *lura Novit Curia* but they need clear facts and the justification of the *bona fides* requirement. (Melich 2002)

## Actio Nata and Contra Non Valentem Principles

*Actio nata* is a principle related to the determination of when time begins to be counted for extinctive prescription purposes. The birth of the right to sue. Also known as "*action nodum natae non praescribitur*", meaning that while an action to sue does not exist there is no way for prescription (Melich 2002).

This is a principle that was valid under the Napoleonic Civil Code and commented by Pothier "time of prescription cannot begin to be counted but only from the day the creditor is able to file lawsuit". This

principle is still present in the law of many Latin American countries (López 2003).

Further, Roman law created another principle to allow suspension of prescription, "*contra non valentem agere non currit praescriptio*", meaning that prescription does not run against one who is unable to act. The development of this rule is attributed to the jurist Bártolo de Sassoferrato in the XIV century. The rule was intended to benefit those individuals who were unable to act, as minors, disabled people, people in absence due to wars or other reasons, but it was also applied as a social or political benefit (Marín 2014).

The principle was applied in the Civil Codes with the recognition that extinctive prescription is to be considered suspended in favor or minors, those mentally incapable, deaf people, and others under legal control by their parents or guardianship, etc, as stated in Arts. 2420 and 2409 of the Ecuador Civil Code (Código Civil, Codificación 2005).

Certain legislations allow to suspend prescription terms due to agreement between parties, or with conciliation proceedings and also regarding other causes. This is the case of Section 32 of the UK Limitation Act 1980, which states that "the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake" (Limitation Act 1980).

Besides, the Louisiana Civil Code article 3467 states that "prescription runs against all persons unless exception is established by legislation" (Louisiana Civil Code 2011). In spite of this provision, the *contra non valentem* principle meaning that prescription does not run against one who is unable to act has been reinstated in the law of Louisiana through jurisprudence (Nichols 1996).

Accordingly, the decision dated 8 October 1979, by the Supreme Court of Louisiana in the case *Corsey v. State of Louisiana* stated four categories in which the principle acts to prevent liberative prescription to continue: "(1) Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) Where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. (4) "Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant" (*Corsey v State of Louisiana* 1979)

Louisiana judges have applied the *contra non valentem* principle to suspend prescription when they find an unfair and impossible short prescriptive period (Nichols 1996), as in the case *Held v. State Farm Ins. Co.*, 610 So. 2d 1017 (La. Ct. App. 1992), in which the Court of Appeals on 25 November 1992 reversed a previous judgment that dismissed the claim by Stephanie Held based in extinctive prescription (*Held v State Farms Ins. Co.* 1992).

## Special Suspension of Prescription Terms by Statute or Decree

In 2005, prescription terms were suspended in a retroactive basis through several executive orders by Louisiana Governor due to the Katrina Hurricane incident. Water covered eighty percent of Louisiana. Although legal commentators criticized these decisions, this was a recognition that at moments when a catastrophe takes place it is impossible for affected people to exercise their rights to sue.

This particularity is not new in Louisiana. Two hundred years before, the State Legislature decided to suspend prescription effects for 120 days near to the Battle of New Orleans. The decision of the Legislature was ratified in 1817 by the Louisiana Supreme Court in the case *Quierry's Ex'r v Faussier's Ex'rs*, and mentioned as an application of the *contra non valentem* principle. This was the leading case related to this doctrine. (Janke 2011)

Similarly, in 2016 a regulation was instituted in Ecuador after the earthquake that affected the Provinces of Manabi and Esmeraldas destroying several cities. The Assembly approved the Organic law of Solidarity for the Reconstruction and Reactivation of the affected zones by the earthquake of 16 April 2016. The outcome was a general term that amended the Tax Code of Ecuador stating that prescription for recovery actions that is running during a force majeure incident will be suspended until causes that provoked it are concluded (Ley de Solidaridad 2016).

