

International Comparative Legal Guides



Shipping Law 2020

A practical cross-border insight into shipping law

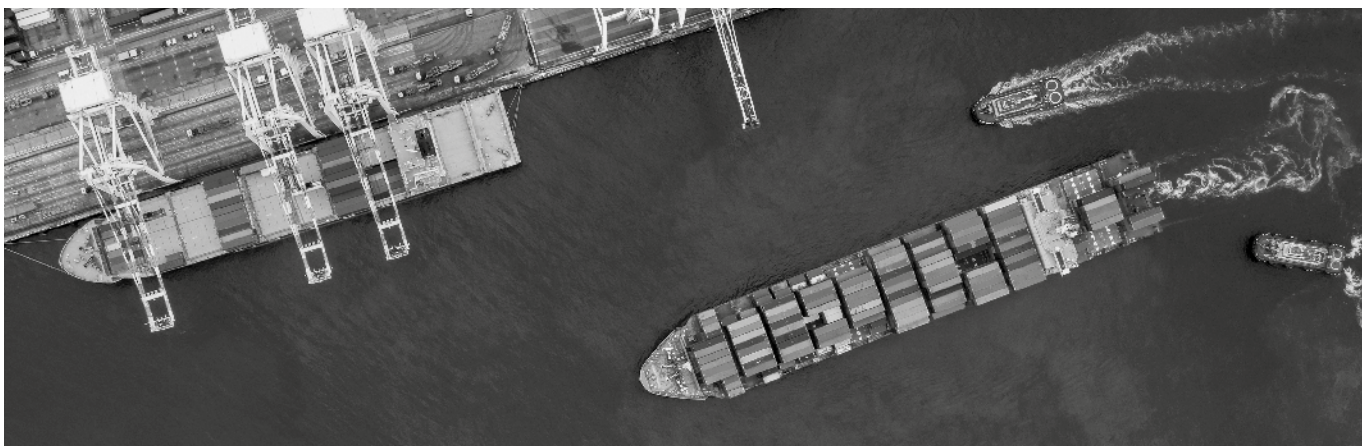
Eighth Edition

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Shipping Law **2020**

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Peru



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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

Peru is a party to the Convention on the International Regulations for Preventing Collisions at Sea (1972). In respect of national law, collision is regulated in Section IV, Chapter III of the Peruvian Code of Commerce and in the Law of Control and Surveillance of Maritime, River and Lake Activities.

Despite the fact that Peru is not a party to the Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels (1910), most of its rules were already established in the Peruvian Code of Commerce (1902). Actions of recovery of damages are time-barred after a period of two years from the date of the casualty, and the liability is apportioned equally in cases where two or more vessels are at fault. Where collision is caused by the fault of one of the vessels, liability to amend the damages attaches to the one that has committed the fault; rules governing accidental and *force majeure* collision, *et al.*, are applicable.

(ii) Pollution

Peru is a party to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and its Annexes. Further, Peru is also a party to the International Convention for the Safety of Life at Sea (SOLAS 74) and its Protocols, and the International Convention on Civil Liability for Oil Pollution Damage (CLC 69) and its Protocols.

Despite the fact that Peru is not a party to the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001), some of its provisions are duly incorporated into Peruvian laws through the Regulations on the Law of Control and Surveillance of Maritime, River and Lake Activities.

Concerning national legislation on pollution, Peru applies several laws related to this matter. One of the most important laws is the Regulations – approved by Supreme Decree – of the Law of Control and Surveillance of Maritime, River and Lake Activities. In connection with this law, it is also important to mention the Safety Regulation for the Transportation of Hydrocarbons.

For oil and other substances, we mainly apply the aforementioned Supreme Decree. These rules and regulations are performed by the General Directorate of Captaincies (DICAPI) and the Supervisory Body of Investment in Energy and Mining (OSINERGMIN), respectively.

