

THE SHIPPING LAW
REVIEW

EIGHTH EDITION

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

THE SHIPPING LAW
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS

Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE

Olivia Budd

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Caroline Fewkes

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at May 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-828-4

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADAME GONZÁLEZ DE CASTILLA & BESIL

A KARITZIS & ASSOCIATES LLC

ANDRADE DIAS & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, SP, RL

ASIALEGAL LLC

BAE, KIM & LEE LLC

BLACK SEA LAW COMPANY LLC

BLOOMFIELD LP

BOSE & MITRA & CO

COSTA, ALBINO & LASALVIA ADVOGADOS

FRANCO & ABOGADOS ASOCIADOS

GAUCI-MAISTRE XYNOU

GORRISSEN FEDERSPIEL

HARRIS & CO MARITIME LAW OFFICE

HESKETH HENRY

HFW

IN LAW OFFICE

JORQUIERA & ROZAS ABOGADOS

MAPLES GROUP

MESTRE ABOGADOS

MORGAN & MORGAN

PALACIOS, PRONO & TALAVERA

PPT LEGAL

SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES

STUDIO LEGALE MORDIGLIA

TMI ASSOCIATES

VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)

CONTENTS

PREFACE.....	vii
<i>Andrew Chamberlain, Holly Colaço and Richard Neylon</i>	
Chapter 1	SHIPPING AND THE ENVIRONMENT 1
<i>Thomas Dickson</i>	
Chapter 2	INTERNATIONAL TRADE SANCTIONS 13
<i>Daniel Martin</i>	
Chapter 3	COMPETITION AND REGULATORY LAW 22
<i>Anthony Woolich and Daniel Martin</i>	
Chapter 4	OFFSHORE 32
<i>Paul Dean, Alistair Loweth and Nicholas Kazaz</i>	
Chapter 5	OCEAN LOGISTICS..... 40
<i>Catherine Emsellem-Rope</i>	
Chapter 6	PORTS AND TERMINALS 47
<i>Matthew Wilmsburst</i>	
Chapter 7	SHIPBUILDING 53
<i>Vanessa Tattersall and Simon Blows</i>	
Chapter 8	MARINE INSURANCE 64
<i>Jonathan Bruce, Alex Kemp and Jenny Salmon</i>	
Chapter 9	PIRACY 75
<i>Michael Ritter and William MacLachlan</i>	
Chapter 10	DECOMMISSIONING IN THE UNITED KINGDOM 85
<i>Tom Walters</i>	

Chapter 11	SHIP FINANCE	95
	<i>Gudmund Bernitz and Stephanie Koh</i>	
Chapter 12	AUSTRALIA.....	103
	<i>Gavin Vallely, Simon Shaddick, Alexandra Lamont and Tom Morrison</i>	
Chapter 13	BRAZIL.....	123
	<i>Geoffrey Conlin, Bernardo de Senna and Carolina França</i>	
Chapter 14	CAYMAN ISLANDS	134
	<i>Sherice Arman and Christian La-Roda Thomas</i>	
Chapter 15	CHILE.....	145
	<i>Ricardo Rozas</i>	
Chapter 16	CHINA.....	161
	<i>Nicholas Poynder and Jean Cao</i>	
Chapter 17	COLOMBIA.....	175
	<i>Javier Franco</i>	
Chapter 18	CYPRUS.....	184
	<i>Zacharias L Kapsis and Antonis J Karitzis</i>	
Chapter 19	DENMARK.....	232
	<i>Jens V Mathiasen and Thomas E Christensen</i>	
Chapter 20	ENGLAND AND WALES.....	245
	<i>Andrew Chamberlain and Holly Colaço</i>	
Chapter 21	FRANCE.....	262
	<i>Mona Dejean</i>	
Chapter 22	GREECE.....	278
	<i>Paris Karamitsios, Dimitri Vassos and Stella-Efi Gougoulaki</i>	
Chapter 23	HONG KONG	289
	<i>Nicola Hui and Winnie Chung</i>	

