



ICLG

The International Comparative Legal Guide to:

Shipping Law 2015

3rd Edition

A practical cross-border insight into shipping law

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Advokatfirma Ræder DA

Ali Budiardjo, Nugroho, Reksodiputro

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SAN SIMÓN & DUCH

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Clyde & Co LLP

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Sub Editor
Amy Hirst

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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EDITORIAL

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

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

It is divided into two main sections:

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

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

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

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

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

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

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Venezuela



José Alfredo Sabatino Pizzolante



Iván Darío Sabatino Pizzolante

Sabatino Pizzolante Abogados
Marítimos & Comerciales

1 Marine Casualty

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

i) Collision

Rules related to collision can be found in Title VI of the Law on Maritime Commerce (the LMC) published in the Official Gazette No. 38,351 dated 6th January 2006, and based on the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels.

Collision is defined by domestic legislation as the violent material contact between two or more vessels, navigating or capable of navigation in aquatic spaces. As prescribed by the Convention, article 328 of the LMC states that the collision rules extend to reparation of damages caused by a vessel to another vessel or vessels; or to the property or persons that might be on board these vessels, even if a collision has not actually taken place and these damages are caused by the execution or non-execution of a manoeuvring, or by the non-observance of the law.

Legal actions for the recovery of damages arising from a collision must be brought within two years of the date of the casualty. In the case of joint liability among the vessels, or among the parties in a convoy, the time-bar for legal actions to exercise the right of recourse by reason of sums paid in excess of those that are payable, shall be one year to be counted from the date of payment.

ii) Pollution

Venezuela is signatory to the 1969 International Convention on Civil Liability for Oil Pollution Damage Convention, as amended in 1976 and 1984, published in the Official Gazette Extraordinary No. 4,340 dated 28th November 1991, as well as the 1992 Protocol published in Official Gazette No. 36,457 dated 20th May 1998, and so liability of ship owners for oil pollution is governed by said provisions. Consequently, ship owners are strictly liable for damages resulting from an oil spill, unless such damage has been caused by the events referred to in the Convention. Ship owners, however, are entitled to limit liability in accordance with the Convention, following the procedural rules prescribed by the LMC (Art. 74).

iii) Salvage / general average

The main provisions of the 1989 International Convention on Salvage are incorporated within domestic legislation, enacted in the LMC. A salvage operation means any act or activity

undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever (Art. 336). Salvage operations which have had a useful result shall give rise to the right to a reward. Unless otherwise agreed, if the salvage operations have had no useful result, no payment is due. Insofar as the criteria for fixing the reward, domestic provisions follow Art.13 of the Convention.

Any action relating to payment under domestic provisions shall be time-barred within a period of two years, to be counted as from the day on which the salvage operations are terminated. The person against whom a claim is made may at any time during the running of the limitation period interrupt it by means of a declaration to the claimant, although interruption is allowed only one time.

On the other hand, general average is also governed by the provisions of the LMC according to which the acts and contributions will be subject to the agreements between the parties, or in any case to the rules and international practices if they are more recent; however, for the purposes of the qualification, liquidation and distribution the parties may freely agree on the application of national or international rules, uses or practices. It follows that the York Antwerp Rules are admitted (Art. 368).

In the case of declaration of general average, the consignee that must contribute to its payment shall sign, before receiving the cargo, a compromise of average making a deposit in cash or submitting a guarantee to the satisfaction of the carrier, actual carrier or their representative to guarantee the payment of the respective contribution, or to guarantee the consignee the reserves he may consider appropriate. In the absence of a deposit or guarantee, the carrier, actual carrier or their representative may request the embargo of the cargo pursuant to a sea protest filed with the authority (Art. 371).