As a complement to the said Supreme Decree, Peru applies Resolutions issued by the Peruvian Agency for Environmental Assessment and Enforcement (OEFA) ascribed to the Ministry of Environment. The said Agency is essentially responsible for the assessment, supervision, enforcement and sanction on environmental matters.

(iii) Salvage / general average

Peru is not a party either to the Brussels Convention for the Unification of Certain Rules with respect to Assistance and Salvage at Sea (1910), nor to the International Convention on Salvage (1989). Nonetheless, salvage activities/operations are governed by the Regulations on the Law of Control and Surveillance of Maritime, River and Lake Activities.

General average is governed by the rules adopted in Section IV, Title I of the Peruvian Code of Commerce. Pursuant to Article 824, “intentionally caused general average” refers to all damages and expenses caused to save the vessel, its cargoes, or both, from any existing risk listed in the aforementioned Section.

Where general average is concerned, and there exists an agreement between the parties to settle those matters under the York-Antwerp Rules, the same takes precedence and applies.

(iv) Wreck removal

Peru is not a party to the Nairobi International Convention on the Removal of Wrecks (2007). Nevertheless, the rules governing wreck removal activities are established in Sub-Chapter V of the Law of Control and Surveillance of Maritime, River and Lake Activities.

(v) Limitation of liability

Peru is a party to the International Convention on Civil Liability for Oil Pollution Damage (CLC 92), by which shipowners are entitled to limit their liability to an amount determined by the size of the vessel.

Concerning the Carriage of Goods by Sea, the limitation of liability stated in Section 4.5 of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading is applicable (The Hague Rules of 1924).

As for national law, the Code of Commerce states that the limitation of liability for carriers with regard to collisions will not exceed the commercial value of the vessel with all its belongings as well as the freight accrued since the commencement of the voyage.

(vi) The limitation fund

Peru is a party to the CLC 92 and thus the limitation funds apply.

1.2 Which authority investigates maritime casualties in your jurisdiction?

The following authorities investigate maritime casualties:

- The Port Captaincy of the area under its jurisdiction.
- The DICAPI, which also operates in the second instance.
- The Public Prosecutor intervenes when there is suspicion of criminal activities.

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

The DICAPI, through its Port Captaincies in each port, is the authority in charge of administrative proceedings and investigations related to collisions, groundings, and any casualty arising from an incident within Peruvian territorial waters.

2 Cargo Claims

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

Peru is a signatory party to the International Convention for the Unification of Certain Rules related to Bills of Lading of 1924 (hereinafter, the Hague Rules), signed in Brussels on 25 August 1924, which was incorporated by Peru into its domestic legislation by means of Supreme Resolution No. 687 of 16 October 1964.

Indeed, the instrument containing the Peruvian adhesion to the said Convention, i.e. the instrument which obliges Peru before the other High Contracting Parties, was deposited before the Belgian Government on 29 October 1964; therefore, the Convention came into force for Peru on 29 April 1965.

The national law is the Peruvian Code of Commerce, which was enacted in 1902.

Regarding limits of liability, we can only invoke that contained in the Hague Rules, because the Peruvian Code of Commerce does not contain any stipulation regarding limitation of liability, save for collision cases.

According to Article 4, Section 5 of the Hague Rules, carriers are entitled to limit their liability to 100 pounds sterling per package or unit. However, this monetary unit shall be deemed in its gold value (Article 9, Hague Rules). The value of the pound sterling shall be obtained considering the gold quotation on the free market. As per the last calculation made at the beginning of the present year, 2019, the said value is about USD 30,473.46 per package.

In spite of the fact that Peru is a party to the Hague Rules, apart from two historical decisions of Peruvian Courts by which the limitation of liability of the Hague Rules was upheld, we are unaware of any recent decisions from the Supreme Court upholding the said defence. In Peru, it is not mandatory for Judges to follow jurisprudence in this area; therefore, they are free to construct it or apply the Hague Rules in any way they see fit.

In some cases, Judges have tended to construct the reverse side's articles of a Bill of Lading as a contract of adhesion. Further, Section 1398 of the Peruvian Civil Code sets out that stipulations in a contract granting limitations or exonerations of liability to the benefit of whoever drafted it, are invalid.

