

# Brazilian Maritime Law: A General Overview

*“The Hegemony of the World is the Hegemony of the Sea”- Seneca*

Direito marítimo brasileiro: uma visão geral  
"A hegemonia do mundo é a hegemonia do mar" – Seneca

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**SUMMARY:** Introduction;Chapter 1. Maritime Law;Chapter 2. Brazilian Maritime Law Jurisprudence;Conclusion;References

**RESUMO** - Tendo em vista que o Direito Marítimo carece de maior difusão no direito brasileiro e na cultura jurídica dos países que comerciam com o Brasil, esse artigo objetiva abordar os principais aspectos jurídicos do Direito Marítimo brasileiro, com a menção às principais fontes, bibliografia básica, órgãos relevantes para a sua efetividade e principais julgados. O método será histórico, comparativo e indutivo, vez que abordará os principais aspectos históricos da disciplina bem como as principais especificidades para atingir uma visão geral. O artigo possui dois capítulos: o Capítulo 1 trata do conceito, origem e evolução do Direito Marítimo no direito comparado e brasileiro, bem como suas principais fontes no direito brasileiro. O Capítulo 2 discorre sobre julgados envolvendo a disciplina interpretada pelos tribunais brasileiros. Em seguida, serão feitas considerações finais visando a difusão Direito Marítimo brasileiro especialmente entre os estudiosos estrangeiros interessados no tema, razão pela qual o artigo é escrito no idioma inglês, o que se insere na proposta de internacionalização do Programa de Mestrado e Doutorado em Ciência Jurídica da UNIVALI, especialmente da linha de pesquisa Direito Internacional, Comunitário e Transnacionalidade. No final serão apresentadas as referências usadas.

**PALAVRAS-CHAVE:** Direito Marítimo; Aspectos Gerais; Jurisprudência brasileira; Transporte; Direito Internacional.

**ABSTRACT** - Due to the small diffusion of Maritime Law in Brazilian legal culture and also in the legal culture of the countries that trade with Brazil, this paper aims to introduce the main legal aspects of Brazilian Maritime Law, through the main

sources, basic references, important entities to its effectiveness and decisions. The method is historical, comparative and inductive, and it will deal with the main aspects of the development of the issue as well as information to get a general overview about the Maritime Law. The article has two chapters, the first one deals with the concept, origin and evolution of the Maritime Law in comparative and Brazilian laws, as well as its main sources in Brazilian legal system. The Chapter 2 deals with the decisions involving this discipline interpreted by Brazilian courts, including Brazilian Maritime Tribunal. Finally, it will be made considerations aiming to divulge the Brazilian Maritime Law specially among the not-Brazilians researchers on the issue. Due to that, the article is written in English language, which is included on the internationalization process of the Master and Phd Law Program of UNIVALI, specially on the line of research International and Community Law and Transnationalism. In the last part, the references used will be mentioned.

**KEY-WORDS:** Maritime Law; General Overview; Brazilian Jurisprudence; Transportation; International Law.

## Introduction

The technological advances brought by the scientific discoveries of the last fifty years of the 20<sup>th</sup> century and ten years of 21<sup>th</sup> century were greater than all those that have taken place throughout history. From the invention of fire, the wheel, the candle, the steam engine which gave rise to maritime navigation, microchips and the personal computer, the development of science and technology has accelerated in great strides, bringing benefits, with the increase in international trade, and also confusion, with the growth of environmental pollution, including pollution of the navigation channels, given that over half of the earth's surface is covered with water and the most part of the world's population lives close to the coast, rivers or lakes.

These discoveries have led to a reduction in the cost of transport and communications, resulting in an increase in the circulation of people, capital and goods between nations. Maritime transport is the oldest and most commonly used modal of transporting goods between various countries, bringing together people and cultures from far-flung corners of the globe.

Due to these interests, the result of the concerns, needs, possibilities and culture of a people, are materialized in what is conveniently called the maritime policy of the country. If their political, economic and military objectives are to be attained,

the appropriate means must be obtained and used, i.e. they depend on a maritime strategy, which will prepare, and make appropriate use of the maritime power.<sup>2</sup>

Maritime power is an extremely wide concept, since it comprises everything that is in some way related to navigation, water transport, fishing and oil extraction from the seabed, nautical sports, and related industries, as well as the population which forms part of these activities, the government policies that govern them, and, above all, the maritime vocation of the people.<sup>3</sup>

Finally, it must also mention the naval power, the armed force of the maritime authority, which exists to defend the interests of the nation at sea, and thereby guarantee the safety of the sovereignty. Through it and its regulations, published by the Autoridade Marítima, the country is guaranteed the right to economic and strategic use of the sea<sup>4</sup>, stressing that this importance will increase even more with the UNO regulations on the continental shelf, where Petrobras has found oil, with the addition of nearly 1,000,000km<sup>2</sup>, which will transform the Brazilian domain into the *Blue Amazon*.

Thus, Maritime Law, as an autonomous legal discipline, and in view of its importance for the legal security of the waterway activity of a continental country, with around 8,500 kilometers of coastline, has not received the treatment it deserves in graduate and post-graduate courses in Law and Foreign Trade. On the contrary, instead of being widely publicized, it is restricted to a small group of legal practitioners.

This article, therefore, introduces the main aspects of Brazilian Maritime Law. Chapter 1 deals with the origins, object, foundations, legal nature and main legal sources and Chapter 2 addresses some Maritime Law's cases decided by Brazilian Courts, in order to transmit a general overview of this discipline in action. So, this part will present a study, with comments on jurisprudence of the courts of the Brazilian Legal Power, in particular, the Supremo Tribunal Federal, the highest Brazilian and Federal Court that judges cases involving violations against the Federal Constitution, through concentrated control of constitutionality and exceptionally through Extraordinary Appeal (Recurso Extraordinário - RE),<sup>5</sup> the Superior Tribunal of Justice, Federal court that judges cases involving violations against the

infraconstitutional legislation, through Special Appeal (Recurso Especial - REsp),<sup>6</sup> and the Maritime Tribunal, a administrative court, that judges accidents of navigation.<sup>7</sup>

