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Responsibility of port terminals for cargo damage during storage and stowage

The responsibilities of port terminals for cargo damage during storage and stowage

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Summary
The theme of this article is: The responsibility of port terminals for damage to cargo during storage and stowage. The following problem was investigated: Is there an international model being applied in Brazil, a unification on the responsibility of the maritime carrier for cargo damage or for losses and delays? The following hypothesis was considered: There is an international understanding about the responsibility within the port terminals during storage and stowage, as the analysis is made by the controllers to the operators. The general objective is: To analyze the operator's liability exclusion clauses during storage and stowage operations. The specific objectives are: The ship owner's responsibility; damage to cargo, losses and delays. This work is important to the Law operator and society as a whole, as it addresses the consequences arising from an institute that is currently little talked about academically and is legally relevant. As a result of the research carried out, it is concluded that: In the maritime transport of goods, contractual civil liability is included for damages, losses and delays arising from non-compliance with contractual obligations, attached to the transport contract or charter contract. This is a theoretical qualitative research lasting six months.

Keywords: Maritime law. Port law. Responsibility . Contract . Right International .

Resumo
O tema deste artigo é: A responsabilidade dos terminais portuários pelas avarias de carga durante a armazenagem e estiva. Investigou-se o seguinte problema: Existe um modelo internacional sendo aplicada no Brasil, uma unificação sobre a responsabilidade do transportador marítimo pelas avarias nas cargas ou pelas perdas e atrasos? Cogitou-se a seguinte hipótese: Há um entendimento internacional sobre a responsabilidade dentro dos terminais portuários durante a armazenagem e estiva, como é feita a análise pelos controladores aos operadores. O objetivo geral é: Analisar as cláusulas excludentes de responsabilidade do operador durante as operações de armazenagem e estiva. Os objetivos específicos

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são: A responsabilidade do proprietário do navio; as avarias nas cargas, pelas perdas e atrasos. Este trabalho é importante ao operador do Direito e a sociedade como um todo, pois aborda os reflexos decorrentes de um instituto hoje pouco falado academicamente sendo juridicamente relevante. Em decorrência da pesquisa realizada, conclui-se que: No transporte marítimo de mercadorias, insere-se a responsabilidade civil contratual por avarias, perdas e atrasos decorrentes do não cumprimento das obrigações contratuais, adstritas ao contrato de transporte ou contrato de fretamento. Trata-se de uma pesquisa qualitativa teórica com duração de seis meses.

Palavras-chave: *Direito marítimo. Direito portuário. Responsabilidade. Contrato. Direito Internacional.*

Introduction

This article will aim to clarify the contractual duty and obligations within the Maritime and Port Law and its specifications of each law of international origin. The little-discussed topic from the complexity of international norms since when it comes to port law, Brazilian norms must be seen in front of foreign ones and vice versa to be determined by the ship and its origin. Those contractually responsible for maritime transport must, in their role, take on an important refutation with regard to responsibility in specific laws, the Consumer Protection Code, civil code, precedents, understandings of advice and international standards applied as equivalence, especially in cases of maritime disaster and shipwrecks.

This work will analyze, in a didactic way, the characterization of the hundreds of specific and derivative norms that directly and indirectly affect the Brazilian port system, from its scope little remembered administratively and covering the international doctrinal concepts adopted by the main ports adopted worldwide, verified by specialists in Law civil law, contractual treatment, port system, administrative law and procedural matters.

The research problem addressed here is: Is there a unification of this understanding in Brazil today about the responsibility of the maritime carrier for damage to cargo or losses and delays? The article will aim to demonstrate in a unified way that the understanding about accountability is not consolidated, all cases are treated as isolated, in the logistics of ports a vast territory carefully mapped to avoid failures, setbacks and mainly losses. As much as the 37 Public Ports organized in the country are individually important for the total sum of these, the main ones occupy more than 42% of all port activity in the Brazilian state, the Port of Santos, in the state of São Paulo, corresponds to 27 .40% of all Brazilian port activity, together with the port of Sepetiba , in the state of Rio de Janeiro with their respective 15.31% of port activity are summarily irreplaceable, causing accidents, delays and resulting stoppages visible in the GDP of the Country (Pereira & Schwind , 2015) .