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

According to Section 632 of the Peruvian Code of Commerce, the Master is responsible for the cargo from the moment he receives it at the berth or beside the vessel at the port of loading, until the moment he delivers it at the port of discharge, unless otherwise agreed. Unfortunately, due to a bad interpretation by the Peruvian Supreme Court, the term "FCL/FCL" is considered by Peruvian Judges as an extension of liability of the maritime carrier as it would have been agreed in terms house-to-house. This interpretation is still being challenged before the Constitutional Court.

Also, according to Section 600 of the same Code, the ship owner is civilly liable for the indemnities in favour of third parties caused by the conduct of the Master who has custody of the cargo. Based on the said Section, cargo interests always sue shipowners, contractual carriers, ship managers, and operators, alleging that all of them are liable *in solidum*. These arguments, in most cases, are upheld by Peruvian Judges, although this is wrong.

Peruvian Courts have jurisdiction over cargo claims when the destination is Peru. Any jurisdiction or arbitration clause inserted in the Bill of Lading, stating the jurisdiction of any other Court or tribunal is, in most cases, dismissed by Peruvian Judges, because they consider the Bill of Lading to be a contract of adhesion where the consignees have not negotiated its terms.

We are fighting against this reasoning and the one related to the *solidum* liability explained above.

Clauses of "quality/quantity unknown" or similar in a Bill of Lading have no value for Peruvian Judges, based also on the fact that the Bill of Lading is deemed to be a contract of adhesion.

The Peruvian Code of Commerce, Section 963 provides that the time bar is one year from the moment the cargo was delivered in the port of destination, or should have been delivered in those cases where the cargo never arrived.

Subrogation by insurance companies is recognised and fully executed in Peru.

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

According to Section 3, Paragraph 5 of the Hague Rules, the shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the nature, quality, number of packages, quantity or weight as furnished by him at the loading declaration, and the shipper shall indemnify the carrier against all losses, damages and expenses arising or resulting from inaccuracies in such particulars.

The right of the carrier to such indemnity shall in no way limit his responsibility and duties under the contract of carriage to any person other than the shipper.

2.4 How do time limits operate in relation to maritime cargo claims in your jurisdiction?

According to The Hague rules and further to Section 963 of our Code of Commerce, maritime cargo claims have a time bar of one year. Recent Supreme Court decisions have established that the time bar is interrupted with the submission of the claim rather than when court summons are served.

3 Passenger Claims

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

The Peruvian Code of Commerce governs the contract of carriage of passengers and their luggage. Also, the Law of Promotion of the National Merchant Fleet contains some stipulations regarding this topic.

Regarding liabilities of the carrier, the rules of the Peruvian Civil Code should be applied since the above-mentioned codes do not contain any stipulation in this respect.

Two matters should be proved in order for the carrier to be liable: i) that the incident which caused the damages occurred in the course of the carriage; and ii) that it was caused by the fault or neglect of the carrier.

There are no limitations of liabilities regarding passenger claims – neither to the passenger nor to his luggage.

Peru is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (1974).

3.2 What are the international conventions and national laws relevant to passenger claims?

Peru is not part of any international convention relating to this matter. Peruvian Civil and Commerce Codes should apply along with the provisions of the Law of Promotion of the National Merchant Fleet and SOLAS.

3.3 How do time limits operate in relation to passenger claims in your jurisdiction?

Time limits operate as per the Terms & Conditions of the ticket and to those applicable under our Civil Code.

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?

Peru, as with some other countries of the Andean region, is a party to the Andean Pact, and as such ought to abide by the Decisions or Resolutions issued by the relevant Authority (the Andean Community Commission).

In particular, Decision No. 487, is applicable for the arrest of vessels, which the Andean Community Commission issued on 7 December 2000, incorporating the provisions of both the International Convention on Maritime Liens and Naval Mortgages (1993) and the International Convention on the Preliminary Arrests of Vessels of 1999 (incorporated into Peruvian Legislation on 22 May 2017), plus adding a few Sections, namely its own legislation on the matter.