## Interruption of Prescription

Prescription is to be interrupted when the debtor recognizes the debt or once a legal action begins. As a development, the Spanish Civil Code states in Art. 1973 that prejudicial actions by the claimant interrupt prescription (Código Civil Español 1989). The interruption of prescription means that the time counted until the day prescription gets interrupted goes to zero.

If the cause of interruption is the recognition of the debt then it means that the term will begin to be counted after said recognition. If the cause is the filling of a lawsuit, or the serve of process depending of the legislation, then the general rule is that prescription time is not to be counted anymore, and procedural rules will be applied when the case is not continued by the plaintiff but for abandonment of lawsuits nor related to the main liability. (Marin 2014)

## Praescriptio Temporis in Common Law

It is estimated that caselaw for prescription appears in England in the twelfth or thirteenth century with the civil and canon law influence promoted by jurist and cleric Henry Bracton in his treatise named *De Legibus Consuetudinibus Angliae* written between centuries XII and XIII (Opala 1971). The justifications brought by Bracton for liberative prescription in his treaty were in concern of both parties. The complication by the defendant to find the necessary evidence that could be missed by the long passage of time and the consideration of the inaction by the plaintiff. The Defendant's defectum probatioms and plaintiff's negligentiam. (Nichols 1996)

Nowadays, the UK Limitation Act 1980 is the general statute with the aim to determine time bars for filing claims. This statute faces criticism and the proposal of reform by the Law Commission of England recommending a common regime for prescription (The Law Commission 270 2001).

The modern doctrine and purposes of statute of limitations in common law is well explained by the Law Reform Commission of Ireland : 1. "later the claim, less reliable the memories of witnesses and the more likely that there will be difficulties in locating witnesses and evidence". 2. "the length of time which is required to resolve the dispute and thereby prevent the use of the public resources of the courts system for current disputes". 3. "the expense of extended insurance coverage and storage of records necessary to defend a claim, further adds to the defendant's burden and, where the defendant is a business, these costs may be passed on to its customers" (The Law Reform Commission of Ireland 2001).



## General Comments on Extinctive Prescription

In summary, extinctive or liberative prescription is the extinction of a right by lapse of time. It is a way of extinguishing the right to pursue an action due to no action by the titular of the claim. Commentators differ if the extinctive prescription produces both the extinction of the right and the action, but the most accepted interpretation is that the right remains but the action to claim that right expires. Traditional doctrine considers two fundamental factors, the inertia of the creditor and the passing of time taking in consideration the existence of a right that can be exercised (Melich 2002).

To sum up, extinctive prescription is to be considered as a transformation from a state of law to a state of fact. A person who has the right to sue loses its right of action because of the pass of certain time. It is a presumption of abandonment by the potential claimant benefiting legal security (Muñoz 2012). For this reason, Savigny stated that prescription is one the most important institutions for the society (Savigny 1839/1847).

This approach has coincided with other authors considering extinctive prescription as fundamental for the order (Valle 2005), the need to put an end to uncertainty of the rights abandoned by the holder of the potential claim (Puig 1986).

Finally, regulations related to prescription need to be clear, accurate and based on a proper equilibrium between affected parties (Marin 2014). Said equilibrium shall include the determination of adequate time to have an action barred in the way that these rules do not infringe the rights of access to justice to potential claimants. These rules are to be accompanied by procedural rules that do not create restrictions on the exercise of the rights.



# Liability Cover in Marine Insurance: P&I Perspective

*Protection and Indemnity Associations also known as P&I Clubs are the result of long time development from Mutual Hull insurers in England.*

*One of the principles of these Clubs is to insure liabilities not covered by the Hull & Machinery policy*

Cover for liabilities not covered by hull and machinery policies in marine insurance is generally provided on a non-profit basis by Protection and Indemnity Associations also known as P&I Clubs which are based on mutuality.