International maritime trade is developed through the rules of maritime law relating to maritime traffic and traffic. Maritime traffic comprises maritime trade, the business activity of maritime transport and the consequent exploitation of the ship as a means of transport, while maritime traffic comprises navigation, the transit of ships

or vessels and their displacement from one point to another. It is evident, therefore, that maritime traffic, that is, maritime trade, takes place through maritime traffic. Maritime traffic rules are regulated, in an international context, by the law of the sea Call *law of the seas* , while at the domestic level they are governed by domestic public maritime law (Paixão & Fleury, 2008; Martins, 2008).

The hypothesis raised in view of the problem in question was: the carrier *Carrier* is the contracted party which signs a contract for the transport of a certain commodity by ship from one port to another. The carrier is not necessarily the owner or shipowner of the ship and does not always effectively carry out the transport. The legal figure of the transporter, a person who signs a contract of means working on his own account or on behalf of another, flows from the concept that, despite the classification of transporter, if the transport is effectively carried out by him or by another, nicknamed transporter executioner, executor or final. This executing carrier may be a person other than the contracting carrier, such as the owner, charterer or shipowner of the ship that, in the event, carries out all or part of the means, through which the ship may be assembled and commercially operated by its own owner, a condition in which which, consequently, emerges the figure of the shipowner-owner-transporter, commonly called *shipowner* or *head owner .* The cause of liability is as complex as finding the originating transporter, covered by several other related transporters (Martins, 2008 & Lacerda, 1984).

Brazil adopts the design of the Latin system of limitation of liability of shipowners, whose liability limitation is exercised through waiver abandonment, Commercial Code (Brazil, 1850) article 494 or the limitation resulting from the Brussels Convention, 1924, promulgated by Decree nº 350/35. The difference in systems refers to the limitation system and the hypotheses in which such limit is admissible. It is constantly standardizing the rules of maritime law. This objective is reached through efforts made by international organizations that, generally, have as one of their targets the study of the most diverse legal norms, aiming to obtain greater harmonization and uniformity of the law (Lacerda, 1999, Martins, 2008b, Borges & SA, 2017).

The General Objective of this work is developed from the norms adopted throughout the territory, when it comes to port law, the Brazilian norms must be seen in front of the foreign ones and vice versa to be determined by the ship and its origin. The case to be dealt with in this article ranges from the initial loss or volume, uncertain of content, either by weight or measurement and its characteristics to a given occurrence such as degradation or compaction of grains or ores in the case of measurements and volume due to transport in open containers being affected by humidity and its coefficients; Those in charge of maritime transport must in their role take important refutation regarding responsibility in specific law; especially in cases of maritime disaster and shipwreck.

The specific objectives of this work are to address the historical concepts of port law as a starting point for the industrial and post-industrial era where they obtained the highest navigation capitalization index in history; the boom in maritime demand and the aforementioned contracts for the use of the ship; the attempt to

standardize maritime law by addressing the main conventions and principles brought to date; goods contracts in Brazilian territory and their contractual aspects and assumption of their due collective and individual responsibilities; the burden of proof and the exclusions of liability regarding its due indemnity and the contractual civil liability arising from the breach of the contract for the international maritime transport of goods; the current accountability regime adopted in Brazil in the face of practical demands and events; the carrier's liability for damage to cargo or loss and delay and its disclaimer clauses; the accidents and their consequences for the transporter and their characters inside the vessel.

The sea, since the most remote times in the history of civilization, has consecrated the space that most stands out in world economic development. The dispute for maritime domain begins with the emergence of the first organized States. For many centuries, certain States claimed to exercise exclusive jurisdiction or even possess property rights over larger areas of the high seas. In the industrial era, the model of infrastructure management and port services organizations was determined by the exclusive action of the State and presented as a configuration the centralized management and administration of ports, through a governmental body autonomous in relation to local institutions (Chauveau , et al., 1986).

Until today, ports are considered vital links in the productive integration between the different regions of the national State and from the latter to the rest of the world. There is a link between industrial production and the port system, which at the time was a result of Fordism, with the profile of highly sectorized ports, without showing flexibility due to variations in the nature of the product, changes in transport technology or market alternatives . The vast majority of Brazilian ports were built in the post-industrial era. Over the years, they underwent some modifications, but they were insufficient for the departure or shipment of products compared to simple Brazilian ports and the most advanced in the world, such as Rotterdam and Hong Kong. (Martins, et al., 2008).