Chapter 24	INDIA.....	314
	<i>Amitava Majumdar, Damayanti Sen, Anuj Dhowan, Pabitra Dutta, Rishabh Saxena and Ruchir Goenka</i>	
Chapter 25	ISRAEL.....	339
	<i>Yoav Harris and John Harris</i>	
Chapter 26	ITALY.....	349
	<i>Pietro Palandri and Marco Lopez de Gonzalo</i>	
Chapter 27	JAPAN.....	363
	<i>Jumpei Osada, Masaaki Sasaki and Takuto Kobayashi</i>	
Chapter 28	MALTA.....	373
	<i>Jean-Pie Gauci-Maistre, Despoina Xynou and Deborah Mifsud</i>	
Chapter 29	MEXICO.....	389
	<i>Ramiro Besil Eguia</i>	
Chapter 30	NEW ZEALAND.....	402
	<i>Simon Cartwright and Zoe Pajot</i>	
Chapter 31	NIGERIA.....	422
	<i>Adedoyin Afun</i>	
Chapter 32	PANAMA.....	440
	<i>Juan David Morgan Jr</i>	
Chapter 33	PARAGUAY.....	450
	<i>Juan Pablo Palacios Velázquez</i>	
Chapter 34	PHILIPPINES.....	460
	<i>Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil and Jennifer E Cerrada</i>	
Chapter 35	PORTUGAL.....	476
	<i>Mateus Andrade Dias</i>	
Chapter 36	RUSSIA.....	488
	<i>Igor Nikolaev</i>	

Contents

Chapter 37	SINGAPORE.....	497
	<i>Toby Stephens, Pooja Kapadia, Magdalene Chew, Edwin Cai and Vanesse Koh</i>	
Chapter 38	SOUTH KOREA	526
	<i>Jong Ku Kang and Joon Sung (Justin) Kim</i>	
Chapter 39	SPAIN.....	539
	<i>Anna Mestre and Carlos Górriz</i>	
Chapter 40	SWITZERLAND	551
	<i>William Hold</i>	
Chapter 41	UKRAINE.....	560
	<i>Eugeniy Sukachev, Anastasiya Sukacheva and Irina Dolya</i>	
Chapter 42	UNITED ARAB EMIRATES	573
	<i>Yaman Al Hawamdeh</i>	
Chapter 43	UNITED STATES	589
	<i>James Brown, Michael Wray, Jeanie Goodwin, Thomas Nork, Chris Hart, Alejandro Mendez, Melanie Fridgant and Svetlana Sumina</i>	
Chapter 44	VENEZUELA.....	612
	<i>José Alfredo Sabatino Pizzolante</i>	
Appendix 1	ABOUT THE AUTHORS.....	625
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	657
Appendix 3	GLOSSARY.....	663

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US\$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US\$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon

HFW

London

May 2021

BRAZIL

Geoffrey Conlin, Bernardo de Senna and Carolina França¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Brazil is the largest country in Latin America, with more than 8,000km of coastline and 20,000km of navigable river. It has the ninth largest gross domestic product in the world.

In 2020, Brazil had 0.55 per cent of the world's merchant fleet value, by flag of registration, with a total fleet of approximately 5.5 million deadweight tonnage (DWT) and 13.6 million DWT under Brazilian ownership. Approximately 50 per cent of this tonnage is oil tankers, 12 per cent bulk carriers, 2 per cent general cargo vessels, 14 per cent container ships and 22 per cent are 'other types'.

In 2019, 866 ships were registered under the Brazil flag. At that point, Brazil had approximately 29,000 registered seafarers. Container port throughput for 2019 was approximately 11 million, and port calls numbered almost 30,000. The shipbuilding sector was responsible for the production of 142,898 gross tonnage.

Brazil is a prominent commodities exporter. It is a leading producer of iron ore, crude and refined petroleum, soybeans and soybean meal, raw sugar and alcohol, poultry and frozen bovine meat, coffee, corn, tobacco, fruit juice and gold. It is a 'cargo' jurisdiction, as opposed to an 'owners' jurisdiction.

Brazil is also a significant exporter of aircraft, helicopters, spacecraft and car and vehicle parts. Currently, its main export trading partner is China (US\$63.358 million), with the United States in a distant second place (US\$29.86 million). There are also strong trading export links with the Netherlands, Argentina and Japan.

There are approximately 178 coastal and river ports in Brazil, of which approximately 34 are public and 144 are private. Public ports are administered by state-run dock companies or by concession and leasing agreements. Private ports account for approximately two-thirds of all cargo movement in Brazil.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework for shipping is scattered across many different statutes. Key legislation is contained in the Brazilian Federal Constitution, the Brazilian Commercial Code dated 1850 and the Brazilian Civil Code dated 2002, which regulates contracts of carriage.

¹ Geoffrey Conlin is a partner at Holman Fenwick Willan LLP and a foreign law consultant to Costa, Albino & Lasalvia Advogados. Bernardo de Senna is a senior associate and Carolina França is an associate at Costa, Albino & Lasalvia Advogados.

There are also other uncodified statutes, such as Federal Law 2,180/1954, which regulates the Admiralty Court and its jurisdiction, Decree-Law 116/1967 addressing, *inter alia*, limitation for cargo claims in shipping disputes, and Federal Law 7,542/1986, which regulates wreck removal.