With regard to time limit, as prescribed by Art. 369, in those cases where a general average compromise is not signed, any party alleging a legitimate interest in the voyage may exercise an action in order to obtain payment of respective contributions within a period of one year, counted from the time of the occurrence of the event. Besides, in those cases where a general average compromise has been signed, the liquidation will be practised. In case of disagreement or non-compliance with what has been decided in the liquidation, the parties may refer to the judiciary, in which case the matter will be decided according to the Brief Procedure as stated in the Civil Procedural Code. This action will be decided within two years, to be counted from the manifestation of the disagreement, or the verification of the non-compliance, whichever occurs first (Art. 370).

iv) Wreck removal

This matter is covered by Art. 92 of the Law on Merchant Marine and Related Activities (The LMMRA), last

amendment published in Official Gazette Extraordinary No. 6,153 of 18 November 2014. Thus, the obstruction of a navigation channel due to grounding of a vessel, collision of two or more ships, collision between a ship and a fixed object, sinking of a vessel as a result of the former, among other causes, will impose upon the ship owner the following obligations: notification of the incident to the Port Captainty; marking the place where the danger to navigation is, the mark should be appropriate and maintained; surveillance of the area and ensuring that the other ships are warned of the danger in the area in case the wreck has not been located; and removal of the vessel with its remains expeditiously and diligently, in the period agreed by the aquatic authority and the ship owner or his representative – in the event no agreement is reached, the aquatic authority will set such time period; and to reimburse expenses incurred by a third party for the marking of danger, surveillance of the area and removal of the wreck.

v) **Limitation of liability**

The LMC has incorporated the provisions of the 1976 Convention on Limitation of Liability for Maritime Claims. Consequently, in Art. 41 the right for ship owners to contractually limit liability is recognised. Unless prohibited by the law, ship owners may limit liability in the same manner as listed in Art. 2 of the Convention.

Limitation figures strictly follow the general limits prescribed by Art. 6 of the Convention, including those for loss of life or personal injury to passengers of a ship. Insurers of claims subject to limitation shall be entitled to limit liability pursuant to these legal provisions, in the same way as is assured under Art. 49.

vi) **The limitation fund**

According to Art. 52 of the LMC the ship owners, charterers, insurers, salvors and in general any person who considers has a right to limit his responsibility, may appear before the maritime court and request to start a proceeding to constitute the limitation fund, verify and liquidate the credits and distribute them with the form and terms prescribed by law, said request for limitation and constitution of the fund, may be asked for in any stage of the court proceedings.

The petition for opening the limitation procedure must indicate the fact giving rise to the damages for which the request is made, the maximum amount of the limitation fund calculated according to the law, the list of the creditors known by the petitioner with indication of their domiciles, definite or provisional amount of their credit and its nature and all the documents that justify the calculation of the amount of the fund.

Pursuant to Art. 56 the court after examining whether the amount of the limitation fund calculated by the petitioner is correct, will then declare the limitation procedure initiated also appointing a liquidator. The court will pronounce upon the modes offered for the fund and order its constitution; it will also set up the amount that the petitioner shall submit to the court to guarantee the costs of the procedure, calculated in a provisional way, so that it includes the value of the necessary studies and the payment of the liquidator, fixed by the court's previous agreement with the petitioner, which shall not be higher than 10% of the value of the fund. The fund will only be constituted in cash money, in financial instruments or in securities issued or guaranteed by the Republic. Once the limitation fund is constituted, any ship or other property of the petitioner in connection to credits to which the limitation of liability is invoked will be suspended.

As required by Art. 61, all existing claims, actions or procedures or those that may be eventually instituted against the petitioner, in respect of which he may limit his

responsibility, will be accumulated in the procedure for limitation.

Following the order of the court for the constitution of the limitation fund, the creditors will be notified within the following 30 days, and will be able to oppose the limitation of liability. In the meantime, the liquidator will submit the list of creditors with the right to participate in the distribution of the fund, to be effected within the following 30 days after publication of the list, based on the rules on the privileges prescribed by the law. The credits with unresolved opposition has not been resolved will be subject to the reserves made by the liquidator, who will proceed to distribute the rest of the fund.

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

The authority vested with broader powers for the investigation of casualties is the National Institute of Aquatic Spaces (INEA) and the Port Captaincies as its local branches. In case of casualties the Master, through his agent, is obliged to make formal notification of the incident to the Port Captainty within 24 hours of arrival, as prescribed by Art. 87 of the LMMRA. Although the Aquatic Authority has the obligation to notify the casualty to other competent authorities that may have an interest in the incident, the investigation in the maritime field will be carried out by the Port Captainty, which in case of a casualty will appoint an Investigation Committee in charge of preparing a formal report.