In Brazil, the first initiative to demarcate the territorial sea took place from the Permit of May 24, 1805, which fixed its width by the cannon firing system. In 1970, Brazil set its territorial sea at 200 nautical miles, a limit established by Decree-Law No. 1,098/70. Later, Law nº 8.617/93 adapted the Brazilian legislation to the UNCLOS - United Nations Convention on the Law of the Sea , fixed the territorial sea at 12 nautical miles. Under the terms of Article 1 of Law No. 8,617 (Brazil, 1993), the strait of the Brazilian territorial sea comprises a belt of 12 nautical miles, referring to width, measured to escape the low tide line of the Brazilian continental and island coast, analogous to those indicated on high-grade nautical charts officially recognized in Brazil. In places where the coast presents deep indentations and recesses or where there is a fringe of islands along the coast in its immediate contiguity, the process of straight baselines, connecting appropriate points, will be adopted for the design of the foundation island , the fraction of which the area of the territorial sea will be measured. The excellence of Brazil extends to the course of the territorial sea, the overlying aerial dimension, as well as its bed and subsoil, Law no. 8617/93, in its 2nd article (Silva, et al., 1994).

In addition to being little debated legally, and nothing studied academically in law schools, the theme proposed in this article has significant scientific and social relevance, because with little viability, everything that comes and goes to another country is by sea, the power The judiciary currently does not have a position to be followed and all cases have their own specificities and in most instances the case is handled in places where the judiciary is more rigorous and serious in relation to the general rules of responsibilities and contracts, as is the case of Brazil. It is expected to give the reader a good overview of the rules of maritime and port law, in an introductory and more in-depth way on the subject in thesis. Maritime law is one of the most complex branches internationally speaking, being the only one in the entire legal framework that involves all branches of law in its scope (Scatolino , et al., 2015,).

For the elaboration of this article, the type of research used was the descriptive bibliographical one, having as a research method the treatment of qualitative data of a secondary nature, using as a research instrument books, doctrine and jurisprudence, articles and theses defended from the keywords: Maritime law. Port law. Responsibility. Contract. International right. Being made the analysis regarding the obligatory rights, responsibilities and contracts; The understanding defended and adopted by national and international courts; the contractual results; the international appreciation for maritime demand. This literature review research has an estimated time of five months. In the first and second month, a survey of the theoretical framework was carried out; in the third and fourth month, the literature review; in the fifth month, the elaboration of the pre-textual and post-textual elements that make up the entire work.

As stated by Gonçalves (2018), the literature review consists of the perspective of bringing public bibliographic data as an instrument of reflection on a subject that is intended to be debated or dialogued. A qualitative research treats the collected information with analysis of all the nuances allowed therein.

Responsibility of port terminals for cargo damage during storage and stowage

Ship owners are directly and indirectly liable. Indeed, shipowners are responsible for the effects of the facts attributable to them as a result of their action or omission resulting from direct responsibility or for the acts performed by their agents or representatives, in the typification of the classic indirect responsibility.

It must be reiterated, the differentiation of two important characters within the vessel, the shipowner and the owner. The owner of the vessel retains the right of ownership. The shipowner is the navigation entrepreneur and has the nautical management of the ship. And in the meantime, differentiated trends are evident regarding the direct and indirect responsibility of ship owners. In the event that the ship is armed and operated by an individual, owner of the ship, the figure of shipowner-owner *shipowner* or *ship-owner* is highlighted . In the hypothesis, however, that the ownership of the ship is inherent to a legal entity, a ship company,

the figure of the owner-manager or co-manager stands out . The acts performed by the owner-manager bind and make the co-owners responsible, within the limits of the mandate and corporate purpose. In such hypotheses, the tendency of the courts to enshrine strict liability or the theory of the professional risk of the shipowner is reiterated, which imputes responsibility regardless of fault, essentially in the civil and administrative scope (Martins, et al., 2008b).