## **Chapter 1. Maritime Law**

### **1.1. Origins and evolution**

Maritime Law and Navigation Law are primitives, contemporary and linked to the history of mankind itself: they are the product of various civilizations which launched their ships into the sea, as this was the means used by ancient peoples in their search for great conquests. These journeys were maritime adventures, based on the practices, the use of customs and above all, the intuition of great navigating civilizations, including the Phoenicians, the Egyptians, the Greeks and the Vikings. This primitive maritime navigation was dangerous, due to primitive technology, and the sea was a long route fraught with dangers and death, and here were countless cases of expeditions which never returned.<sup>8</sup>

Throughout history, various rules have been applied to Maritime Law, such as the Hamurabi Code, drawn up by Hamurabi, king of the 1st Babylonian Dynasty (23rd Century B.C.), which contained rules on naval construction, chartering of sailing vessels and galleys, the responsibilities of the charterer, collisions, and payment of indemnity by those who caused damages. Curiously, the sailing ships were much smaller than the galleys as it was a civilization which evolved in the basins of the Euphrates and Tigris rivers, it may be that river navigation went as far as the Persian Gulf, therefore Maritime Law may also have included river navigation, although no direct reference was made to rivers.<sup>9</sup>

Another code, Manu's Code, of the Indians (13th Century B.C), brought rules for maritime exchange, there being no mention of documents which reveal the existence of Maritime Laws for the Phoenicians and Hebrews.<sup>10</sup> There is little reference to Maritime Law in Roman law. Although the Romans were very active in maritime trade, they did not know of, or made little use of, the Maritime Laws used by navigators from the East.

There is no doubt that the Greeks used the customs of the Island of Rhodes, in the Eastern Mediterranean, as well as the *nauticum foenus*, which was simply a risk money or maritime exchange contract. This contract stipulated that a party who loaned money would only be repaid if the maritime expedition was a success,<sup>11</sup> and due to the risks, this represented the beginnings of the idea of insurance.

Long-distance transport was monopolized by the Muslims after the Fall of Constantinople in 1453, and ocean crossings enabled the colonization of the New World, becoming more practicable after innumerable technical alterations. Also, the Muslims in the 15th Century still presented a threat, and the Saracen pirates were attacking and ransacking the Mediterranean cities of Europe. The Moors, in turn, held a monopoly over spices from the Orient which, at that time, were essential for preserving food.<sup>12</sup>

Within this scenario, King Manuel wanted to improve the lives of his people, and the School of Sagres, in Portugal, made a major contribution to maritime navigation and its discoveries, through King Manuel's quest to find a maritime route to the Indies, going around Africa and weakening the power of Islam, opening a way to the Indies, and for the great voyages, including those which expanded the known world, such as the discovery of Brazil in 1500. Thus, a small country, making use of the brilliance of its nautical knowledge, helped change the course of world history.

It was not until the Middle Ages that elements of modern Maritime Law emerged, and two compilations of rules began to exert a major influence on Europe: the Rules of Oléron and the Consulate of the Sea, which was a compilation of the uses that were followed in the Western Mediterranean. It was also the name of the Maritime Court of Barcelona, and although of Catalonian origin, the Italians claimed ownership of it. However, the first written code was in Catalan, and dates back to the 14th Century. It is a very comprehensive code, although not written in any specific order, owing to successive alterations, and it has been translated into many languages.

The ancient authors believed that the Rules of Oleron and the Consulate of the Sea were sovereign decrees, which was incorrect: they were compilations of the uses and customs. In relation to maritime insurance, the *Guidon de la Mer*, written in

Rouen in the 16th Century, can be cited as the first code of detailed rules on maritime insurance, and it contained the rules for each port or city.<sup>13</sup>

According to Rodière, the first codification of Maritime Law goes back to the Kingdom of Luis XIV, at the instigation of Colbert, who encouraged to the King to appoint a committee which, after extensive research in the ports, elaborated the *Ordennance touchant la marine* of 1681. It was the most important law created by Luís XIV, as it included public Maritime Law and private Maritime Law. It achieved great importance in Europe, and was copied by various countries, including: The Netherlands, Venice, Spain, Prussia and Sweden.<sup>14</sup>

In France, the Trade Code of 1808, the Code of Napoleon, had a major influence on Brazilian Maritime Law, and contained a Book, number II, dedicated to Maritime Law (articles 190 to 426), which was partially taken from the 1681 Ordinance, omitting everything that appeared to relate to public law. This code, which was a reproduction of the law of the 17<sup>th</sup> century, gradually became defunct because when it was written, maritime navigation was still that of two centuries earlier, but the conditions of exploration had changed. Thus, the code left various laws in force, such as the 1793 Act, on the nationality of vessels, which remained in force for a long period.

In Brazil, for a long time, the legislation in force was consubstantiated by the Ordinances of the Kingdom of Portugal, such as the Alphonsines, Manuelines and Philipines Ordenances, of the Kings of Portugal, respectively. The greater part of the Brazilian colonial period was ruled by the Philippine Ordinances, printed in 1603, under the Reign of Philip II of Portugal. With the independence of 1822, portions of the above-mentioned code remained in force, as long as they were not replaced by the national laws, and its application was attenuated by the granting of the 1824 Imperial Constitution, the Criminal and Procedural codes, of 1830 and 1832, and Commercial Code of 1850.<sup>15</sup>

It should be emphasized that the Commercial Code, promulgated by Law 556 of 25<sup>th</sup> June 1850, regulated maritime trade in its Second Section, maritime trade, and this section was maintained in the Civil Code of 2002, article 2045, while

the majority of the Brazilian Maritime legislation is distributed across several laws, as shown below.

The Brazilian Commercial Code of 1850 (CCB), maintained by the Civil Code of 2002, regulates a substantial part of Maritime Law, in its articles 457 to 796, through ten following titles:<sup>16</sup>

The titles are as follows: I – Craft; II – Owners, partners and cash-holders of vessels; III – Vessel captains and masters; IV – Pilot and co-master; V – Gathering of officers and crew, their rights and obligations; VI – Chartering; VII – The risk money or maritime exchange contract; VIII – Maritime Insurance; X – Forced Calls in Port; XI – Damage caused by collision; XII – Abandonment and XIII – Damage.