Federal Law 10,233/2001 created the National Waterway Transportation Agency (ANTAQ), whose mandate includes the regulation of domestic and international waterway carriage of people and goods, offshore platform and port supply navigation, ports and terminals and the exploitation of the federal waterway infrastructure.

Federal Law 9,537/1997 regulates waterway safety in Brazilian territorial waters, Federal Law 9,432/1997 provides the statutory framework regulating waterway transportation, while Federal Law 9,611/1998 regulates multimodal transportation.

The Brazilian Navy, which acts as the national maritime authority, has an active role in shipping matters. It presides on the procedures tried before the Admiralty Court and issues norms, which are mandatory law within Brazilian jurisdictional waters, known as NORMAM.

Brazil is not a signatory to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules), the 1968 Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague-Visby Rules), the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules). However, Brazil has ratified most of the conventions on marine safety, such as the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), the International Convention for the Safety of Life at Sea 1974 (SOLAS) and the International Convention on Salvage 1989 (the 1989 Salvage Convention). Brazil has also ratified the International Convention on Maritime Liens and Mortgages 1993.

In practical terms, the statutory framework outlined above is designed to protect and develop the local shipping market.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated before either the state or federal courts.

Under the Brazilian Constitution, federal courts have jurisdiction, *inter alia*, in cases involving the federal union, its agencies and companies; claims between foreign states or international organisations and a person domiciled in Brazil; claims arising from international treaties; and crimes committed on board vessels.

State courts have jurisdiction over all other cases, save for military, electoral and labour disputes, which are usually referred to specialist courts. First instance judgments, handed down by a single judge, may be appealed to a second instance court of appeal and, in limited circumstances, to the Superior Court of Justice, the highest court of the land for non-constitutional matters, or the Supreme Federal Court, the country's highest court.

The Admiralty Court, which sits outside the judiciary, has jurisdiction to investigate and try parties involved in accidents and to establish navigational facts. The Admiralty Court is an administrative tribunal, whose functions include imposing administrative sanctions

(fines, licence suspensions and cancellations, etc.). One of the objectives of the Admiralty Court is to ascertain the cause of accidents, to assist ANTAQ in preventing similar accidents in the future.

The Admiralty Court has no jurisdiction to determine the payment of damages between private parties. Decisions rendered by the Admiralty Court can be filed in federal and state courts as qualified evidence. The Admiralty Court is a specialist tribunal, and recognising its relevance, the Civil Procedure Code obliges regular lawsuits to be suspended for up to one year, if the same matter is subject to discussion at the Admiralty Court.

Brazilian courts have jurisdiction over the following types of cases:

- a* where the defendant is a Brazilian resident;
- b* if the obligation is to be performed in Brazil;
- c* if the case arises from an act or fact that occurred in Brazil;
- d* in respect of consumers, when the consumers are residents in Brazil; and
- e* if the parties submit to Brazilian jurisdiction, whether expressly or tacitly.

The courts have consistently disappplied foreign law and jurisdiction provisions, especially in circumstances where the contract is a contract of adhesion (i.e., where the parties to the contract have unequal bargaining power). If the parties choose arbitration, their freedom to agree the law applicable to the arbitration should be upheld.

Limitation periods are set in the Brazilian Civil Code and other statutes. Disputes in tort usually have a three-year limitation period and contractual disputes usually have a 10-year limitation period. Cargo disputes usually have a one-year limitation period, counting from discharge. Insurance disputes also have a one-year limitation period, typically, counting from the date the assured had knowledge of the claim.

ii Arbitration and ADR

It is increasingly common to see parties referring maritime disputes to arbitration. Many people hold the view that disputes can be settled more quickly in arbitration than in court proceedings, by qualified maritime arbitrators, with perceived cost savings, while maintaining confidentiality over the dispute.

This has resulted in the creation of a number of specialist maritime chambers, including the Brazilian Centre for Maritime Arbitration (CBAM), which was created as a joint initiative of the Trade Union of Shipping Agencies of Rio de Janeiro (SindaRio) and the Brazilian Association of Maritime Law (ABDM).

There are also non-sector specific chambers in which sector-specialised arbitrators can be appointed, including the Brazilian Centre of Mediation and Arbitration (CBMA), the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), the Chamber FGV of Mediation and Arbitration (Chamber FGV); and the Chamber of Conciliation, Mediation and Arbitration Ciesp/Fiesp (Chamber Ciesp/Fiesp).

Mediation is likely to be a significant area of growth in the future, owing to the uncertainty in many areas of Brazilian commercial law, potentially high amounts of interest and monetary correction on claims, the allocation of lawyers' fees, time spent on interlocutory applications and the length of time to judgment or award.

