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From 22 to 24 June 2006

3rd GENERAL MEETING SHIPARRESTED.COM

MARSEILLE

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International Maritime Transportation under Brazilian Law

The Hague-Visby Rules

X

Brazilian Legislation

(Commercial Code, Civil Code and Consumer Code)

Position of the Brazilian Courts

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Subject of Presentation:

1. **International Convention not signed, ratified and promulgated by a Legislative-Decree in Brazil.**

2. **Maritime Law in Brazil – Bill of Lading:**

   2.1 Jurisdiction of Brazilian Courts to hear and adjudicate actions;

   2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code;

   2.3 Civil Liability of the Carrier under the Consumer Code – New Trend;

3. **Statute of limitations (carrier, shipper and consignee)**

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1. The Hague-Visby Rules - Main Clause of International B/Ls – 'Paramount Clause'

- "The Hague-Visby Rules", signed in Brussels in 1924, as well as its later amendments, was not ratified by Brazil;

- **Consequently:**

  - subordination of a transport agreement **entered into in Brazil** to a foreign law is not altogether permitted by Brazilian law.

  - any clause that makes reference to a foreign law or an international convention **not** signed and **ratified** by Brazil **and promulgated in Brazil by a legislative decree** may be questioned as to its validity [especially if the foreign legislation and/or international convention contains provisions that contrast with those contained in Brazilian legislation].

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1. The Hague-Visby Rules – International Convention not ratified by Brazil

- **Application of the international conventions or the legislation of a foreign country to Bills of Lading executed outside Brazil:**
  - may be applied, provided such rules do not conflict with the Brazilian public order, i.e. with laws considered imperative or cogent in Brazil (whose applicability cannot be set aside through the autonomous exercise of private volition)
- **The so-called "Lex Mercatoria":**
  - commercial customs and usage are considered under the Brazilian legal system to be a fundamental source of commercial law. Thus, when the law is silent (or even as a complement to the law), our Courts usually apply such customs and usage in resolving litigation involving commercial relationships **if it is evidenced that they coincide with the customs and usage widely accepted in international trade**.

1. The Hague-Visby Rules – International Convention not ratified by Brazil

Briefly:

- Norms contained in international conventions not signed and ratified by Brazil, may be recognized and applied in Brazilian Courts, if it is evidenced that they coincide with the customs and usage widely accepted in international trade. However, the acknowledgment and application of such customs and usage by our Courts will be limited by respect for the public order in Brazil.

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2. Maritime Law in Brazil – Bill of Lading

2.1 Jurisdiction of Brazilian Courts to hear and adjudicate actions (Arts. 88 e 89 of Procedure Civil Code)

- that originate from facts that occurred (or were undertaken) in Brazil;
- that concern obligations that must be performed in Brazil (even if resulting from acts performed abroad); or
- in which the Defendant, whatever his/her/its nationality, is domiciled in Brazil.
  - **Foreign corporate entity:** under the terms of the law, it is considered to be domiciled in Brazil **whenever** it has an **agency** or branch office

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2.1 Jurisdiction of Brazilian Courts to hear and adjudicate actions

- Therefore, above articles allow the alleged prejudicated party to file **in Brazil** an action against the foreign carrier

- **Case Law already established in the Superior Court of Justice:** it is considered that the ship owner's or carrier's agent in Brazil has the **powers to accept service of process** in its name

- Brazilian shipper that hires transport via an agent here in Brazil can file an action against the agent itself (as if the latter were responsible for performance of the maritime contract of carriage).

2.1 Jurisdiction of Brazilian Courts to hear and adjudicate actions

- The frequently used argument is, that the agent, would be in fact, a branch office or legal representative of carrier/ship-owner.

- **Homonymy effect:** In some cases, involving agents that have the same corporate name as the ship-owner/carrier, the court ordered the agent to compensate the shipper as if it was the carrier!

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Decision rendered by the Superior Court of Justice:

Proceeding REsp 404745 / SP; Special Appeal 2002/0001110-6;
Reporting Judge Justice JORGE SCARTEZZINI (1113) –
Court FOURTH JUDICIAL REGION –
Date of Judgment: 04/November/2004 – Official Gazette: 12/06 2004 p. 316

Summary

Civil Liability – Special Appeal – Damages – Violation of arts. 499 and 500 of the Commercial Code to arts. 159 and 1056 of of Civil Code and art. 12, VIII, of the Code of Civil Procedure - .....- Maritime International Transport – Damage to the Goods – Action for Damages – Foreign carrier's maritime agent as improper defendant – The agent is the only legal representative in Brazil

1 - ....;
2 - ....;
3 - ....;

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...