## 1.2. Object and Legal Nature

Thus, an area of law emerged which focused on the legal rules relating to navigation, and activities carried out at sea: Maritime Law,<sup>17</sup> a limited concept, as it is understood the concept as being wider than this, to include the set of legal rules relating to the ship, including contracts of affreightment and transport, and covers the whole range of rules which regulate contracts for the transport of goods and people, by sea, rivers and lakes, the rights, duties and obligations of the ship owners, captains, and other parties interested in the services of private navigation, as well as those governing vessels used in their service.

In Brazil, in the practice of Maritime Law, despite the abundant legislation on the subject, which comprises a whole body of legislation regulating the object, a certain prejudice was observed towards classifying it as an autonomous discipline within Law, even though its rules were applied in petitions, judgments and sentences involving foreign trade contracts and disputes, and the inspection and security of waterway transport. In this context, the legislator is responsible for placing this discipline at the constitutional level which it deserves, in light of article 22, I, of the 1988 Federal Constitution,<sup>18 19</sup> so that from then on, there was no longer any question as to its existence or autonomy.

Navigation Law should also be discussed, since owing to the division between public and private law, which is typical of the Roman-Germanic law, and bearing in mind the confusion between Navigation Law and Maritime Law, it is maintained that the latter is of a mixed nature, whereas Navigation Law, which may be by air or sea, is of a public nature, since it is governed by regulations of internal and international public law, such as universality, supremacy of the public interest, *jus cogens*, immutability and non-retroactivity, as well as the general regulations of public order.

The majority of these regulations are elaborated by the IMO and in Brazil, they are enforced by the Directorate of Ports and Coasts (DPC), which is subordinated to the Naval Command and Ministry of Defense, and which regulates traffic and navigation safety, such as the regulations on nautical signaling, and the internal and international regulations for waterway traffic, in ports, rivers, navigable waterways and the open sea.

In Maritime Law, on the other hand, which is wider in scope, there are both public and private regulations, and the precepts of Navigation Law are applied, together with the institutes of private law, in particular, those of Commercial and Civil Law, which include obligations, simplicity, mutability and equality of the parties.<sup>20</sup>

It therefore calls for greater commitment on the part of the Brazilian legislators, with the construction of a new constitutional and administrative theory of Maritime Law, particularly in view of the role of the National Waterway Transport Agency in the sector, through a study of the North American models, whose pragmatism favored the development of an intricate formula for transferring the Legislative powers, initially to the Executive and then to the regulatory independent agencies<sup>21</sup>, and Italian models, faced with the economic regulatory experience of a country which uses the Roman-Germanic system, as an important contribution to the process.



### 1.3. Autonomy of Maritime Law

The majority Brazilian doctrine erroneously treats Maritime Law and Navigation Law in exactly the same way, as though they were the same discipline, which leads to confusion, since, as mentioned earlier, Maritime Law is wider in scope, as it regulates the transport of goods or people, by maritime routes, in all its details.

The object of the former, therefore, is the safety of waterway transport, and its principal source of legislation is the Lei de Segurança do Transporte Aquaviário (Waterway Transport Safety Law) - LESTA. Navigation Law, on the other hand, is autonomous or independent in various countries, like Italy for example, with its *Codice della Navigazione*, or the *Lei da Navegação* in Argentina and the discipline has not yet been formally codified, or its autonomy guaranteed in the 1988 Federal Constitution, as is the case with Maritime Law, in article 22, I, cited earlier.

It should be emphasized that the congressmen who initiated the Law were largely responsible for the confusion between Maritime Law and Navigation Law, as it refers directly to air navigation and indirectly to maritime navigation, in various following articles of the 1988 Federal Constitution:

Art. 21 – It is the responsibility of the Federal Government to: XII – exploit, directly or through authorization, concession or permission: c) air and aerospace navigation and airport infrastructure ; d) railway and waterway transport services between Brazilian ports and national borders, or which cross State or Territorial borders ; f) maritime, river and lake ports ; XXII – to carry out services of maritime, airport and border controls ; Art. 177 – The monopoly of the Federal Government includes: IV – the maritime transport of crude oil of national origin or basic oil derivatives produced in Brazil, as well as the transport, via pipes, of crude oil, its derivatives and natural gas of any origin; Art. 178 – The law shall regulate air, water and land transport, and in relation to international transport, shall observe the agreements signed by the Federal Government, adhering with the principle of reciprocity. Sole paragraph. In the regulation of water transport, the law shall establish the conditions in which the cabotage transport of goods and inland navigation can be carried out by foreign vessels.

#### **1.4. Relationship between Maritime Law and other areas of Law and knowledge**

It can be said that maritime transport, owing to its complexity and the need to standardize the international rules between the countries that use this means of transport, particularly those published by the international bodies, is one of the areas of law which has the highest number of links with other areas of law.

As mentioned earlier, the 1988 Federal Constitution brings the bases of Maritime Law, according to the above-mentioned articles, as well as its autonomy, as set forth in article 22, I. Maritime Law, in turn, is related principally to Commercial Law, through its regulation in the 1850 Commercial Code, Second Part; to Civil Code, through the Civil Code, in the part which deals with transport contracts;<sup>22</sup> to Consumer Protection Law, particularly the relationship between consumers and suppliers of goods and services within the navigation industry, and collective actions, especially those relating to environmental damage caused by maritime pollution.

It is also related to Regulatory of Maritime Transport and Ports Law<sup>23</sup>, Customs Law, through the inspection of foreign trade by the Federal Revenue; to Port Law,<sup>24</sup> since it is in the local port that goods are loaded; to Administrative Law, due to the legislation published by the various bodies of the Executive Power, particularly the Naval Command ; to International Public Law, through the large number of treaties and conventions, particularly those published by the International Maritime Organization and World Trade Organization; to International Private Law, through the complexity of conflicts involving transport contracts and various nationalities of the parties involved; to Environmental Law, through the fact that transport occurs on waterways; and to various other areas of law.