The story behind these Clubs comes from the 18th century in England, with The Bubble Act of 1720 which prevented corporations to engage in the marine insurance business unless duly authorized by Act of the Parliament or Royal Charter thus creating a monopoly for two companies. The Bubble Act allowed individuals to insure marine risks. This facilitated the formation of the Lloyd's insurance market but also individual shipowners organized and established mutual clubs or associations to insure themselves. Members in a club had the dual function of insurer and insured. The main characteristic with the mutual system is that every member contributes for the losses of the other members (Gurses, 2015, p. 3)

It is also found that the protection associations had their origin on the mutual hull clubs organised in other ports than London as an alternative to the market at Lloyd's. The concept of these clubs evolved from hull protection to liability protection due to market changes and the decision in *De Vaux v Salvador* [1836] 4Ad&E 420 that upon the denial of the existence of cover on liabilities generated by a collision created the need of full cover against. The marine insurance hull market adopted the three fourths cover limited to the value of the ship known as the runaway clause. The remaining cover was facilitated by Protection Clubs. New Legislation passed in England in regard to the rights of recovery of surviving relatives of victims of a casualty in fatal accidents (Fatal Accidents Act, 1846), damages from vessels to port facilities (Harbour, Docks and Piers clauses Act, 1847), and injury claims by workers (Employers' Liability Act, 1830) begun to be considered in the "Protection" cover.

The "Indemnity" role was established as a need for cover in regard to liabilities to cargo interest due to case law which restricted exclusion clauses in contracts of carriage.(Anderson & de la Rue, 2011, p. 1261) Before that the carriage of goods depended fully on the terms of the contract and shipowners used to include provisions which almost denied any responsibility on the cargo.

Nowadays, the liability P&I cover for approximately 90% of the world's ocean-going tonnage comes from a number of thirteen Associations members of the International Group of Protection and Indemnity Clubs.[1](IGP&I, 2016)

Members of the International Group are The Swedish Club, UK P&I Club, Skuld, Britannia, Steamship Mutual, Gard, The London P&I Club, West of England, NORTH, Shipowners, The American Club, The Standard and Japan P&I Club.

The Britannia Steam Ship Insurance Association (The Britannia Club) features as "the oldest P&I in the market", "in business since 1855"[2].

P&I Clubs are also found in other parts of the world, as The Korea Shipowners' Mutual Protection & Indemnity Association (Korea P&I)[3], the Noord Nederlandsche P&I Club[4] (Netherlands), China Shipowners Mutual assurance association (China P&I)[5], The Turkey P&I[6]

The mutual concept is still found in Hull cover being the example the Norwegian Hull Club[7], as well for other specialized cover as the TT Club[8] oriented to logistics and containers[9], and the German Shipowners Defense Association[10] (German FD&D Club).

Insurance companies provide P&I cover as Raetsmarine[11] and other large insurers as AIG have included in their portfolio the cover of marine liability insurance[12] to catch some part of the market, and an example of a P&I Club demutualization into an insurance company is British Marine[13], occurred in 2000.(British Marine, 2016). Recently, a potential merger is being discussed between The Britannia and NORTH (Britannia, 2016).

## The incident: A Collision

As an example, Vessel "A" while approaching the port collides to the tanker vessel "B" while she was discharging her cargo of sulfuric acid. This collision generates the sinking of the tanker vessel, the leak of some of her toxic cargo into the harbour waters and damages to the quay and the cargo pipelines on the quay. Vessel "A" also report damages to her hull and spill of some bunkers.

It is also known that after the incident the vessel "A" was inspected and detained citing unseaworthiness as the cause. The insurers will need to verify with details the facts behind such decision.

If the vessel "A" is insured under a London market time policy and the unseaworthiness took place before the vessel begun the trip and this was with the privity of the assured then insurers may be able to deny liabilities if the loss is connected to such unseaworthiness state. This will also happen if in a case of a voyage policy the vessel begun her trip in an unseaworthy condition taking in consideration the common law principle of implied warranty of seaworthiness of the ship at the commencement of the voyage ratified in the English Marine Insurance Act, 1906.

