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DO PRESCRIPTION TERMS IN THE ECUADORIAN LAW OF MARINE COLLISION PROVIDE FAIR ACCESS TO JUSTICE?

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Abstract

The issue addressed in this study is prescription terms in collision law of Ecuador and the analysis of its development and current compliance with the constitutional right of access to justice. Prescription terms in the Ecuador law of collision are based on the first French Code of Commerce enacted by Napoleon. With recent developments in the Ecuador legislation there are clear symptoms of a latent problem which affects the right to access to justice to obtain adequate remedies for those shipowners affected by a collision.

Resumen

La temática materia de este estudio es en relación a los términos de prescripción en el derecho sobre el abordaje en el Ecuador y el análisis de su desarrollo y actual armonía con el derecho constitucional de acceso a la justicia. Las disposiciones actuales del derecho sobre abordaje están inspiradas por el Código de Comercio Francés instituido por Napoleón. Con recientes modificaciones en las leyes de Ecuador se presentan claros síntomas que hay un problema latente que afecta el derecho de acceso a la justicia para obtener soluciones adecuadas para aquellos armadores afectados por un abordaje.

Key words:
Collision Law, Ecuador, Prescription, Statute of Limitations, maritime law

Palabras claves:
Abordaje, colisión entre naves, prescripción, derecho marítimo

INTRODUCTION

In August 2017 during a hearing in a Harbor Master investigation case regarding a collision incident, Mr. John Castro[1], a very well-known Ecuadorian maritime attorney and former master mariner recalled that collisions happen due to diverse causes, that no master sails with the aim of such incident, and that even when the master, the pilot or the crew execute different maneuvers to impede collisions the vessel is like an individual, sometimes is not possible to predict what is going to happen. "*That is why in a collision incident fortuity is to be presumed according to our laws*", he said.[2]

The argument exposed by Mr. Castro brought the total attention of the Tribunal. He was alleging that the collision incident was fortuitous and there was nobody to blame. This was understandable. He was representing the owners of a Liberian container vessel that in October 2016 while navigating in a narrow canal in territorial waters of Guayaquil, Ecuador, in normal weather conditions, collided to an Ecuadorian fishing vessel that was in mooring operations by the port. The fishing vessel was seriously damaged with a loss of approximately US$500,000, while the container vessel had almost no losses.

Notably, the purported strategy of Mr. Castro of having no vessel to be blamed considered the universal principle of *force majeure* in a collision valid under Ecuadorian law. In a collision caused by fortuity every vessel bears their own damages. Therefore, the pretension was that the owners of the fishing vessel will bear their own loss of 500,000 dollars while the owners of the container vessel will have to assume almost nothing.

The allegation of fortuity in the collision was based in that the container vessel while navigating in the narrow canal suffered the effects of low water, with the phenomenon known as bank effect. The maneuvers done to have the vessel scape from this situation made the vessel have contact with the fishing vessel causing damages.

[1] This is a fictitious name

[2] This is not a quotation. It Is a fictitious narrative based in a real event in a hearing. Besides, the prestigious maritime attorney and former master marine exists and he mentioned that collisions happen and sometimes with no explanation. Besides, that was the strategy regarding prescription

Consequently, the attorney for the fishing vessel strongly opposed such allegation and remarked that the maneuvers by the master and the pilot were inappropriate. He relied on experts reports and insisted that such negligent maneuvers were the proximate cause of the collision to the fishing vessel, and that the losses need to be compensated by the wrongdoer. For this reason, he asked the panel to declare fault on the master and pilot of the container vessel.

Finally, the Harbor Master investigation panel –known in Ecuador as Jury of Captains- decided that the fault was on the container vessel. They were not convinced by the experienced words from Mr. Castro. The approach by the Jury demonstrated what professor Thomas Schoenbaum has mentioned, that with the actual advanced techniques of investigation it is now less complicated to determine fault in a collision incident (Schoenbaum 2004). The attorney for the fishing vessel was very happy. He anticipated that with the decision the civil demand will be filed.

Surprisedly, Mr. Castro was also very happy. He said that this decision was expected, it was reasonable and there was no reason to appeal.

Moreover, he called his clients by phone and informed them about the decision and that a civil lawsuit was expected to be filed soon by the owners of the fishing vessel. He said that as soon this demand is filed he will oppose the complaint alleging prescription.

He explained them that according to the Ecuador law of collision there were two requirements to comply by claimants. First, the duty of the master was to protest in twenty-four hours, which was duly complied; and second, following the protest a lawsuit was to be filed in thirty days after such protest was notified. This second requirement was not complied on time by the shipowner of the fishing vessel, and therefore actions are to be considered extinguished upon a defense on prescription.

The owners of the container vessel seemed to be surprised. They expected that the prescription time was two years from the casualty as stated in the Brussels Collision Convention 1910. Mr. Castro just told them that Ecuador is not party of such convention.

As has been noted, Mr. Castro knew beforehand that the civil case was time barred. His appearance to the Jury of Captains was only part of his strategy. It transpires that the attorney for the fishing vessel was not duly informed about this prescription term. This is not so strange, these

provisions are almost hidden in a specific chapter regarding prescription related to maritime commerce in our current Code of Commerce 1960. It is also true that these provisions are not new, they exist in our laws since the 19th century.

Mr. Castro predicted the future. The owners of the fishing vessel will file a lawsuit claiming damages to the owners of the container vessel. The main evidence will be the declaration on fault recently issued by the Jury of Captains.

Subsequently, said complaint will need to be notified. As the defendant is a foreign company summons will have to be executed overseas through letters rogatory proceedings by the ministries of foreign affairs of each country. After this, it is expected that Mr. Castro will raise the defense of prescription. The judge more likely will have to decide based on said strict rule.

The questions are if the attorney of the fishing vessel would have known about such provisions on prescription could he be able to evade such defense? The thirty days prescription term is a reasonable time? It is incontestable that this prescription term has been valid for more than a century but it is also true that the legal scenario has changed. These changes have been more intensive since 2008 with the enactment of a new constitution. Following the constitution new statutory law has been approved. The new set of laws have impacted the way how claims are to be handled.

The issue raises also questions on constitutionality. A short and non-reasonable prescription term can be considered unconstitutional? The owners of the fishing vessel are facing an unfair situation which prevents them to recover their losses and therefore violates their rights of access to justice?

Marine incidents can happen at any moment, at any jurisdiction and when they occur shipowners, masters and insurers face the uncertainty of what the law is in determined territory. This is more emphatic in relation to collisions under jurisdiction of countries that are not parties to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910 “The Brussels Collision Convention”. Ecuador is one of those countries nonparties to the Convention. Certainty in what is the law appears crucial.

Therefore, the objective of this research is to determine if the law of Ecuador provides fair access to justice to parties involved in a collision incident taking in consideration extinctive prescription times.

The study will be illustrated with the analysis of the constitutional right of access to justice, including judgments by the Constitutional Court of Ecuador as well by other foreign courts. Relevant statutory law and caselaw in relation to prescription and collisions will be addressed including comparative law. Provisions in the new Ecuador Constitution 2008 and other statutes that have impacted the way of handling claims in the judiciary will be mentioned.

The research will allow to identify problems with substantive and procedural law and to suggest potential solutions.

1. MARITIME LAW IN ECUADOR

This is a summary of the maritime law regime in Ecuador with a historic analysis will lead to verify the sources and the strong influence of 19th century Spanish and French laws in South American countries including Ecuador. This influence from the old laws prevails until today, even when Spain and France have introduced reforms to adapt their maritime legislation to international principles. It will also show the legal scenario by which maritime law in Ecuador is surrounded and provides impact on the exercise of rights as in a collision incident.

1.1 General Overview

Ecuador is a civil law country traditionally based on statute. The new Constitution 2008 brought a fundamental exception to this rule. Art. 435 paragraphs 1, 6 and 10 allowed the Constitutional Court of Ecuador to issue jurisprudence to be binding generally. There is also a provision in Art. 185 of the Constitution that entitles the National Court to adopt a binding rule of jurisprudence in case of repeated similar opinions in determined matters (Constitución del Ecuador 2008).

Maritime law in Ecuador has been traditionally regulated according to provisions included in a Code of Commerce and under international conventions in which Ecuador is party.[3]

The Code of Commerce is a compendium 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 in movement 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 in 30 August 1821 had 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 in 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

[3] A list of International conventions that Ecuador is party as well as national statute related to maritime law can be found in Appendix A: *Legislation on maritime law in Ecuador*

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).

On the other hand, as a regional intention to unify the law, several South American countries, signed in 1928 the 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).

Besides, in 1960 the Ecuador Congress approved the Code of Maritime Police. This is a body of laws that confers judging authority to the Harbor Master and the Jury of Captains. The Harbor Master is an officer of the Ecuador Navy while the Jury of Captains is composed of a panel of five members: the Harbor 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 Harbor Master. (Código de Policía Marítima 1960)

The Code of Maritime Police in Section II concedes to the Harbor Master jurisdiction to decide minor penal offenses 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 Harbor Master has no authority to decide. Penalties can range from fines to detention.

In addition, the Code states in Art. 22 that cases involving ocean-going ships or the death or disappearance of a person needs 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 Harbor Master under request by the Ministry of Defence, and the Jury of Captains is composed by individuals not members of the Judiciary.

Despite, Harbor 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 revisions are sent to the National Court of Justice with the outcome of different criteria from said Court. This has impacted appeals and revisions 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 specialised 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)

1.2 Overview of Collision Law in Ecuador

Ecuador is party from 2012 to the United Nations Convention on the Law of the Sea (UNCLOS). This convention includes provisions in regard to collisions on the high seas, determining that in regard to penal or disciplinary matters jurisdiction is subject to the flag State, or the State in which the individual to be investigated is a national. The Convention does not include provisions regarding civil liability nor prescription in collisions. (UNCLOS 1982) .

Besides, the Bustamante Code includes several provisions regarding collisions but only related to jurisdiction. Moreover, its provisions on prescription are subject to local law. The problem with this Code is that it is not valid in all what opposes to the Constitution and local law, as it was the reserve in the ratification process from Ecuador (Bustamante Code 1928) .

Basically, current principles of liability in a collision remain the same in Ecuador since the 19th century, as with the first Code of Commerce. Moreover, as in the Spanish Code, the Third Book of the Ecuador Code of Commerce 1882 was dedicated to maritime commerce and continues as it. Although, one differentiation with the old Spanish Code was the inclusion of a specific section in relation to collision law with the general principles of liabilities (Código de Comercio 1882), similar to the French Code of Commerce 1807 sourced by the French Ordonnance de la Marine 1681 (Tetley 2002).

The Ecuador Code of Commerce 1882 stated in Art. 766 as a general rule that if the collision was of fortuity nature or by fault of both masters or their crew then each vessel had to bear their damages. The exception to this rule was introduced in Art. 769 which imposed to sailing ships to pay half of the damages if the collision was to an adequately moored vessel not able to impede the incident (Código de Comercio 1882).

Moreover, if the collision was the result of negligence of one of the masters then he was ought to pay all the damages, and if it was not possible to identify the guilty party then each of the vessels had to pay the half of the required repairs under estimation by experts.

In addition, under the 1882 Code all collisions were to be presumed that they come from fortuity, but liability on the collision was to be considered when the vessel was not properly moored, if encountering with other vessel no precaution was taken to impede the collision, if the vessel did not have proper lights at night, etc.

Besides, for claims purposes, under Art. 913, the Ecuador Code of Commerce 1882 introduced that in case of partial loss of a vessel it was the duty of the master to follow two requirements: First, to protest in twenty-four hours, or when the master was able to protest. Second, following the protest a lawsuit should be brought in a term of thirty days after the notification of such protest. If any of the requirements of this rule is not complied accordingly then the action was to be considered extinguished (Código de Comercio 1882). These are terms still remaining in the current Code of Commerce of Ecuador.