Among them, it may be mentioned Maritime Criminal Law, Maritime Tax Law, Comparative Law,<sup>25</sup> and Integration Law, as well as other areas of knowledge, including Theory of International Relations,<sup>26</sup> Astronomy, Meteorology, Naval Engineering and Economics, among others. Particularly important is the relationship of Flag of Convenience in Maritime Law, because transnational shipping companies, in order to reduce shipping costs, registry them in countries that do not enforce the

regulations and provide tax exemptions, like fiscal paradises.<sup>27</sup>

### 1.5. Sources of Maritime Law

To avoid confusion between the sources of law which operate in the area of navigation, it is important to address Maritime Law and Navigation Law together. As seen earlier, the nature of the former is mixed (public and private law),<sup>28</sup> because "there is no dominance of public or private interest"<sup>29</sup> while that of Navigation Law is considered public law, and although it has a clear identity of its own, it should be emphasized that this law is generally based on internal and international regulations of a public nature, such as the IMO Conventions, dealt with in Chapter 2, which are applied internally in the form of a Decree, after being approved by the National Congress (art. 49, I, of the 1988 Federal Constitution) and ratified by the President of the Republic (art. 84, VIII, of the 1988 Federal Constitution).<sup>30</sup>

Maritime Navigation Law is governed by the regulations of public law, such as the NORMAMs (Normas da Autoridade Marítima) published by the Directorate of Ports and Coasts (DPC), the Brazilian Maritime Authority, as well as those of private law, such as the Commercial Code and Civil Code. In the case of this study, the sources of interest are the formal or known ones, which unlike material or production sources are only of interest for the study of the history, sociology or other sciences. This is so because it is through these sources that the law is exercised, giving rise to the formal sources, and this is the means by which the law becomes known, with these sources of knowledge or positive law being subdivided as follows:

Formal or known sources: a) immediate or primary: laws (conceived like all the regulations of positive law, not only those published by the legislative power, international treaties, agreements and conventions, decree-laws, decrees, regulations etc and b) mediated or secondary : custom, doctrine, jurisprudence and general principles of law.

Although various national authors generally include unilateral contracts and statements among formal sources of law, denominated by some internationalists as unilateral acts (protest, notification, statement, promise and renouncement), Dos

Anjos and Gomes disagree, since these are sources of obligations and not sources of law. Contracts create a binding obligation between the parties to the contract and the unilateral acts; they are legal acts, whose repercussions on the legal world are not as widespread as those of regulations, or formal sources of law.<sup>31</sup>

### 1.5.1. Brazilian maritime legislation

The legislation of Maritime Law, as seen above, was heavily influenced by international sources, especially the conventions published by the International Maritime Organization,<sup>32</sup> whose activities are described below, and by the uses and customs of international trade, through the *Lex Mercatoria*, as prescribed by Berthold Goldman, when he laid the foundations for an ardent and in-depth characterization of that institution as a source of international trade legislation. In this scenario, according to the above-mentioned author, the English practice in maritime transport is a good example, due to its naval tradition and the major role played by its merchant services industry, such as arbitration and maritime insurance, which it is applied to variety: us non-English clients, who have no link with England.<sup>33</sup>

Often, even international treaties not ratified by the Federative Republic of Brazil must be complied with by national merchant vessels, when they use foreign ports, as in the case of the International Convention for the Prevention of Pollution from Ships (MARPOL/78) which obliges Brazilian craft to adapt to the international regulations in order to be able to call at foreign ports. In order to carry out the activities regulated by Maritime Law, it is necessary to have a knowledge not only of Administrative Law, Public International Law and Civil Law, but also of basic notions of naval architecture and navigation, English and meteorology.

This work presents only Maritime Law and the main regulations, so that, besides the Commercial Code, The Civil Code and Federal Constitution and other federal regulations cited above, many federal laws<sup>34</sup> make up the set of regulations of Maritime Law, including: The Civil Procedural Code - Law. n. 5.869, of 11 January 1973, article 1.218 regulates the subject;<sup>35</sup> Law n. 6.421/77 – Establishes directives

for the protection and use of lighthouses, light beacons and other visual signals and navigation aids on the Brazilian coast; Law n. 7.203/84 – On giving assistance to and rescuing craft, objects or goods in peril at sea, in ports and in inland navigable waterways; Law n. 7.273/84 – on Search and Rescue of Human Life in Peril at Sea, in Ports and in Inland Navigable Waterways. To these we can add Law 7.652/88, altered by Law n. 9.774/98 – on the Registration of Maritime Property and other provisions; Law n. 7.661/88 – which institutes the National Coastal Management Plan, and other provisions; Law n. 8.617/93 – On Brazilian territorial sea, contiguous zone, exclusive economic zone and the continental shelf, and other provisions; Law n. 8.630/93 - Law of Ports – on the legal system of exploitation of the organized ports and port facilities, and other provisions; Law n. 9.432/97 – on the waterway transport system and other provisions; Law n. 9.605/98 – on penal and administrative sanctions derived from conduct and activities which are harmful to the environment, and other provisions; Law n. 10.233/01 – on the restoration of waterway and land transport, creates the National Council for Transport Policy Integration, the National Land Transport Agency, the National Waterways Transport Agency<sup>36</sup> - (ANTAQ)<sup>37</sup> and the National Department for Transport Infrastructure, among other provisions.

Among the Decrees, it can be mentioned: Decree n. 70.198/72 – Regulates Decree-law n. 1.023, of 21 October 1969, on the tariff for the use of Lighthouses, and other provisions; Decree n. 1.886/96 – which regulates provisions of Law 8.630 (Ports Law), of 25 February 1993, and other provisions ; Decree n. 2.596/98 – Regulates Law n. 9.537 (LESTA), 11 December 1997, on waterway transport safety in waters under national jurisdiction; Decree n. 2.840/98 – Establishes regulations for the operation of fishing vessels in waters under Brazilian jurisdiction, and other provisions; Decree n. 2.869/98 – Regulates the granting of public waters for exploration of aquaculture, and other provisions.

The following can also be added: Decree n. 3.179/99 – on the specification of sanctions applicable to conduct and activities which are harmful to the environment, and other provisions; Decree n. 4.136/02 – on the specification of sanctions applicable to infringements of the legislation for the prevention, control and inspection of pollution caused by jettisoning oil and other harmful or dangerous substances into waters under national jurisdiction, contained in Law n. 9.966, of 28

April 2000, and other provisions; and Decree n. 4.406/02 – Establishes directives for the inspection of commercial tourism craft, their passengers and crew.

There are also other Decrees,<sup>38</sup> Decree-Laws,<sup>39</sup> Conventions of the International Labor Organization (ILO), rules, regulations, and guidelines which affect maritime activity, the maritime transport sector and property of the Union, and a knowledge of Administrative and Civil Law is important for their understanding.<sup>40</sup>

Besides this legislation, the regulations published by the Directorate of Ports and Coasts, known as NORMAM (Norma da Autoridade Marítima), are also very important for those operating in the area of Maritime Law, since it directly affect the day-to-day life of the waterways and navigation safety.