Although conciliatory hearings are compulsory in the context of court proceedings, these are rarely taken as seriously as they should be. It is unusual to resolve disputes in Brazil by reference to final and binding neutral evaluation by an independent expert.

iii Enforcement of foreign judgments and arbitral awards

In July 2002, Brazil became a contracting state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Prior to its ratification, the key provisions of the New York Convention were incorporated into the Brazilian Arbitration Act of 1996 (BAA).

Enforcement of a foreign arbitral award in Brazil is a two-phase process consisting of (1) recognition proceedings before the Superior Court of Justice (SCJ) and (2) actual enforcement proceedings, before a federal court. It is a prerequisite to recognition and enforcement that the award is final, binding and unappealable.

The applicant must file an application before the SCJ. The application must observe the formal requirements of the New York Convention, the BAA, the Brazilian Code of Civil Procedure and the internal rules of the competent court. All documents must be legalised and, if necessary, translated into Portuguese by a sworn translator.

The SCJ will issue an order for service of process to the federal court with personal jurisdiction over the defendant. Upon service, the defendant will have 15 days to file a challenge, based on one or more limited grounds to resist recognition. These grounds can be procedural or substantive (i.e., broadly the same as the reasons listed at Article V, Paragraphs (1) and (2) of the New York Convention).

If the application for recognition is not challenged, jurisdiction lies with the Chief Justice of the SCJ. If a challenge is made, jurisdiction moves to the Special Chamber and a reporting justice is appointed to conduct the proceedings and present the case to the other members of the Court. The applicant can file a reply within a limited time frame.

After the parties have filed their submissions, the reporting justice usually notifies the Federal Public Attorney's Office, which is asked to issue its opinion on the applicant's compliance with formal evidence requirements. This is sent to the reporting justice, who presents his or her own opinion. This can take several months, after which a hearing date is set.

During the hearing, the reporting justice will present his or her own assessment of the case, casting his or her vote against or in favour of partial or full recognition. Counsel for the respective parties have a short time frame in which to present their arguments to the Special Chamber. In the majority of cases, the other justices will simply follow the reporting justice.

The final decision will be published in the *Official Gazette*, after which the parties have five days to file a Motion for Clarification, or 15 days to file an Extraordinary Appeal to the Federal Supreme Court, which is permitted under very exceptional circumstances.

After the final decision recognising the award, the competent court will issue a writ of enforcement. At this stage, the foreign arbitral award acquires full efficacy within Brazil. In this sense, the arbitral award will have the same effect on the parties as a judgment rendered by a state or federal court. If it includes an obligation for payment, it shall constitute an enforceable instrument.

If payment is not volunteered when the validity of the arbitral award or judgment is recognised, the judgment creditor will need to commence enforcement proceedings, at the federal court that has jurisdiction over the defendant, aiming to attach the defendant's assets and to secure payment.

The court reviews the submission and, if the requirements are met and the request is in line with the award, will order service of the enforcement proceedings on the debtor, requiring payment within 15 days. The judge may rely on a court-appointed expert accountant to review the figures.

If payment is not made within the 15 days, the debt is increased by a 10 per cent fine, plus additional lawyers' fees of 10 per cent, both on the amount of the total outstanding debt.

IV SHIPPING CONTRACTS

i Shipbuilding

In the absence of specific rules, the freedom of the parties and the express terms and conditions of the Brazilian Civil Code provide the contractual framework of a shipbuilding contract.

Ancillary requirements are scattered throughout other statutes, which cover issues such as the transfer of title, ownership registration, effects on the rights of third parties and mortgages. For example, Federal Law 7,652/1988 establishes that ownership rights and security interests over Brazilian vessels must be registered with the Admiralty Court, if the vessel is of more than 100 gross tons, whereas smaller vessels are registered at the port captaincy with jurisdiction over the port where the vessel is located.

The registration of maritime property (RPM) is mandatory whenever the vessel's owner is domiciled in Brazil, or is a government or private entity subject to Brazilian law. Non-compliance of this rule may render ineffective the transfer of title. The RPM validates the ownership title and secures the flag. Application to obtain the RPM must include the deed of acquisition or, in the case of a newbuild, the respective licence and evidence of payment of the price to the shipyard.

Brazilian vessels are also eligible for registration in the Special Brazilian Registration regime (REB). This provides incentives such as tax cuts and special financing rates. Registration of shipbuilding contracts with the Admiralty Court may entitle the shipping company, as owner, and the Brazilian yard, as contractor, to a provisional enrolment in REB of vessels under construction with a Brazilian shipyard, for the purposes of taking advantage of tax and financing incentives.