With regard to the shipowner's responsibility for the acts performed by the master, in general, the shipowner's strict liability for the master's acts relative to commercial management functions prevails, that is, in cases in which the master acts as the shipowner's agent. In the exercise of nautical management, the responsibility, as a rule, rests with the captain. Thus, having verified the distance in the representation of the figure of the owner from the legal circumstance of the shipowner, in theory, in ambition of civil and administrative obligation, it is revealed a predisposition of subjective responsibility of the shipowners, except for legal exceptions. As a model, in the event that the owner does not notify the shipping company, there will be a difference in the rights and obligations of the owner and the shipowner under the terms of the agreement previously involving the parties. (Juste Ruiz, 1999).

Two fundamental conceptions regarding the limitation of liability of shipowners are highlighted. The first conception refers to the English system and advocates limited personal liability. The second conception engenders a non-personal limited liability system. Under the aegis of this second conception, two distinct systems unfold. The first concerns the Germanic system, which limits liability to the value of the ship and freight. The second leads the Latino system, whose liability limitation is exercised by the liberatory abandonment (Didier Jr, 2015).

Liberatory abandonment includes the ship and the freight and is usually exercised after a naval accident or at the end of the voyage, essentially in cases of total loss of the ship. It is inferred that the waiver abandonment will include, if any, indemnities for material damage suffered since the beginning of the voyage and indemnities for common damages received by the owner, both indemnities not used for the repair of the ship. They are not part of the context of the ship and, consequently, are not subject to release, the indemnity received from the insurance. In effect, the indemnity refers to the contract between the insurer and the insured to which third-party creditors are unrelated. Also excluded are prizes or subsidies for navigation. With regard to freight, the prevailing understanding is to abandon the gross freight for the outward or return journey, depending on the moment in which the accident occurred and which includes the price of the tickets, which constitutes a product of the operation of the ship. Compensation for *demurrage stays* , subfreight or subsequent freight are not considered part of freight for abandonment purposes (Miller, 2011).

As a result of the need to institute uniform legislation regarding the limitation of liability of shipowners, the International Convention on the Limitation of Liability of Owners of Seagoing Ships was signed in Brussels in 1924. The 1924 Convention on Limitation sought to reconcile the conceptions of limited personal liability, English

system and limited non-personal liability, Latin and Germanic systems. This Convention instituted a hybrid option system, in which the owner could limit his liability by abandoning the value of the ship and freight or, alternatively, by paying a certain amount of money, gold value (Ripert , 1954) .

International Convention on the Limitation of Indemnities for Maritime Claims *Convention on limitation of Liability for Maritime Claims* - LLMC-76 - London, 1976 and 1996 Protocol, *Protocol of 1996 to amend the Convention on limitation of Liability for Maritime Claims* , 1976 - LLMC *Protocol96'* . The International Convention on the Limitation of Indemnities Relating to Maritime Claims - LLMC-76 - was adopted in London and had the significant adherence of 46 signatory countries. It entered into force in the international legal order on 12.01.1986 and aims to replace its counterparts in 1924 and 1957.58 The LLMC stipulates specified limits for two types of claims claims the first concerning loss of life or personal injury; and the second those related to property, such as damage to ships, facilities or port property. (Santos, 1964, p.19)

Responsibility of the ship owner for damage to the transported cargo - Under the auspices of the maritime transport contract, the carrier is bound to transport certain goods from one port to another and also to deliver it to the consignee or to its representative, at the agreed location, for a pecuniary fee, known as freight. As a rule, the carrier's liability ceases with the delivery of the goods to the recipient. From the transport contract, the carrier essentially has an obligation to deliver certain goods to a certain destination. It should also be noted that the contract for the maritime transport of goods is a formal contract, titled through the bill of lading, *bill of lading* – BL: Maritime Bill of Lading (Tartuce , 2017).

The *bill of lading* - BL, is the representative instrument of the maritime transport contract and works, in addition, as a receipt of receipt of the goods on board, it was consolidated that the owner of the ship holds the property rights. The owner may explore the vessel for cargo transport or make it available to third parties, through leasing, leasing or chartering contracts. Specifically with regard to charter contracts, the most common way of using the ship, the owner will assume the legal status of charterer, maintaining or not the ship's NG and GC, in the event of chartering. Indeed, the owner will not necessarily be the ship's owner, considered the one who holds the NG of the ship and/or the cargo carrier, the subject who effectively transports the goods. In the use of the ship, a succession of contractual relationships may occur (Miller, 2011).