## **Chapter 2. Brazilian Maritime Law Jurisprudence**

The jurisprudence of Brazilian Maritime Law is still few used as a source of study, therefore, some judgments of the Supremo Tribunal Federal (STF) and Superior Tribunal of Justice (STJ) concerned to Maritime Law will be mentioned here, as well as of the Maritime Court, emphasizing that although some were published some time ago, they should be consideration in the application of the results and interpreted in the light of a new hermeneutic, which incorporates the values and principles of the 1988 Federal Constitution and the infraconstitutional legislation, especially the dialog between the sources of law existing in the Consumer Defense Code and the 2002 Civil Code.

## 2.1. The Brazilian Supreme Court (Supremo Tribunal Federal)

### 2.1.1. Maritime Transport Contract and the Clauses of Election of Jurisdiction

Historically, the Supreme Court has interpreted autonomy of will for the election of the jurisdiction, in the sense of observing whether the agreement was the unequivocal expression of the desire of both parties. As an example, revising the decision of the lower court, the STF, when analyzing and Recurso Extraordinário - Extraordinary Appeal n. 18.615,<sup>41</sup> judged on 21<sup>st</sup> June 1957, did not consider the above-mentioned clause electing the jurisdiction for Amsterdam, in Holland, in the contract of maritime transport,<sup>42</sup> since according to the French doctrine, the desire is presumed, therefore there is no conflict of wills. “In his vote, the Minister. Villas Boas clarified as perfectly valid, the convention which transfers the knowledge of issues of this type to a foreign court, but in this case could not allow it because there was no adequate proof of the advantage a specific clause would give to one of the parties in the Court of Amsterdam, and for this reason, ruled that the party would be better protected in the Brazilian jurisdiction.”<sup>43</sup>

So, it can be argued that in Brazil, the *pactum de foro prorrogando* is permitted, whether express or tacit, provided there is no fraud of law, violation of the principles of public order, failure to comply with the limits of the freedom of contract in terms of International Private Law or offence to the basic principles of the Law of contractual obligations.<sup>44</sup> Therefore, the election of a jurisdiction should not be accepted, without any objective or subjective connection admitted by the International Private Law,<sup>45</sup> simply as the result of experience or tradition of a specific jurisdiction before the requirement to specialize in certain matters, such as the English jurisdiction for matters of Maritime Law, loans in Eurodollars or the international grain trade, among others.

Among these, it is important to mention the work contracts of foreigners residents in Brazil, celebrated by agencies located in Macaé, Rio de Janeiro,

representatives of North American companies which operated for Petrobras in the Campos Basin in the 1990s. The jurisdiction elected for these working agreements was the city of Singapore, without there being any factor of convenience whatsoever for electing this jurisdiction (court) *ratione loci*, since the services were provided within Brazilian maritime territory (*lex loci executionis*), and therefore governed by the Brazilian court and the labor law of the land, for settling controversies arising from non-compliance with the collective labor conventions of the professional categories of foreign maritime offshore workers.

The only exception is the possibility of electing an arbitral judge in a neutral country other than the one to whose jurisdiction each of the disputing parties is submitted, provided it is a dispute relating to commercial matters and involves Countries which have ratified the protocol on Arbitrage Clauses, signed in Geneva on 24<sup>th</sup> September 1923 (article 1 of the Protocol), and ratified in Brazil by Decree 21.187, of 22<sup>nd</sup> March 1932.

### **2.1.2. Non-operation of the Non-Indemnity Clause in the maritime transport contract**

Recurso Extraordinário RE n. 107361 / RJ – Rio de Janeiro. Extraordinary Appeal. Judge Octavio Gallotti. Ruling: 24th June 1986. Ruling body: First Group. Publication: Diary of Justice of 19 September 1986, p. 17143, Summary vol. 1433-01, p. 139.

Abstract: The decision appealed, which resulted in limitation of the responsibility of the carrier, to a value capable making the indemnity ludicrous, diverges manifestly, from the Súmula n. 161 of the Supreme Court, where the non-binding effect of the non-indemnity clause is allowed. Extraordinary Appeal Granted.



### 2.1.3. Rights of the Insurer for damage to cargo

Recurso Extraordinário RE n. 82037 / RJ – Rio de Janeiro. Extraordinary Appeal. Judge Aldir Passarinho. Ruling: 10 December 1982. Ruling Body: Second Group. Publication: DJ 06/05/1983. p. 627. Summary. Vol. 193/02, p. 419. RTJ 105/03, p. 1029. ADJ 01/05/2003. p. 1029.

Abstract: Maritime transport. The carrier is not allowed to transfer to the shipowner the losses occurred in the cargo transported. The carrier received payment to carry the goods, and is therefore responsible for non-compliance of the contract of transport. If the insurer pays the owner the value of the damages, it becomes subrogated from the rights of the owner, in order to receive from the transporter a fair compensation.

### 2.1.4. Importance of the ruling of the Maritime Tribunal

Agravo de Instrumento AI n. 62.811 / RJ. Rio de Janeiro. Appeal. Judge Bilac Pinto. Ruling: 24th June 1975. Ruling body: First Group. Publication: DJ 26/9/1975.

Abstract: Maritime insurance. Shipwreck. Lawsuit claiming compensation corresponding to its total loss. Legitimacy of the use of the proof, the technical conclusions and the ruling of the Maritime Tribunal in the judgement of the lawsuit by Tribunal Federal de Recursos. Tendency (bias) of the Modern State to provide the binding of administrative bodies quasi-jurisdictional functions. Alleviating the courts of the Judiciary Power from to examination of purely technical matters. Unfeasibility of the Extraordinary Appeal for the examination of proofs. Appeal denied.

### **2.1.5. Non binding effect of Non-indemnity clause**

Recurso Extraordinário RE n. 78.012 / SP- São Paulo. Extraordinary Appeal. Judge Aliomar Baleeiro. Ruling: 18th June 1974. Ruling body: First Group. Publication: DJ 17th October 1974.