In comparison, the Code of Commerce of Chile 1865 adopted a prescription term of two months (Código de Comercio de Chile 1865), purportedly following the provisions related to prescription in the Spanish Code of Commerce 1829, Art. 1000 which stated that protest will be without effect if no judiciary demand is raised in two months. (Código de Comercio de España 1829). Ecuador approach was near to the one-month term stated in the French Code of Commerce 1882. The only difference is that while the French stated one month, the Ecuador Code provided for 30 days. (Code de Commerce 1807)

As a consequence of the liberal revolution, a new Code of Commerce was enacted in 1906 by President Eloy Alfaro. The third book of this Code was again dedicated to maritime commerce. This Code maintained same provisions regarding collision law and prescription terms. (Código de Comercio, 1906)

Finally, since 1960 Ecuador has its current Code of Commerce which again maintains the principles of collision law and its terms on prescription as in the first Code of Commerce, inspired by the French legislation from the Napoleonic era.

In contrast, the new Code of Commerce 1960 did not consider the new international principles on collision law already adopted by several countries including France and Spain under the Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels "*The Brussels Collision Convention 1910*", signed in Brussels in 23 September 1910. France ratified this convention in 1913 and Spain acceded in 1923. This is many years before Ecuador approved said Code of Commerce maintaining old principles of collision law (CMI 2015).

Different from the old rules, the Convention provides several new rules. As examples: first, presumptions on fault are abolished; second, it excludes the equal apportionment of liabilities in a

both to blame collision and imposes a regime of liabilities in direct relation to the degree of fault in the collision; third, prescription time for recovery of damages is two years from the incident; and, fourth, the protest formality is no longer a condition for recovery (The Brussels Collision Convention 1910).

2. THE CONSTITUTION OF ECUADOR

The dilemma in this research is to analyze if prescription terms in the law of collision of Ecuador comply with the principles of access to justice accepted by the Ecuador Constitution. For that purpose, this chapter explains the current constitutional system in Ecuador as a constitutional state of rights and justice.

As a result, there is a special focus in two characteristics: first, the direct application of the fundamental rights and, second, the source of constitutional law beyond the formal text of the constitution which entitles constitutional judges to observe also foreign judgments and foreign constitutions as source or reference for their decisions.

These principles are to be connected directly to the doctrine of access to justice, a universal human right and a constitutional guarantee under Ecuador law.

2.1 A Constitutional State of rights and justice

The Constitution 2008 states as a principle in Art. 1 that Ecuador is a Constitutional State of rights and justice. This new concept for the structure of the state brings a new environment. One characteristic in a constitutional state of rights is that every person is submitted to the constitutional rights. The judges are entitled to the direct application of the Constitution in matters of fundamental rights. Consequently, there is no requirement of a law for the defense of these rights (Zavala 2010).

In addition, in a constitutional state of rights the characteristic is that sources of law are diversified beyond the statute. A principle of *legal plurality* is adopted including caselaw from local constitutional courts to be considered as national precedents, judgments from international

courts, public policies in form of a law, indigenous communities law and judgments, and morality for the interpretation of legal texts (Avila 2009).

As a consequence, the Constitution 2008 created the *Constitutional Court* to act as the binding instance of interpretation of the Constitution and human rights treaties, to decide about the constitutionality of statutory law or general regulations by the administration, and to issue precedents regarding constitutional actions among other functions as stated in Art. 436. (Constitución del Ecuador 2008).

2.2 Sources of Constitutional Law

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 mentioned 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.

Human Rights International Treaties in which Ecuador is member 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.

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).

Moreover, it is a fact that the Ecuador Constitutional Court has based many of its decisions in previous judgments by foreign courts, as those from Colombia, Spain and Germany.

2.3 Foreign Judgments as source of Constitutional law in Ecuador

As has been noted, the constitutional block of Ecuador entitles the Constitutional Court to justify its decisions based on jurisprudence from other courts, and doctrines in relation to the law in other jurisdictions. These 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[4] (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[5] 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).

[4] The Constitutional Court of Ecuador was in reference to the decision of the Supreme Court of Colombia, Exp. No.11001-0203-000-2004-00729-01, 29 August 2008.
[5] The decision from the Constitutional Tribunal of Spain is dated 17 March 1997, number RTC 1997-54.

The application of the available sources related to the constitutional law in Ecuador is fundamental for this research and its conclusions.

3. COLLISION LAW

The focus of this study is regarding two institutions in law. The first is the law of collision in relation to maritime law which main source is the Code of Commerce. It has been stated that provisions on collision law in the Ecuador Code are directly related to the French code, but to understand collision law its origins are deeper. Initial regulations are purported to come from the 9th century, adopted by Roman law and derived to common law and finally unified by both the civil and common law by international conventions as the Brussels Collision Convention 1911, the COLREGs 1972 among other conventions.

The term collision comes from the Latin *collisio*, and in the marine world the term is applied for all impacts between vessels that causes damages. When a vessel strikes with another object, as a floating or fixed object (FFO), it is regarded as a contact or also known technically as *allision* (Healy and Sweeney 1998).

The Latin origin of the term in used in the Spanish language as *colisión*. The Spanish meaning is a strike between objects, but for maritime purposes the specific term for a striking or contact between vessels follows the French word of *abordage* written the same in ancient Spanish but now is *abordaje* (Spanish Royal Academy 2017).

Therefore, collision is related to a direct and violent contact between vessels in the sea or inland waters which causes damages to the property or the people (Quiñones 2015). It has been also ruled that collision involves incidents even when no contact has occurred as when a vessel proceeds at non-authorized speed causing damages to other vessel (Mahnood 2015).

3.1 Origins of Collision law

The Historical origin of collision law is uncertain. It appears to be initiated with the *Lex Rhodia*[6] *around 800 B.C.* mentioned by The Roman law under the Justinian Digest. It is also to

[6] The Lex Rhodia also known as The Rhodian Sea Law and the maritime code of the Eastern Roman Empire

consider the Roles of Oleron, enacted by Eleanor of Aquitaine, who was Queen of France and England. These rules dated from 1160, (Schoenbaum 2004) influenced the English law of collision. During the 14th century these rules were part of the law of Bristol and London, the main seaports in England (Staring 1957).

Indeed, the Roles of Oleron brought the first known doctrine of division of damages in a collision. When a vessel that is not well steered strikes another which is at anchor both vessels were to divide damages in common, divided half by half, provided the captain of the colliding vessel should swear on the Gospel that the incident was not on willing. (Staring 1957)

3.2 The Ordonnance de la Marine 1681 and the French Code of Commerce 1807

In 1681 the King Louis XIV of France adopted the Ordonnance de la Marine.[7] It was considered the most important of the maritime codes adopted in Europe in that century. It is the source of maritime provisions in the first French Code of Commerce 1807 (Healy y Sweeney 1998) enacted by Napoleon during *the golden age of civilian codifications* (Tetley 2002).

The French Code of Commerce dedicated its entire chapter two to maritime commerce[8] (Klimaszewska 2012). Art. 407 of said Code lays out the doctrine of divided damages in a collision stating these rules: first, if the incident is purely accidental, the suffering vessel bears the damage; second, if the fault comes from one Master then the damage is paid by the one who occasioned it; and, third, if it is uncertain which of the two vessels is in fault, the damage is to be repaired by those two vessels, in equal proportion.

Moreover, at the end of the second book, per Arts. 435 and 436 of the French Code in case of actions for compensations caused by collisions, there is a requirement of a protest within twenty-four hours and the duty to file lawsuit within a month. Failure to comply is considered that the actions are inadmissible:

[7] A complete French text of the Ordonnance de la Marine 1681 can be found at https://archive.org/stream/OrdonnanceDeLaMarineDuMoisDaoust1681/Ordonnance%20de%20la%20marine%2C%20du%20mois%20d%27aoust%201681#page/n0/mode/2up

[8] English and French versions of the French Code of Commerce 1807 can be found at https://play.google.com/store/books/details?id=qSo2AAAAIAAJ&rdid=book-qSo2AAAAIAAJ&rdot=1

"*Art. 435. Sont non recevables:*

... Toutes actions en indemnité pour dommages causés par l´ abordage dan un lieu oú le capitaine a pu agir, si´l n´a point fait de réclamation.

"Art. 436. *Ces protestations et reclamations son nulls, si ells ne sont faites et signifies dans les vingt-quatre heures, et si dans le mois de leur date, ells ne sont suivies d`une demande en justice*." (Code de Commerce 1807)[9]

3.3 Collision law in the common law

The English Admiralty Court purportedly had its origins in 1360. Its records are only available from 1530. Very few collision cases are reported until 1789 with *The Petersfield & The Judith Randolph* case. (Healy and Sweeney 1998).

Anyway, the judgement in the case *Woodrop-Sims* from 1815 is one of the most cited decisions stating the basic rules of liabilities in a collision: first, in case there is no blame from either party then each party bears their own losses, as when the collision is a result of a fortuity; second, if both vessels are to blame, damages are apportioned between both parties; third, when the collision is the result of the blame of the suffering party there is no right of recovery; and, fourth, when the other party is alone to blame then there is right to full recovery by the damaged vessel. (Dodson 1815-1822)

Nevertheless, in regard to both to blame collisions the British Parliament in 1911 abolished the principle of division of damages and adopted the *comparative fault rule* as stated in the Brussels Collision Convention (Tetley 2001). The United States Supreme Court with the case *United States v Reliable Transfer Co*. (United States v. Reliable Transfer Company, Inc. 1975) submitted to this new universal doctrine same rule, meaning that liability for damages in a collision is to be allocated proportionately to the degree of the fault. The equal proportion is only applied when is not possible

[9] Translation using google translate:
Art. 435. The following are inadmissible:
... Any action for compensation for damage caused by the collision in a place where the master may have acted, if he has not made a claim.
"Art. 436. Such protests and claims shall be null and void, if they are not made and served within twenty-four hours, and if within a month of their date they are not followed by a demand in court.

to verify the comparative degree of fault, as stated in the Brussels Collision Convention (The Brussels Collision Convention 1910).

3.4 Development of collision law in Latin America

During 19th century, after independence from the Kingdom of Spain the new Latin American countries faced the challenge of deciding the law to apply locally. Most of these countries continued or adopted the Spanish laws with little modifications but with the aim to implement their own legislation. As a result, a trend of unification of the laws of South America begun in this century which included civil, commercial and penal matters (Inter-American Juridical Comittee 1959).

Consequently, the first result to unify the law appears with the South American Congress of Private International Law held from 1888 to 1889, also known as the *Congress of Montevideo.* The outcome was the *Treaty of International Commercial Law* signed in 1889 in Montevideo, Uruguay. Parties of this treaty are South American countries: Argentina, Bolivia, Paraguay, Peru, Uruguay and Colombia (Delic 2016).

Although, regarding impacts and collisions, the Montevideo Treaty of 1889 only included as a general rule that the law and jurisdiction to be applied is the place where the incident takes place. But, if the collision occurs in non-jurisdictional waters then the law and jurisdiction is the place of registration of the vessels, or if different between each other, the most favorable country of registration to the defendant. Jurisdiction is awarded to the tribunals where the vessel first arrives or where the authorities acknowledge the situation. Thus, there is no approach regarding prescription terms for claims in collisions (Tratado de Montevideo 1889).

Subsequently, the *Congress of Montevideo* in 1940 provided a new instrument, the *Treaty on International Commercial Navigation Law*. Parties in this treaty are Uruguay, Argentina and Paraguay. Even though, the treaty has similar provisions in regard to collisions as in the previous agreement, meaning that the law and jurisdiction are those in which the incident took place but if the collision is out of jurisdictional waters then the law of the flag of the vessel applies.

Anyhow, the difference with the previous treaty is that the claimant has multiple options regarding where to file a claim. First, the place where the defendant is domiciled. Second, the port

where the vessel is registered. Third, the place where the vessel was arrested due to the collision. Fourth, any other port where the vessel made her first call or eventually arrives. This provision applies in case the collision occurs out of jurisdictional waters between vessels of different nationalities, as stated in Section II related to collisions. There is no provision in regard to prescription in a collision incident (Tratado de Montevideo 1940).

On the other hand, the Sixth International Conference of American States held in Havana, Cuba, in 1928 adopted the Convention of Private International Law and the *Bustamante Code of Private International Law*. This Conference recommended to the countries of the hemisphere the adherence to the Brussels Collision Convention 1910 in order to contribute with the adoption of uniform laws in matters of maritime law (Inter-American Juridical Comittee 1959).

Parties to the Convention are The Bahamas, Bolivia, Brasil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic and Venezuela. Several of these countries issued reserves to the treaty, as in the case of Ecuador it was stated that the treaty was approved in all parts that are not in contradiction to the Constitution and laws of Ecuador (OAS 2017).