In the event of damage to the transported cargo, as a rule and without prejudice to a specific analysis of the supporting evidence, the carrier is responsible. The transporter called Carrier is the contracted party that signs a combination or transport of certain goods by ship from one port to another. The carrier, as a consequence, is not indispensably the owner or shipowner of the ship and does not always permanently perform the means responsible for the transport. The legal stamp of the transporter, in its broad interpretation, is defined according to every person and/or individual who signs a medium agreement working for its own operation or on behalf of another. It follows from the assessment presented that it

does not matter, in the framework of a carrier, whether the means is permanently carried out by him or by a different means, classified as an executing carrier. The executing carrier may be a person other than the contracting carrier, since it is the ship's owner, charterer or shipowner who actually performs all or part of the transport. Indeed, the ship may be armed and operated commercially by its owner, a circumstance in which, therefore, the figure of the shipowner-owner-transporter emerges, commonly called *shipowner* or *head owner .* (Martins, 2008).

There are hypotheses in which there is a distance between the legal status of owner and the legal status of shipowner. The vessel may be subject to a charter contract. In the event of chartering the ship, there are three contract hypotheses: BCP, VCP and TCP. At BCP, the charterer assumes the nautical and commercial management and, consequently, assumes the legal status of owner-charter. This is the *chartered-owner* or *available shipowner. owner* , since the charterer will, in effect, set up and operate a ship by BCP. In VCR and TCP contracts, the charterer maintains nautical management and, consequently, the condition of shipowner. The shipowner is the shipowner *in* VCP and TCP. The charterer may use the ship to transport its own goods or, as is more usual, make it available for the transport of goods for third parties, by means of a sub-charter or transport contract. (Lacerda, 1984)

In the cases of sub-chartering of the vessel by the charterer, there will therefore be a differentiation of the figure of the shipowner in the different charter contracts, the main contract between charterer and charterer and in the sub-charter contract between sub-charter , which becomes the charterer in the main contract. In the event of a main charter contract and, subsequently, a second transport contract, two distinct, albeit consecutive, ways of using the ship are enshrined. In the event of a first charter contract followed by a second transport contract, the main charterer, shipowner-charterer *chartered-owner ,* will be maintained in the legal status of shipowner in the BCP and, in the transport contract, in the contractual identification of executing carrier, also known as shipowner transporter *carrier owner* (Martins, 2008).

A priori, without prejudice to the factual analysis and evidence of a causal link, the executing carrier would be responsible. However, the understanding prevails that the contracting carrier is directly responsible for paying the losses of the owner of the lost goods, having a return action against the shipowner or, even, against third parties (Freitas, 2008).

It is also necessary to analyze the hypothesis of the charterer's right of recourse against the charterer or vice versa. Once again, the doctrinal and jurisprudential scarcity regarding this hypothesis is highlighted. In spite of dualities about the theme and the need to analyze the casuistry and the evidence, according to the basic premise that results from the content of the Civil Code (Brasil, 2002), art. 934, it is admissible, in terms of civil liability, the right of recourse by the party that compensated the damage against the one that actually caused it. Under the terms of the preceding analysis, the carrier's civil liability for damage to the cargo is objective and contractual. Therefore, the carrier is entitled to refuse improperly packed goods, damaged goods and dangerous cargo, or even demand a relative order to guarantee

the safety of the ship and the goods. It must, moreover, refuse the thing whose transport or commercialization is not allowed, or that comes unaccompanied by the documents required by law or regulation (Paixão & Fleury, 2008).

It should also be noted that, as a rule, it is forbidden to load the goods on the deck of the vessel without an order or written consent from the shippers. It is inferred that, if irregularities are found in the goods or packaging, the shipowner must insert a reservation in the BL, with the document being considered an *unclean* BL, under penalty of being presumed to have been received in good order. In terms of the analysis carried out, in the breakdowns and absences that occurred during the trip, the carrier is responsible and may be covered by the P&I civil liability insurance (Pereira & Schwind , 2015).

