Brazilian recent developments in Maritime Law

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Cases that will be discussed today:

1) The OSX 3 Case

2) The Scan Bothnia Case


OSX 3
Flag: Liberia

OSX 3 Leasing B.V.

Bonds

USD 650 million
(500 million + interest)

Norwegian Stockmarket

Representation of Bondholders

NORDIC TRUSTEE

Mortgage

Engineering Contract

MODEC

USD 27 million
Bank Guarantee
(up to USD150 million)

LIEN

BTG - Cayman

Joint Debtor

Charter Contract

OGpar

Evaluated in 2015:
USD 800 million *(aprox)*

Service Contract

OSX Serviços

OSX Brasil S.A.

1st Instance Decision

- **The foreign mortgage registered at Liberia registry is not valid for the purpose of priority.**

  "The foreign maritime mortgage, that was registered solely before the Maritime Authority of Liberia, is not valid, as there is no proof of the registry of NORDIC's mortgage at the [Brazilian] Admiralty Court."

- **Nordic Trust <u>should</u> have registered the mortgage at the Brazilian Admiralty Court**

  "The vessel, although foreign (Liberia flag), operates in Brazilian waters, is used by the oil industry, and has registration at the Rio de Janeiro Port Captaincy."

  "So, Nordic could have promoted its registry at the Admiralty Court in order to enable the subsequent registration of the mortgage, as determined by §2º of art. 12 of Law. 7.652/88".

"Registration of liens and other onuses against <u>Brazilian vessels</u> must be effected before the Admiralty Court, under the penalty of not being valid against third parties"

(Section 12, Law 7.652/88 - Registration of Maritime Property)

Court of Appeal of São Paulo State

- **The foreign maritime mortgage registered in Liberia (flag of convenience) is not valid in Brazil.**
- **Inapplicability of the 1926 Brussel Conventions and Bustamante Code because Liberia is not a signatory.**
- **It was not demonstrated the existence of international customary law recognizing foreign mortgage.**
- **The creditors accepted the Liberia registry and were aware of the risks involved (contractual clause).**
- **Brazilian law is applicable, not foreign law, as the FPSO would stay as a fixed asset in Brazilian waters for 20 years.**
- **It would be necessary a treaty between Brazil and Liberia to have the recognition of the mortgage.**

Decision rendered on the Special Appeal Nº 1.705.222/SP, by the Fourth Panel of the Superior Court of Justice

- ✓ The decision adopted a **Supreme Court** leading case ADI 1.480 MC/DF, concludes that ***"the international treaties or conventions once regularly incorporated into the internal law, are, in the Brazilian legal framework in the same levels of validity, efficacy, and authority in which the ordinary laws are positioned, consequently, there is among these and the acts of public international law a mere relationship of parity".***

- ✓ **UNCLOS** United Nations Convention on the Law of the Sea determines that the ships have the nationality of the **State of its flag**, and that such **sovereign** State ***"exercises its jurisdiction and its control in administrative, technical and social matters on ships flying its flag"***.

Decision rendered on the Special Appeal Nº 1.705.222/SP, by the Fourth Panel of the Superior Court of Justice

- ✓ ***"The mortgage registry is a sovereignty act of the State of the nationality of the vessel, being under its jurisdiction the respective administrative matters.*** ***Therefore, the act has extraterritorial effects, reaching the national internal order."***

- ✓ Restating that to allow ships mortgages is a national and international tradition, notwithstanding them carrying the legal nature of movable assets, the Superior Court of Justice provisions of the **Bustamante Code** and of the **1926 Brussels Convention** for the Unification of Certain Rules Relative to Principles and Maritime Mortgages to conclude that the maritime mortgage established according to the **law of the foreign flag** has extraterritorial effects "**including in nations whose legislation is not aware of or does not regulate the matter".**

Decision rendered on the Special Appeal Nº 1.705.222/SP, by the Fourth Panel of the Superior Court of Justice