Brazilian companies operating a foreign vessel may provisionally register a vessel to fly the Brazil flag within the REB regime. The 'suspension' of a vessel's original flag and the provisional utilisation of the Brazil flag during the relevant period the vessel is in contract in Brazil is subject to compliance with specific requirements provided for in both Federal Law 9,432/1997 and Decree 2,256/1997.

If a vessel is delivered to the buyer with instalments still due to the shipyard, the buyer can apply for an RPM and request the registration of liens in the Admiralty Court for the unpaid balance, subject to the production of evidence.

ii Contracts of carriage

In general, the authorities have opted to safeguard Brazil's position as a 'cargo' country, as opposed to a 'carrier' country. As such, Brazil is not a signatory to the main international conventions that limit the liability of carriers as regards cargo interests. Brazil has not ratified the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

Brazilian courts have treated bills of lading as contracts of adhesion. As such, they tend to disapply foreign law, foreign jurisdiction and limitation of liability clauses. Brazilian courts refer primarily to the Brazilian Commercial Code and the Brazilian Civil Code, case law precedent and scholarly commentary. The obligation of a carrier is generally considered to be an obligation of result as opposed to a duty of due diligence or best efforts.

The issue of liens is regulated by the Brazilian Commercial Code of 1850 and by the International Convention for the Unification of Certain Rules relating to Maritime Liens and

Mortgages of 1926. The Convention has been ratified and adopted via Decree 351/1935, which means maritime liens can be exercised in Brazil for, *inter alia*, the collection of federal taxes, payment of crew and captain's wages, salvage indemnities, port fees and general average contributions.

Multimodal transport is regulated by Federal Law 9,611/1998, which determines that a licensed multimodal transport operator is the 'principal' party contracted to perform the multimodal transport of cargoes from origin to destination, using its own means or those of third parties, potentially under a single bill of lading.

Foreign vessels can act in cabotage, provided they are chartered by Brazilian shipping companies, as defined above, if they meet the criteria set forth in Federal Law 9,432/1997.

iii Cargo claims

A party who sustains damage arising out of a breach of a contract of carriage has title to sue, provided a Letter of Protest is issued within 10 days of the date of discharge. Some experts are of the view that the claimant can frame a claim against any of the participants in the transportation services' chain (i.e., charterer, sub-charterer, owner or non-vessel operating common carrier (NVOCC)), each of whom is arguably jointly liable to the cargo owner. Demise clauses are usually not enforceable.

If cargo owners and carriers have contracted with equal bargaining power (e.g., if cargo owners are multinational corporations heavily involved in the international carriage of goods market, such as manufacturers of large commoditised goods), then the tendency of the courts is to uphold the written terms of the contract. This approach is encouraged by the Charter of Economic Freedom, under Federal Law 13,874/2019.

Claimants are often subrogated local insurers. Service of a party not domiciled in Brazil can be effected via its local maritime agents.

iv Limitation of liability

Brazil has not yet ratified the Convention of Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) but has ratified the International Convention for Unification of Certain Rules relating to the Limitation for Liability for Owners of Sea-Going Vessels 1924. However, the Brazilian courts frequently do not apply its provisions.

Civil liability, therefore, is usually determined under the Brazilian Civil Code, which makes provision for contractual liability (Article 389) and liability in tort (Article 927).

The Civil Code provides a strict liability regime in circumstances where the activity, normally performed by the party who causes damage, implies by its very nature a risk to the rights of others. This is particularly relevant for claims arising in tort, when carriers are the tortfeasor, irrespective of who the victim is (e.g., another vessel or a terminal in the case of collision).

In terms of the contractual liability of carriers, Brazilian courts have ruled that liability for the correct and timely delivery of the cargo is strict. However, strict liability, whether in contract or in tort, is excluded if, for example, carriers can evidence that the damage arises from *force majeure* or the victim's exclusive actions, or the exclusive acts of third parties (e.g., shipper's incorrect packaging).

As a general rule, the courts do not usually uphold the limitation of a carrier's liability in respect of cargo owners. A Brazilian court is likely to hold charterers, sub-charterers, owners and NVOCCs jointly and strictly liable for damage to cargo owners. However, they each retain their right to seek recourse against the party who actually caused the damage.

The ordinary measure of damages under Brazilian law is usually upheld by the courts in cargo disputes. In practical terms, all damages, whether arising from physical damage or from 'reasonable' loss of profits and business interruption, would potentially be indemnifiable. Punitive damages are not available and indirect and consequential losses are excluded from the ordinary measure of damages, save if the parties agree otherwise.