According to the second Paragraph of Section 37 of the said Decision, applicants seeking the preliminary arrest of a vessel are entitled to ask Peruvian Courts for the arrest of a vessel only in respect of maritime credits, which are listed in Section 1 of such Decision.

Consequently, plaintiffs would be entitled to ask Peruvian Courts for the preliminary arrest of a vessel, provided that the person who was the owner of the vessel at the time when the maritime credit arose, and who is bound under the said credit,

is the owner of the carrying vessel at the time of the attachment of a preliminary arrest, pursuant to Section 41 of the said Decision only.

Also, under Section 42, Sub-Section c) of the said Decision, plaintiffs would be entitled to ask for the preliminary arrest of any other vessel or vessels, i.e. sister ships, provided that at the time of the arrest, the vessels belong to the person who is personally bound under the relevant maritime credit, and that at the time when the credit arose, said person was the owner of the vessel in respect of which the maritime credit had arisen.

In order to perform this right of preliminary arrest, applicants should file their Applications together with the relevant supporting evidence set out by Sections 608, 610 and 613 of the Peruvian Civil Procedural Code, which includes the putting up of a counter guarantee. The arrest shall be served upon owners only after the carrying out of the attachment, as set out in Section 636 of the said Code.

4.2 Is it possible for a bunker supplier (whether physical and/or contractual) to arrest a vessel for a claim relating to bunkers supplied by them to that vessel?

Yes. In pursuance of Section 1.12 of Decision No. 487 of the Andean Community, any claim related to the bunker provided to a vessel is qualified as a maritime credit. Thus, a vessel can be arrested.

4.3 Is it possible to arrest a vessel for claims arising from contracts for the sale and purchase of a ship?

Yes, it is possible to arrest a vessel for claims arising from the sale and purchase of a ship, pursuant to Section 1.19 of the Decision No. 487 of the Andean Community.

4.4 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?

In accordance with Sections 678, 679 and 680 of the Commercial Code, the carrier cannot retain the cargo in the case of lack of payment of freight or other expenses. Nevertheless, the carrier is entitled to proceed with the embargo of the cargo and later sell it in order to recover the amount due and the costs and fees incurred.

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

All of the above is at the claimants' discretion. It should be mentioned that Section 85 of the Regulations on the Law of Control and Surveillance of Maritime, River and Lake Activities states that any commercial vessel that arrives at a national port must certify that it, among others, has an insurance policy issued by members of the International Group of P&I Clubs.

4.6 Is it standard procedure for the court to order the provision of counter security where an arrest is granted?

There is no standard procedure. The provision of counter security depends on the Judge criterion.

4.7 How are maritime assets preserved during a period of arrest?

Owners remain custodians of their asset and must ensure its preservation during the arrest.

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?

Administrative procedures in Peru related to maritime claims should be started with a letter of protest before the Port Captain of each jurisdiction where the incident occurred. In this procedure, experts may be nominated and the examination of witnesses may also take place.

In order to preserve evidence related to general average and particular average caused or suffered by a ship, Sections 864 and 882 of the Peruvian Code of Commerce are applicable.

Before filing Court proceedings, documents, examination of witnesses and a surveyors' report may be ordered by a Judge as evidence in anticipation.

5.2 What are the general disclosure obligations in court proceedings? What are the disclosure obligations of parties to maritime disputes in court proceedings?

Our procedural rules do not include disclosure proceedings, though plaintiffs are compelled to support their claims by submitting all the evidence together with the filing of the claim.

5.3 How is the electronic discovery and preservation of evidence dealt with?

Electronic discovery and preservation of evidence is dealt with by obtaining relevant copies of administrative procedures or offering the administrative files and conclusions as evidence to the competent judge.