While in the common law world this is an implied warranty, the approach appears different in civil law jurisdictions where non-compliance is considered as exclusion in the case of losses due to unseaworthiness. The Nordic Plan approach is towards negligent "breach of safety regulations" by the assured connected with the casualty as stated in Clauses 3-22 and 3-25.(Pavliha & Padovan, 2016)

In relation to English P&I cover "the provisions regarding seaworthiness have a role to play". Membership in a P&I Club is considered as a time policy therefore common law principles on warranties and self P&I Club rules may apply (Soyer, 2006). The updated rules for the eight P&I Clubs based in English jurisdiction, members of the International Group incorporate in said Rules all provisions of the Marine Insurance Act, 1906 and the new Insurance Act 2015 upon entry into force on 12 August 2016, but all of them exclude Sections 10 and 11 of the Insurance Act 2015. This means that a breach of a warranty discharges liability on the relevant Association from the day of the breach regardless of any remedy, and regardless if the breach is not material to the loss.

Relevant provisions are found in The UK P&I, Rule 5L, NORTH Rule 6(1),(2) (b),(c), West of England Rule 21(1)(b) (c), Britannia Class 3 Rule 3 3(5), Steamship Class 1 Rule 7 IV, London Class 5 Rule 43 43.1.1, Shipowners Rule 1, II A, B, and Standard Section A 1.5.1. and 1.5.2

The approach of Nordic P&I Associations is in relation to the conduct of the owners. Gard excludes cover when the loss is a consequence of "willful misconduct on the part of the Member, such misconduct being an act intentionally done, or deliberate omission by the Member with knowledge that the performance or omission will probably result in injury...[14]" The Swedish Club excludes cover caused by "intentional or grossly negligent acts or omissions of the Member nor for such acts or omissions which the Member knew or ought to have known would cause liabilities..." [15]

### **Potential Liabilities of the respective shipowners**

A collision is able to create a domino effect in regard to liabilities and marine insurance claims as in the case in question and an assessment of losses and liabilities is needed as well immediate actions to avert or minimize such losses or liabilities upon the obligation of sue and labour clause.

### **Liability on Collisions**

It is to consider that a collision per se does not produce a liability. Liabilities for collisions as well for allisions depend on "the finding of fault that caused or contributed to the damage incurred"(Schoenbaum, 2004, p. 757). The case in question shows that the tanker vessel "B" was on berth on process of unloading cargo at the moment when the vessel "A" stroke her.

The owners of the vessel "A" may argue that the collision was not a result of fault but "inevitable accident" which may be connected with latent machinery failure. But, If the cause of the collision is not determined then the plea of inevitable accident will not be accepted as in *The Merchant Prince* [1892] P.179 in which it was alleged that the collision was a result of the latent defect in her steering gear and consequent jamming of the wheel but the cause of the incident was finally not established. The Court of Appeals denied the inevitable accident defense taking in consideration that the cause of the accident was unknown.(McKoy, 1999)

The vessel "A" has a potential liability on the loss and damages sustained to the tanker vessel "B", her cargo, and also in respect to loss and damages to the quay as a result of the collision. The owners of the collided tanker vessel "B" while recovering her purportedly total loss from the Hull Insurer seem to be able to argue and prove inevitable accident to avoid liabilities in relation to the damages to the quay and the cargo pipelines on the quay.

In view of the vessel "A" potential liabilities in the collision with the tanker vessel those liabilities are covered by the London market Hull policies under the "running down clause" (RDC). Legal costs in "contesting liability or taking proceedings to limit liability" are also covered under said clause. The extent of the cover depends on the clause applied. This is the same for liabilities arising from contact with fixed and floating objects.

Cover for Liability on collisions or contact with fixed and floating objects ("FFOs") always depends on the H&M policy. It is to remember that P&I Clubs provide cover for liabilities not covered by the Hull Policy. Therefore if the Standard English cover for liabilities in a collision under the Hull policy is applied, it means that the Hull Insurer will pay three-fourths of said liabilities provided that the limit is 75% of the value of the insured vessel. The P&I club cover on liabilities will be the remaining portion non covered by the Hull policy. In relation to FFOs the standard London market Hull clauses provide no cover, then in this case the P&I Club will provide the cover.

