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THIRD PARTY CLAIMS UNDER BRAZILIAN JURISDICTION RECENT DEVELOPMENTS

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By

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**CIVIL LIABILITY CONCEPT AND
INTRODUCTORY NOTES**

Civil Law – Brazil adopted the **CODE SYSTEM** and Brazilian Civil Code (1916 –Reviewed in 2002 – LAW 10.406/2002 - *The New Civil Code*) was inspired by the French Napoleonic Code;

- Brazilian Civil Code – Section 927 – ***“The one which, by means of an unlawful act, causes damage to the other, is obliged to repair it.”***
- The definition of unlawful act is stated in the Section 186 of the Civil Code: ***“The one which, through action or voluntary omission, negligence or imprudence, violates the right or causes damage to the other, even if exclusively moral, commits an unlawful act”***

- This concept of Civil Liability applies to most of the Non-Contractual Maritime Claims, as indemnities due as a result of collisions, or any other sea accident, oil pollution, personal injury, among others;
- **NEW TIME BAR RULE** – The Civil Code enacted in 2002 established a 3-year time bar for actions arising from unlawful acts. The previous 1916 Civil Code had a general rule of 20 years for time bar – Lawsuits filed after 15 years (personal injury);
- **USUAL DEFENSE** – Victim's own fault or *Force Majeure* (unavoidable circumstance – Act of God included);
- **LIMITATION OF LIABILITY** – Not usually accepted by the Brazilian Courts. Brazil did not ratify most of the International Conventions on Limitation of Liability of Shipowners;

**THIRD PARTY CLAIMS DIRECTLY
AGAINST INSURER**

- Direct Actions – **Controversial** issue at the Brazilian Courts;
- 1980 -1990 – Few precedent cases – As there were no legal provisions establishing the direct action against insurer, the Courts usually **rejected such direct claims**;
- There are several decisions of the State and Federal Courts of Appeal in the sense **THAT OBLIGATION OF THE OFFENDER TO REPAIR IS PERSONAL AND INDIVIDUAL, AND THE CONTRACTUAL LINK OF THE INSURANCE CONTRACT IS EXCLUSIVELY TO THE INSURER AND NOT TO THIRD PARTIES;**

- Therefore, the most common scenario: The offender, as insured, would figure as sole Defendant in Civil Liability claims. The insured would have a redress action against the insurer, or would be entitled to bring the insurer to the claim through a procedural mechanism called ***“Denúnciação” – “Impleading” (Section 72 of the Brazilian Procedural Code)***, but would only be entitled to execute the insurer once the payment is effected to the Plaintiff (victim), as a classical reimbursement relationship;
- The **IRB** (Brazilian Reinsurance Company) as impleaded party by the insurer (mandatory by law). Consequences: long-term proceedings – multilateral litigant parties;

Main Lawsuit
THIRD PARTY X INSURED

Collateral Lawsuit
INSURED X INSURER X REINSURER

- However, the New Brazilian Civil Code introduced a Section, by which several scholars interpreted as a right of third parties to direct action against Civil Liability Insurers. Section 787 of the Civil Code brought a new definition of this specific insurance, stating that:

“In Civil Liability Insurance, the insurer assures the payment of losses and damages due by the insured to a third party.”

- It also introduced a 1st paragraph, as follows:

“As soon as the insured becomes aware of the consequences of his act (possibly unlawful), which might entail responsibility included in the guarantee (policy), he will notify the insurer.”

- And a 4th paragraph:

“The responsibility of the insured would remain in force toward the third party, if the insurer becomes insolvent.”