Abstract: Maritime insurance. Non-indemnity clause. In a transport contract the non-indemnity clause does not operate. (Súmula 161 of STF)

### **2.1.6. Bill of Lading**

Recurso Extraordinário RE n. 48.789 / RS. Rio Grande do Sul. Extraordinary Appeal. Judge Carlos Medeiros. Ruling: 17th June 1966. Publication: DJ 24/08/1966.

Abstract: Maritime transport contract. Validity of the bill of lading signed by the captain of the vessel, or by the representative of the carrier, its attorney or agent. Application of the Súmula 400 of STF.

## **2.2. Superior Tribunal of Justice - STJ**

The jurisprudence of the STJ is more updated with the legislative alterations which the Brazilian infraconstitutional law has undergone since 1988, than the judgments of the SFT, with a major impact on Maritime Law, especially in relation to the editions of the Consumer Defense Code and Civil Code of 2002.

### 2.2.1. Responsibility of the Maritime Agent

Recurso Especial. RESP. Special Appeal n. 665.950 / PE; Special Appeal 2004/0095225-8. Ruling 24th August 2005.

Abstract: Special Appeal – Administrative – Sanitary infraction committed by the ship owner – Lack of responsibility of the maritime agent – Precedents.

'One cannot penalize the maritime agent (...), for an irregularity practiced by the ship owner, since he only acting under orders, there being no confusion of roles' (Special appeal 255.820/RJ, of the report of this Judge, DJ 13.10.2003). The extinct Federal Appeals Court, by publishing Summary 192, consecrated the understanding that 'the maritime agent, in the exclusive exercise of his own attributions, is not considered a transporter for the purposes of the Dec. Law n. 37/66', the regulatory act which deals with import duties. If there is no equivalence between both parties for tax purposes, neither should the maritime agent be held responsible for an administrative infraction committed through failure to fulfill the duty imposed on the ship owner, by the law. Precedents. Special appeal denied.

### 2.2.2. Application of the CDC to the maritime transport contract<sup>46</sup>

Recurso Especial. RESP. Special Appeal n. 302.212 / RJ ; Special Appeal 2001/0010266-2. Ruling. 07/06/2005

Special Appeal for indemnization. Maritime Transport. Prescription. Consumer Defense Code Application. I - The insurer subrogates all the rights of the insured party, in relation to the restitution of the full value paid by way of indemnity for damages suffered by the consumer. II – In the case of indemnity arising from damage caused to goods during maritime transport, the prescription contained in article 27 of the Consumer Defense Code is applied. Special Appeal not known.

### 2.2.3. Effects of the rulings of the Maritime Court

Recurso Especial. RESP. Special Appeal n. 38.082 / PE ; Special Appeal. 1993/0023708-0.

Abstract: Civil. Responsibility. Maritime Tribunal. The decisions of the Maritime Tribunal may be reviewed by the Judiciary Power; when based on technical expertise, however, they will only cease to exist if they are contradicted by the legal evidence. Special Appeal granted.

### 2.3. Maritime Tribunal

The Maritime Tribunal is an administrative court located in Rio de Janeiro that judges maritime accidents, registers ships, among others attributions concerned to safety at Brazilian waters. Theirs administrative are very important to the decision of the courts of the Judiciary Power, although they don't have binding effect.

### Conclusion

As seen earlier, Chapter 1 addresses the origins and evolution of Maritime Law in the world, and the wide, historical maritime interests which run through the history of Brazil. So, this article intends to collaborate to the improvement of the institutional framework of the maritime transportation system and national development, unblocking channels which hindered the effectiveness of the regulations of Maritime Law in Brazil.

The special aspects of the Maritime Law, and the technological advance of the activities of the agents that operate in it, require constant updating and review of the rules which regulate this strong sector of the international services industry, whose competition is set to increase and create dependencies.

Within this context emerges Maritime Law, a legal discipline which regulates a large part of these activities, and which requires a standardization at global level of

its regulations, which is done by the IMO and implemented by the DPC at internal level, provided national interests are observed.

Chapter 2 brings a general overview of the jurisprudence of the Judiciary Power, in particular the STF and STJ, as well as the Maritime Tribunal, in order to facilitating understanding of Maritime Law, through some actual case studies. So, it must be mentioned that the decisions of the Maritime Tribunal, although don't have binding effects in the courts decisions (from the Judiciary Power), are very important to them, due to their technical arguments.

It is also emphasized that environmental preservation, faced with the applied legislation, is also one of the objects of Maritime Law, all this, linked to the de-bureaucratization of the international trade sector and efficiency of the judicial system,<sup>47</sup> among other factors, effectively collaborate to create an institutional environment which concretizes the dream of national businesses of a domestic economy that is part of a global market that enables the desired economic growth, which is an essential fuel for social and sustained development to Brazilians.

In this scenario, knowledge of Maritime Law can make a great difference in defending the economic interests of the immense riches that come from the Brazilian rivers and sea, such as oil and fishing, and from the sea, through maritime transport, in Brazil where the future is already present.