But, if the contract of marine insurance follows the International Hull Clauses with the amendments to provide liability cover to four-fourths, and any liability arising from contact with FFOs then the P&I will not provide this cover. The total cover for liabilities on a collision and contact with FFOs is a specific characteristic of the Nordic Plan clauses.

The collision generates the sinking of the tanker vessel but also the loss of her cargo. The Hull clauses do not provide cover for cargo in the

insured vessel. P&I Clubs provide such cover. To avoid liability on the cargo shipowners of the tanker vessel may invoke immunity based on the Hague Visby Rules, Art. IV r2 (c) ("perils, dangers and accidents of the sea or other navigable waters"). Finally liability may be imposed on the owners of the vessel "A" if the fault in the collision is finally declared upon this vessel.

The incident may involve the loss of lives of seamen or personal injury, loss of their personal property or also the loss of wages or the surviving crew for both vessels who need to return to their home countries. Further, authorities may impose the wreck removal and immediate actions to mitigate the contamination. All of this is dully covered by the P&I Clubs.

### **Pollution**

In a report sponsored by the United States Coast Guard in July 1980 it was stated that the mixing of water with sulfuric acid causes a large amount of heat which vaporizes and forms "an acid mist in the atmosphere" which "would pose an immediate danger to anyone directly involved in the accident and, under adverse meteorological conditions, even threaten the safety of the nearby public as well". The leakage would also harm the marine life.(Tang, Wong, Munkelwitz, & Flessner, 1980)

The leak is an imminent danger to the people nearby the incident. But a potential additional pollution incident may happen if the winds send the acid mist through the city which can turn more complex if the remaining sulfuric acid in the sunken vessel tanks encounters water which can generate an explosion hazard. Potential health effects of the acid mist are irritation or chemical burns to all types of body tissues (Teck Cominco American Inc, 2003). The inhalation can produce death or long-term damage due to pulmonary edema and has been associated with cancer of the larynx or lung cancer in encounter with strong mists.(CCOHS, 2016)

Depending on the place of the incident, pollution of toxic substances as sulfuric acid may fall within the doctrine of strict liability and the "polluter pays principle". This will apply if the incident occurs in a country member of the EU according to the Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004. In this case there is no need to prove fault in order to generate a liability(European Commission, 2016). The concept of strict liability also known as no-fault liability consist that "the shipowner is liable simply because of the fact that his ship caused pollution damage"(Zhu & Zhang, 2015, p. 376)

Pollution brings immediate media attention and public concern. Authorities may be bound to initiate administrative and criminal investigations. It is to expect claims by third parties for loss or damages caused by pollution. In regard to the leak of bunker according to the Bunkers Convention[16], strict liability applies and there is direct action against the insurer.

P&I Clubs provide cover for liabilities arising from collisions with other vessels[17] and damages to property or FFOs[18], cover for liabilities regarding wreck removal[19], towage[20], salvage[21], cargo in the entered ship[22],loss or damage to property[23], any real or personal property in the entered ship, personal injury or illness, repatriation and compensation of the crew, wages[24] and pollution[25]. The Clubs provide cover as well for expenses in relation to sue and labour, legal costs[26] and fines[27].

As mentioned a collision generates multiple potential losses, damages and liabilities. Criminal charges are likely to appear when pollution incidents take place. Immediate actions to avert or minimize the losses and liabilities are required. Maritime casualties may occur in different parts of the world with different jurisdictions and law systems. The advantage of the P&I Clubs in a casualty is the development of Correspondents to assist shipowners and masters in the same place of the incident.

# Freedom of Contract in International Carriage Contracts. What about Ecuador?

The Doctrine of Freedom of Contract also known as "Laissez Faire" is the common law and civil law basis for international carriage contracts. The application of such doctrine has been limited in order to balance bargaining powers between carriers and shippers as with the Hague-Visby rules, The International Convention for the Unification of Certain Rules relating to Bills of Lading (The FIND MORE LEGAL ARTICLES Hague Rules 1924), and the amendments with the Brussels Protocol 1968, (The Visby Protocol), which were incorporated in English Statutory Law with the implementation of COGSA 1971. Ecuador is signatory to the Hague-Visby rules.