The Bustamante Code of International Private Law includes several provisions in regard to collisions, contained from Art. 289 to Art. 293. These are most related to conflict of laws and jurisdiction. The principles are that the law of the place of the incident is to be applied in case of collisions in territorial waters, but if the collision takes place in the high seas then the law of the common flag is to be applied. When the flags that the vessels fly differ, then the law of the impacted vessel is the applicable, provided that the collision was in fault. (Linares 1961).

In relation to apportion of liabilities in a collision Art. 294 of the Code states that in case of a fortuity collision in the high seas between vessels that fly different flags, each one will bear the half of the total expenses divided upon the law of one of them, and the other remaining half will be apportioned according to the law of the other. In regard to prescription the Code does not provide specific terms and as general rule submits to local law (Bustamante Code 1928)

3.5 The Convention for the Unification of Certain Rules of Law with respect to Collisions between vessels, 1911

The Convention for the Unification of Certain Rules of Law with respect to Collisions between vessels**,** is also known as The Brussels Collision Convention, It was signed in Brussels in 1910 by most of the maritime nations of the world,[10]and is considered as the modern international maritime law on collisions (Staring 1957).

Briefly, this Convention confirmed the *fault liability* in collision cases. Therefore, it abolished all presumptions on liability and determines contribution in damages regarding collision cases in proportion to the fault, imposing a general time bar rule of two years for all claims: "*Actions for the recovery of damages are barred after an interval of two years from the date of the casualty*". An additional term of one year counted from the day of payment is awarded to a party that has paid in excess of his proportion to recover from the other defendant or defendants when the liability has been jointly and severally. Besides, the Convention disregards the necessity of a protest or any other formality for claim purposes. (The Brussels Collision Convention 1910).

To sum up, said prescription term of 2 years in the Convention was interpreted in 1 February 2008 in the case *Chan Kwai Ha v. Wong Chick Bun* at the Hong Kong Court of Appeal region 1. The decision stated that actions for recovery were related to all kind of actions and not only to tortious actions, indicating that "*all actions for recovery in collision cases are barred after the lapse of two years from a casualty*" (Chan Kwai Ha v Wong Chick Bun 2008)

Although the Convention states that the term is counted from the date the incident takes place, its provisions contemplate that lex-fori is to be applied for terms related to suspension or interruption of the two years period with the possibility to national legislations to extend the period when it is justified that the arrest action to the defendant vessel has not been possible in the territorial waters of the plaintiff's domicile or main place of business (Tetley 2002).

Despite the United States not being a party to this Convention, its principles have been adopted by U.S. district courts applying the Convention in cases of International collisions under a choice of law analysis (Morris 2007).

[10] The Brussels Collision Convention became effective March 1, 1913

Latin American countries that have adopted the Convention are Brazil, Mexico, Uruguay, Paraguay, Nicaragua, Guyana, Dominican Republic, Argentina, Antigua and Barbuda, Haiti. Ecuador has not ratified said convention (CMI 2015).

As mentioned earlier, several efforts have been executed in the Americas to unify the law, as in relation to the accession to the Brussels Collision Convention. In testimony, the Inter-American Council of Jurists at the Pan-American Union, currently Organization of American States, prepared a study on collision and mentioned two pitfalls: the need to protest and *diversity of legal rules* in regard to statute of limitations contributing to the conflict of laws (Inter-American Juridical Comittee 1959).

3.6 The Convention on the International Regulations for Preventing Collisions at Sea, 1972

The Convention on the International Regulations for Preventing Collisions at Sea also known as COLREGs was adopted in 1972 in London[11] by the initiative of the United Nations agency called Intergovernmental Maritime Consultative Organization IMCO lately developed as the International Maritime Organization IMO. Further amendments were executed in 1983, 1989 and 1991 by which the initial convention maintains its essence. These are the universal rules accepted by most of the countries (Healy y Sweeney 1998).

COLREGs provides the rules for navigation to reduce the risks of collision between vessels. These rules come from maritime custom and the noncompliance can result in liabilities for damages by the wrongdoer to the contacted vessel. (Lowndes 1867)

Effectively, COLREGs does not refer to apportion of liabilities nor to time bar to file claims. These provisions are included in the Brussels Collision Convention, but the failure of compliance to navigation rules or *rules of the road* that is a proximate cause of a collision provides elements of fault and is a basis of liability (Griffin 1988).

It is to mention that Latin American countries adherence is most prominent with this convention than with the Brussels Collision Convention, as Bolivia, Brazil, Venezuela, Argentina, Chile, Nicaragua, Cuba, Dominican Republic, Panama, Colombia, Paraguay, Perú, El Salvador,

[11] COLREGs became effective July 15, 1977

Guatemala, Honduras, México, Uruguay. Ecuador is also part of this convention (IMO Status of Conventions 2017).

4. EXTINCTIVE PRESCRIPTION

The second institute of law considered in this research is the law of prescription. The interest of this study is related to liberative or extinctive prescription which has specific characteristics since its origins with Roman law, as long term and short-term prescription terms, the bona fide principle and the need to allege prescription, the actio nata, causes of interruption of prescription, the contra non valentem principle and developments in common law. The understanding of what is extinctive prescription as a general concept with the help of comparative law will provide a broader perspective of the universal principle and its approach in the Ecuador law.

4.1 Origins

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. He cites that there were many kinds of prescriptions 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 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 *Iura Novit Curia* but they need clear facts and the justification of the bona fides requirement. (Melich 2002)

4.2 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 (Marin 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).

4.3 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).

4.4 Interruption of prescription

Prescription is to be interrupted when the debtor recognizes the debt, and 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)

4.5 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 Brancton 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 *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).[12]

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 forcurrent 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).[13]

4.6 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.

[12] http://www.lawcom.gov.uk/app/uploads/2015/03/lc270_Limitation_of_Actions.pdf
[13] http://www.lawreform.ie/_fileupload/Reports/rLatentDamage.htm

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 losses his 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). In next chapters it will be verified that 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 of the potential claimants. These rules are to be accompanied by procedural rules that do not create restrictions on the exercise of the rights.

5. THE LAW OF ECUADOR RELATED TO COLLISION AND PRESCRIPTION

The Civil Code and the Code of Commerce are the main sources for general terms in relation to prescription in Ecuador. The Civil Code states the adopted general principles of prescription and the Code of Commerce is more specific. In the case of collision law, it is the Code of Commerce which brings the general principles but also other legislation as the Code of Maritime Police provide specific provisions regarding collision.

5.1 The Ecuador Constitution, 2008

In 2008, Ecuador Assembly approved the new Ecuador Constitution which was accepted by the People in a referendum. The new Constitution brings fundamental changes to the structure of the State and creates new regulations. One of these regulations is related to strict liability and prescription in environmental damages.

A collision incident may produce pollution. In this case the doctrine of prescription does not apply. The Ecuador Constitution 2008 in Art. 396, states that legal actions to pursue and to sanction damages for environmental damages are not subject to prescription. The Constitution also contemplates strict liability in these matters. This is a new approach regarding liabilities in environmental incidents as a general rule not only limited to maritime incidents. Although, there is still the need to differentiate between types of claims, those related to state claims, collective actions and individual interests (Bedon 2011). Anyway, the Constitution has not specified any difference between rights of potential claimants.

In consequence of, the new criminal code of Ecuador named Organic Integral Penal Code enacted in 2014, in compliance with the constitutional rule ratified that criminal felonies in regard to environmental damages are not subject to prescription, as stated in Art. 15, #4. Apart from this, Statutes regarding civil law have not been amended in this respect but as already mentioned, Constitution is to be applied directly in consideration to the fundamental right to an effective remedy, as stated in Art. 11, para. 3. (Constitución del Ecuador 2008)

Consequently, if a collision incident generates pollution, people and entities affected by the pollution are submitted to mentioned prescription rules stated in the Constitution, meaning that there is no prescription.

5.2 The Civil Code 2015

The current Civil Code of Ecuador is the result of an adaptation from its similar of Chile which was inspired in the Napoleonic Civil Code of France,1804 and several amendments that have been applied. The first Civil Code of Ecuador was enacted on 1861, but new codifications

were implemented in 1970, 2005 and the latest on 2015. No fundamental changes from the initial Code appear.

The Civil Code in Art. 2392 considers that by liberative prescription actions are extinguished. But, what happens with the right? It is also extinguished? The accepted doctrine of liberative prescription considers that the right remains but the action expires. This means that the right suffers a transformation. This is now a non-enforceable obligation, as stated in Art. 1486.

A civil liability that has been affected by prescription is transformed as a "*natural liability*" meaning that there is no action to demand compliance. But if the obligation is complied with, then the beneficiary is able to keep what has been given or paid.

Extinctive prescription only requires the specific time lapse in which there has been no action. The general rule is that the time is to be counted from the time the right of action begins, meaning when it is possible to raise a claim. This is the *actio nata* principle in Art. 2414 of the Civil Code.

Regarding how the time is to be counted, Art. 33 of the Civil Code states the general rule for all kind of terms also applicable for prescription in the sense that all terms in the law related to days, months or years are to be counted until midnight of the last day of the term. It is also stated that the first day and last day of the term related to months or years is the same date for relative months. The Code makes no difference when a month ends on the 28th, 29th, 30th or 31st. The same is for years.

As examples, if the beginning of a prescription term is 10 March 2017 and the prescription term is for one month then the prescription is completed on midnight of 10 April 2017. But if the prescription term is for thirty days then the prescription should be considered completed on midnight of 9 April 2017. If the prescription term is for one year, actions for liabilities shall be considered expired at midnight of 10 April 2018.

Besides, for interruption of prescription Art. 2418 of the Civil Code describes that prescription is to be interrupted when there is an express or tacit recognition of the liability by the party liable. This general rule results very important due that if a party liable recognizes by any mean the debt or the liability then the time lapse until that day goes again to zero. A simple letter

or an email by the debtor requesting an extension for payment, or a partial payment which makes understood the recognition of the obligation provides interruption of prescription. (Valencia 1990)

One the other hand, the same Art. 2418 states that when the complaint is duly notified to the defendant then prescription is interrupted. This means that even when the claim is filed, prescription time will continue to be counted until the summons are executed. Consequently, if prescription time ends before this compliance then the defendant can raise effectively the prescription defense.

Besides, regarding actions to claim damages, Art. 2229 of the Civil Code states as a general rule that any damages which are a result of negligence or malice shall be compensated by its perpetrator. Moreover, if two or more persons originate the losses, then they will be jointly liable as mentioned in Art. 2217. This provision entitles a claimant to have more than one defendant in a collision incident when there is both to blame vessels and other persons or entities involved.

The general rule is applicable to injury claims in delict by third parties. Therefore, if a plaintiff provides enough evidence that the proximate cause of those damages is the result of the illicit action or omission by the defendant, as stated in Art. 2232, then moral damages can be awarded. Finally, actions in delict seeking compensation for damages contemplate a prescription time of four years according to Art. 2235 of the Civil Code,

5.3 The Ecuador Code of Commerce, 1960

Collision law is stated in the Ecuador Code of Commerce, 1960 in section IV of the Book number 3 related to Maritime Commerce. Provisions of this section are basically related to how to determine fault in a collision incident.

The general rule on liability is that collisions are to be presumed as fortuitous. The burden of the proof is on the claimant. Therefore, in any claim the plaintiff has to obtain all the evidence to prove that the incident is a result of negligence from the defendant. Moreover, the Code provides cases in which a collision is to be considered as in fault by the master, as when the vessel is not appropriated anchored or when it is sailing or anchored at night without lights (Art. 862).

Ecuador is party of the COLREGs Convention (International Maritime Organisation 2017). Therefore, its provisions are to be considered as tools to determine fault if its provisions have not been followed. (Lowndes 1867)

Besides, other general rule on liability is regarding which party has the burden to pay for the damages. As already mentioned Ecuador maintains from 1882 the principles of the old rules in collision law of the French Code of Commerce 1807.

Therefore, if the collision is ratified as fortuitous each vessel will bear their damages suffered. No party will have to pay to the other. This is the same if the collision is to be blamed to both vessels. This old rule was ratified in *The Huacho* v *The Josefina*, a judgment on a collision incident dated 31 March 1887[14] in which both vessels were found in fault and therefore it was declared that each party should bear their expenses (The Huacho v The Josefina 1887).