2 Cargo Claims

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

When dealing with the provisions for the carriage of goods by water, Chapter III, Title V, the LMC adopts a mixed regime (i.e. Hague-Visby/Hamburg Rules). Art. 199 makes it clear that these provisions shall apply whatever the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person might be. Nevertheless, according to Art. 201, these provisions do not apply to charter-parties, unless a bill of lading is issued pursuant to a charter-party and it governs the relationship between the carrier and the holder of the bill of lading (which is not the charterer). It follows that any shipment to or from Venezuela under liner traffic will be subject to the provisions of Chapter III in terms of the liability regime, exoneration and limitation of liability, time-bar, etc., irrespective of the nationality of the ship.

Insofar as the period of responsibility is concerned, Art. 202 states that it covers the period during which the goods are under the custody of the carrier at the port of loading, during the actual carriage, and at the port of discharge. Goods are deemed to be under the custody of the carrier from the moment he receives the goods from the shipper or the person acting on his behalf, or from any other competent authority through a document issued to such effect, until that time when he has delivered the goods: 1) to the consignee. In cases when the consignee does not receive the goods from the carrier, the carrier shall make them available to the consignee pursuant to contract, law or common commercial practice at the port of discharge; or 2) to an authority or a third party to whom goods must be delivered, pursuant to contract, law or common commercial practice at the port of discharge (Art. 203).

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

The carrier will be able to exonerate and limit liability in certain cases. The events that give rise to exoneration from liability are found in Art. 206, matching the content of Art. 4 of the Hague-Visby Rules.

Limitation of liability is found in Art. 211 of the LMC, according to which the liability of the carrier or the ship in respect of losses or damage to goods shall in no case exceed the limit of 666.67 units of account per package or per any other unit of cargo transported, or 2.50 units of account per kilogram of gross weight of goods lost or damaged, whichever is the higher, unless the shipper has declared before the shipment the nature and value of the merchandise and that such declaration has been incorporated into the bill of lading and that such declaration has not been an administrative imposition on the country of loading or discharge. Liability of the carrier for delay in delivery shall be limited in similar terms to those set out in the Hamburg Rules. The loss of the right to limit liability is regulated by Art. 218 stating that the carrier, his employees, agents and port operators nominated by the carrier may not invoke the limitation of liability, as provided in Chapter III, if it is proved that the loss, damage or delay in delivery resulted from an act or omission with the intent to cause such loss, damage or delay or gross negligence.

As per Art. 253 of the LMC all actions derived from the contract of carriage of goods by water lapse after one year, counted from date of delivery of the merchandise by carrier to the consignee, or the date when the merchandise should have been delivered.

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

In light of the LMC the shipper, its servant or agent are not liable for losses sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by their fault (Art. 229).

As required by Art. 230, if the goods are dangerous the shipper must mark or label the goods as such in a suitable manner. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, he must inform him of the dangerous nature of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous nature then the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3 Passenger Claims

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

The LMC has incorporated the provisions of the Athens Convention in its Chapter V, governing the contract for carriage of passengers.

Indemnity paid by a carrier in cases of death or personal injuries to a passenger shall not exceed the amount of 46,666 special drawing rights (Art. 298). The limits of liability both for contractual and non-contractual liability of the carrier in respect of loss or damages suffered by the luggage shall not exceed the following limits: 1) per cabin luggage, 833 special drawing rights per passenger and per

voyage; 2) per vehicle, including luggage being carried inside the vehicles or on top of it, 3,333 special drawing rights per vehicle and per voyage; and 3) per item of luggage, which is different from that mentioned in point 1) above, 1,200 special drawing rights per passenger and per voyage. Contractual and non-contractual liability of the carriers in those cases covered by Arts. 286 and 288 of the law shall not exceed 3,000 special drawing rights per passenger.

A time-bar is set up by Art. 308, under which the right to exercise any action for damages due to death or personal injuries or for the loss or damage to luggage or to cabin luggage shall expire after two years have elapsed: 1) in the case of personal injuries, from the date when passengers disembarked; 2) in the case of death or disappearance of the passenger occurring during the carriage, from the date that the passenger should have disembarked; 3) in the case of personal injury occurring during the carriage which subsequently becomes the cause of death after the passenger disembarks, from the date of death, always when this lapse does not exceed three years counted from the date passengers disembarked; and 4) in the case loss or damages occurred to the luggage or cabin luggage, from the date of disembarking or from that date when disembarking should have occurred, if this is a later date.