As stated above, in circumstances where the case involves sophisticated parties, with equal bargaining power, as opposed to consumers, and assuming the contract is not an adhesion contract, Brazilian law will usually uphold the parties' freedom of contract. As such, the parties' express contractual position on the allocation of liability for certain categories of damages should supersede the default position under Brazilian law.

V REMEDIES

i Ship arrest

Brazil is not a party to the two main international conventions on ship arrest, namely the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships of 1952 and the International Convention on the Arrest of Ships of 1999. The matter is therefore regulated by the rules of Brazil's Commercial Code, Civil Code and Code of Civil Procedure, which provide for two types of arrests:

- a* to secure the payment of a debt when there is a risk that the debtor will not honour a future award or judgment; and
- b* to enforce the payment of a debt already granted by an award or judgment that the debtor has not paid.

An arrest as described in point (a), above, is available on an interim basis, as an injunction or precautionary measure. If the creditor's application is successful and the vessel is arrested and the debtor does not pay, then the creditor has to file a substantive action to seek an award or judgment in its favour. The ordinary requirements for injunctions and precautionary orders apply.

For the arrest described in point (b), a final decision is necessary, and the creditor must have exhausted other means of collecting the amount awarded in its favour. A Brazilian court is extremely unlikely to grant an arrest in a case where Brazilian courts do not have jurisdiction to decide on the merits of the substantive claim.

Claimants may be ordered to provide counter security at the court's discretion and compensation is available for wrongful arrest. Parties who are domiciled abroad, depending on whether their country of origin has signed a bilateral cooperation treaty with Brazil, may also be required to post security for costs, pursuant to Article 83 of the Brazilian Code of Civil Procedure.

Once a court issues an arrest order, it is forwarded to the relevant Brazilian Navy's port captaincy, which will enforce the arrest, usually by withholding the vessel's exit pass. An interested third party (e.g., the owner) may intervene to try to lift the arrest, for instance by presenting a guarantee to secure the release of the vessel.

Brazilian law recognises the distinction between *in personam* arrests and *in rem* arrests, but does not address the issue of arrest of sister ships. Sister ship arrests are less likely to succeed when the arrest is sought *in rem*, on the basis of a maritime lien; however *in personam* arrests of sister ships may be granted. The arrest of bunkers is uncommon and not expressly provided for in statute. Cases would therefore follow the general procedure described above.

ii Court orders for sale of a vessel

Court orders for the sale of vessels are available under the same rules as those for public auctions and asset bidding, more commonly used for the sale of real estate. The court order will include the minimum bid value and the auction will be conducted by a court-appointed auctioneer, who charges a percentage fee of the proceeds of the sale. The vessel cannot be sold below the minimum bid value in the first auction. However, it can be sold at any price in a second auction.

Once the sale is concluded and ratified by the court, the highest bidder will be able to register its ownership of the vessel with the Admiralty Court, which keeps a record of the ownership of vessels. Pursuant to Article 477 of the Brazilian Commercial Code, all prior debts and liens are extinguished by the judicial sale and the transaction is considered to be equivalent to a first acquisition.

VI REGULATION

i Safety

Article 178 of the Brazilian Federal Constitution states that the law will establish the rules regarding navigation and transport of goods and passengers by sea, while abiding by the international conventions signed by Brazil.

The main statute addressing marine safety is Federal Law 9,537/1997 (The Waterway Transport Safety Law, also known as LESTA). This is regulated by Decree 2,596/1988, known as RLESTA. Both statutes provide safety rules, including for pilotage and seafarers, and penalties for infractions.

Brazil does not have a coastguard. The Brazilian Navy acts as the national maritime authority, pursuant to Article 17 of Federal Complementary Law 97/1999. It also enacts safety regulations via the issuance of NORMAM (see Section II, above) by the Navy's Directorate of Ports and Coasts.

If a breach of safety recommendations results in an accident, the maritime authority will be responsible for opening a formal inquiry to investigate the cause of the accident. The investigation may lead to an administrative procedure at the Admiralty Court, where administrative liability will be ascertained.

As regards international conventions on safety, Brazil is a signatory to the COLREGs and SOLAS.

ii Port state control

The aim of port state control inspections of foreign-flagged vessels is to verify whether the condition of the vessel and its equipment complies with the requirements established by Brazilian law and applicable international conventions.

The objective of an inspection is restricted to the safeguarding of human life and the safety of navigation, whether in open waters or in inland waterways. Inspections also focus on the prevention of environmental pollution from ships, fixed platforms or their support vessels.

After a port state control inspection, the maritime authority issues a Declaration of Conformity to Operate in Brazilian Jurisdictional Waters, which certifies that the vessel is compliant with the applicable legislation. Qualified and authorised marine inspectors carry out inspections, as determined by NORMAM 4, issued by the Directorate of Ports and Coasts.