Article 756 of the Civil Procedure Code of 1939 states, verbatim, that unless proven otherwise, the receipt of baggage or goods without protest from the recipient will constitute a presumption that they were delivered in good condition and in accordance with the transport document. In the event of losses, jurisprudential understanding is enshrined that advocates that the indemnity claim is inadmissible if it is not demonstrated that the good did not reach its recipient (Tartuce , 2017).

In the event of a contract signed with the *said clause I'm contain* , the responsibility of the carrier is restricted to the transport of the goods duly sealed; as a rule, he is not responsible for the disappearance of the cargo. It is admissible, a priori and depending on the factual circumstances and causal link, the responsibility of the carrier for delays in the delivery of the goods, essentially resulting from non-compliance with the established contractual term, and the hypotheses of damages arising from non-compliance with tax formalities (Rosa, 2017).

Under the terms of the Civil Code, art. 749, the transporter will take the thing to its destination, taking all the necessary precautions to keep it in good condition and deliver it within the agreed or foreseen period. Evidently, in order to avoid incurring delays, the carrier must deliver the goods at the agreed place and time. Specifically, in the event of an arrival changing the route with unjustifiable delay in the delivery of the goods, the principle of travel diversion or route diversion is enshrined in maritime cargo transport, a principle that allows the carrier to divert travel in order to safeguard human life or cargo, also including the ship at sea, being therefore, from the doctrinal point of view, excluding the responsibility of the carrier in terms of losses and/or damages due to delay in delivery. However, the trip diversion cannot be confused with the actual delay in the delivery of the goods. This is because, in order to delimit one and the other, it is necessary to analyze certain circumstances that require proof, it is inadmissible, as a rule, to give rise to compensation for the damage caused, regardless of the deadline set for delivery of those (Santos, 1964, p.20) .

Brazilian law does not recognize the validity of non-indemnity clauses. As a rule, under Brazilian law, the non-indemnity clause in a transport contract is inoperative, Precedent No. 161 of the STF. The argument that the goods were fragile and, therefore, the transport risk was not to be attributed to the maritime carrier, is not to be accepted, since the jurisprudence of the STF was established, according to

its Precedent 161, in the sense that the non-indemnity clause RTJ 125/307 is inoperative in the transport contract. Also noteworthy is art. 1 of Decree 19,473/30, which considers that no restrictive or modifying clause of the carrier's obligation to deliver the cargo at the destination has not been written (Freitas, 2008).

In fact, in Brazilian legislation, the legal exemption from liability stems from the characterization and proof related to the legally protected exclusions. Furthermore, it is opportunely inferred the incidence of the Consumer Defense Code (Brasil, 1990) in contracts for the maritime transport of goods. Having accepted the influx of the aforementioned Code, art. 25 prohibits the contractual stipulation of a clause that makes it impossible, exonerates or mitigates the obligation to indemnify. In the case of contractual stipulation, art. 51, I, of the same rule decrees that such contractual clauses related to the provision of services are null and void. Under the designation of negligence clauses are grouped hypotheses of exoneration of non-responsibility of the carrier (Freitas, 2008).

Essentially, negligence clauses deal with three types of shipowner's dismissals: One is dismissal for faults committed by its agents; Two relating to certain specifically designated occurrences and three general dismissals provided that it is proven that the shipowner has exercised reasonable diligence and has not committed any faults in the stowage or presented an unnavigable vessel. The burden of proving the carrier's negligence or any other serious misconduct rests with the shipper or recipient (Lacerda, 1984).

The limitation of the liability of the maritime carrier is one of the peculiarities of maritime law enshrined in numerous international conventions, such as the Hague, Hague- Visby , Hamburg and Cogsa Rules of 1936 As a rule, clauses limiting the liability of the carrier have been accepted in the Law Brazilian. Limitation clauses are not to be confused with disclaimer clauses, as they only limit and do not exempt the carrier from liability for damage and loss of cargo (Martins, 2008).

The limitation of liability is supported by the Civil Code, art. 750, which regulates the liability of the transporter, limited to the constant value of the knowledge, begins at the moment he, or his agents, receive the thing and ends when it is delivered to the recipient, or deposited in court, if that is not found. Attention should also be paid to the current that advocates the incidence of the Consumer Protection Code in maritime transport contracts. The acceptance of this thesis implies the non-acceptance of the liability limitation clauses considered to be abusive. The so-called restrictive clause, limitations are valid, unless considered abusive and, consequently, null by operation of law. The International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Ships was signed in Brussels, on August 25, 1924, and enacted in Brazil by Decree n. 350/ 31.According to the Brussels Convention, the owner of a seagoing ship is only responsible until the end of the competition for the value of the ship, the freight and the ship's accessories (Miller, 2011).