4 Arrest and Security

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

Provisions related to the arrest of ships in Venezuela have significantly improved with the enactment of the LMC, which to a great extent incorporate the 1999 International Convention of Arrest of Ships. Art. 93 contains the list of maritime claims giving rise to an arrest of ship, similar to those prescribed by the Convention.

The governing provisions allow the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship. As per Art. 97 of the LMC the court shall grant the arrest for a maritime claim when this is founded in a public document or a private one recognised by the other party, accepted invoices, charter-parties, bills of lading or any other document proving the existence of said maritime claim, otherwise, the court as a condition to granting the arrest of the ship may request from the claimant the submission of a guarantee in the amount and subject to the conditions determined by the court. The defendant, however, may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, save in cases in which the ship has been arrested for any dispute as to the possession of the ship or any dispute resulting from a contract of sale.

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

Following a ruling by the Supreme Court of Justice in 2004 it has been held that the arrest or preventive embargo should only proceed in the event of maritime claims as listed by the law. For credits different from those regarded as maritime claims a “prohibition from sailing” is available pursuant the rules of the Code for Civil Procedure.

Based on Art. 259 of the LMC, in order to guarantee the payment of freight, use of containers, demurrage, contribution to general average and signature of the bond, the carrier, through an order of

the maritime court, may place the goods in the hands of a third party (warehouse), provided the carrier guarantees the corresponding fiscal credit and in the absence of anyone claiming the goods, they will be taken to court auction.

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

As previously mentioned, Art. 97 of the LMC states that the court may as a condition to grant the arrest of the ship, request from the claimant, the submission of a guarantee subject to the conditions determined by the former, for the claimant to answer for the damages that may be caused as a consequence of the arrest. Usually this guarantee may take the shape of a bank guarantee or bond equivalent to 30% of the claim amount as the maximum legal costs, plus the double of the said claim amount. The lifting of the arrest as well as any other embargo measure granted by the court will be subject to the submission of a bank guarantee. A Letter of Undertaking issued by a reputable P&I Club can be only used if acceptable by claimants.

5 Evidence

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

As allowed by Art. 16 of the Law on Maritime Procedure (LMP) published in the Official Gazette Extraordinary No. 5,554, dated 13th November 2001, even before the claim is brought any interested party may request a judicial inspection from the court in order to certify the state of persons, things, sites or documents. This is also established by the provisions of the Code for Civil Procedure. To achieve this, those persons to whom such proof will be opposed shall be summoned in advance, except in cases where, by reason of urgency, this is not possible, and in such cases those persons will be assigned a court-appointed defence counsel who will attend the inspection.

5.2 What are the general disclosure obligations in court proceedings?

Maritime procedural rules incorporate the so-called “discovery”. As per Art. 9 of the LMP, after answering the claim, and once precedent matters presented by the defendant have been amended or decided, any of the parties may request, within a period of five days, that the court orders the other party: 1) exhibit documents, records or registers under the other party’s control or custody, related to the subject claim, or to allow for these documents, records or registers to be reproduced by any means; and 2) to allow access to a ship, pier, dry dock, warehouse, facility or port area, in order to perform an inspection of ships, merchandise or any other object or document; or in order to measure, photograph or reproduce them. As per Art. 10, the judge shall request the required parties exhibit documents, recordings or registers, and allow for access to the ship, pier or other area, requiring compliance with court orders within a period of 20 court days following the issuance date of the order. This period may

be extended pursuant to an agreement by the parties or because of a justified cause, as decided by the court. Within the first five days of said period, the requested party may oppose the totality or part of the contents of order, alleging illegality, impertinence or reason of public order. The judge shall resolve in respect of allegations within a period of no more than three court days. Opposition shall suspend the term of compliance. When opposition is decided upon, the period shall continue in respect of those initial elements requested and admitted.