Brazilian port state controllers follow the International Maritime Organization's Port State Control Procedures of 2017. Brazil is also a party to the Latin American Agreement on Port State Control of Vessels of 1992 (the Viña del Mar MOU).

iii Registration and classification

Federal Law 7,652/1988 regulates the registration of vessels. Brazilian vessels, except those owned by the Brazilian Navy, must be registered with the port captaincy with jurisdiction over the area where the owner is domiciled, or where the vessel will operate. The registration of the property in the Admiralty Court is mandatory if the vessel has a gross tonnage greater than 100.

According to Federal Law 7,652/1988, a vessel may be acquired while under construction or by any other means already established by Brazilian law. However, property is only transferred effectively once the title is duly registered at the Admiralty Court or the respective port captaincy.

The Admiralty Court is responsible for the registration not only of the ownership of vessels but also of ship owners and *in rem* guarantees, as well as any relevant contracts or changes to a vessel's characteristics (change of company name, charter contracts, changes to the vessel's structure, engines, among other things).

Classification societies are recognised organisations with delegated powers conferred by the maritime authority, pursuant to NORMAM 6 (Norms for Recognition of Classification Societies to Act on behalf of the Brazilian Government). The Directorate of Ports and Coasts maintains a list of the classification societies approved by the maritime authority.

The classification societies' activities are varied and include classifying ships and maritime units, representing the maritime authority, certifying compliance with environmental regulations, and health and safety regulations, and providing technical consulting services.

There is no specific law that regulates the liability of a classification society to a counterparty, a third party or the government. However, if the affected person succeeds in proving the equivalent of gross negligence under Brazilian law, it is possible in principle to frame a claim, pursuant to Article 189 of the Brazilian Civil Code.

iv Environmental regulation

Brazil's environmental legal framework is onerous and complex. It is encompassed in a series of statutes. There are a number of environmental agencies with overlapping jurisdiction. Owing to Brazil's federative structure, environmental agencies may be federal, state or municipal entities, each with its own structure and mandate.

Environmental liability is joint and several and strict (i.e., liability will be ascertained regardless of fault or negligence). Environmental liability has three main areas – administrative, civil and criminal liability – which can operate on a simultaneous basis.

Brazil has ratified a limited number of international conventions on environmental matters, such as MARPOL (73/78), the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention), the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention). Brazil has not ratified many of the subsequent Protocols.

Brazil has also not signed other relevant international conventions, such as the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

v Collisions, salvage and wrecks

Brazil has signed the following international conventions regarding the liability of shipowners and carriers, in relation to collisions and salvage:

- a* International Convention of Private Law (Bustamante Code), signed in 1928;
- b* Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea (Brussels 1910);
- c* International Convention on Regulation for Preventing Collisions at Sea 1972 (COLREGs); and
- d* International Convention on Salvage 1989.

Brazil is not a signatory of the Nairobi International Convention on the Removal of Wrecks (Nairobi WRC 2007). The domestic legal framework regarding wreck removal comprises Federal Law 7,542/1986 and NORMAM 10. These regulations allow the maritime authority to order a wreck to be removed by the responsible party if the wreck poses a danger or an obstacle to safe navigation, a threat to the environment or a threat of damage to a third party. When ordering removal, the maritime authority may request a Letter of Undertaking by a first-class insurance company or a protection and indemnity club, in case the wreck is not successfully removed and damage occurs.

vi Passengers' rights

Brazil is not a signatory of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974. Brazilian courts have held that the Brazilian Consumer Protection Code (CPC) applies to passengers.

The Brazilian Civil Code has a specific chapter on transport contracts, which could potentially supersede the provisions of the CPC on the basis that the Civil Code specifically addresses the issue of transport, whereas the CPC does not. It is also more recent.

Nevertheless, the prevailing tendency of the courts, when judging cases involving passengers, is to apply the CPC. The CPC has stringent provisions on service providers, ranging from extended limitation periods to shifting the burden of proof to the defendant.

vii Seafarers' rights

Under Brazilian law, all those who work in open sea navigation, maritime support, port support and inland navigation are deemed seafarers. This definition covers both crew members in charge of operating the vessel and the workers who carry out activities that do not involve the operation of the vessel, such as waiters, nurses and cooks.

The Consolidation of Labour Laws, which is the Brazilian equivalent of a Labour Law Code, governs the rights and duties of workers in general, and is also applicable to seafarers. However, they contain very limited provisions that specifically address this type of work. The very particular conditions of seafarers' work and the lack of specific regulations generates significant scope for legal uncertainty.

