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The International Comparative Legal Guide to:

Shipping Law 2015

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A practical cross-border insight into shipping law

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Shipping Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of shipping laws and regulations.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting shipping law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in shipping laws and regulations in 41 jurisdictions.

All chapters are written by leading shipping lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Ed Mills-Webb of Clyde & Co LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 10

Colombia

FRANCO & ABOGADOS ASOCIADOS

Javier Franco-Zárate

1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

(i) Collision

Colombia is not a party to the 1910 Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels. However, the 1972 Convention on the International Regulation for Preventing Collisions at Sea (COLREG 72) is in force at the domestic level. It is worth noting that the Colombian Commercial Code (CC) has also incorporated some provisions regarding collisions (articles 1531 to 1539) differentiating between i) those caused due to circumstances beyond control (i.e. the so-called *force majeure* events), ii) those occurring as a consequence of a negligent act of one of the ships involved, and iii) those in which there is a both-to-blame collision.

(ii) Pollution

Both the Convention on Civil Liability for Oil Pollution Damage 1992 CLC and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 FUND are in force in the country. Decree 1875 of 1979 also has a definition of marine pollution, and demands insurance policies whenever a vessel is involved in exploration, exploitation or transport of hydrocarbons or other polluting substances. On the other hand, it must be highlighted that regarding offshore activities there are also some recent important provisions (from the preventive perspective) contained in Resolution 674 of 2012 of DIMAR (Colombian National Maritime Authority). Those provisions aim to request, among others, the adoption of security measures and risk mitigation plans.

(iii) Salvage / general average

The 1989 Salvage Convention is not in force in Colombia. However there are some specific provisions addressing this topic at the domestic level in the CC, namely articles 1545 *et seq*.

(iv) Wreck removal

As per article 5 of Resolution 071 of 1997 a shipowner, a ship's agent and/or the vessel's captain have the obligation to duly signal and ultimately remove a shipwreck. If they do not act accordingly then the removal can be ordered (as per Resolution 071 of 1997) by the *Superintendencia de Puertos y Transportes* (National Port and Transport Superintendency) and costs of said operation could be recoverable against those originally requested by the law to do so.

(v) Limitation of liability

Colombia is neither a party to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) or to the 1996 Protocol. However, article 1481 of the CC states that there are some specific claims (thereby described) in respect of which the shipowner could limit his liability up to the value of his vessel, her accessories and the freight involved.

(vi) The limitation fund

There is no additional request for the constitution of a limitation fund.

1.2 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

As per article 25 *et seq.* of Decree 2324 of 1984 the respective Harbour Master of the relevant area in which a maritime casualty has occurred (i.e. wrecks, groundings, collisions, marine pollution incidents, among others, as described in article 26 of Decree 2324 of 1984) is supposed to initiate investigation procedures. Although the Harbour Master is not strictly speaking a judge in Colombia, said procedure is supposed to determine the liability of the persons/ships involved in the maritime casualty (article 48 Decree 2324). They will also decide whether the conduct of the parties involved could have constituted a violation of local merchant shipping regulations (that could also be sanctioned with, among others, a fine as per articles 48, 80 Decree 2324). The decision of the Harbour Master on the merits could be subject to appeal before DIMAR.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

Colombia has not yet ratified any of the Conventions in force at the international level regarding cargo claims (namely, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules). Neither has the country yet ratified the Rotterdam Rules. However, there are some local provisions contained in the CC (articles 1578-1665) aiming to reproduce the Hague-Visby Rules scheme to a certain extent and with some important differences (see the answer to question 2.2 below).

2.2 What are the key principles applicable to cargo claims brought against the carrier?

As per article 1609 of the CC, the carrier will have similar defences to those contained in article 4 rule 2 of the Hague-Visby Rules. In fact, local legislators aimed to adopt The Hague Visby scheme by making an adaptation of it to the local legal usage. It could be highlighted that, under the domestic provisions (article 1644 CC), if there were no declared value of the cargo, the limit of liability would be the value the cargo had at the port of origin. However, the Colombian Supreme Court (decision of 8 Sept. 2011 L.J. William Namén) has ruled in a recent decision – and in a clear departure from what would happen internationally under the Rules – that under the domestic provisions the carrier could freely agree to limit his liability in a different manner, i.e. up to a sum agreed between the parties (even below to the one resulting from applying the local provision, as long a it does not constitute a so-called derisory limitation).