6 Procedure

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

Claims are litigated in the maritime courts and governed by the procedural rules introduced with the enactment of the LMP, the main features of which are now oral proceedings and abbreviation. Ordinary procedure before the First Instance Maritime Court, in general terms, is as follows: the claim will be brought in a written manner, also attaching any documentation proof and the name of the witnesses to participate in the oral hearing; and the answer to the claim or submission of precedent matters will take place within the following 20 court days as from the date the writ has been served. The plaintiff is allowed to amend the claim and the defendant may amend the answer to the claim; in any case, after the claim is amended or once the answer to the claim is put into effect, the court will schedule any of the following five court days for the preliminary oral hearing. At any opportunity prior to the oral hearing, the parties may promote any witness, judicial inspection, expertise or recognition, as long as they justify the urgency for such procedure by virtue of the imminent danger or disappearance of evidence. Under this supposition, the judge shall schedule a time which may not be in less than two court days, and the other party must be notified in advance. After initial steps have been complied with, the court will schedule any of the following thirty calendar days for the oral hearing to take place, and the hearing may be extended to another day or couple of days to complete the matter, in which case the judge will proceed to give judgment. Appeal is heard by the Superior Maritime Court and eventually cassation (if any) will be heard by the Supreme Court of Justice.

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

Generally speaking, maritime proceedings develop smoothly. The LMP allows the use of the electronic Power of Attorney. For the purposes of submittal and admission of a lawsuit or any other petition, representation of the plaintiff may be proved by written or electronic means, provided it is accompanied by a guarantee; however, this must be later replaced by the formally granted POA. All supporting documentation must be submitted in original, duly notarised form with the Apostille formalities as per the 1961 Hague Convention and translated into Spanish by a public interpreter.

7 Foreign Judgments and Awards

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

The Code for Civil Procedure contains the provisions for the execution of foreign judgments. In any such case judgments will require the exequatur of the Supreme Court of Justice for its enforcement, although such exequatur may be denied in the cases specified in the procedural rules.

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

Venezuela is signatory to the Convention for the Recognition and Execution of Foreign Arbitration Awards (New York Convention), published in the Official Gazette Extraordinary No. 4,284 dated 29th December 1994. Therefore, foreign arbitration awards are enforceable provided requisites of Art. IV of the Convention are met, in which case the execution will follow the rules prescribed by the Code for Civil Procedure for the compulsory execution of sentences. In addition to the domestic application of the New York Convention, Venezuela has also enacted the Law for Commercial Arbitration published in the Official Gazette Extraordinary No. 36,430 dated 7th April 1998, based on the Model Law for International Commercial Arbitration by UNCITRAL, whose Art. 48 of which prescribes that the final arbitration award, wherever it is issued, shall be recognised by ordinary justice as entailing and non-appealable, and on presentation of written petition to the competent Court of First Instance, must be executed by such court with no requirement of an exequatur.

8 Updates and Developments

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

In recent years the shipping industry in Venezuela has seen a trend towards the criminalisation of seafarers in drug-related cases, resulting in the conviction of seafarers and the retention of ships. It is worth pointing out that such cases are outside the scope of the maritime jurisdiction, as they are exclusively dealt with by the criminal courts and the investigation is vested with the Prosecutor's office, for which reason it is advisable to use a team of shipping and criminal lawyers to discuss strategies and an effective approach.

The current exchange control regime continues to be an important obstacle to the country's international trade, affecting the regular flow of goods through the ports. In recent years ports have experienced an important reduction in cargo volumes, now backed by a punitive newly-enacted customs law imposing huge fines on importers and shipping lines. The decline in oil prices has obliged the State to look for other sources of foreign currency, for which reason port tariffs in commercial ports as well as pilotage and towage are now payable in US Dollars, with the resulting increase in costs. The former obliges both public ports and carriers to review their tariffs in order to cope with such an adverse economic environment, giving rise to concerns due to gaps in the legislation regarding the applicable exchange rate and fair prices that might result in administrative sanctions for carriers.

After almost one decade and a half since the package of maritime laws was enacted, the maritime authority (INEA) has begun a revision of these legal instruments to update them, but they are also likely to introduce more governmental control on the private sector and increase the financial burden on shipping and ports.