As a rule, the carrier's liability is strict; however, it may exempt itself from responsibility for non-performance of the contract by claiming and proving the occurrence of some of the exclusions provided for by law. There are, moreover,

hypotheses of inclusion of limiting clauses and exemption from liability of the maritime carrier contained in the BL, however of questionable effectiveness and validity under Brazilian law, as per the analysis below. Under the aegis of the Civil Code, art. 393, the debtor is not liable for damages resulting from acts of God or force majeure, if he is not expressly responsible for them (Ripert , 1954).

Acts of God or force majeure occur in the necessary fact, the effects of which could not be avoided or prevented. Attention should also be paid to the absence of a causal link, which excludes responsibility for the lack of a cause and effect relationship between the action or omission and the fact that occurred. Depending on the legal precepts raised, Brazilian law enshrines as exclusions of the carrier's civil liability the hypotheses of absence of a causal link, own or redibitory vice, acts of God and force majeure. However, if the incidence of the Consumer Protection Code is raised in contracts for the maritime transport of goods, textually and exhaustively, that the supplier will only not be liable when he proves: That, having provided the service, the defect does not exist; and that regarding The sole fault of the consumer or a third party. Therefore, any other hypotheses of exoneration are excluded, including the traditional exclusionary ones (Santos, 1964).

Brazilian law enshrines the non-performance of the obligation due to a fact attributable to the debtor. According to the Civil Code, art. 396, if there is no fact or omission attributable to the debtor, the latter does not incur arrears. The absence of a causal link is therefore excluding civil liability. The exclusive fault of the victim is also exclusive and stems from the absence of a causal link. Effectively, civil liability presupposes the agent's action or omission, excluding the obligation to indemnify if the victim's exclusive fault is proven, which is admissible in transport contracts. In the event of concurrent fault, the victim's compensation will be fixed taking into account the gravity of his fault compared to that of the author of the damage. In the same wake of exegesis of the absence of a causal link, the hypothesis of exclusive fault of third parties outside the legal relationship arising from the transport contract fits (Tartuce , 2017).

For the characterization of the exclusion of responsibility for acts of God or force majeure, two assumptions are commonly pointed out: the inevitability and the absolute impediment to the fulfillment of the obligation. There are authors who also add unpredictability. The objective requirements of force majeure and fortuitous event are embodied in the inevitability of the event. The subjective requirement is configured in the absence of guilt in the production of the event. In accordance with the normative command of art. 393 of the Civil Code (Brazil, 2002) and art. 1 of Decree no. 2681/12, the debtor is not liable for damages resulting from acts of God or force majeure, if expressly not responsible for them. Therefore, some exceptions to liability for damage resulting from force majeure or acts of God are admissible (Freitas, 2008).

Pursuant to the provisions of art. 393 of the Civil Code, the act of God or force majeure occurs in the necessary fact, whose effect it was not possible to avoid or prevent. The exegesis emanating from that article considers that the regulation in

question makes no distinction between fortuitous events and force majeure (Borges & Sá, 2017).

Standing out are understandings that argue for the differentiation between fortuitous events and force majeure, defending that in the context of force majeure the assumptions of unpredictability and inevitability fit. In case of fortuitous event, only the inevitability. Inevitability is the common characteristic of acts of God and force majeure. Predictability just sets them apart. Sustained, however, the incidence of the Consumer Defense Code (Brasil, 1990) in contracts of the kind in accordance with art. 14, § 3° the service provider will only be held liable when he proves that: Having provided the service, the defect does not exist; and The fault lies solely with the consumer or a third party. Therefore , the exclusion of acts of God and force majeure from those excluding civil liability resulting from the consumption relationship is evident (Martins, 2008).

Notwithstanding such considerations, some hypotheses have been recognized to exonerate the service provider's responsibility. Such hypotheses have been framed in the context of an external act of God, which is reflected in an inevitable addiction that occurs after the service is made available to the consumer.