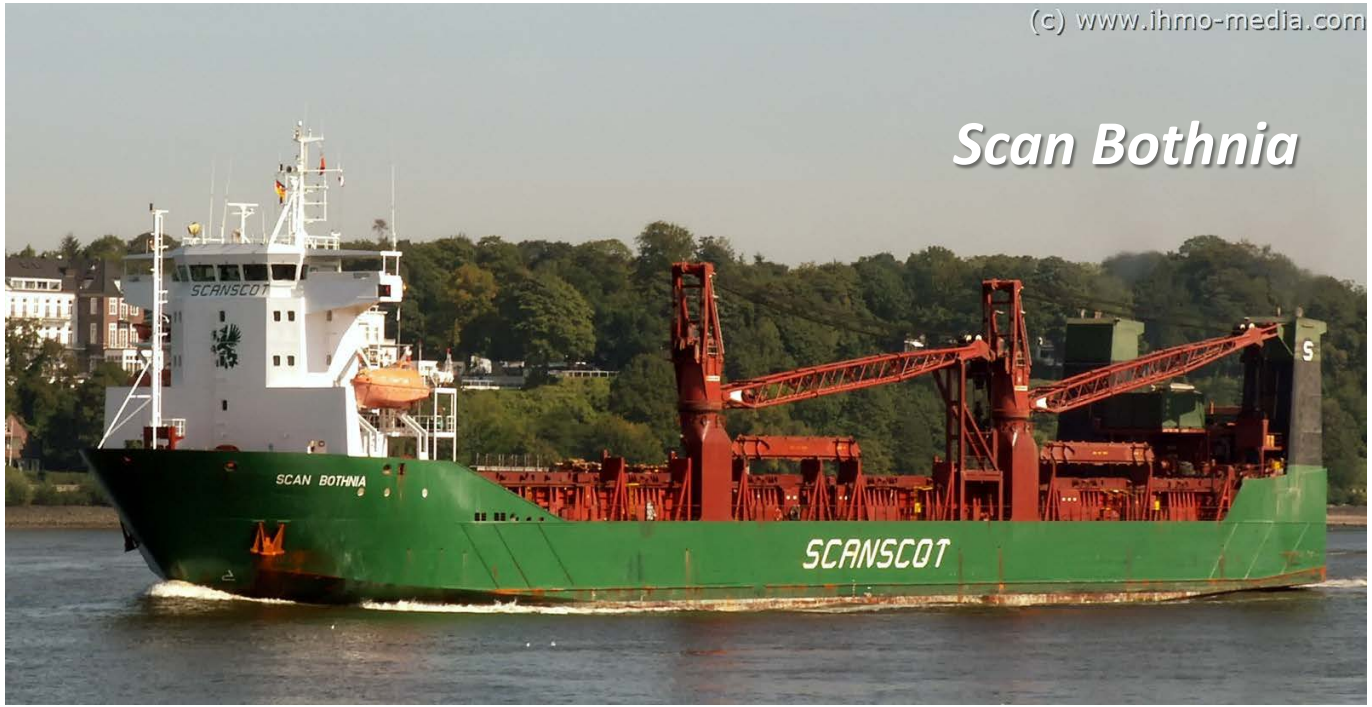
- ✓ Admiralty Court is not incumbent upon registering the mortgage of a vessel flying a flag of another country, even for lack of legal provision, being the registration an act of sovereignty of the State of nationality of the vessel.

- ✓ ***"The instability and the maritime risk resulting from the constant displacement [of vessels] shall be balanced with the stability and effectiveness of the registries at ports of origin."***

- ✓ The Fourth Panel overturned the decision rendered by the Court of Appeals of São Paulo, **recognizing the validity, within national scenario, of the foreign maritime mortgage registered within the State of the Flag.**

Decision rendered on the Special Appeal Nº 1.705.222/SP, by the Fourth Panel of the Superior Court of Justice

"By denying efficacy to the mortgage, with all due respect, the local Court fails to observe several international conventions and causes <u>legal uncertainty</u> with possible restrictions and increased costs for the charter of vessels used in Brazil. Therefore, overturning such decision is mandatory".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Scan Bothnia
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Facts of the case

- Classic Cargo Claim - Ceará State Court of Appeals had rendered a decision granting a Brazilian insurer's claim and ordered the foreign shipowner to reimburse the insurer for the amount paid to its insured for the damaged cargo. Decision by default and final.

- The shipowner **failed to pay** the award. No assets located.

- Brazilian insurer's attorney filed a lawsuit before the Rio de Janeiro State Court against the foreign shipowner's P&I club, claiming a declaration that the P&I club **was a joint or secondary debtor of the shipowner** with respect to payment for the aforementioned cargo damage and attorney fees.

Importance of the Scan Bothnia Case

Is the P&I club jointly liable for shipowner's debts?

Is it possible to claim directly against the P&I?

Decision from Rio de Janeiro State Court

- The legal relationship between the shipowner/member and its P&I club is of a **statutory nature (By laws prevails)** rather than a contractual one. The P&I Club holds an **associative relationship (Brazilian Civil Code)** with its members aiming for **mutual assistance**, which differs from the contractual relationship between insurer and insured. **Non profit** and **non bilateral** as the insurance contract.

- In an insurance contract, the insurer must reimburse the insured for the indemnity paid to the aggrieved third party. P&I club coverage is subject to the ***'pay to be paid'*** rule. Therefore, before it is paid by the member, **no obligation arises** to the association**, neither a joint liability**.

- **Supplementary calls** also differ substantially from the traditional insurance premiums.

- The P&I club had no joint and several liability in relation to the shipowner's obligation, as it was not a party to the proceedings that adversely judged the shipowner. Imposing this liability would violate the ***due process of law*** and ***full defence*** principles.

Conclusion

- Despite the current political uncertainties in Brazil (ongoing elections), it appears that, at least in relation to Maritime Law, Brazil is going on the right direction, as the High Courts have recently rendered decisions bringing legal certainty to the market.

- The decision of **OSX-3** demonstrates the concern of the Judiciary with the legal certainty towards owners, creditors and holders of rights on ships, as well as with the correct applicability of the international conventions, recognizing the validity of foreign maritime mortgages.

- The decision from **Scan Bothnia** case is paramount for the international maritime community, included owners, **P&I Clubs** and the **IG** as it creates a **leading precedent** preventing direct action against the P&I clubs and most important with a clear differentiation between the mutuality concept and traditional civil liability insurance regime.

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Thank You!

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