In contrast, when the incident is the result to the fault of one of the masters then the master in fault will pay all the damages, and when it is determined that the collision incident is not of fortuity nature and it is not possible to verify which of the masters is responsible, then every vessel will pay half of the repairs under experts advise, as stated in Art. 862.

In addition, in maritime commerce affairs, the general rule in the Ecuador Code of Commerce is that all claims require a protest, as stated in Art. 1009. But, the Code of Commerce 1960 does not provide a definition of a protest. Anyway, it is considered as a report by writing from the master to the maritime authority for the purpose to avert liabilities in the event of any accident, situation or damages (Vigier 1978). The Navigation Act of Chile defines the protest as the denounce by the master or the shipowner due to accidents in regard to a vessel or related to damages to the cargo transported by the vessel (Ley de Navegación de Chile 1978). The current Code of Commerce of Ecuador also refers to protest issued by other parties involved.

Therefore, the general rule in collision law, when the result is not a total loss of the vessel, is that there is a duty to the master to protest in twenty-four hours and following this protest to file a lawsuit in thirty days. Noncompliance of the protest means that the actions shall be considered extinguished. A noncompliance with the filling of the lawsuit means that the protest gets no effect.

[14] Serie 2 Gaceta Judicial 142 de 31-mar.-1887

The translation from Spanish into English of said provision is as follows:

"Art. 1009.- It is to be extinguished:

1. *The actions against the master and against the insurers due to damages to the cargo if the cargo is received without protest;*
2. *The actions against the charterer for damages, if the master delivers the merchandise and receives the freight without protest;*

3. The actions for compensation of damages in a collision, if the Master would have not protested on time.

This provision is not applicable when the collision causes the total loss of the ship.

Protests related to this article are not to produce effects:

1.- If are not executed and notified, within seventy two hours, in the cases of the two first paragraphs, and within twenty four hours, en regard of the third; and,

2.- If done and notified properly, there is no judicial demand within thirty days following notification."

"Art. 1011.- In case of collision, wherever the place it occurred, the twenty-four hours will be counted from the moment the Master is able to protest."[15]

The Code of Commerce is not specific regarding which claims are referred to be extinguished in case of a collision. But, it refers to the master duty of protesting, and following this protest a lawsuit shall be filed. Therefore, this rule is related to those claims by the master or the shipowner. The strict rule is not to be applied in detriment of other potential claimants as for cargo or injury claims. These parties cannot depend on the master´s compliance (Quiñones 2015).

As a tradition, extinctive prescription is to be invoked as a defense, but it also can be brought as an action to have the judiciary declaration that a right to file an action has expired. This is a doctrine accepted by the Supreme Court of Justice of Ecuador as in the judgment in the case *Rebecca Elyse Shipping Corporation v Ecuadorian Seafoods C.A*., dated 3 February 2004. The claimant, a Liberian company was the shipowner of the *M/V ARGUS* involved in a collision

[15] Translated by the author

incident on 3 September 1997 with the fishing vessels *Ivette, Cristina* and *Jose Alfredo* owned by the defendant Ecuadorian Seafoods.

The pretension of the owner of the *Argus* was to have a judiciary declaration that prescription time of thirty days has passed. This was a claim in which extinctive prescription was alleged as an action rather than a defense. The intention may also have been to secure jurisdiction in Ecuador, in which they will take advantage of singular prescription time, averting forum shopping and arrests in other jurisdictions that may have a longer time bar as regarding those countries signatory of the Brussels Collision Convention.

The judges in their decision ratified that the extinctive prescription is a way to extinct the actions to enforce compliance of liabilities, they also ratified that the extinctive prescription needs to be alleged by the party wishing to benefit. In relation to how to allege prescription they pointed out that there is a unanimous doctrine that it is through a defense in trial, recognizing that the doctrine is divided in regard to the declaration of prescription via an action. They stated that there are several legal commentators that do not agree with a prescription claim through an action, but they also considered that this point of view has been superseded by recent doctrine as in recent decisions by the Supreme Court. The road was free for this complaint.

Anyway, when the judges analyzed the documents filed by the plaintiff which purportedly accredited the ownership of the vessel, they found out that the certificate was signed by two individuals who certified the ownership in the Liberian flag authority, with no indication if they were public officials. The judges also verified that the document was legalized before a Notary Public in New York, and they questioned if this document was to be executed in Liberia or if this country includes legislation allowing different manners of certifying ownership on vessels, situation that was not duly explained by the plaintiff.

Therefore, even when the judges in the National Court of Justice considered that the case of claiming extinctive prescription could be a case to have a decision, they dismissed the claim due that the ownership of the vessel was not duly accredited, due to failure from the plaintiff to provide proper documents and therefore there was no evidence in regard to the interests of the plaintiff (Rebecca Elyse Shipping Corporation v Ecuadorian Seafoods C.A. 2004) .

As a final point, a third party as an injured crew in a collision incident will have the option to claim damages to his employer under a contractual relation or to raise a claim in delict to the owners and operators of the other vessel. The claim in delict will seek remedies regarding loss of or damages including moral damages, if it is found that those are a result of an illegal act or omission by the defendant, as stated in Art. 2232 of the Civil Code (Código Civil, Codificación 2005).

Besides, if the crew is under Ecuador law then the prescription time for a claim related to labor relations is three years according to Art. 635 of the Labor Code (Codificación del Código del Trabajo 2015). Moreover, claims in delict regarding damages have the general rule of prescription in four years counted from the perpetration of the act, as stated in Art. 2235 of the Civil Code (Código Civil, Codificación 2005).

In addition, cargo claims in a collision in fault will follow prescription times due to their contractual relations, under a bill of lading or international rules, as The Hague-Visby Rules which is one year. But, if the transportation involves another mode along with the transportation by sea then Multimodal Regulations of the Andean Community applies, with a prescription term of nine months. Accordingly, when the origin of the voyage or its destination includes a country member of the Andean community as Ecuador, these regulations are imperative.

But, if these terms are not possible to be applied, then provisions in the Code of Commerce are to be considered with the general prescription term of six months in voyages within the territory of Ecuador and one year in case of expeditions with destination to foreign countries. If these claims are against the other vessel then is to be applied the general rule of prescription related to maritime commerce which is five years, as stated in Art. 1006 of the Code of Commerce. This is the same prescription term to be applied in collisions that generate the total loss of a vessel (Código de Comercio 1960).

5.4 Ecuador Organic General Code for Procedure, 2015

In 2013, The National Court of Ecuador and the Council of the Judiciary begun a preparation of a bill for a new code to include procedures for lawsuits in civil cases, as well other

non criminal cases. The bill was approved by the Legislature and in 22 May 2015 the new Statute was published in the Official Gazette to begin implementation in most areas in a year term.

Therefore, from 22 May 2016 the Ecuador General Code for Procedure is in force for all types of claims to be filed. This new statute, also known as COGEP, replaced the Civil Procedure Code. (COGEP 2015).

However, the new Code brought changes to the principle of representation. Attorneys can sign complaints in representation of their clients only when they hold a power of attorney. Moreover, for appearance in hearings the power of attorney shall include a special clause that entitles the attorney to settle with no limitation in this respect, as stated in Arts. 86 and 143. The new code maintained the principle under the previous Code of Procedure, that a power of attorney to represent in court shall only be provided to a lawyer (COGEP 2015).

In contrast, with the previous procedural code complaints could be signed by lawyers upon the offer of posterior ratification. This was a doctrine accepted by the Supreme Court of Justice by a decision dated 10 September 1958, in the case Mariana Cabezas v Zoila Cevallos. It was stated that even when there was a lack of the signature of the plaintiff Cabezas in the complaint, this was not a violation of process, consideration taken by the court in view that the plaintiff ratified her claim in further proceedings. ("Cabezas v Cevallos" case 1958).

Consequently, with the new code if the complainant or the defendant is a foreign company then this company shall need a local lawyer authorized to practice in Ecuador to act as their representative in Court. A power of attorney is required, which needs to be translated and authenticated in the nearest Consulate of Ecuador. The apostille is other option for certain countries due that Ecuador is party to The *Apostille Treaty* 1961 named *Convention Abolishing the Requirement of Legalization for Foreign Public Documents.*

It may be duly considered that there are countries which have not adopted said Convention. Therefore, a power of attorney needs to be legalized before the Consulate of Ecuador, as in some jurisdictions as China and Canada. Moreover, in relation to China, before documents are processed by the Consulate of Ecuador there is a need to legalize them in the Ministry of Foreign Affairs. The legalization process for a power of attorney in certain countries can take time to be executed.

In the other hand, in relation to evidence for a trial, it is the obligation of the plaintiff to announce or file the necessary evidence with the complaint, as stated in Arts. 142 and 143. The regime under the former Code was that parties in a specific term after the complaint was contested, filed their evidence or requested the judge discovery from third parties. Therefore, the time for evidence or to request discovery for both parties was with the contested action.

Anyway, as an extraordinary measure and before the trial hearing is called, the judge is able to accept "*new evidence*" not announced previously by any of the parties if it is accredited that the party who requests did not know about its existence, or was not able to obtain it, as mentioned in Art. 166 of the Code.

One of the effects of the notification of the complaint to the defendant is to interrupt prescription as stated in Art. 2418 of the Civil Code (Código Civil, Codificación 2005). The Code of Commerce in Art. 1009 in relation to prescription in collisions mentions that actions are extinguished when there is no filing of the demand in thirty days, meaning that the interruption of prescription is when the complaint is introduced and not when the defendant is notified. The Code of Commerce was born as a special law from the Civil Code therefore its provisions prevail (Código de Comercio 1960).

Anyway, with the enactment of the General Code of Procedure 2015 its Art. 64 states that the notification of the complaint to the defendant interrupts prescription (Asamblea Nacional del Ecuador 2015). This is an Organic statute, which means that it prevails over other statutes but the Constitution and international treaties of human rights, as stated in Art.425 of the Constitution. (Constitución del Ecuador 2008). Therefore, the doctrine is ratified. The notification of the complaint to the defendant interrupts prescription. This is one of the problems that a plaintiff will face in a claim of damages due to a collision incident.

5.5 The Code of Maritime Police, 1960

In 1960, the Ecuador Congress enacted the Code of Maritime Police which included provisions related to collision law, stating that collisions that take place in waters under the jurisdiction of Ecuador regardless of the nationality of the ship is to be judged under Ecuadorian law.

The Code states in Arts. 19 and 20 that naval jurisdiction is to be exercised by Harbor Masters, the Jury of Captains and the Military Court of Justice. The Harbor Master has jurisdiction in every cases concerning minor criminal offenses; those related to maritime police in which any person is involved; and, in regard to any maritime casualties or accidents between ships of less than 50 tons with no loss of human lives.

In regard to the Jury of Captains, the Code in Art. 21 provides jurisdiction to this entity to decide all cases of maritime casualties or accidents within the territory of the Captaincy and in the high seas concerning national merchant vessels, in which the Harbor Master is not authorized to decide. This means that according to the Code the Jury of Captains is able to judge all cases that result in loss of human lives, and those accidents or incidents concerning vessels of 50 tons or more, and all cases of the high seas when a national commercial vessel is involved .

Moreover, Art. 22 states that the Harbor Master is to be appointed by the President of the Republic under petition of the Minister of Defense. The Code also allows to appoint to such position an active or retired officer of the Navy. The Jury of Captains is a legal body presided by the Harbor Master with four members appointed by the Navy Commander of the Region and in a case by case basis by random from a list of Masters of the merchant marine and officers of the Navy, as mentioned in Art. 360. It is clear that the Harbor Master and the members of the Jury of Captains are not members of the Judiciary.

Ecuador has experienced fundamental constitutional changes. The Constitution of 2008 established that jurisdiction is to be exercised only by the judiciary. Members of other functions were forbidden to act as judges. This is the principle of division of powers, a principle that guarantees independence between functions of the state.

The Code of Maritime Police has not been amended. Even with current developments under the umbrella of the new constitution, juries of captains continue deciding cases related to marine incidents including collisions under the Code of Maritime Police, considering that their decisions are limited to determine the technical and professional responsibility of the indicted. The Harbor Master and the Jury of Captains are now only administrative bodies with no capacity of judges. Therefore, their decisions are to be considered as of administrative nature and not judiciary. This is a switch from penal authority to administrative authority.

