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1932

# ***DEALING WITH BIG MARINE CASUALTIES IN BRAZIL***

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**International Law Seminar  
Trinity House – London - October 2010**



## **P 36 Semi-Sub Rig**

Explosion - Sinking – Rio de Janeiro/RJ, Brazil – March 2001  
11 casualties ; Large oil spill.



## VICUÑA

Explosion – Paranaguá/PR, Brazil - November 2004

4 casualties; Large spill of oil and methanol cargo; Fishing activities suspended;  
All vessels manouvres were stoped at the Bay of Paranaguá; Port was temporarily closed.



## **NORSUL VITÓRIA and NORSUL 12**

Capsizing of the convoy barge + tug – São Francisco do Sul/SC, Brazil - January 2008  
Oil pollution; Cargo loss

# PORT CAPTAINCY INQUIRY

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In Brazil, whenever a sea accident involving a vessel occurs, it is mandatory that the local Port Captaincy carry out an inquiry to determine the causes of the accident.

The Port Captaincy will collect statements from the parties involved as well as technical evidence.

After this initial stage a report is prepared by the Port Captaincy indicating the party that is hold responsible for the incident, if any.

After the report is concluded, the proceedings are then remitted to the Admiralty Court.

# ADMIRALTY COURT PROCEEDINGS



# ADMIRALTY COURT

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After the conclusion of the Port Captaincy Inquiry the proceedings will be forwarded to the Admiralty Court, in Rio de Janeiro, and will be subsequently remitted to the Navy Prosecutor's Office.

Based on the conclusions of the Port Captaincy Inquiry, the Navy Prosecutor's Office can decide to bring charges before the Admiralty Court against the parties they deem to blame for the incident or can request the proceedings to be archived.

In addition to the public charges from the Navy Prosecutor's Office, any interested party can file a private complaint against the parties to be blamed.

The public and private complaints will be received by the judge of the Admiralty Court and the accused parties will be summoned to present their defences and present their evidence.

The case will subsequently go to trial and a judgment will be rendered by the Admiralty Court, thus recognizing or not the defendants fault for the incident.



# ADMIRALTY COURT

The Admiralty Court, located in Rio de Janeiro, is an administrative entity of the Ministry of Defence and only rules on navigation accidents and shipping matters, issuing penalties upon the liable officers and/or crewmembers

**Jurisdiction:** Judgment of maritime accidents and incidents involving sea, river and lake navigation, whether voluntary or under litigation, and to maintaining the registry of maritime property, as regulated by Law no. 2.180/54.

*Art. 13. It is upon the Admiralty Court:*

*l – to judge navigation accidents and occurrences;*

*a) defining the nature thereof and determining their causes, circumstances and extent;*

*b) indicating those responsible and applying the penalties set forth in this law;*

*c) proposing preventive and navigational safety measures; (...)*

*Art. 14. Navigation accidents are deemed to be:*

*a) sinking, grounding, collision between vessels, collision with fixed objects, breaching of the hull, explosion, fire, beaching, putting into port under stress, cargo dumping.*

*b) damage to or defect of the vessel and fixtures thereof that puts the vessel and lives on board at risk.*

# ADMIRALTY COURT

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Since the Admiralty Court is an administrative court it does not establish indemnity amounts, nor does it determine who should pay what to whom. This is the task of the Civil Courts.

The Admiralty Court's function is to simply determine the causes of the accident and to identify the person responsible, levying nominal fines and applying professional sanctions.

*“The action of the Judiciary is not dependent on prior decision of the admiralty court. The decision of the administrative Admiralty Court the force of which is merely supplemental to the work of the experts, has no influence over the civil courts as to reparation of damages. (Supreme Federal Court - STF, Justice Orozimbo Nonato)*

*“As already well-settled, the Admiralty Court is a merely administrative entity. It is not part of the Judiciary Power, and has no jurisdictional function. Decisions rendered thereby are effective in the administrative sphere, but in no way can they influence those rendered by the Judiciary. (Superior Court of Justice - STJ, Justice Eduardo Ribeiro)*

The Admiralty Court also does not have criminal law attributions, these being the exclusive domain of the criminal courts. However, a decision rendered by the Admiralty Court, if duly grounded, can be of paramount importance as technical evidence in future discussions involving eventual judicial claims.

# **ADMINISTRATIVE LIABILITY FOR ENVIRONMENTAL DAMAGES**

# ADMINISTRATIVE LIABILITY – ENVIRONMENTAL DAMAGES

Responsibility arising from conduct considered damaging to the environment is taken into consideration by the Federal Constitution itself, subjecting *“individuals or legal entities to criminal and administrative sanctions, independently of the obligation to repair the damage caused.”* (Art. 255, §3 of the Federal Constitution)

The administrative liability arises when there is a violation of environmental administrative rules.