4 - The maritime agent, as agent and the carrier's sole legal representative in Brazil, assumes jointly with the carrier the obligations to transport the goods, and thus both are liable for the executed international transport agreement. Indeed, as the agent has the right to receive all the amounts due to the ship-owner, in addition to paying and being responsible for all the charges to the ship or to the cargo, when no one in the port is more qualified, it is proper that the foreign carrier's representative defend against the action for damages or other consequences, for which it can be served judicially as agent. The defendant is deemed proper defendant in the cause of action.

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Maritime Law in Brazil – Bill of Lading

2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

- **B/L, its issuance and legitimacy:** Commercial Code and especially in Decree No. 19.473/30 .

- **Brazilian legal writings on this matter:**
  - **BLs are adhesion contracts**: the will of only one of the parties prevails → **the maritime carrier**.

  - **Case Law:** Print clauses should be interpreted, preferentially, based on equity, it being certain that, in case of doubt, the interpretation should favor the party that was **obliged to accept**, thus minimizing the negative effects of the impositions dictated by the carrier

2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

- **The transport agreement is a "purpose"-driven obligation / "result" obligation:**
  - **Shipper:** undertakes to pay a certain, predetermined price (the freight);
  - **Carrier:** carrier undertakes to transport and deliver the goods entrusted to him in the same condition in which they were received to the location indicated in the B/L. Only upon the prompt and perfect performance of these obligations can one consider that the legal transaction entered into has been properly fulfilled.
- **Brazilian law – Theory of Objectivity :**
  - When there is a breach of the contract of carriage, the carrier is held liable independent **of any demonstration of guilt.**

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

The only means of escaping the obligation of repairing the damage suffered by the other party is to prove that:

- there is no causal link between its conduct and the respective damage; **or**
- the existence of a legal justification is provided for the damage produced (cases which, for the purposes of law, are evidenced precisely in the event of occurrence of any one of the causes exculpating liability).

Exculpating causes:

- **(i)** sole fault of the other party; **(ii)** defect at origin; **(iii)** acts of God and/or *force majeure*; and **(iv)** acts performed in the normal exercise of a right or even the deterioration or destruction of another's property to avoid imminent danger (as in the case of jettisoning objects and those resulting from measures taken to protect the ship in a general sense)

2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

- **The Acts of God or of *Force Majeure*:** proof has been increasingly difficult to produce, since it has been the understanding of the Judiciary Branch that it is a known fact that constant advances in technology have driven enormous developments in:

  - **Naval Engineering:** ships are designed and built to handle the adversities typical of the sea.

  - **Technology:** Modern communications media allow for control of the ship by means of powerful radar and onboard computers directly linked to cutting-edge satellites, providing exact, wide-ranging and secure information at any point in time on conditions at sea and the weather to be faced.

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

Robbery of Cargo

- **Fact characterizing *force majeure*: absolves the maritime carrier of liability for possible breach of contract**
  - **Presupposition:** the carrier did not fail to employ the care and precautions to which it is obliged, and therefore the robbery is an inevitable happening and, since it is also unforeseeable, it is an irresistible fact, in view of the fact that it involved a high degree of danger to the physical well-being of the victim, in this case the agents of the carrier.

- **Fact that not characterizing *force majeure* -** the occurrence of robbery in the form of piracy is therefore foreseeable and provides in itself the prerogative of **presuming liability of the carrier** for what has occurred, since all those who undertake to transport merchandise, goods and valuables ought to be prepared for the most adverse situations, **assuming the risk** in view of the unequivocal predictability that they will occur.

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

JUDICIAL DECISION – ROBBERY OF CARGO

- Predominating position in Brazilian Case Law:

Robbery eliminates the liability of carriers in general, **since that cannot be proven that the carrier acted negligently in protecting and guarding the goods in its care.**

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

Clauses exculpating the carrier from liability (inserted into BL)

- **Non Liability Clauses:** In Brazil the carrier is only exempt from liability for damage to, and shortage in, the shipment if they occur due to defects at origin, acts of God or *force majeure*. A clause that exculpates the carrier from liability is null and void.

- **Clauses limiting liability:** Provided the amount stipulated is not negligible (abusive), clauses limiting liability for indemnities have been allowed by our Courts.