The Military Court was extinguished and most of its duties passed to the National Court of Justice. Appeals and revisions of decisions by the Jury of Captains are currently uncertain due that at some stages, the National Court has decided that they have no legal authority to decide those revisions as in "*The Punta Blanca*". The Second Criminal Law Chamber of Judges in the National Court on 28 September 2011 decided that they had no authority to decide these cases but stated that the authority was on criminal judges in the lower Court (The Punta Blanca 2011).

Similarly, this approach was ratified by the criminal chamber of the National Court on 21 August 2013, in the case 096/2013 by decision 945/2013, stating that they had no authority to decide the case and that jurisdiction was on the Provincial Court of Guayaquil to where the case was transferred for a criminal judge to decide ("The Lancha Annette", 2013).

Moreover, same approach was in the case 97/2013/AR, decision 998/2013, dated 30 August 2013[16], as in the case 94-2013, decision 1049-2013 dated 13 September 2013[17]. Different approach appeared in the case 323/2012, decision 940/2013[18] dated 16 August 2013 in which judges of the National Court declared that they had no authority and said that the law does not contemplate the authority with jurisdiction in these cases ("The Jetli 1", 2013).

In contrast, in the case 1873/2013, decision 195/2014 the Chamber of Judges in the National Court in 10 February 2014, modified their opinion saying not only that they have no authority to decide these cases but also that this is not a case to be consulted, due that the consultation process is only for cases in which there is involved deaths or disappearance of persons ("The Jesus del Gran Poder", 2014)[19]. Although, in 21 May 2014, National Court case 224-2014, judges returned to their initial approach[20], confirming that they have no authority to decide the

[16] http://www.cortenacional.gob.ec/cnj/images/pdf/sentencias/sala_penal/2013jn/R998-2013-J97-2013-ACCIDENTE%20MARITIMO.pdf
[17] http://www.cortenacional.gob.ec/cnj/images/pdf/sentencias/sala_penal/2013jn/R1049-2013-J94-2013-CONSULTA%20Y%20APELACION.pdf
[18] http://www.cortenacional.gob.ec/cnj/images/pdf/sentencias/sala_penal/2013jn/R940-2013-J323-2012-ACCIDENTE%20MARITIMO.pdf
[19] http://www.cortenacional.gob.ec/cnj/images/pdf/sentencias/sala_penal/2014/R195-2014-J1873-2013-ACCIDENTE%20MARITIMO.pdf
[20] http://www.cortenacional.gob.ec/cnj/images/pdf/sentencias/sala_penal/2014/R712-2014%20J224-2014%20ACCIDENTE%20MARITIMO.pdf

case, and ordering to be transferred to The Provincial Court of Manabi for a decision of a criminal judge ("The CSAV Rio Bueno", 2014).

Finally, in "*The Paula Schulte*". [21] The President of the National Court on decree dated 30 March 2017 stated that he had no authority to decide on the consultation in respect to the resolution by the Jury of Captains in their investigation process. The Judge also considered that this was an administrative case to determine professional and technical responsibility. The file was sent back to the Harbor Captain. The case has no review and there is no final decision ("The Paula Schulte", 2017).

5.6 The Bustamante Code, 1928

In 1933, Ecuador ratified and adopted The International Convention of International Law, 1928, which approved what is known as the Sánchez de Bustamante Code[22]. The ratification was executed with the only reserve that it is accepted in all parts with the exceptions of what is opposed to the Constitution and laws of the Republic. This generalization is a confusing element that converts the International Code in a law submitted and dependent of local law of Ecuador, in contrary approach to what international conventions are in the Kelsen pyramid in regard to hierarchy of positive law.

Anyway, the Sanchez de Bustamante Code contains some regulations regarding collisions from Art. 289 to Art. 294. These regulations are part of chapter II related to the Special Contracts of Maritime and Air Commerce of the Book III Maritime and Air Commerce.

The Sanchez de Bustamante Code states these principles of law about jurisdiction in a collision:

In regard to collisions in territorial waters these rules apply: first, the fortuitous collision is submitted to the law of the flag if its common; second, If pavilions are different then the law of the incident applies; third, a collision under fault is submitted to the law of the incident

[21] Investigation case 15-2017 "The Paula Schulte".
[22] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-31_Codigo_Bustamente.asp

In regard to collisions in the high seas: first: In both cases of fortuitous collision or under fault, it is to apply the law of the pavilion if both vessels share the flag; second, if the flags the vessel fly are not the same, then the law of the collided vessel will apply, if the collision is under fault; third, in case of a fortuitous collision between vessels that fly different flags, every vessel will bear half of the damages shared under the law of one of the parties and the other half will be shared under the law of the other.

Now, regarding prescription the Sanchez de Bustamante Code includes a chapter in the Book II *International Mercantile Law*, under the title *Prescription*, stating that prescriptions that are related to contracts or acts of commercial nature, is imperative to be submitted to the rules stated in the same code for civil obligations.

The Art.229 of said Code mentions that extinctive prescription for in personae actions is submitted to the law of the obligation. The Sanchez de Bustamante Code in this matter only provides vague principles of law and not a specific period in which to consider an action as time barred. The Code refers to national law for this purpose.

Anyway, It is understood that any collision that takes part in territorial waters is to be submitted under the law of the incident unless both vessels have same pavilion. If this is the case then the pavilion law will be applied. This provision provides the possibility of the application of foreign law for an incident occurred in territorial waters.

In contrast, Arts. 342 and 343 of the Code of Maritime Police of Ecuador are in contradiction of said provision in the Bustamante Code which states that all collisions that have occurred in jurisdictional waters are to be judged under the law of Ecuador, whichever is the nationality of the affected vessels.

As earlier mentioned, Ecuador ratified the Bustamante Code with the specific reserve that it is accepted in all parts that do not act in contradiction with the constitution and the law of Ecuador.

5.7 Subrogation actions and prescription

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, national judges in Ecuador have different approaches, as in the case *La Union v Panalpina – National Court 149-2007*, 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 clamant to have the two years prescription time stated by *The Insurance Statute* ("La Union v Panalpina" 2011).

Similarly, in 13 July 2012 the civil chamber of the National Court in the case *Ecuatoriano 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. (Ecuatoriano Suiza v Hamburg Sud 2012), 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 *Ecuatoriano 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 (Ecuatoriano Suiza v Maersk del Ecuador 2012).

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.

6. ACCESS TO JUSTICE

From the early 20th century, access to justice is a topic of research with two directions. The first addresses it as a social problem, a matter of equality, looking to guarantee the option of justice for those disadvantaged groups. This was in relation with poor people as the study published by Reginald Heber Smith in 1919 regarding access to justice in the United States in which concluded that freedom and equality of justice was only an ideal, but it was a fact that rich and poor people were not equal before the law. Doors to justice were closed to the poor, denial of justice affected millions of persons countrywide in the United States[23] (Heber 1919).

The second direction is related to the tendency for reducing, in different ways, "*questions of justice to matters of law"* (Sandefur 2009). One of the characteristics of access to justice is the right of all parties to bear the opportunity to present their cases in effectively manner (Beqirak and McNamara 2014).

6.1 The right to an effective remedy

Furthermore, access to justice is considered a right to a remedy that every individual has. It means open access to the courts to file a claim and to issue defenses, related to the preservation or the rights of life, liberty and property (Phillips 2002). It is also mentioned as a fundamental right, related to liberty (Thomas 1877) .

As a matter of fact, this is the sense of Article 8 of the Universal Declaration of Human Rights approved by the United Nations General Assembly in Paris, France on 10 December 1948, which states that all persons bear the right to "*an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*", and

[23] The concept of access of justice to address a social problem has developed to include other disadvantaged groups as women, children, refugees, senior citizens, minorities, etc.

Article 10 which states that all persons are entitled to a fair and public hearing "*in the determination of his rights and obligations",* including criminal charges. (Universal Declaration of Human Rights 1948)

The United Nations principles on human rights were observed in the American Convention on Human Rights approved in San Jose, Costa Rica in 22 November 1969, also known as the *San Jose Pact*. Article 8.1 states that all persons have the right to a hearing, within a reasonable time in regard to accusations of criminal nature but also for the "*determination of his rights and obligations of a civil, labor, fiscal, or any other nature".* Furthermore, Art. 25 states that every person has the "*right to simple and prompt recourse, or any other effective recourse, to a competent court of tribunal for protection against his fundamental rights recognized by the constitution or laws of the state…"* (Organization of American States 1969)

Similarly, The Charter of Fundamental Rights of the European Union in Art. 47 in relation to the right to an effective remedy states that "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*" (CFR 2012).

The universal principle refers to all persons and makes no difference in relation to which party has the right of a reasonable time for determination of rights. Consequently, the right is valid both for plaintiffs and defendants[24]. Therefore, a party claiming damages because of a collision should have the right to be heard in Court in a reasonable time.

Moreover, States should not obstruct people in their intent to have their rights protected or determined by the judiciary, and that any internal regulation which puts an unjustified barrier in the access of people to court must be considered in breach of the principle (Ventura 2005).

Accordingly, The Ecuador Constitution provisions on access to justice are contained in Art. 76. It is stated that the right to have a proper defense is mandatory in all procedures to determine rights or obligations. This right includes the obligation of the State to guarantee that every person counts with the adequate time for the preparation of the defense, and the possibility to be heard in the suitable moment. (Constitución del Ecuador 2008)

[24] This is based on the universal principle on Roman law that when the law does not distinguished no one is able to distinguish. *Ubi lex non distinguit, nec nos distinguere debemus.*

As a result, the Constitutional Court of Ecuador has considered that the efficacy of the right of access to justice is related to judicial protection and the compliance of the individual rights of the persons. The effectiveness of access to justice is an essential requirement in a legal system based on equality and in compliance with human rights. This right is to have direct relation with the principle of legal security in consideration that there is a need of certainty regarding protection of people's rights with no consideration to legal formalities. (case Conecel 2016)

6.2 Reasonable time in prescription terms

Reasonable time and adequate time are terms to be taken in consideration. If determined statute does not provide a reasonable or adequate time for the determination of rights of an individual then the right of access to justice may be at breach. If will be the same if any procedural law obstructs the exercise of this right.

This reasonable or adequate time is to be considered for all the process, meaning also the time by which the plaintiff should bring the matter to court. The term reasonable time includes the preparation of the defense as the current Constitution of Ecuador states. To have reasonable or adequate time for presenting a case to court is a fundamental right in pursuit of an effective remedy. The European Court of Human Rights have said that limitations are compatible with access to courts only when they follow a "*reasonable relationship of proportionality between the means employed and the aim pursued"* (case Affaire Howald Moor Et Autres c. Suisse 2014).

Therefore, it can be concluded that if a statute determines unreasonable prescription terms in a manner that it obstructs the possibility of an effective remedy by a potential claimant then this statute may be at breach of the principles of access to justice.

Anyway, the Ecuador jurisprudence in constitutional law does not provide a specific case in which a determined extinctive prescription term has been declared unfair on inadequate as to infringe the constitutional right to access to court for the people seeking an effective remedy. This is the same consideration regarding decisions by the judiciary.

In contrast, several decisions by the high Courts of foreign countries have already addressed these problems. Their decisions provide the experience and leads to the inevitable

conclusion that inadequate prescription terms act in violation of the universal and constitutional right of access to justice.

The Constitutional Tribunal of Spain has stated that prescription terms are necessary for legal security but there is violation to the rights of judicial protection when lawmakers do not set up adequate prescription terms that are impossible to accomplish (Case Modesto MS 2005). Therefore, extinctive prescription terms are not to obey to unreasonable decisions by the lawmakers. Extinctive prescription rules are to be constructed or improved according to their nature and legal scenario.

6.3 Prescription in a collision incident: The Playa Dorada case

The Spanish courts have applied the principles of *actio nata* and contra non *valentem* when they have found inconsistencies in the law. It has been considered that during a criminal case prescription for civil claims related to the same incident are not running (Gonzalez 2002).