Art. 70 of the Law of Environmental Crimes (Law no.9605/98).

*“An environmental administrative infraction is deemed to be any action or omission that violates the legal rules of usage, usufruct, promotion, protection and recovery of the environment.”*

Administrative liability remains even if no damage was caused to the environment. The simple act of violating the administrative rules generates liability to the violator, independently of the occurrence of environmental damage.

# ADMINISTRATIVE LIABILITY – ENVIRONMENTAL DAMAGES

In terms of administrative violations, the Federal, State and Municipal governments are all equally competent to protect the environment. The liability arising from such violation is **STRICT**, as per several Superior Court decisions:

*The application of fines, in the case of environmental damage, results from police powers – a mechanism available to the Public Administration to contain or inhibit activities performed by private entities that are considered harmful, inconvenient to the general well-being of society, to the national development and security, as is the case in the event of environmental degradation.*

*Finally it should be emphasized that the administrative fine, in the case of environmental damage, contrary to the arguments of the appellant, is set forth in Law 6.938/81, in addition to being **strict**, and thus being owed independently of fault or malicious intent of the violator.(...).*

*(STJ, REsp 442586, Justice Luiz Fux, Judgment on 26.11.2002)*

# ADMINISTRATIVE LIABILITY – ENVIRONMENTAL DAMAGES

Administrative violations can subject the offender to different types of penalties:

- Warning;
- Simple Fine – up to R\$ 50.000.000,00;
- Daily Fine – when the violation extends over time, until the effective conclusion of the polluting activity;
- Seizure of the Vessel;
- Destruction of or disablement of the Product;
- Suspension of the Activity;
- Restriction of Rights;
- Loss or restriction of tax benefits;
- Suspension of participation in financing programs issued by the official credit establishments.

However, the lack of clarity as to the limits of the competencies of each notifying authority generates serious disadvantages for the violator, permitting one single violation to be object of several different fines from each competent of authority.

# ADMINISTRATIVE LIABILITY – ENVIRONMENTAL DAMAGES

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Brazil's system of multiple competencies allows different public authorities to levy fines, leading to the possibility of a single violation being the object of multiple notifications by each one of those entities. The entity responsible for applying the fines is also the beneficiary of the amounts collected, increasing the probability of conflict among the inspection agencies themselves.

The application of the penalties does not exempt the violator from other administrative and criminal sanctions, nor does this exempt the violator from legal liability for damages caused to the environment and to public or private assets.

Administrative liability also admits the possibility of accumulation of penalties in the event of simultaneous commission of two or more violations. In the event of reoccurrence, penalties may double or even triple the original amount.

Authorities also may have the power to pierce corporate veils to ensure payment of fines or damages



# **CRIMINAL LIABILITY FOR ENVIRONMENTAL DAMAGES**

# CRIMINAL LIABILITY – ENVIRONMENTAL DAMAGES

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The criminal liability results from the practice of a fact foreseen as crime or contravention, imposing fines, confinement or restriction of rights to the offender.

Brazilian law defines environmental damages as a crime as disciplined in Law no. 9.605/98 (Law of Environmental Crimes).

In the sphere of Criminal Law liability is always based on the fault of the causing agent.

Criminal penalties can lead to the suspension of the activities, in addition to the rendering of community services; funding of environmental projects; execution of recovery works in degraded areas; contributions to environmental and cultural public entities.; suspension of the activities; incarceration and others.

# CRIMINAL LIABILITY – ENVIRONMENTAL DAMAGES

Criminal liability can also be attributed to corporate entities:

*“It is well known that the greatest responsible parties for damage to the environment are companies, collective entities through their industrial and commercial activities.*

***The criminal responsibility of the corporate entity for environmental violations arises, therefore, not only as punishment for environmentally damaging activities, but as a means to prevent the practice of such crimes, an essential function of the environmental legislation that calls out for conservation. (...)***

*Reality has unfortunately shown that environmental damage is, in many cases, irreversible, leading to the fear of imminent loss of life quality on the planet.(...)*

*If the corporate entity enjoys its own existence in the legal order and commits acts within the social arena due to the actions of their administrators, it may come to adopt typical conduct and, therefore, be held criminally responsible.*

***(...) all those involved in the violation will be held responsible proportionally to their fault.”***

*(STJ Special Appeal no.564960. Reporting Justice Gilson Dipp, Judgment rendered on 02.06.2005)*

# **CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGES**

# CIVIL LIABILITY – ENVIRONMENTAL DAMAGES

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In addition to administrative and criminal liability, civil liability will also apply, given the occurrence of damages and the consequent obligation of repairing it.