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- <sup>2</sup> BRASIL. Comando da Marinha. O Brasil e o Mar. Available at:<[www.mar.mil.br/brmar.htm](http://www.mar.mil.br/brmar.htm)>. Accessed on: Dec. 20, 2007.
- <sup>3</sup> SOAMAR – Sociedade dos Amigos da Marinha (Society of Friends of the Navy) a private non-profit making entity, has played a major role in publicizing the maritime culture in Brazil.
- <sup>4</sup> BRASIL. Comando da Marinha. O Brasil e o Mar. Available at:<[www.mar.mil.br/brmar.htm](http://www.mar.mil.br/brmar.htm)>. Accessed on: Dec. 20, 2007.
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- <sup>10</sup> **LACERDA, José Cândido Sampaio de.** Curso de Direito Privado da Navegação – Direito Marítimo. 3<sup>a</sup>. ed. Rio de Janeiro: Freitas Bastos, 1984, p. 19.
- <sup>11</sup> **DOS ANJOS, José Haroldo; GOMES, Carlos Rubens Caminha.** Curso de Direito Marítimo, p. 2.
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- <sup>13</sup> **RODIÈRE, René.** Droit Maritime. Paris: Dalloz, 1982, p. 11.
- <sup>14</sup> **RODIÈRE, René.** Droit Maritime, p. 11-12.
- <sup>15</sup> **CASTRO JUNIOR, Osvaldo Agripino de.** Introdução à História do Direito: **Estados Unidos X Brasil.** Florianópolis: IBRADD, CESUSC, 2001, p. 104.
- <sup>16</sup> Title IX – Shipwreck and rescue – arts. 731 to 739, were revoked by Lei n. 7.542, of 26th September 1986.
- <sup>17</sup> **RODIÈRE, René.** Droit Maritime, p.1.
- <sup>18</sup> **BRASIL. Supremo Tribunal Federal. Available at:<www.stf.jus.br>. Accessed on: Jan. 20, 2010.**
- <sup>19</sup> Art. 22. It is the responsibility of the Union to legislate on: I – civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, spatial and labor law;
- <sup>20</sup> **DOS ANJOS, José Haroldo; GOMES, Carlos Rubens Caminha.** Curso de Direito Marítimo, p. 5.
- <sup>21</sup> **SAMPAIO, José Adércio Leite.** A Constituição Reinventada pela Jurisdição Constitucional. **Belo Horizonte: Del Rey, 2002, p. 439.**
- <sup>22</sup> **See the most recent doctrine about Brazilian Maritime Law: CASTRO JUNIOR, Osvaldo Agripino de. (org.)** Direito Marítimo Made in Brasil. **São Paulo: Lex, 2007; MARTINS, Eliane Maria Octaviano.** Curso de Direito Marítimo. Vols. I and II, 3<sup>a</sup>. Ed. São Paulo: Manole, 2008.
- <sup>23</sup> **About this Law, on a comparative analysis between Federal Maritime Commission and ANTAQ, see: CASTRO JUNIOR, Osvaldo Agripino de.** Direito Regulatório e Inovação nos Transportes e Portos nos Estados Unidos e Brasil. **Preface Prof. Ashley Brown – Harvard University. Florianópolis: Conceito Editorial, 2009.**
- <sup>24</sup> For further information on this subject, see: CASTRO JUNIOR, Osvaldo Agripino de; PASOLD, Cesar Luiz (orgs.) **Direito Portuário, Regulação e Desenvolvimento.** Belo Horizonte: Fórum, 2010; COLLYER, Wesley Oliveira. **A Lei de Modernização dos Portos e o Conselho de Autoridade Portuária: Estudo de caso de Itajaí.** São Paulo, Lex, 2008; PASOLD, Cesar Luiz. **Lições Preliminares de Direito Portuário.** Florianópolis: Conceito Editorial, 2007; NETO, Arnaldo Bastos Santos; VENTILARI, Paulo Sérgio Xavier. **O Trabalho Portuário e a Modernização dos Portos.** Curitiba: Juruá, 2000.
- <sup>25</sup> On this theme, through a comparative analysis between the United States and the Brazilian legal systems, including twenty-two determinant elements of both judicial systems, from a Law and Development perspective, see: CASTRO JR., Osvaldo Agripino de. **Teoria e Prática do Direito Comparado e Desenvolvimento: Estados Unidos x Brasil.** Florianópolis: Fundação Boiteux, IBRADD, Unigranrio, 2002, 555 p.
- <sup>26</sup> **See: STELZER, Joana. Fundamentos do comércio internacional e seu ordenamento jurídico.** In: **STELZER, Joana.** Introdução às Relações do Comércio Internacional. 2<sup>a</sup>. Ed. Itajaí: UNIVALI, 2007, p. 23-48; **Paulo Márcio. O Estado como principal sujeito da sociedade internacional.** In: **STELZER, Joana (org.).** Introdução às Relações do Comércio Internacional, 2007, p. 49-63; **DE MACEDO, Paulo Emílio Vauthier Borges de Macedo. Outros atores da sociedade internacional.** In: **STELZER, Joana (org.).** Introdução às Relações do Comércio Internacional, p. 83-96; **DE OLIVEIRA, Odete Maria. Relações Internacionais e a questão dos seus paradigmas.** In:

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<sup>27</sup> It is important to mention the line of research created in Master and PhD in Law Program of the University of Vale of Itajaí (UNIVALI), called Law and Transnationality. About the issue, see: CRUZ, Paulo Márcio; STELZER, Joana. (orgs.). *Direito e Transnacionalidade.* Curitiba: Juruá, 2010.

<sup>28</sup> DOS ANJOS, José Haroldo dos; GOMES, Carlos Rubens Caminha. *Curso de Direito Marítimo*, p. 5.

<sup>29</sup> MARTINS, Eliane Maria Octaviano. *Curso de Direito Marítimo. Vol. I, 3ª. Ed. São Paulo: Manole, 2008, p. 8.*

<sup>30</sup> CASTRO JUNIOR, Osvaldo Agripino de. *Direito Marítimo: Aspectos Introdutórios.* In: CASTRO JUNIOR, Osvaldo Agripino de. (org.) *Direito Marítimo Made in Brasil.* São Paulo: Lex Editora, 2007, p. 69. (47-95).

<sup>31</sup> DOS ANJOS, José Haroldo dos; GOMES, Carlos Rubens Caminha. *Curso de Direito Marítimo*, p. 11.

<sup>32</sup> It is also called international maritime authority. IMO. International Maritime Organization. Available at: <[www.imo.org](http://www.imo.org)>. Accessed on: Jan. 27, 2010.

<sup>33</sup> Goldman apud MAZZUOLI, Valério de Oliveira. *A Nova Lex Mercatoria como fonte do Direito do Comércio Internacional: Um paralelo entre as concepções de Berthold Goldman e Paul Lagarde.* In: FIORATI, Jete Jane; MAZZUOLI, Valério de Oliveira (orgs.). *Novas Vertentes do Direito do Comércio Internacional.* São Paulo: Manole, 2003, p. 195.

<sup>34</sup> Besides those mentioned in this article, of the Federal laws, others which can be mentioned are: Law n. 5.811/72, of 11/10/72 – Oil tankers – Regulates the working regime of workers involved in the drilling, production, refining, processing and transport of oil and its derivatives; Law n. 7.002/82, of 14/06/82 – Regulates the night shift in the organized ports; Law n. 7.542/86, of 26/09/86 – Regulates research, exploration and demolition of objects or goods which are sunk, submerged, run aground or lost in waters under national jurisdiction, in marine territory and its annexes and border territories, resulting from damage, jettisoning or sea fortune; Law n. 8.059/90, of 04/07/90 – Regulates the Special Pension for Veterans of the Second World War and their dependants; Law n. 8.374/91, of 30/12/91 – Regulates Obligatory Insurance for Personal Injuries caused by Craft or their Cargo; Law n. 9.478/97, de 06/08/97 – Regulates the national energy policy, and activities related to the monopoly of oil, through its institution the National Council for Energy Policy and the National Oil Agency; Law n. 9.611/98, of 19/02/98 – Which regulates the multimodal cargo transport.