- One of the reasons for such understanding is that frequently the assets and economic situation of the insured **are not sufficient to respond to Civil Liability claims;**
- **Latin America** – Mexico, Bolivia, Colombia, Peru, Honduras and Guatemala already have this direct action against insurers incorporated to their domestic law;
- **Panama and Venezuela** – Recognized by the Courts, despite no legal provision;
- **Brazilian Consumer Act – Law 8.078/90** – Since 1990 there is a provision which, in service and supply liability claims, guarantees the insured to bring the insurer to the proceedings as **jointly liable for third party claims** (Section 101 – III). If the insured is insolvent, third parties will be entitled to claim directly against insurers;

- Brazilian Courts (STJ – Superior Court of Justice): Infra- Constitutional Court - Jurisprudence changing direction -

Recent decisions granting the direct action from third parties against insurer : ***“The relationship in the insurance contract is not restricted to the contracting parties, as it can affect beneficiaries - third parties, as it occurs in life insurance and personal injury. In the stipulation on behalf of a third party, the latter can be a future, non-designated person, being sufficient that this beneficiary is ascertained by the time of the damage. The third party - beneficiary, although not a party in the contract is entitled to sue the insurer directly. (RESP 257880/RJ) ”***

- **P & I CLUBS – Direct actions from third parties – Nonexistence of precedent cases.**
- **Possible action against P&I Clubs if based on a Letter of Undertaking, establishing the jurisdiction of the Brazilian Courts. In this case, the P&I Club will be considered a guarantor of the beneficiary of the LOU and the latter will not be considered a third party under Brazilian Law.**

**DIRECT ACTION AGAINST INSURER AND
THE NEW PROJECT OF INSURANCE
LAW (BILL 3.555/2004)**

- Author: Federal Deputy Jose Eduardo Cardozo (Labor Party).
- Establishes general rules for private insurance policies, revokes certain rules of the Civil Code and Commercial Code;
- **Section 115** considers beneficiary of the **Civil Liability Insurance** not only the insured, **but the victims or any individual or entity which suffers losses and damages caused by the insured.**
- **The Bill expressly grants to those beneficiaries – third parties included - the right of direct action against insurers, PROVIDED THAT THE LIMITS ESTABLISHED IN THE RESPECTIVE POLICY ARE OBSERVED;**

- The 2nd paragraph of Section 115 states that in Civil Liability Insurance related to the use of land, inland and sea transportation vehicles, the policy guarantee will be extensive to their lawful users (truck drivers, pilots, captains, charterers);
- Principles adopted from the New Civil Code 2002 – Sections 61/62:

“The insurance contract shall not be interpreted or executed in prejudice of society, even if for the benefit of one or more insured or beneficiary, or to promote the enrichment of any of the contractors or third parties.”

“The insurance contract shall be executed and interpreted in accordance with the utmost good faith and always with the objective to ensure its social function”

- Principles adopted from the Consumer Act of 1990 – **Insurance Bill** - Section 62 – Sole Paragraph:

If the interpretation of any document issued by the Insurer, such as publicity and advertising brochures, pre-contractual and contractual instruments, may generate questions, contradictions or misunderstandings, those shall be resolved in the more favorable sense on behalf of the insured or the beneficiary.

- **TIME BAR** – Action of the insured against insurer - One year as from the date of the payment to the victim or, if filed by a third party, the date of the occurrence of the accident, faulty event (Bill – Section 142/143);
- **ARBITRATION CLAUSE** – Null and void if inserted in the policy (Bill - Section 66), however, possible to contract mediation/arbitration clause through separate and specific agreement between insurer and insured;

- JURISDICTION OF THE BRAZILIAN COURTS:

“The jurisdiction of the Brazilian Courts is absolute for the disputes arising from the insurance contracts executed in the country, or with respect to the risks and interests of assets located within the Brazilian territory.”

- Assets = Vessels & RIGS – Cabotage, Supply and Port Navigation – If the Bill is approved by the Brazilian Congress, the insurance companies (P&I) that have members with vessels trading and rigs operating within the Brazilian coast, should be prepared to respond to claims filed at the Brazilian Courts – third party claims included - if disputes arise from the Insurance Policy.

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