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

- **The following are some such decisions that have been handed down:**

"Superior Court of Justice"

FINAL DECISION: RESP 36706/SP (9300187970)SPECIAL APPEALDECISION: UNANIMOUS, NOT TO EXAMINE THE APPEAL.DATE OF THE DECISION: 05/NOV/1996JUDGING BODY: T4 – FOURTH PANEL - **REPORTING JUSTICE: JUSTICE SÁLVIO DE FIGUEIREDO TEIXEIRA** OTHERS: RESP 48875 SP 94/0015621-9 DECISION: 22/APR/1997 DJ DATE: 26/MAY/1997 PAGE: 22541SOURCE: DJ DATE: 09/DEC/1996 PAGE: 49279SEE: RESP 39082/SP, RESP 12220/SP, (STJ)

S U M M A R Y

Commercial docket. Maritime law. Transport. Clause limiting liability. Validity. Second Section precedent. Appeal dismissed.

- **Clauses inserted into maritime transport agreements limiting liability for indemnities are valid.**

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2.2 Civil Liability of the Carrier under the Commercial Code and the Civil Code

"Superior Court of Justice"

FINAL DECISION: RESP 644/SP (8900099175)SPECIAL APPEALDECISION: UNANIMOUS TO EXAMINE THE APPEAL IN ORDER TO GRANT ITDATE OF THE DECISION: 17/OCT/1989JUDGING BODY: T4 – FOURTH PANEL – SPECIAL APPEAL EXAMINED AND GRANTED. **REPORTING JUSTICE: JUSTICE BARROS MONTEIROSOURCE:** DJ DATE: 06/NOV/1989 PAGE: 16691SEE: RE-107.361-6-RJ (STF)

S U M M A R Y

Commercial law docket. Maritime transport. Clause limiting liability of the carrier. Decree 19.473, dated 12/oct/30, in its art. 1, **considers the clause restricting or modifying the obligation as an unwritten one, and thus corresponds to limiting the amount of the indemnity to a negligible**. Sum. Supreme Court of Justice precedents.

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Maritime Law in Brazil – Bill of Lading

2.3 Civil Liability of the Carrier under the Consumer Code – New Trend – Theory defended by some and that is gaining acceptance in our Courts

- **Precept of "Recht übber Recht":** the possibility of applying more than one legal norm to the same legal fact/act without there being a conflict of norms, it would be permissible to apply the aforementioned law

- Without prejudice to the other norms present in Maritime Law that govern maritime relations, we would also have the consumer legislation (which is well in tune with the spirit of third-generation rights, the diffuse and/or collective rights)

2.3 Civil Liability of the Carrier under the Consumer Code - New Trend -

- Anyone who hires or is the beneficiary of a maritime transport service would be a consumer, consequently being legitimized to litigate within the limits of the specific law (art. 2nd Federal Law 8078/90 – Consumer Code)

- **The maritime carrier would fit into the definition of a provider of services:** that the maritime carrier is a private-law corporate provider engaged in an activity of providing services in the field of transportation, on a regular basis and for profit (established by Art. 3, heading and § 2º of the aforementioned Code)

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2.3 Civil Liability of the Carrier under the Consumer Code - New Trend -

- **Briefly:** A legal consumer relationship is thus characterized, since there are shippers, contracting parties, or consignees of the cargo (beneficiaries and addressees of the transport) or even cargo insurers (legally subrogated) who utilize, as end-users and for consideration, the maritime transport services put on the consumer market by carriers (ship-owners and/or charterers).

- Some of the legal benefits present in the Consumer Protection Code have less impact on issues of Maritime Law, which does not in any way lessen its significant applicability since under the Civil Code and Commercial Code the liability of the carrier is an objective one.

2.3 Civil Liability of the Carrier under the Consumer Code - New Trend -

- **Introduction of the consumer law into the Brazilian legal system:** greatly strengthens the prohibition of clauses that limit or restrict liability, which are common in maritime contracts of carriage (article 6)

- **All clauses that limit liability are abusive:** they constitute an affront to contractual balance, especially when the contract containing them is a typical adhesion contract, as is the case of maritime contracts of carriage

- **Any type of clause that limits, restricts or modifies liability would be prohibited**, thus being included on the list of abusive clauses. In other words: it would be abusive to limit the amount of the indemnity owed by the carrier, regardless of the proposed sum (even if a very substantial one)

2.3 Civil Liability of the Carrier under the Consumer Code - New Trend -

ANOTHER IMPORTANT ISSUE:

Cargo Insurers and the right of the consumer, transmission of the latter by subrogation.

- Paying the insurance indemnity to their insured party, the Insurer becomes legally subrogated in all its rights and actions, becoming empowered to litigate in its own name for the indemnity owed (reimbursement of the indemnity paid for a contractual breach).
- The insurer of cargoes can avail itself of the consumer legislation, for all due purposes, especially as concerns the issue of limitation of the amount of the indemnity covenanted between the shipper (or consignee) and the carrier.