The Hague - Visby Rules provide limits to said doctrine, setting minimum standards for protection of the cargo and restrictions to the limitation of liability by carriers (any attempt to reduce the carrier's liability is consider void). But, according to The M/V Jordan II 2003] 2 Lloyd's Rep. 319 it is possible to reallocate the risks by agreement in the process of loading and unloading of the cargo. This is also considered in the judgment in Pyrene v Scindia Navigation Co [1954] 2 QB 402 : "nothing in the Hague-Visby Rules took away the freedom of contractual parties to allocate responsibility for loading and unloading the cargo".

As the Rules are considered only to set up minimum standards, they are not to be applied in every situation. This is the case of cargo loaded on deck. When cargo on deck is stated in the B/L and so transported, the Rules do not apply. Parties are free to agree their own terms. They can also agree that the HVR will govern the contract of carriage as if the receipt was a bill of lading, or that the rules are going to be applied for the carriage. In the first case, the Rules will prevail. In the second case, any special provision that does not act in conformity with the rules will prevail. This is because the rules are considered part of the contract (contractual force, non statutory force)

Contracts of carriage of live animals are also excluded from these rules. Parties are free to agree in their own terms.

Other examples, in which according to the HV rules the doctrine of freedom of contract prevails, are:

1. Combined contract of carriage. This is the case of contracts of carriage from/to any of the countries members of the Andean Community (Ecuador, Colombia, Peru, Bolivia) the Multimodal transportation Regulations apply and they set specific limits to the responsibility of the carrier and a different time bar for claims (9 months unless different agreed)
2. Charterparties. The Rules expressly excludes these contracts.
3. Bills of Lading under charterparties, when such bills remain in the hands of the charterer.

## The Ecuador Consumers Act

It is to consider Ecuador consumers Act in specific situations. This Act states that every service is submitted to its regulations with the exception of those transactions involving commercial purposes. Therefore, as is usual in international carriage contracts, when a contract of carriage involves an international sales contract then the consumer's law will not apply. Again if the goods are carried with the intention to be sold then The Consumers Act does not apply either.



But, if a contract of carriage of goods is executed by a person who will use those goods for his own then The Consumers Act may apply. An example of this is when an individual send his personal property to the US using carriage maritime services. This property is not to be sold, and is not for commercial purposes then the Ecuador Consumers Act applies for the carriage service. When this Act applies it means that there will be certainly a new scenario.

The first principle is the "In Dubio Pro Consumer". Any doubt in the interpretation or application of the Act should be applied in favor of the consumers.

The Ecuador Consumers Act considers not written every clause or statements in the contract in which the length of the characters are lower than 10 points. This regulation will have invalid all the clauses in the Bills of Lading in consumer cases due that in most of the cases the B/Ls forms include all the clauses in the reverse in very small characters inferior to 10 points. The Act also states that all the clauses should be written in official language (the Act says Spanish, anyway our Constitutions recognizes other indigenous languages). It is customary that the clauses are in English.

In cases in which there is a claim based on a breach to the Act joint liability is stated with the entities involved in the service. Jurisdiction for Consumers claims it set with criminal judges (not being a criminal case) in a special standardized short time process and there is option to appeal. Time bar to produce claims under the Act is 1 year.



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Visit to King & Capital lawfirm in Beijing



Visit to JLL offices in Beijing



Lecture on marine insurance, University Umed, Machala



UTEG University in Guayaquil, lecture on marine insurance



Jessica Cisneros, Hugo Cisneros and Leonidas Villagran



Dr. Hector Villagran and sons



Visit to Gard in Oslo



The Guayaquil team of VL attorneys



Visit to Alandia Marine in Helsinki



Meeting with Deloitte in Quito

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