6 Procedure

6.1 Describe the typical procedure and timescale 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.

6.1.1 Which national courts deal with maritime claims?
Both Civil and Commercial Courts, where they exist, deal with maritime claims depending on the defendant's legal domicile.

In the Peruvian judicial system, proceedings are classified into two large groups: "contentious" and "non-contentious" proceedings. In this regard, maritime claims are processed within the so-called contentious proceedings, which, in turn, are sub-classified into: cognisance proceedings; summary proceedings; expeditious proceedings; and proceedings based on a claimed amount.

The typical procedure characterising maritime claims in these kinds of legal proceedings is the following: claim (lawsuit);

preliminary pleas and points of defence; replying preliminary pleas; hearing of evidence and determining controversial issues; allegations; and judgment.

The timescale is between three and five years in the High Court, mainly due to an excess of lawsuits.

The legal basis governing the various judicial proceedings and their respective timescales are stipulated in the Peruvian Civil Procedural Code (from Sections 475 to 607).

6.1.2 Which specialist arbitral bodies deal with maritime disputes in your jurisdiction?

This depends on the arbitration clause. Commonly, the Arbitration Centre of the Peruvian Chamber of Commerce is the body that deals with maritime disputes.

The Peruvian arbitration system has been strengthened due to the crisis with the traditional justice system. It is the most commonly used method for deciding on maritime cases provided that a valid arbitration clause is in force and/or the parties agree to it.

The timescale for the final resolution is about eight months.

The legal basis governing both the proceeding and timescale in the arbitration is stipulated in Executive Decree No. 1071 – Law Governing Arbitration, which has been in force and included in the Peruvian legal system since 1 September 2008. However, in the case of institutional arbitration proceedings, for example, through the Lima Chamber of Commerce (CCL) or the American Chamber of Commerce of Peru (AMCHAM), they are regulated by their respective regulations of arbitration and additionally by the above-referenced Arbitration Law and the Civil Procedural Code, in that order of preference but within the rules of the Law.

6.1.3 Which specialist alternative dispute resolution bodies deal with maritime mediation in your jurisdiction?

This is not common for maritime disputes. Specialist lawyers and *ad hoc* arbitration proceedings are an alternative to institutional arbitration.

Peruvian procedural law requires conciliation as a previous step that claimants must follow to be able to start a legal action afterwards. A solution in this procedure, in maritime matters, is rare.

With regard to the timescale applied to maritime claims in conciliation proceedings, it is necessary to specify that the proceeding lasts approximately one month.

The legal basis governing both the proceeding and timescale in the conciliation is stipulated in Law No. 26872 – the Law of Conciliation, in force in Peru since 13 November 1997, and Supreme Executive Decree No. 004-2005-JUS – Regulations of the Conciliation Law.

6.2 What are the principal advantages of using the national courts, arbitral institutions and other ADR bodies in your jurisdiction?

The advantage of using arbitration instead of proceedings before national Courts is the length and cost of the proceedings. With national Courts, proceedings are lengthy but cheap, whereas arbitration proceedings are short but, to a certain extent, onerous.

6.3 Highlight any notable pros and cons related to your jurisdiction that any potential party should bear in mind.

The pros both in Court proceedings and arbitration are:

- The costs are recoverable from the party to be blamed for the claim and the judicial costs are not excessive like in other jurisdictions.
- It is preferred to use arbitration rather than applying to the Court.

The cons in proceedings before the Court are:

- The slow progress in the development of the legal proceedings.
- The lack of predictability of maritime judgments.

7 Foreign Judgments and Awards

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

Exequatur is a legal proceeding whereby a foreign judgment is recognised and enforced in our judicial system. This proceeding, which in Peru is a “non-contentious” one, does not involve the review of the contents of the said judgment.

The *Exequatur* procedure must be initiated considering the effectiveness of international rules (treaties, Conventions) binding on Peru and the State in which the Court issued the respective judgment.

In cases where any treaty exists on the matter, the legal proceeding is followed according to the terms thereof.