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

According to article 1615 CC the shipper guarantees the precision of the information regarding marks, number, quantity, quality, condition and weight of the cargo as he so declares to the carrier at the moment of shipment. Additionally, as per article 1619 CC whenever the shipper – knowingly – has made an inexact declaration in relation to the nature or value of the cargo, the carrier will be exempted from all liability as a consequence. In any case, as per article 1623 CC, the shipper is only accountable for damages suffered by the carrier or the vessel whenever said damages arise out of his own fault (or that of his agents).

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Colombia is neither a party to the 1974 Athens Convention on the Carriage of Passengers and their Luggage by Sea nor to the 2002 Protocol. However there are some local provisions in articles 1585 to 1596 of the CC.

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

As in many other jurisdictions the usual method to obtain security for a maritime claim against a vessel owner is through a ship arrest. According to Decision 487 of 2000 of the Andean Community, (a regional international instrument of superior hierarchy inspired in the International Convention on the Arrests of Ships 1999) a ship could be arrested in Colombia whenever there is a "maritime credit". Article 1 of Decision 487 expressly states what could constitute said type of credit for the purposes of the statute. In Colombia an arrest of a vessel under Decision 487 is to be carried out exclusively by a civil judge. According to article 40 of Decision 487 the domestic local procedure law is to be applicable to the arrest petition.

On the other hand, article 72 of Decree 2324 of 1984 states that (once an investigation has been initiated in cases of maritime casualties) a harbour master could request security to be provided by the ship(s) involved in the incident to serve different purposes, namely, to cover eventual fines, damages, and proceedings expenses.

4.2 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

As per article 41 of Decision 487 of 2000, in general terms, an arrest should only proceed to obtain security for a maritime claim (i.e. whenever said maritime claim is supposed to be a "maritime credit" as defined by the Decision) against a vessel owner or a demise charterer (unless there is a privileged credit as described in article 22 of Decision 487). Other types of credits or credits against different persons should follow the traditional rules of domestic procedure to obtain security (which could vary depending on the nature and characteristics of the specific claim).

On the other hand, as per article 1624 CC sea carriers are granted a right of lien over cargo (or with the possibility to ask a judge to order the cargo to be put in a warehouse) in cases where freight and other charges caused by the delay of payment are not yet paid (and until those charges are effectively paid).

4.3 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

As per article 45 of Decision 487, parties can initially agree on the sort of security to be provided (i.e. an LOU, if it is accepted by the parties involved). However, if no agreement is finally reached between the parties, then the Tribunal will determine the nature and amount of the security. Although it could be debatable, the likelihood is that, in general terms, either a proper bank guarantee or insurance policy (that meet certain requirements) would be acceptable in the majority of cases (due to a reference made in article 40 of Decision 487 to the application of domestic law). Different rules could apply depending upon whether the arrest has already been served/made effective.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

In cases of maritime casualties the Harbour Master of the respective area will initiate procedures within the following day (or so, in practice) of the occurrence (as ordered by article 35 of Decree 2324 of 1984). As per his opening procedure order (article 36 of Decree 2324 of 1984) he will *ex officio* request evidence to be brought to the investigation. In fact, as per article 36 of Decree 2324 of 1984 the Harbour Master will require the captain(s) (and usually other crewmembers of the vessel(s) involved in the incident) to declare within the hearings (to be held in the following days). He will usually appoint a maritime expert (or a captain's tribunal, as per article 28 of Decree 2324, depending on the nature and complexity of the situation) to have expert advice/report on operational and/or technical matters.

Once the first hearing has started, parties to the investigation could request the Harbour Master to secure evidence and/or to request other persons to provide documents/materials that could be important for the investigation (article 37.5. of Decree 2324 of 1984). Parties could also submit documents and other evidence they consider important and could require the Harbour Master to call third persons to declare (or to be granted the condition of a party) within the investigation.

On the other hand, contractual situations (i.e. cargo claims) are usually dealt with by regular civil judges (unless an arbitration agreement or other sort of ADR mechanism was put in place by the parties). Thus, the general Colombian procedure will be *prima facie* applicable to them. It is worth noting that as per article 590.c of the Colombian General Procedure Code nothing precludes a judge from taking any precautionary measure he deems appropriate whenever it could be found "*(...) it is reasonable for the protection of the right in question, to prevent his infringement or to prevent the consequences, to prevent damages, to put a stop to those caused or to ensure the effectiveness of the claim*". This is the so-called "innominate" precautionary measure. It is worth noting that said provision is supposed to be also available to Harbour Masters in investigations carried out in cases of maritime casualties due to a reference made by Decree 2324 to domestic general procedure law.