A relevant decision by the Supreme Tribunal of Justice of Spain is related to prescription in a collision case. This is the *Playa Dorada* case. In 6 April 1979 the fishing vessel *El Colorao* sunk due to an impact by the *M/V Playa Dorada* near to the Barcelona port. As a result, seven fishermen members of the crew of the fishing vessel passed away. Their families intended for many years to have a compensation. Criminal proceedings were initiated by the maritime authority and in 1982 a decree was issued by which the authority closed the case. The notification of this decision was delayed to the families of the decedents until 24 March 1994.

In 3 May 1996 in the civil claim, the civil judge of Barcelona ruled that the owners of the Playa Dorada were liable to pay compensations to the families. The case passed to the Supreme Tribunal due to cassations resources filed by the defendants. One of their arguments refers that actions are time barred in consideration that the prescription term of two years to be counted from the incident has passed.

Finally, in 28 September 2005 the civil chamber of the Supreme Tribunal of Justice of Spain recognized the provision in the Code of Commerce regarding prescription time of two years for actions derived from a collision incident. They acknowledged that the law says that

prescription time is to be counted since the date of the incident, which in the case was 6 April 1979. Although, they also mentioned that there is need to consider the existing jurisprudence concerning actions in delict when criminal actions have been initiated as in the case in question.

Consequently, the Tribunal ratified that according to said jurisprudence, prescription terms are to be counted from the day that the criminal proceedings are concluded, meaning the day in which the claimants are notified of such conclusion. With this in consideration, the allegation on prescription was dismissed.

The Supreme Tribunal of Spain based this decision in a set of jurisprudence of said Tribunal but fundamentally in the judgment of the Constitutional Tribunal of Spain dated 11 December 2000, in which the Tribunal voided previous judgments that dismissed several actions in delict due to prescription even when criminal proceedings conclusion were not notified to the claimants. This was considered in breach of the fundamental right to effective judicial protection. The reasoning by the Constitutional Tribunal was based in that claimants cannot exercise their rights until criminal actions are concluded and notified. Therefore, prescription terms are not running.

The Tribunal manifested that prescription is generally not to be considered of constitutional relevance, due that the interpretation on how the term is to be counted belongs to the judges. In contrast, when there is a matter related to the nature of prescription the approach is different. The issue may turn in a constitutional breach of the effective judicial protection if the claimant is restricted to exercise its rights (case Shirley Ann Steeden et.al. v Zurich España 2000).

6.4 Short term limitation periods: The Enron experience

The Enron debacle, publicized in October 2001 is a demonstration on how inadequate short statute of limitation periods can impact negatively access to justice, and how the system can help to evade responsibilities to those liable for their acts or omissions.

This was mentioned in the United States Senate Report by the Committee of the Judiciary dated 6 May 2002 which recommended the adoption of The Corporate and Criminal Fraud Accountability Act of 2002 introduced by Senator Patrick Leahy, as a respond to the crisis which

included criminal prosecution to those that incur in alteration or destruction of evidence, defraud investors, to provide protection to whistleblowers. One of the objectives of said bill was to amend the current limitation period for securities fraud in civil cases, which at that time was three years from the date of the fraud or one year after the fraud was discovered.

The relevant proposal in the bill was to establish new terms for statute of limitation related to private recovery actions in : "*5 years after the date on which the alleged violation occurred"; or "2 years after the date on which the alleged violation was discovered"*. The scope of claims to be related to fraud, deceit, manipulation, or contrivance of regulatory requirement in regard to securities laws.

These limitation periods, also known as "*one and three*", were considered unfair and as restrictions for recovery to defrauded and innocent investors. On the other hand, it was reported that due to the short statute of limitation some states were forced to refrain from continuing claims against Enron in regard to securities fraud in 1997 and 1998.

Moreover, it was revealed that only in the State of Washington the impact of the short statute of limitation generated an unrecoverable loss for state employees, firefighters and police officers of around fifty million dollars. Said limitation purportedly rewarded and insulated offenders taking in consideration the complexity of these kind of frauds, which makes it difficult for cheated victims to verify who were the perpetrators and how the fraud was conducted. (U.S. Senate 2010)

Anyway, the bill was not enacted as law but it provides enough understanding on how inadequate prescription terms can harm the right of an individual to have remedies in a claim in court.

The "*one and three*" formulae related to the Enron case is far from the "*thirty days*" term as stated in the Ecuador Code of Commerce for collision cases which produces a partial loss to another vessel. Under the new scenario is incontestable that current prescription term of thirty days results a very short period of time which entitle potential defendants to evade liabilities in detriment of affected plaintiffs, who are seeking effective access to court.

Ecuador Constitution clearly states that the remedy should be effective. *Prima facie* this requirement is not being met with the current legislation.

6.5 Inadequate prescription terms: The Mohlomi case[25]

The Mohlomi case is an example on how an unfair and inadequate prescription term is a restriction to the constitutional right of access to court for an effective remedy.

In 2 May 1994 Leach Mokela Mohlomi was still a minor when he suffered injuries due to a shot that he received from a soldier in South Africa. His father filed a lawsuit in his name against the minister of defense seeking compensation. The answer of the defendant was the total denial of the facts with a specific plea alleging prescription The government relied on the terms of section 113(1) of the Defense Act which stated the prescription period of six months counted from the cause of actions arose. The statute included another provision that entitled the claimant to give advise to the defendant in a term of at least one month before the commencement of proceedings.

Even when the defenses of the South African government were based on true facts, the plaintiff alleged that such provision of section 113(1) of the Defense Act was contrary to the principles of the provisional Constitution of South Africa. The claim was finally referred to the Constitutional Court for a decision.

The Constitutional Court in his opinion dated 26 September 1996 considered that rules that provide limitations are common in their legal system as well in respect to many others. Anyhow, these limitations need to be analyzed to verify if their terms are compatible *with the right of everyone to have justiciable disputes settled by a court of law.*

Therefore, the test was to verify the sufficiency and the adequacy that the limitation provides to allow persons to exercise the right to file a lawsuit. The Judge Didcott J qualified the section 113 (1) as severe considering that *it does not bring adequate and fair opportunity to seek judicial redress from wrongs allegedly done* to people affected with a too short time for both requirements mentioned.

Finally, the conclusion was that said regulation infringed the Constitutional right to access to court for an adequate remedy and it was declared invalid. Section 113 (1) was repelled from the legislation of South Africa. The decision was *Erga omnes* meaning that was valid for all the

[25] http://www.saflii.org/za/cases/ZACC/1996/20.html

people in regard to actions brought before or since 27 April 1994 with the exception to those actions already barred (Mohlomi v Minister of Defence of South Africa 1996).

6.6 Statute of limitation that does not provides equal protection: The Mills v. Habluetzel

The Supreme Court of the United States in 5 April 1982 decided that a Texas Statute that provided a strict statute of limitation of one year for filing lawsuits in paternity actions was in violation to the Constitution. In this sense the judgment reversed a previous decision by the Texas Court of Civil appeals which accepted the Statute of Limitation defense by the defendant due that the lawsuit was filed seven months after such limitations has passed.

The fundament behind this decision was that such statute of limitation violated the Equal Protection Clause of the 14th amendment. It was considered as a denial of equal protection of the law, and qualified the short time limitation as "*non realistic*". There was no justification to restrict rights of actions through extinction.

It was stated that "*the period for obtaining support granted by Texas to illegitimate children must be sufficient duration to present a reasonable opportunity for those with an interests in such children to assert claims on their behalf.*."

In addition, it is interesting to mention that after the decision by the Court of appeals, the short term of one year was changed for a term of four years in relation to statute of limitation for paternity claims. (Mills v Habluetzel 1982)

The mentioned judgement and report regarding access to justice will be considered in view of the current prescription terms in the law of collision of Ecuador. The question is if these terms provide reasonable time for an effective remedy. It is true that the prescription terms in collision law are in force for more than a century but paradigms have changed first with the Constitution as with statutory law. It will be demonstrated in the following chapter.

7. THE PROBLEMS IN ECUADOR COLLISION LAW RELATED TO EFFECTIVE REMEDIES

The Ecuador Code of Commerce imposes a duty to the Master affected by a collision. This is supremely important when the master or the shipowner is willing to claim damages in a partial loss sustained on their vessel. The Master should protest in twenty-four hours and following this protest he must file the complaint in thirty days after the protest is notified. If any of those requirements is not fulfilled then the claim for damages shall be considered time barred.

The protest is an extinct requirement in the international doctrine of collision law as in the Brussels Collision Convention but Ecuador has not approved this Convention, which also states the prescription time of 2 years for any kind of claims.

The twenty-four hours' time to protest and the thirty days' time to file a lawsuit is not a new regulation. It is part of ancient law that Ecuador has from its first Code of Commerce, 1882. Collision law and prescription terms for collision in the Ecuador Code were inspired in the Napoleonic French Code of Commerce 1807, with the difference that prescription time to file a lawsuit was one month in the case of the French Code.

Therefore, prescription terms in a collision incident have been the same for more than one hundred thirty years in Ecuador, and have been ratified by new Codes of Commerce in 1906 and 1960 in which the regulations maintained the same old principles.

The *actio nata* is a principle to be considered as a general doctrine to determine when the prescription period is to be counted. This coincides with the principle in the Ecuador Civil Code that prescription is to be counted when the right to bring actions begin, but in the case of collisions the Code of Commerce has a strict approach, meaning that the lawsuit is to be filed within 30 days counted from the notification of the protest, and if this is not complied then any action against the master and insurers is to be considered extinguished.

At the time the first Code of Commerce was enacted and also when the new codes were adopted there may be no presence of problems regarding the application of the law and the possibility to file lawsuits concerning collision incidents which generated partial loss to a claimant vessel. This may have been the same for France for many years.

Anyway, at this moment with the change of circumstances and the presence of new legislation in Ecuador the access to justice for potential claimants is clearly affected. The time bar

of thirty days appears to be a complicated task for shipowners seeking to claim damages that are a result of a collision.

Detected problems are as follows:

7.1 The signature of the plaintiff as a mandatory requirement

Under the previous procedure law it was possible for the attorneys to file lawsuit with their sole signature offering posterior ratification of their clients. This was a general doctrine accepted by the law and by a decision of the Supreme Court of Ecuador This meant that the lawsuit was possible to be filed the same day of the incident.

Under the new rules, the complaint needs to be signed by the complainant or by his representative with a power of attorney. This is a fundamental change to the old procedure by which attorneys were able to appear or to sign petitions even complaints offering ratification by their client.

The new rules may not be a problem for nationals and residents of Ecuador but in the case of foreign shipowners non-domiciled in Ecuador they will need to appoint a representative to sign the complaint in their name. The representative needs to be an attorney.

This means that the shipowner will need to find an attorney to whom he should trust the recovery action, and issue in his favor the power of attorney “POA”. If the power of attorney is issued in another country needs to be notarized and apostilled, as Ecuador is signatory of the Apostille Convention. If said document is issued in another language than Spanish then it will to be translated. In some countries there will be a need of an official translator. In Ecuador the translator needs to recognize his signature before a notary public. The process of issuing a POA may take more time if the country where the POA is executed is not signatory of this convention. Therefore, traditional rules are to be applied which means that the legalization needs to be done before the nearest Ecuador consulate.

In some countries, there are internal regulations before a document is to be legalized by a Consulate. This is the case of The Peoples´ Republic of China, which is also non-signatory of the Apostille Convention. Any documents need first to be previously legalized by the Ministry of Foreign Affairs in a process that takes around 20 days.

Similar complication will be faced for those countries non-signatory of the apostille convention that may not have a consulate of Ecuador in their territories. There will be a need to find a consulate in a nearest country.

Finally, once the Power of Attorney is ready it needs to be sent to the attorney in Ecuador to be filed with the complaint. Depending on the country of remittance the document will arrive to Ecuador in several days.

With the power of attorney, the representative of the complainant will be able to sign and file the lawsuit, and will face the challenge of filing on time, before the thirty days period, with the hope to avert any defense on prescription by defendants. This sole development on procedural law converts the filing of an action in a stressful situation when there is the presence of a very short prescription term. Regretfully, this is not the only situation that the plaintiff and its attorney will face.

7.2 The need to interrupt prescription serving the complaint

Once the lawsuit is filed, the plaintiff and its attorney may feel that they has complied and that there will be no room for prescription defenses by the adversary. But the stress does not end. The complainant and the attorney face a new challenge: the interruption of the prescription term.