In the absence of any treaty, the Judge will verify the reciprocity that exists in the country where the judgment was issued with regard to the application of Peruvian judgments in that country.

Requirements of *Exequatur* (Section 2104 of the Peruvian Civil Code):

1. The proceeding does not solve matters of exclusive Peruvian competence.
2. The foreign Court must have been competent to take cognisance of the subject, in accordance with the rules of Private International Law and the general principles of international procedural competence.
3. The defendant must have been notified according to the law of the place where the proceeding takes place, a reasonable term to appear must have been granted, and procedural guarantees must have been granted to exercise his/her defence.
4. The judgment has the authority of *res judicata* according to the laws of the place where the proceeding took place.
5. There is no pending trial in Peru between the same parties and on the same matter, which must have been initiated prior to the filing of the claim that gave rise to the judgment.

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

For arbitration awards, provisions of Executive Decree No. 1071 – the General Arbitration Law – shall be applicable as per the provisions of Section 2111 of the Peruvian Civil Code.

According to the said law, foreign arbitration awards may be recognised and executed, taking into consideration:

- a) The Convention on Recognition and Enforcement of Foreign Arbitration Awards, approved in New York on 10 June 1958.
- b) The Inter-American Convention on International Commercial Arbitration, approved in Panama on 30 January 1975.

- c) Any other treaty on recognition and enforcement of arbitration awards to which Peru is a party.

The timescale is about six months.

Afterwards, the execution of the foreign arbitration awards, solely recognised by the Peruvian tribunal, should be followed before the Courts.

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 2009, a new law was enacted for the development of Peruvian merchant shipping, aimed specifically at Peruvian flag vessels sailing for coastal trade. The law provides that only ship-owning companies of Peruvian nationality (i.e. those with a 51% Peruvian majority among their investors) may operate vessels, which are to be manned by a Peruvian crew, especially their Master, and the time charter of foreign vessels is allowable for six months only, in case of defect or non-existence of Peruvian flagged vessels.

After about 10 years of the successful re-building of Peruvian merchant shipping for coastal trade, with heavy investment, among other achievements, the Parliament approved by legislative decree, dated 13 September 2018, to open coastal trade to any foreign flag vessel on any cargo, with the exception of liquid and gas cargoes, intended to promote and facilitate coastal trade and passenger maritime transportation. Container ship companies are acting upon the said law.

In other developments, a fact of international impact is that Peru ratified Annex VI of MARPOL 73/78, by Supreme Decree No. 029- 2013-RE, dated 25 June 2013. The said Supreme Decree includes the use of a Bunker Delivery Note (BDN), a document which evidences the delivery and quality of fuel to a ship by the supplier of bunkers in Peru.

At the time of writing, there have been two new developments under the umbrella of the COVID-19 measures.

The first is the new regulation, Legislative Decree No. 1492, dated 10 May 2020, regarding the electronic commerce and the non-presentation of the original Bills of Lading to Customs to allow delivery of the cargo to the consignee. Further, all chargeable costs must be described in the Bill of Lading and, though the cargo is delivered in the place described in the Customs declaration and/or Cargo Manifest, the consignee may require their cargo to be delivered in another location.

This is achieved by consignees changing the Customs declaration at least three days before the arrival of the vessel. It is not clear then that when the regulation states that the obligation of the carrier ends with the delivery of cargo according to the Customs declaration, it includes the new place of delivery so changed.

Nonetheless, for this Legislative Decree No. 1492 to come into effect, a set of regulations for its application and clarification needed to be enacted by the Government in 30 days, that is to say, on or around 10 June 2020.

In line with the above, the Government declared on 11 June 2020, the Denouncement of the International Treaty known as The Hague Rules, which should come into effect after a period of one year elapses.



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Estudio Arca & Paoli Abogados was established on 1 May 1980, under the name of ESTUDIO FRANCISCO ARCA PATIÑO, ABOGADOS, and changed to the current name in 2004. From the beginning, we have provided specialised legal services to commercial firms, associations and institutions, both national and foreign.

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