5.2 What are the general disclosure obligations in court proceedings?

Please refer to the answer to question 5.1. It must be said that in Colombia there is no specific disclosure duty imposed on the parties (and there is no specific discovery procedure, as known in Anglo Saxon jurisdictions). However, in procedures before regular judges (i.e. cargo claims cases) parties usually could request anticipated statements and/or interrogatories, and/or a documental exhibition to be carried out (i.e. before a proper trial has been initiated) if needed. In any case, parties should conduct procedures in good faith, and both the judge and the Harbour Master will have powers to request evidence *ex officio*.

6 Procedure

6.1 Describe the typical procedure and time-scale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

In cases of maritime accidents the procedure will be the one described in Decree 2324 of 1984. Accordingly the Harbour Master of the respective area will initiate investigation procedures (*ex officio* or due to notice submitted to him) within a day or so from the moment he knows of the occurrence. He will then issue an opening procedure order requesting captain(s) and other crewmembers of the vessel(s) involved to declare within the hearing to be held in the following days. As per article 72 of Decree 2324 the Harbour Master could also require security to be provided as explained above (see the answer to question 4.1).

Once the first hearing has started parties could request evidence to be brought to the investigation. An expert (or a Captains Tribunal) is to be appointed by the Harbour Master to assist him by submitting a report regarding technical or operational matters. After completion of the hearings then parties are to be requested to submit their closing arguments and once this stage is finished the Harbour Master will decide on the merits. His decision could be subject to appeal before DIMAR.

On the other hand, civil judges will regularly deal with contractual matters (such as cargo claims) whenever Colombian law is to be applicable to such issues according to the nature and or characteristics of the particular claim. They will also deal with arrest petitions under Decision 487 of 2000 as explained above (see the answer to question 4.1). Thus, regular Colombian law on procedure would be applicable to those types of claims (please see the answers to questions 4.1 and 5.1).

Whenever the parties have entered into an agreement regarding the application of an ADR mechanism i.e. arbitration (or if they so decide at the relevant time) then, as far as the tribunal is to have its seat in Colombia (which is not a very usual situation for this type of claim within our jurisdiction) the rules contained in Law 1563 of 2012 (National and International Arbitration Statute) should apply.

6.2 Highlight any notable pros and cons related to Colombia that any potential party should bear in mind?

Colombia is not a traditional maritime nation. As explained, Harbour Masters deal with maritime casualties occurring in Colombian waters and civil judges deal mainly with contractual matters and arrest procedures. Despite that, it must be said that Colombia still lacks a proper maritime jurisdiction to deal with maritime issues in general.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

Recognition of foreign judgments in Colombia is dealt with in Articles 693 *et seq.* of the Colombian Code of Civil Procedure (CPC). According to these regulations, the so-called exequatur petition is to be submitted to the Colombian Supreme Court of Justice (article 695 CPC) unless there is an international treaty requiring otherwise. The affected party should be cited to participate within proceedings. The petition should contain the request of evidence as deemed appropriate. The claim's admission court order will be notified to the affected party and to the State attorney for civil matters, and they both will have five days to request evidence. Once evidence is provided both parties will have five days to present their respective closing arguments. After that, the Court will decide the exequatur request. If enforcement is required, then the competent judge will be determined according to the general local rules of procedural law on the matter.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

Colombia is a party to both the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration. The local procedure for recognition of foreign awards in Colombia (that has followed the guidelines of the New York Convention) is described in article 111 *et seq.* of Law 1563 of 2012 (National and International Arbitration Statute). According to these regulations, a petition for

recognition is to be submitted to the Colombian Supreme Court of Justice. The award must be submitted in original or copy form, and if not in Spanish, a proper translation should be carried out.

Awards granted in international arbitration proceedings carried out in Colombia are considered national awards, and thus, they will not require further recognition (unless the annulation action has been waived).

If the tribunal has its seat in a different jurisdiction then procedure for recognition is the one described in article 115 of Law 1563. The procedure can be summarised as follows: a petition should be filed accompanied with the requested documents (those described in article 111). If the documentation is completed the petition will be admitted and parties will have 10 days to pronounce themselves regarding the admission. Once this period has elapsed then the judicial body will have an additional 20 days to decide on the recognition of the award.

If further enforcement of the award (once it has been recognised) is required, then the competent judge will be determined according to the general local rules of procedural law governing the matter.

8 Updates and Developments

8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

As per Decree 2682 of 2014 the Colombian government has allowed the possibility to declare custom-free zones in maritime territory. Accordingly, those zones will have special tax treatment allowing the participants (i.e. the so-called "industrial users") to have tax benefits that will not regularly apply to those activities in Colombian territory. Said regime is supposed to be an incentive for those areas to be developed in the country and to bring foreign investment to be channelled to further develop said offshore activities in our jurisdiction.

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