Seafarers are also governed by Federal Law 9,537/1997 and Decree 2,596/1998. Brazil is a signatory of the Maritime Labour Convention 2006, which was enacted into law in 2021. The following conventions of the International Labour Organization have also been ratified by Brazil:

- a* Convention No. 07 (Convention on the Minimum Age for Admission of Minors in Maritime Work);
- b* Convention No. 146 (Convention Relating to the Annual Paid Vacations of Seafarers);

- c* Convention No. 147 (Minimum Standards of Merchant Marine);
- d* Convention No. 163 (Welfare of Maritime Workers at Sea and in Port);
- e* Convention No. 164 (Health Protection and Medical Assistance to Maritime Workers);
- f* Convention No. 166 (Repatriation of Maritime Workers); and
- g* Convention No. 178 (Convention on the Inspection of Living and Working Conditions of Sea Workers).

VII OUTLOOK

Local and overseas entities interested in the Brazilian cabotage market need to pay close attention to the Cabotage Incentive Programme (BR do Mar), as codified in draft under Bill of Law No. 4199/2020, which is currently before Congress. The Bill has been approved by the Chamber of Representatives and is currently being discussed in the Senate.

If converted into legislation, BR do Mar should open up cabotage to foreign-flagged vessels on time charters for the first time, and new companies could provide new competition for existing entities.

Brazil is the largest exporter of soya beans and corn, much of which is grown in central Brazil, especially the states of Mato Grosso and Goiás. Bottlenecks in the heavily over-burdened ports in the south of Brazil have resulted in the consolidation of the Northern Arc as one of the main grain export gateways.

The Northern Arc includes the Brazilian ports and cargo-handling facilities along the Amazon River and its tributaries, from Port Velho (Rondonia) in the west to São Luís in the east (Maranhão), including Manaus (Amazonas), Santarém (Pará), Belém (Pará) and Santana (Amapá).

During the past decade, the Brazilian government has invested in the Northern Arc, and the results show an increase of 482 per cent in the amount of soybeans and corn exported from the northern ports in 2020 as compared with the amounts exported in 2010.

ABOUT THE AUTHORS

GEOFFREY CONLIN

Costa, Albino & Lasalvia Advogados

Geoffrey Conlin is a partner at HFW and a foreign law consultant to Costa, Albino & Lasalvia Advogados in Brazil. He is an English lawyer and is registered as a foreign lawyer with the Order of Attorneys of Brazil, where he has been based since February 2013. Geoffrey acts mainly for charterers, commodity traders, insurers and reinsurers. He specialises in resolving complex marine insurance claims (cargo, hull and machinery, and liability) and is an expert in ports and terminals work. He is a member of the British Insurance Law Association and has presented on shipping, insurance and reinsurance related issues in the United Kingdom and in various countries in Latin America.

BERNARDO DE SENNA

Costa, Albino & Lasalvia Advogados

Bernardo de Senna is a Brazil-qualified lawyer assisting the reinsurance and shipping industries, representing foreign and Brazilian clients in court and in arbitration, both in Brazil and abroad. Bernardo also advises on non-contentious reinsurance and shipping matters, as well as in claims handling and loss adjustment procedures. He is versed in transnational disputes, having worked in cases throughout Latin America. Bernardo is a member of the Association Internationale de Droit des Assurances and the Brazilian Maritime Law Association and a former member of the Maritime Law Committee of the Rio de Janeiro BAR (2016–2018).

CAROLINA FRANÇA

Costa, Albino & Lasalvia Advogados

Carolina França is a dual-qualified Brazilian lawyer and barrister-at-law in England and Wales with a broad international experience. As a maritime law practitioner, she advises clients in common law and civil legal systems conflict, notably the English legal system. Carolina França specialises in various consultative matters by dealing with marine and cargo claims, oil pollution, protection and indemnity, ports and terminals and regulatory matters. She has also been widely involved in emergency response to complex accidents (e.g., on-board explosions, collisions, oil spill and ship grounding), working closely with maritime authorities and other regulatory bodies. Carolina França is also a member of Wista Brazil, the Ibero-American Institute of Maritime Law and the Brazilian Maritime Law Association.

COSTA, ALBINO & LASALVIA ADVOGADOS

Edifício New England
Avenida Angélica No. 2346
10º andar – Cj. 103/104
Consolação
São Paulo, 01.228-200
Brazil
Tel: +55 11 3179 2900
geoffrey.conlin@cal-law.com.br

Praça Floriano 19, 25º andar
Centro
Rio de Janeiro, 20031-924
Brazil
Tel: +55 21 3550 9010
bernardo.desenna@cal-law.com.br
mariacarolina.franca@cal-law.com.br

www.cal-law.com.br

an LBR business

ISBN 978-1-83862-828-4