<sup>35</sup> Art. 1218 expressly states that “*The procedures regulated by Decree-Law 1.608, of 18 September 1939, shall remain in force until they are incorporated in special laws. These procedures relate to: VIII – protests on board (arts. 725 to 729); X – risk money (arts. 754 and 755); XI – the inspection of damaged goods (Art. 756); XII – the seizure of craft (arts. 757 to 761); XIII – damage under the responsibility of the insurer (arts. 762 to 764); XIV - damages (arts. 765 to 768); XVI – forced calling at port (arts. 772 to 775).*”

<sup>36</sup> About the regulation of this federal transport agency important to the maritime transport (Agência Nacional de Transportes Aquaviários – ANTAQ), see: CASTRO JUNIOR, Osvaldo Agripino de. *Direito Regulatório e Inovação nos Transportes e Portos nos Estados Unidos e Brasil.* Prefácio Prof. Ashley Brown – *Harvard University.* Florianópolis: Conceito Editorial, 2009, 410 p.

<sup>37</sup> BRASIL. Agência Nacional de Transportes Aquaviários. Available at: <[www.antaq.gov.br](http://www.antaq.gov.br)>. Accessed on: Jan. 24, 2010.

<sup>38</sup> These include: Decree n. 22.826/33, of 14/06/33 – Creates the Notary Office for the Registration of Maritime Contracts; Decree n. 1.265/94, of 11/10/94 – Approves the National Maritime Policy (PMN); Decree n. 1.561/95, of 19/07/95 – Delegates competence to the Ministry of State of the Navy to approve the Internal System of Maritime Courts; Decree n. 1.765/95, de 28/12/95 – Establishes tax rules between the countries of the South Cone Market for air and maritime transport; Decree n. 2.256, de 17/06/1997 – Regulates the Brazilian Special Register (REB), for craft described in Law n. 9.432, of



8 January 1997, and Decree n. 351/35, of 01/10/35, International Convention for Unification of the Certain Rules relating to Maritime Liens and Mortgages.

<sup>39</sup> Decree-law n. 2.784/40, of 20/11/40 – on navigation cabotage companies; Decree-law n. 73/66, of 21/11/66 – on the national system of private insurance and regulates the insurance and reinsurance operations; Decree-law n. 116/67, of 25/01/67 – on the operations inherent to the transport of goods by water, in Brazilian ports, delimiting their responsibilities and dealing with fault and damages; Decree-law n. 221/67, of 28/02/67 – on the protection and promotion of fishing (Fishing Code); Decree-law n. 346/67, of 28/12/67 – on the optional use of services of a customs broker; Decree-law n. 366/68, of 19/12/68 – on the optional use of services of brokers in foreign and domestic trade operations, and Decree-law n. 687/69, of 18/07/69 – which Alters Decree 666/69, of 02/07/69, which instituted the obligatory nature of transport with Brazilian flag vessels.

<sup>40</sup> **A list of the conventions and NORMAM is on: BRASIL. Diretoria de Portos e Costas. Available at:<[www.dpc.mar.mil.br](http://www.dpc.mar.mil.br)>. Accessed on: Jan. 10, 2010.**

<sup>41</sup> **The Recursos Extraordinários are available at:<[www.stf.jus.br](http://www.stf.jus.br)>.**

<sup>42</sup> It is emphasized that this practice has been carried out until today, ranging from countries with a large merchant fleet, to exporters and importers of countries with a smaller merchant fleet, like Brazil, including determining as the applicable law the Convention for the Unification of Certain Rules of Law relating to Maritime Knowledge, which come from the Brussels Convention of 25<sup>th</sup> August 1924, signed but not ratified by Brazil, and the Haia Rules of 1968.

<sup>43</sup> ARAUJO, Nádia de. Contratos Internacionais e a Jurisprudência Brasileira: Lei Aplicável, Ordem Pública e Cláusula de Eleição de Foro. In: RODAS, João Grandino. (coord.). **Contratos Internacionais**. 3<sup>a</sup>. ed. São Paulo: RT, 2002, p. 219.

<sup>44</sup> **For further information on this subject, especially for international agreements for purchase and sale made over the Internet: CASTRO JR, Osvaldo Agripino de. Direito das Obrigações. Os Contratos Internacionais de Compra e Venda. In: FERREIRA JUNIOR, Lier Pires; CHAPARRO, Verônica Zarate (Coord.) Curso de Direito Internacional Privado. Rio de Janeiro: Freitas Bastos, 2006, p. 361-408.**

<sup>45</sup> The elements relating to the convenience jurisdiction which indicate international competence *rationi loci* in contractual matters, should be recognized as reasonable by the legal system of the land, including place of residence, location in which the obligation is fulfilled, nationality and place in which the fact occurred which led to the obligation.

<sup>46</sup> **About the issue: FILHO, Orlando de Moraes. A Aplicação do Código de Defesa do Consumidor no Contrato de Transporte Marítimo. In: CASTRO JUNIOR, Osvaldo Agripino de. (org.) Direito Marítimo Made in Brasil. São Paulo: Lex Editora, 2007, p. 165-210; CASTRO JUNIOR, Osvaldo Agripino de. O Diálogo entre as Fontes no Direito Marítimo: Código Civil e Código de Defesa do Consumidor. In: CASTRO JUNIOR, Osvaldo Agripino de. (org.) Direito Marítimo Made in Brasil, p. 271-284; LAMY, Eduardo de Avelar. Contrato de Transporte Marítimo Internacional: Competência e Legislação Aplicável. In: CASTRO JUNIOR, Osvaldo Agripino de. (org.) Direito Marítimo Made in Brasil, p. 97-120.**

<sup>47</sup> CASTRO JUNIOR, Osvaldo Agripino de. **Teoria e Prática do Direito Comparado e Desenvolvimento: Estados Unidos x Brasil**, p. 114-121; 426-452.