José Alfredo Sabatino Pizzolante

Sabatino Pizzolante Abogados
Marítimos & Comerciales
Centro Comercial Inversiones Pareca, Piso 2
Oficinas 2-08/2-09, Urb. Cumboto Sur
Puerto Cabello, Estado Carabobo
Venezuela

Tel: +58 242 364 1801
Fax: +58 242 364 0998
Email: jose.sabatino@sabatinop.com
URL: www.sabatinop.com

José Alfredo Sabatino Pizzolante holds a Law Degree from the University of Carabobo (Venezuela). He studied at the University of Wales, College of Cardiff, where he obtained an M.Sc. in Port and Shipping Administration, as well as an LL.M. in Maritime Law. Currently he is a Partner with Sabatino Pizzolante Abogados Marítimos & Comerciales, Managing Director of Globalpandi, S.A. (P&I Correspondents) and a Professor at the Universidad Experimental Marítima del Caribe (Caracas). He is also a Legal Advisor to the Venezuelan Shipping Association, Vice-President of the Port and Customs Committee of the Venezuelan Association of Maritime Law, Executive Vice-President of the Venezuelan Association of Port Law, Titular Member of the Comité Maritime International (CMI) and the Iberoamerican Institute of Maritime Law. He has written extensively on the subject of Venezuelan maritime law, attending many international seminars and congresses as a speaker.


Iván Darío Sabatino Pizzolante

Sabatino Pizzolante Abogados
Marítimos & Comerciales
Centro Comercial Inversiones Pareca, Piso 2
Oficinas 2-08/2-09, Urb. Cumboto Sur
Puerto Cabello, Estado Carabobo
Venezuela

Tel: +58 242 364 1801
Fax: +58 242 364 0998
Email: ivan.sabatino@sabatinop.com
URL: www.sabatinop.com

Iván Darío Sabatino Pizzolante is a lawyer who graduated from the Universidad de Carabobo (Venezuela) with specialisation in Maritime Law at the School for Superior Studies of the Merchant Marine, Caracas, Venezuela. He followed a course of specialisation in International Maritime Law at the Spanish Maritime Institute (IME) and Universidad Pontificia de Comillas, Spain, and later a specialisation in Commercial Arbitration at the Universidad Católica Andrés Bello (UCAB), Caracas. He is a Partner at Sabatino Pizzolante Abogados Marítimos & Comerciales and General Director of the firm Globalpandi, S.A. (P&I Correspondents). He is a member of the Venezuelan Association of Maritime Law and the Iberoamerican Institute of Maritime Law. He is a former consultant to the National Institute of the Aquatic and Insular Spaces (INEA). Presently he is a Director of the Chamber of Commerce of Puerto Cabello and Vice-President of Oil Affairs in the Venezuelan Association of Maritime Law.



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Established four decades ago, Sabatino Pizzolante Abogados Marítimos & Comerciales is one of the leading law firms in maritime and port affairs throughout the country. Although situated in Puerto Cabello, the second largest city within the state of Carabobo, the firm has correspondence in all other major Venezuelan ports, among them La Guaira, Maracaibo, Guanta, Puerto Ordaz and Caracas, offering assistance in the field of commercial and business, labour, tax, administrative and customs law, as well as litigation in the context of international trade.

In the maritime field, services are not restricted to maritime and port law, but through Associated Maritime Consultants, C.A., its sister company, services extend to the areas of managing and technical consultancy comprising, among others, construction, sale and purchase agreements, vessel registration and documentation, naval mortgages, charterparty and bill of lading disputes, marine pollution, salvage, towage and collisions, port and terminal management consultancy, port operators' liabilities, pre-loading surveys, vessel and cargo inspections, reefer and dry container inspections, investigations (theft, fraud, etc.) and legal remedies on customs affairs. Globalpandi, S.A. is another sister company, purely acting as Commercial P&I Correspondents.

In addition, the office keeps close relations with legal firms and specialised international agencies worldwide, with periodical updates for its domestic and international clients – ship owners, protection and indemnity clubs, port operators, ship agents, etc. – through the publication of the Sabatino Pizzolante Newsletter, fully searchable alongside an important number of articles and papers on the firm's website.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk