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1932

HOW TO PROTECT SHIPOWNERS AGAINST CONTRACTUAL DEFAULT

A BRIEF OVERVIEW UNDER THE BRAZILIAN LAW PERSPECTIVE

October 2009

➢ JURISDICTION AND APPLICABLE LAW

Prior to making some comments on the possibility of an eventual judicial measures to protect shipowners in Brazil, it is necessary to analyze the jurisdiction of the Brazilian Courts.

In order to characterize the Brazilian judge international jurisdiction in a lawsuit, one of the circumstances below must obligatorily exist:

> *"Article 88 — The Brazilian judiciary authority has jurisdiction where:*
> *•the defendant, whatever its nationality, is domiciled in Brazil;*
> *•the obligation is to be performed in Brazil;*
> *•the fact which gave rise to the claim results from a fact occurred or an act performed in Brazil*
> *Sole Paragraph: A company is considered domiciled in Brazil, when said company has an agency, branch or subsidiary located here."*

➢ ARBITRATION CLAUSE

According to art. 267 of the Civil Procedures Code, an eventual lawsuit filed in Brazil would be judged extinguished without resolution on the merits:

> *Art. 267, Civil Procedures Code:*
> *"Proceedings are extinguished without resolution of merit (...)*
> *VII – if the parties have agreed to solve their disputes through arbitration"*

In the event any legal process is filed in Brazil, the cargo would allege in its defence the *Exceptio Fori Motion* of the Brazilian courts, requesting the extinguishment of the case.

HOW TO EXERCISE A LIEN/ARREST OF CARGO?

- **BRAZILIAN COMMERCIAL CODE (LAW No. 556/1850)**

*"Art. 527: (...) The Master can not retain the cargo onboard as security for freight; but he has the right to demand that the cargo owners or consignees, upon delivery of the cargo, deposit or guarantee the amount of the freight, general average and expenses to be borne by them; and in the event of absence of prompt payment, deposit or guarantee, the Master may **request embargo** of the cargo for the freight, average and expenses.*
The embargo will be time-barred after 30 (thirty) days as of the day of discharge."

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"Art. 619: The Master or shipowner shall not retain the cargo onboard under the pretext of absence of payment of freight, general average or expenses; he may, however, by means of a competent protest, request the deposit of equivalent assets, and request the sale thereof, and the rights thereof will be safeguarded by the outstanding credit against the shipper, in the event of an insufficient deposit. (...)"

SOURCE OF LAW

DECREE No. 19.473/1930, that rules bills of lading of goods transported by land, water or air, and makes other provisions:

> *"Art. 2º: (...) The lack of payment of freight and expenses authorizes the retention of the goods on the account and risk of the owner"*

DECREE-LAW 116/67, which rules operations related to waterways transportation of goods at Brazilian ports:

> *"Art. 7: The Shipowner is entitled to determine the retention of goods at warehouses, until the owed freight or the payment of contribution for declared general average is settled"*

➢ PRECAUTIONARY ACTIONS (GENERAL):

Aims to obtain the ruling of urgent measures, deemed essential or necessary to the efficacy of another proceeding considered as the main lawsuit (e.g.: a contractual claim or an indemnity "*in tort*" lawsuit)

It is not intended to satisfy plaintiff 's claim, but secure the satisfaction thereof feasible and avoid eventual damages and irreversible losses, until a final decision is achieved in the main proceeding.

The Brazilian Civil Procedural Code provides, among other actions, as typical precautionary measures: the arrest, seizure of assets, search and seizure of assets, etc.

In addition to the specific precautionary measures there are also the non specific one. In this case, the purpose thereof is defined according to each peculiar concrete situation, through a prudent judicial analysis ("*Poder Geral de Cautela*"). The main feature of the precautionary proceeding is the cognition in view of the requirements of PERICULUM IN MORA and FUMUS BONI JURIS.

PRECAUTIONARY ACTIONS

According to the Brazilian Law, the **ARREST** consists in the judicial apprehension of the asset, object of the litigation (seizure) or of debtor´s assets necessary (arrest) to secure the liquid debt the collection of which is processed or will be processed in court.

The precautionary measure will be applicable when:

✓ debtor without a domicile attempts to be absent, or dispose the possessed assets or fails to pay the obligation within the stipulated term;
✓ debtor with a domicile is absent or escapes in an attempt to be absent, and
✓ when debtor becomes insolvent, assigns or attempts to assign his assets, contracts or attempts to contract extraordinary debts, transfers or attempts to transfer the assets thereof to third parties, perpetrates any other fraudulent act with the purpose of frustrating execution.

For the granting of the arrest it is essential to:

✓ duly evidence the certain and indisputable debt;
✓ document evidence of the aforementioned hypothesis;

It will be automatically granted independently of previous justification, when creditor´s posts bond and whenever the main lawsuit is deemed grounded, the arrest will be converted into an attachment, which will cease only with the payment or compromise/settlement.

➢ EXECUTION

Requires the existence of a Judicial Debt Instrument (grounded on an awarded judgment) or an Extrajudicial Debt Instrument, such as bills of exchange, promissory notes, trade notes, cheques, private documents signed by debtor and two witnesses.

There are three requirements:

1. Non-performance of the obligation;
2. Certainty and liquidity of the credit;
3. The obligation must be agreed by means of a formal and proper debit instrument.

We do not have in our Procedural Code any independent measure as the Rule B Attachment of the NY jurisdiction. Normally, the creditor may resort to the attachment on line of debtor´ s bank accounts, as well as the attachment of real estate property, vehicles, attach a company ´s sales results , etc. However, such measures are upon judge's discretion and subject to a foreclosure stage of Brazilian judicial action (merits to be discussed in Brazil).

- **CONCLUSION**

According to the Brazilian legislation, the lack of payment of the freight, general average contribution and other related expenses, authorizes the cargo retention.

The cargo retention must not be effected onboard, but on storage/warehouse after discharge, but subject to previous notice of protest from carrier. Initial costs related to storage would be on carrier 's side, but such expenses together with the legal fees and court costs should be reimbursed if the judicial claim is finally granted and ruled in favour of carrier.

There are other legal measures available to the carrier and shipowners' interest in Brazil, through the filing of the so- called precautionary actions (*"Medidas Cautelares")* in order to obtain security in case of evidenced: (i) a grounded claim/credit and (ii) potential risk of the debtor not having assets or means to pay the obligation.

THANK YOU!

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