Despite the Brazilian system of civil liability being based on fault, in environmental issues strict liability is applied for the damages caused, as provided in the Law of the National Environmental Policy (Law 6,938/81).

Environmental Legal Liability, contrary to administrative fines, is not limited by Law for indemnification. Reparations are proportional to the severity of the damage pursuant to the principle of full responsibility.

Limitation of liability as set forth in the CLC-69 does not prevail in Brazil, as it is contrary to the Constitutional Order in force.

The Theory of Total Risk is applied, not allowing any exemption from liability. Some scholars argue that even the occurrence of Acts of God or force majeure, do not dismiss strict liability for environmental damage, due to the Principle that the one who makes a profit with the activity, assumes its onuses.

# CIVIL LIABILITY – ENVIRONMENTAL DAMAGES

*The Law that provides the National Environmental Policy (6.938/81) has adopted **liability without fault**, or **strict liability**, which is fully in force in what relates to civil liability for damage to the environment and to third parties.*

*(...) the application of an administrative penalty (At. 14, I to IV) does not exclude indemnity or reparation that may be determined by the Judiciary (...)*

*(STJ, REsp 442586, Justice Luiz Fux, Judgment on 26.11.2002)*

The key element to be observed is the potential for damage of the harmful act. The culpability of the agent is not even brought to discussion.

A civil public lawsuit may be brought by the Federal Government, State and Municipality or by quasi-public companies, state-owned corporations, public-private companies of environmental defense associations, against those responsible for environmental damage.

Violators can be held jointly and severally liability, including: the owner of the vessel, or whomsoever legally represents them; the charterer or operator of the vessel; the concessionaire or company authorized to perform activities pertinent to the oil industry; the Master or crew of the vessel; the port operator; the cargo owner; the insurer ; the salvage company; and other parties eventually involved.

# **ADDITIONAL CLAIMS AND JUDICIAL LAWSUITS**



Besides the action of the public entities regarding administrative, criminal and civil liabilities for environmental damages, big marine casualties may also re-echo into several other judicial claims from private parties.

- Arrest proceedings;
- Cargo claims;
- Fishermen claims;
- Indemnity lawsuits - personal injury of crewmembers or victim's family in case of death (full pension and punitive damages);
- Third party lawsuit;
- Salvage claims (the "Bermuda" precedent case);

Thus, a single casualty can generate a high extent of liability to the parties involved in several different spheres and levels, each of them with its own bases, diverse and independent and, most of it, without limitation regime.

The current trend in Brazil is that such claims to list as a defendant all parties involved directly or indirectly and request their joint and strict liability.



## CONCLUSION



- **Regime of multiple competencies** – *overlapping* jurisdiction of the government authorities in the environmental sphere (Municipal, State and Federal authorities);
- **Severe fines and lack of criteria** on the part of the public authorities in quantifying and establishing fines or quantifying the damages – security/guarantee (LOU) in always a non-predictable amount .
- **Customs Risk** - If there is a total loss and vessel/unit is permanently operating in Brazil, under any special custom regime with importation duties suspended, owners/charterers should bear the burden of payment of all taxes suspended if it is evidenced operational fault of the owner or charterer/importer;
- **Joint liability of all parties directly and indirectly involved** (owners, charterers, operators, agents and, in occasional situations: insurers);
- **Shipowner's liability for the negligence or fault of the Master and crew** ("*in eligendo*")
- **No limitation of liability regime for most of the Brazilian law claims** ("the indemnification is measured by the extent of the damage" - BCC);

## Recommendations:

- **Immediate communication and remedial actions.** Lack of communication and remedial actions is also punishable in accordance with the Law of Environmental Crimes.
- **Rapid response is crucial. Brazil's territory is large and logistics can be complex.** When major maritime casualties or marine environmental incidents occur it is important to have a rapid response team of specialists, marine experts, attorneys and other professionals ready not only for a first response at the site but also before the authorities, government hearings, administrative proceedings (since Port Captaincy inquiry), as well as judicial litigation.
- **Jurisdictional issues. Forum Shopping - possible tool for contractual disputes only.** Big casualties often involve complex, multi-jurisdictional litigation and Brazilian jurisdiction may apply when the fact occurs in Brazilian territorial waters; when the parties are domiciled in Brazil; or when there is an obligation to be performed in Brazil.
- **Settlement alternative. Long term proceedings in Brazil can be surprisingly expensive.** High legal interest of 1% per month. After 5 years interest of 60 % shall apply on the original amount (settlement alternative can save a great amount of money from owners and insurers). Club's reserves for the claims and LOUs must be increased and updated from time to time.



# THANK YOU !

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