Art. 1007 of the Code of Commerce states that the filling of a lawsuit interrupts prescription, but the Organic General Code for Procedure 2015 states that prescription is interrupted when the lawsuit is summoned to the defendant.

Organic statutes prevail over other different statutes as stated in Art. 425 of the Constitution. The exception is with the Constitution and International conventions. The Code of Commerce is not an organic law. Therefore, provisions in the Organic General Code of Procedure prevail and prescription is interrupted when the defendant has been notified of the lawsuit.

The mentioned principle is not new regarding interruption of prescription. The former procedural law had the same approach with the difference that it was not an organic statute/. Therefore, its provisions were not to prevail before another law of same nature. Before the appearance of the COGEP both Code of Civil Procedure and Code of Commerce were special legislation which prevail before the Civil Code which was a general law. With this sole element, of prevalence of laws a complaint may face the problem of no reaching on time notification to avert a prescription defense.

But, it is also to consider that developments on case management and the increase of new lawsuits have complicated the process of notification of lawsuits. In the eighties, it was possible for the clerks of the court to serve complaints, but a new internal regulation was enacted impeding this duty. Specific servants of the judiciary had the sole function to notify complaints to plaintiffs. In 1990 it was known that the process of notification could take around 6 months. Several efforts were executed until with the help of the new procedural law in 2015 the Council of the Judiciary was able to appoint the Ecuador mail service for the notification process of complaints.

Anyway, even with this change, it is known that the process of notification takes more than a month after the filling of the complaint. To be legally served there is a need to receive three notifications by the Court unless the defendant to be notified is found in person.

Indeed, the thirty-day period limitation for collision claims is a short period but it was not so difficult to overcome as in present time. A similar term that rushed attorneys and their clients is the 30 days' time that a new real state owner has to notify tenants of the termination of their contracts through a judiciary special claim. If not complied, tenants are able to continue in the property with the new owner as lessor. With proper strategy, these complaints were filed by experienced attorneys who normally obtained duly notifications on time and had the property free of tenants for their clients. Other attorneys for the tenants were also smart and looked-for ways to have their clients not notified, but anyway this is a short term, which entitles to have attorneys in a rush.

But, if the domicile of the defendants in Ecuador is uncertain the plaintiff has to produce enough evidence that it has been impossible to determine his address, and when this is complied the judge will order notification by newspaper or radio in three different days. Only when this is

completed and twenty more days has passed, the defendant time to contest the claim is counted. The terrain is ready for defendants to file a motion of dismiss due to prescription in a collision claim to the purported vessel liable.

Moreover, if the defendant is an individual or a corporation not domiciled in Ecuador another problem arises due that prescription will not be interrupted until the individual or corporation is duly notified via a rogatory letter or any other valid option under international conventions. Once a request for summons is filed and requirements are met the judiciary sends the documents to the Ecuador Ministry of Foreign affairs and this institution sends overseas to the country authorities where the summons are to be executed.

No doubt that the simple effect of prevalence of an organic law has impacted the effects of prescription and specially to those known as short prescription periods including the very short and ancient prescription period related to collisions claims by shipowners against the other vessel in case of partial loss.

It is simple, if the defendant is summoned after time bar has passed, there is an opportunity to raise a valid defense on prescription. Consequently, the plaintiff will loose his remedy. The National Court of Justice confirmed this doctrine in the decision 003-2012-ST dated 30 July 2012, "*Maria Cajamarca*" case, No. 313- 2006. (The Maria Cajamarca, 2012)

With this in mind, it is clear that the current prescription term related to collisions claims concerning the partial loss of a vessel, does not follow the nature and the purposes of extinctive prescription. It is in the essence that extinctive prescription is the result of no action by the potential plaintiff, but nowadays this extinctive prescription term results in a serious restriction to those who are willing and ready to claim.

7.3 Evidence to be produced at the moment of filing the complaint

Previous procedural law in Ecuador allowed the plaintiff to file lawsuit with no indication of evidence to be presented. These means that for collision cases as well for other cases the complaint was able to be filed the same day of the incident, once the loss and damages have occurred, although still not well determined.

The complaint was known by a civil judge who ordered to have the defendant notified by an officer of the Court or by a Court Clerk and this notification could be executed immediately . In absence of the plaintiff the complaint could be signed by his attorney with no need to show a power of attorney, but an offer to the judge to provide later a ratification by his client.

On the other hand, under the new procedural law the plaintiff needs to file the complaint with all the evidence. In a collision incident, such evidence may be comprised of expert reports and other testimonials with technical information by both vessels. Only as an exception the complainant will ask for more evidence only when it is accredited that he was not advised of its existence. Therefore, the general rule is to introduce or announce evidence with the complaint.

Besides, in 2014 the Council of the Judiciary enacted a new regulation stating the general rule that all experts for lawsuits are to be previously registered within the judiciary. The new procedural law states that only those experts duly accredited are authorized to present expert reports, and to testify in court.

The only exception in which an expert non accredited will be considered in court is when no experts are accredited in a specific specialty. In this case the Council of the Judiciary will require public institutions, universities or professional associations to provide a list of three names to be accredited as expert for the specific case.

Consequently, all reports by surveyors regarding an incident may not be considered in trial due to lack of this previous requirement. Even when in a collision incident many international accredited surveyors are present to analyze the causes of the incident these testimonials may not be considered by the judges.

Moreover, it is to remember that according to the Ecuador Code of Commerce there is a general doctrine that a collision is to be presumed as of fortuity nature. This means that if there is no evidence on the contrary all vessels involved should bear their own losses.

Therefore, it is a duty for the plaintiff to introduce enough evidence that the defendant is responsible of the incident. The decision of the Harbor Master or the Jury of Captains and the investigation process itself may be good evidence on the presence of fault that can be presented in trial, to justify the pretension of the plaintiff for recovery of damages.

7.4 Decisions by the Jury of Captains as evidence of fault

The Code of Maritime Police 1960 determines a fast procedure for the investigation of all maritime incidents, including collisions. Some of the incidents are to be judged by the Harbor Master and others by the Jury of Captains. As a general principle recognized by the Constitution all decisions are subject to be appealed, and according to this Code, decisions by the Jury of Captains need to be reviewed by the Judiciary

The decision by the Jury of Captains was considered evidence to be filed in a civil lawsuit to claim compensatory damages. Indeed, according to the Maritime Police Code it was a judiciary binding decision in regard to minor penal offenses.

But, it is to consider that an investigation process may take around eight months, as in the collision case of *The Em Hydra*[26], which occurred in 24 February 2016. The Jury of Captains issued their decision in 27 October 2016 with an opinion of mutual responsibility by the vessels involved in the collision incident.

The investigation for an allision took more time in the case *MV Paula Schulte*. The incident occurred on 15 September 2013 and the Jury of Captains decided the case in 28 July 2016 declaring the responsibility of the Master of the MV Paula Schulte in the incident of allision or contact with a dock. This is not to be considered as a collision but provides an idea on how much time may take a marine incident to be investigated and decided by the Jury of Captains.

Anyway, time for a decision of the Jury of Captains seems not to be the only problem it is also to be considered that the Harbor Master and the Jury of Captains lost their judiciary duties under the strict separation of power rule stated by the current Constitution of 2008. This is simple, they are not part of the judiciary system as the Constitution requires. The Harbor Master is an officer of the Navy of Ecuador and the Jury of Captains is an ad-hoc tribunal composed by civilians and military appointed by the local commander of the navy for each case.

This means that their decisions are no longer valid to be considered as judiciary decisions, but only as an administrative measure or disciplinary actions. They lost their jurisdiction stated in the Code of Maritime Police for minor criminal offenses. The impact in this change is dramatic

[26] The EM HYDRA, investigation process 003-2016

due that a claimant can only count with an administrative opinion rather that a judiciary decision which has more weight as a previous judgment.

This is a result of the application of the new Ecuador Constitution 2008 which abolished the Military Courts and stated that all decisions should come from the judiciary. Before the enactment of the new Constitution the appeals and reviews were the duty of the Military Justice Court which was an Organism not dependent of the judiciary and therefore was extinct. Once it disappeared, the National Court was requested to decide such cases and as previously mentioned the Court has provided different approaches generating confusion and uncertainty.

Moreover, there is no current certainty on the law in regard to which is the authority with jurisdiction to decide their appeals and reviews. If an appeal or review is pending is not to be considered as a final decision.

This is the cited example of the *MV Paula Schulte* case in which the President of the National Court in 30 March 2017 returned the file to the Harbor Master with the indication that he has no jurisdiction in the matter. More than three years and the review is still pending. There is no indication that the judgment by the jury of captains has been ratified according to law and therefore is not binding. There is no final decision.

This has also been the concern of the National Director of the Aquatic Spaces in Ecuador (DIRNEA) who in communication to the Commander of the Navy, dated 11 March 2016, said that there is no current authority to decide the appeal cases and that there is a need to solve this situation through a decision by the National Council of the Judiciary, to confirm jurisdiction to the Harbor Master and Jury of Captains in the investigation procedures and to establish jurisdiction to civil judges for the appeals. The scenario appears uncertain for those parties wishing to have justice through the Jury of Captains decisions as evidence.

Under these considerations and the new scenario, filing lawsuits claiming damages in collision cases can be a complicated task due to the very short prescription time. Parties may consider better to find ways to have the claims solved with amicable agreements. It is also known that in regard to international vessels there is a prima facie consideration that claims should be agreed to be filed before arbitration or foreign court i.e. English law and jurisdiction. If potential defendants in collision cases would know more about Ecuador law they may consider to have their

cases with Ecuador jurisdiction. It is to remember that according to local law all collisions in territorial waters have the jurisdiction of the courts of Ecuador.

Under the current scenario it is most likely that the purposes of the liberative prescription are not to be met. There is clear absence of adequate time for plaintiffs to file their claims in a very short prescription period. The consequence is that in most cases the actions would expire even when there is fresh evidence, memories are latent and witnesses are ready to testify (Fischer 1986).

8. THE QUESTION: PRESCRIPTION TERMS IN ECUADOR COLLISION LAW PROVIDE FAIR ACCESS TO JUSTICE?

As previously stated, the right of access to justice is directly related to the right of an effective remedy. It is directly linked to fairness and involves the necessity of reasonable time for the preparation of the defense and the determination of rights before an independent tribunal.

Besides, if a statute does not provide reasonable time for the determination of rights then there may be a breach to the principles of access to justice. Moreover, this breach is ratified when a prescription term results impossible to accomplish.

The history demonstrates that provisions regarding prescription for Ecuador law of collision are the same as in the first Code of Commerce of Ecuador since 19th century. Moreover, these specific rules are valid from the first French Code of Commerce adopted in the Napoleonic era. Therefore, these provisions are not new and it is most possible that they were convenient at the time of adoption.

Therefore, the Code of Commerce of Ecuador maintains the strict rule that imposes the master in a partial loss of the vessel, to protest in twenty-four hours and following this protest to file a lawsuit in thirty days. If one of these requirements is not complied the actions to claim are considered extinguished. The Code is gentle when allows the master to issue and notify the protest when he is able to protest, but the thirty-day's provision is clear and provides no exception.

As mentioned, if the lawsuit is not filed in such term the result is the extinction of the action. It has been demonstrated that this term is currently almost impossible to accomplish. Potential

plaintiffs face the immediate risk of having their claims time barred due to an allegation of prescription by the defendants.

The general principles in prescription law has shown that there are ways to determine when prescription begins to be counted, in consequence of current provisions in the Civil Code which recognizes that extinctive prescription shall be counted from when the plaintiff has the right to sue, the action nata principle. Nevertheless, the approach of the relevant prescription term in question is clear in the sense that the lawsuit shall be filed in thirty days after the notification of the protest.

The study of prescription provides the principle of contra non valentem. This is a convenient resource to interrupt prescription but considered in the Ecuador civil law only for limited cases.

In contrast, the current legal environment contributes to complicate more the position of shipowners claiming partial damages caused to their vessels by other vessels in a collision incident.

Consequently, the mention prescription term of thirty days is currently non reasonable and therefore infringes the fundamental right of access to justice. On this basis, there is no incentive to file lawsuits for these kind of cases and claimants will look for different options including forum shopping in a country where they can gain jurisdiction.