2.3 Civil Liability of the Carrier under the Consumer Code - New Trend -

In this respect, [we cite] the decision handed down by the law courts of Santos – State of São Paulo:

"Initially, it bears mentioning that the alleged juridical relationship between the plaintiff's insurer and the defendant is included among the so-called 'consumer relationships' in accordance with Articles 2 and 3, heading and Paragraph Two, of the Consumer Protection Code, since it involves the rendering of a service, where the carrier undertakes to transport the merchandise safe and sound to its destination, for consideration, for the benefit of the owner of the goods, as the final addressee, making no difference whether the owner is an individual or a corporate entity, large or small, since there is no limitation under the law in this regard.
Further in this regard, I note that as provided in Article 988 of the Civil Code, all norms, rights, privileges and guarantees of the original relationship apply to the plaintiff subrogated in the insured's rights, pursuant to Article 1458 and Article 985, Sub-section III of the Civil Code, and Supreme Court of Justice Abstract 188.
Thus, the defendant's liability for redress of possible damages caused does not depend upon guilt, it being sufficient to show the existence of the defect in the provision of services, the damages, and the causal link between them, pursuant to Article 14 of the Consumer Protection Code."

3. Statute of limitations
(carrier, shipper and consignee)

3.1 Civil Code and Decree Law 116/67

- **Civil Code (which took effect on January 10, 2003):** replaced Commercial Code
- **Article 8 of Decree Law 116/67 - Specific norm -** actions relating to misplacement, missing contents, shortages, losses and ordinary damage to cargo
- **Events interrupting the statutes of limitations:** very briefly, in the novation of the obligation or the substitution of the instrument on which it is founded, in the citation effected in a judicial measure or in the appropriate judicial protest interrupting the statute of limitations (Article 202 of the Civil Code)

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3.1 Civil Code and Decree Law 116/67

Time bar are the following:

- cargo claims continue to be submitted to a one-year time limit, in accordance with Decree Law no. 116/67;
- personal injuries: 3 years;
- freight and demurrage claims are time-barred after 3 years;
- general average claims are ruled by the new Civil Code under the general rule of civil indemnity claims, which establishes a 3-year time bar;
- civil liability claims relating to labor accidents involving crewmembers and stevedores: 3 years.

3. Statute of limitations
(carrier, shipper and consignee)

3.2 Statute of Limitations in the event the the Consumer Protection Code is applied:

The statute of limitations on actions against the carrier runs out in **5 years**; in other words, an extremely extended timeframe as compared to the speed of maritime activities.

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3.2 Statute of Limitations in the event the Consumer Protection Code is applied:

Some decisions already rendered by our Superior Court of Justice:

SPECIAL APPEAL FOR DAMAGES. MARITIME TRANSPORT. **STATUTE OF LIMITATIONS. CODE OF CONSUMER PROTECTION. APPLICATION.**

I – The **insurer is subrogated to all of the insuree's rights** in regards to reimbursement for the full amount paid as compensation for the injury suffered by the consumer.

II – In the case of an action for damages arising for damage to goods during maritime transport, **the statute of limitations provided in article 27 of the Consumer Protection Code governs**. Special Appeal not heard.

Proceeding: REsp 302212 / Rio de Janeiro ; SPECIAL APPEAL 2001/0010266-2 Reporting Judge: Judge CASTRO FILHO (1119) Court: THIRD REGION - Judgment Date: 07/June/2005 - Publication Date/Source: DJ 27.06.2005 p. 362

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3.2 Statute of Limitations in the event the Consumer Protection Code is applied:

SUMMARY

Action for Damages. Transport Agreement. Motion for clarification. Consumer Protection Code. Barred by Statute of Limitations.

1. ....

2. The statute of limitations for the Consumer Protection Code governs (art. 27) in case of damage caused to goods during the respective maritime transport, and it does not matter for identification of the end user of the service, what is the intended use of the transported product. In this case, the transport service terminated with the arrival of the goods at the destination, at which time the relationship established between the carrier and the company that contracted it terminated.

3.2 Statute of Limitations in the event the Consumer Protection Code is applied:

...

3. Special appeal heard and granted.

(Justices Antônio de Pádua Ribeiro and Ari Pargendler **were in the minority**. Justices Nancy Andrighi and Castro Filho voted with Carlos Alberto Menezes Direito in the Majority.)

Proceeding : REsp 286441 / RS ; SPECIAL APPEAL 2000/0115400-1
Reporting Judge: Justice ANTÔNIO DE PÁDUA RIBEIRO (280)
Reporting Judge of the Appellate Decision: Justice CARLOS ALBERTO MENEZES DIREITO (1108)
Court: 3rd REGION
Judgment Date: 07/November/2002
Publication Date/Source: DJ 03.02.2003 p. 315; RSTJ vol. 175 p. 349

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