9. OPTIONS TO SOLVE THE CURRENT RESTRICTION TO ACCESS TO JUSTICE

It has been found that current prescription term of thirty days for claims related to partial loss of a vessel stated in the Code of Commerce 1960 results inadequate and no effective for remedies. This is not a reasonable time anymore due to several changes in the Ecuador legislation. Therefore, the current prescription term infringes the universal right of access to justice recognized by the Universal Declaration of Human Rights, the Interamerican Human Rights Convention, and the Constitution of Ecuador.

Several options are available to have this regulation been expelled or limited from Ecuador legislation, as follows:

9.1 Accession of Ecuador to the Brussels Collision Convention 1910

Ecuador is not signatory of The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels adopted in Brussels in 1910. If the accession is executed the effects of article six and seven of the Convention will immediately impact in collision law related to prescription.

Ecuador law following the ancient French law principles requires the formality of a protest for any maritime incident. Article six of the Brussels Collision Convention abolishes the protest requirement and any other formality prior to the right of action for recovery of damages in a collision case. This means that if Ecuador accedes to the Convention, the requirement of protest in twenty-four hours by the Master will be no longer valid.

Moreover, prescription time of 30 days in Ecuador law with the accession to the Convention will be replaced by two years from the date of the incident as stated in article six. This new term for prescription provides an international standard dramatically different with the current period. Besides, if one of the parties found joint liable in a death or personal injury pays, this party has the right of recovery the portion know as contribution by the other joint liable parties and with a right of action to sue in a period of one year from the date of payment.

Even with the accession, Ecuador is able through legislation to state extensions to the two years term when the plaintiff has not been able to arrest the defendant vessel in the territories where the plaintiff has his main place of business or domicile. The convention also allows countries to establish grounds to suspend or interrupt prescription by local legislation.

The main benefit with the accession to the Brussels Collision Convention is that it will provide to Ecuador an update to principles of collision law and not only to those related to prescription, as follows:

a. In case of a both to blame collision the liability will be determined according to the proportion to the fault of each vessel involved. This is in difference with the current provision in the Ecuador Code of Commerce that states that in the case of joint fault every vessel bears their own expenses. This is completely unfair when a vessel gets considerable less damages than other.

As an example: vessel A collides with vessel B. Vessel A has the 98% of fault in the incident. Vessel A has a loss of US$10,000 while Vessel B has a loss of US$500,000. The outcome with the current law in Ecuador is that every vessel will bear their own expenses, meaning that Vessel A having almost all the fault will evade the damages incurred to vessel B.

b. Any legal presumptions of fault are abolished in the Convention. This is an international standard. Anyway, Ecuador as other countries still maintain some presumptions. First, Ecuador has the presumption that any collision incident comes from a fortuitous nature, and also inputs some presumptions of fault in determined situations i.e. when there is absence of lights. With the accession to the Convention all of these presumptions are not valid anymore and the conclusion of fault will be determined based on facts.
c. Joint and severally liability is stated in the Convention in regard to death or personal injuries sustained as a result of a collision. If one of the joint liable vessels pays then a contribution can be obtained by the other vessels found in fault. Even without accession to the Convention, Ecuador Civil Code states that there is several and joint liability when it is found negligence by two or more parties, but the contribution provision is not stated in Ecuador law.
d. According to the Convention, when the fault in the collision is on the pilot, the liability attaches to the vessel even when this is a compulsory by law. In Ecuador law the pilot is only advisor to the master according to a provision in special Regulations for the Service of Pilots approved by the late Marine Merchant General Direction. Therefore, when the Master executes a wrong action advised by the pilot that produces a collision, the vessel will be liable, and the pilot is also responsible of his wrongdoing. With the accession to the Convention there will be more certainty on liabilities.

The accession to the Convention will bring a complete update on collision law, expelling those old principles, providing legal security and certainty. This is the best option to consider.

9.2 Claim before the Constitutional Court

It has been concluded that the current prescription term in collision related to partial loss of a vessel infringes the right to access to justice due to restrictions imposed by the actual legal scenario.

Besides, it has been demonstrated that those restrictions affect dramatically the right to a remedy by the plaintiff. With the actual situation, there is no effective solution nor adequate terms for the exercising of the rights.

Therefore, one of the options is to file a complaint before the Constitutional Court requesting that the very short term of thirty days to be expelled from the Ecuador legislation or modified.

Main basis may be stated as follows:

a. The 30 days prescription period infringes article 8 of the Universal Declaration of Human Rights which states that all persons bear the right to "*an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law"*. Said too short prescription time under current circumstances results almost impossible to comply. Therefore, this is not an effective remedy
b. Said prescription term infringes article 10 of the Universal Declaration of Human Rights which states that all persons are entitled to a fair and public hearing "*in the determination of his rights and obligations"*. With mentioned prescription term and in view of the current legal scenario there will be no option for a fair hearing. The allegation of prescription will be always a threat that will destroy fair pretensions for a remedy.
c. The provision in prescription also infringes Article 8.1 of the American Convention of Human Rights or San Jose Pact, which states that all persons have the right to a hearing, within a reasonable time for the purpose of determination of rights and obligations of civil nature as a collision claim, which involves rights in regard to private law. It has been demonstrated that with the current prescription term there is no option to a reasonable time and any hearing will be conducted on the risk of having the claim declared time barred when such allegation arises from the defendant.

d. There is also infringement in Art. 76 of Ecuador Constitution related to due process which states that all procedures need to be complied with specific guarantees, including the right to have a proper defense. It is stated in the Constitution that it is to guarantee adequate time and means for the preparation of the defense, and to be heard in a suitable time. These requirements are not possible to be met with the current prescription term in collision regarding partial loss of a vessel. Thirty days under actual circumstances is not possible to accrue taking in consideration that under provisions of the Organic Procedural law time bar is to be counted until the complaint is notified to the plaintiff.

The complaint must be filed before the Constitutional Court. This is the organism with authority to declare constitutional infringement with duty to invalidate unconstitutional regulations that are of general application, as statutes. Judges in the judiciary are not allowed to invalidate these regulations but they have the option of executing a consultation to the Constitutional Court in regard to determine statute that the judges consider may act in violation of the Constitution.

In case the complaint succeeds the prescription term of thirty days will be expelled from the Ecuador legislation. The Constitutional Court has the possibility of stating which will be the adequate prescription time. If this is not completed then prescription time will be considered under general principles of law in Art. 1006 of the Code of Commerce: 5 years in delict.

9.3 Amendment of relevant provision in the Code of Commerce

The amendment of the Code of Commerce is other option to modify the current prescription term of thirty days for claims in regard to partial loss of a vessel in a collision.

A bill is to be introduced by the President of the Republic or by a member of the Assembly with the support of at least 5% of other members. Citizens are also able to introduce bills with a support of at least the 0.25% of the citizens registered to vote. To convert in law the Bill should pass two debates and be accepted by the President of the Republic.

If the sole intention of the bill is to modify the current prescription term then this will be a non complex document for discussion and according to the priorities of the Legislature it will be

considered. A new prescription term to implement can be two years from the incident in replacement of the thirty days. Additional provisions regarding prescription could be providing a clear regulation on recoveries based in subrogation. If the nature of the subrogation is to acquire same rights of the insured then the same prescription time should be applied with the difference that the time begins when the insurer pays the indemnity.

Anyway, a sole amendment of a prescription term is not a reasonable measure. Lawmakers should consider proceeding with a total revision of maritime law in Ecuador with the intention to have dramatic amendments according to current principles of law.

This was the aim of Assembly member Galo Borja who introduced a bill with a new Code of Commerce in 9 November 2015. This bill passed first debate and was ready for the second but the Assembly faced different priorities and the consideration was postponed. Mr. Galo Borja and other members of the Assembly that supported the bill are now not in office due to a renovation of the members. The bill is now pending to be considered by the new Assembly which may have another priorities.

The bill introduced by assemblyman Borja is an ambitious reform of the whole Code of Commerce as difference with the previous Codes in which amendments were far from fundamental.

In relation to prescription in marine collisions the bill introduces a general term of 2 years counted from the date of the incident. But, the term will be 3 years in case the vessel in fault could not be arrested or sued while she was in national waters, if sailed after the collision with no call in any other national port. The bill introduced a provision by which a claim could be notified to the agents of the vessel in Ecuador.[27]

Both options to eradicate the current prescription period for claims related to partial loss of a vessel in a collision incident are valid. Some are more effective than others. As mentioned, the more effective approach should be the accession to the Brussels Collision Convention. With this option, the Convention will prevail before any other local legislation with the only exception of the Constitution. Therefore, any changes to the Ecuadorian law will not affect the Convention.

[27] A version of said bill can be found in the website of the Nacional Assembly of Ecuador http://ppless.asambleanacional.gob.ec/alfresco/d/d/workspace/SpacesStore/86831a74-2c1e-4b0b-9579-10253d52eae1/Informe%20Segundo%20Debate%20Tr.%20281694.pdf

Other benefit is the generation of certainty to the marine world adopting standard instruments of law.

It is to mention that under any solution it is necessary that the Assembly of Ecuador considers immediate reform of the Code of Maritime Police with the purpose to provide clear regulations on the administrative role of the maritime authority, the distinction between the breach of administrative rules with minor penal infringements and how these cases are judged or investigated. A whole reform is also needed to comply with actual scenarios.

10. CONCLUSIONS

Extinctive prescription is a principle instituted to provide legal security, a measure that allows the defendant to extinct the right of actions to those creditors that have not exercised said actions during a determined lapse of time. The law provides the creditor sufficient time to file its claim and if this is not completed then the action shall be extinguished.

Therefore, the essence of liberative prescription relies in mentioned premises. Adequate time of a prescription term. If this time passes then the defendant can raise his allegation to extinct actions. But, if the law does not provide enough time to the plaintiff then this is to be considered as a denial of justice.

In the matter of determination of the term of prescription the logical approach shall be to provide enough time to the potential plaintiff to interrupt said prescription. This includes the time to identify attorneys, prepare his defense and obtain evidence.

If a statute provides a prescription term that is not sufficient to allow the plaintiff to file lawsuit on time, then the conclusion is that there are inadequate guarantees for the plaintiff, due that the law will facilitate defendants position to argue the extinction of the action.

This problem has been identified with the current prescription term in Ecuador law related to collisions in a partial loss of a vessel. Thirty days to file lawsuit results an almost impossible task to complete specially for those plaintiffs that are not domiciled in this country. The problem is not produced only by the relevant provision in the Ecuador Code of Commerce. The new Constitution and legislation introduced from 2008 have contributed.

Notably, maritime law reforms are not in the eyes of the lawmakers. Ecuador is still keeping old principles of law of collisions and this is the same for almost every aspect of maritime law. Renovation of the law and certainty is a supreme need for an industry that would offer more benefits if its legislation provides clear rules and adopts current international principles of law.

But, there is no indication that this will change in the near future unless legislators continue the discussion and approval of the bill which intends to enact a new Code of Commerce for Ecuador. This may be a good signal. There is a need for a fundamental reform in this code, or at least there is an urgent need to update principles of maritime law in our legislation.

The accession to the Brussels Collision Convention has been identified as the most efficient measure to solve the problem related to prescription in collision law with the opportunity to include in the legislation other matters of this area that our country has not applied yet.

Meanwhile, the current prescription term infringes the universal human right of access to justice to those plaintiffs wishing to recover losses in a collision incident that has produced partial loss to a vessel.

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APPENDIX A: LEGISLATION ON MARITIME LAW IN ECUADOR

Ecuador is party of 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 with local statute, as follows:[28]:

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;

[28] Information obtained from the Yearbook 2016 ANNUARIE, New York II, Documents of the Conference. Comite Maritime International CMI. Part III Status of ratifications of Maritime Conventions, and also from the website of the International Maritime Organization and The Andean Community and the Official Gazette of Ecuador

- 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, as amended (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. American Conventions:

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

f. The Andean Community legislation[29]:

- Decision 288, Freedom of access to cargo with origin and destination by sea inside the subregion, 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

[29] Known as decisions of the "Comision del Acuerdo de Cartagena" Decisions from the Cartagena agreement commission. Information obtained from the website of the Andean Community www.comunidadandina.org

- 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

g. National Statute related to Maritime law[30]:

- 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
- Nacional 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

[30] Information obtained from www.lexis.com.ec a website related to the law of Ecuador