Under the terms of the preceding analysis, the assumptions of acts of God or force majeure are enshrined, unpredictability and inevitability and the absolute impediment to fulfilling the obligation. The question regarding the hypothesis of theft and theft of cargo still does not find a consensus, there are arguments that advocate the inadmissibility of theft and theft as cases of fortuitous event or force majeure. The argument is based on the predictability of the facts. In international maritime transport, the chances of theft and theft of cargo are perfectly predictable. Standing out are understandings that defend the exemption of the carrier from liability due to force majeure, caused by a third party act, essentially with regard to theft and theft of cargo (Juste Ruiz, 1999 & Lacerda, 1984).

Acts of God, *acts of God ,* or fortune of the sea; the so-called events of nature, commonly called “acts of God with unpredictable effects”, are similar to the hypothesis of fortuitous events or force majeure. The framing of events in nature that constitute predictable facts. As a rule, bad weather and storms cannot be treated as acts of God, as a normal navigation event is considered, jurisprudence takes an iterative position in the sense that bad weather and storms, being predictable facts, do not they constitute a fortuitous event, before a normal navigation event, and ships must be in a position to be able to face them and have prior conditions for this. There are also arguments that argue, moreover, that bad weather is not a factor that configures the success of a trip or the fortune of the sea. Indispensable, therefore, the factual analysis for correct framing of the hypothesis in case of fortuitous event or force majeure. The burden of proof is on the carrier (Miller, 2011 & Figueiredo, 2016).

It is considered an inherent *vice defect* the intrinsic property of the commodity, which tends to self-destruct or suffer damage by itself. Effectively, any and all harmful events, predictable or unforeseeable, resulting from the very nature of the transported cargo, without occurring directly or indirectly through the fault of the carrier. Article 4 of Decree 64.387/69 equals insufficient packaging *insufficiency of*

packing to a defect of the goods, stipulating, The non-adequacy of the packaging according to the use, customs and official recommendations, is equivalent to a defect of the goods, and the carrier is not liable for the risks and consequences arising therefrom (Didier Jr, 2015 & Rose, 2017).

The following fall within the hypotheses of own vice: evaporation or leakage of liquids; rotting and deterioration of perishable cargo; decrease in weight and volume of goods; fermentation, acidity or effervescence of fluids. Specifically in relation to the hypothesis of decrease or increase in weight or volume, art. 617 of the Commercial Code (Brazil, 1850) prescribes that, in the genres that by their nature are susceptible to increase or decrease, regardless of poor storage or lack of stowage or defect of containers, such as, for example, salt, it will be on account from the owner any decrease or increase that the same genres have inside the ship; in both cases, freight is required rather than numbering, measuring or weighing when unloading (Silva, 1994, & Scatolino , 2015).

The occult or redibitory defect results from a latent defect in the thing transported, pre-existing to shipment. According to the previous analysis, it is reiterated that if the carrier is allowed to enter reservations in the BL in the event of suspecting the veracity of the indications given by the shipper with regard, essentially, to the nature of the cargo and other specificities or, alternatively, in the event of having no possible means or enough to verify them, making you *unclean on board* - dirty BL. In the absence of exceptions or reservations in the BL, this will be considered clean on board - clean BL, reputing the goods in good order. The absence of reservations engenders, in theory, liability of the carrier. Both in the hypotheses of own defect and in the hypotheses of redibitory defect, the *onus probandi* is from the transporter (Miller, 2011 & Martins, 2008b p.417).

It is necessary to differentiate the responsibilities arising from a charter contract between a party and another contracting party, towards third parties. As a general rule, with regard to responsibilities arising from the contractual relationship, each party will be liable to the other under the terms of the respective obligations and responsibilities assumed in GN and GC and the contractual clauses, under the terms of the preceding topics. With regard to liability towards third parties, it is also essential to identify the type of charter, the factual hypothesis and the causal link relating to NG and GC and contractual clauses (Martins, 2008b p.422).

With regard to damage to the load, the factual circumstance must be observed and whether the fact stems from the NG and GC, with the respective subjects who hold them. Therefore, it is important to identify the figure of the owner and the causal axis. The charterer, again, may use the ship to transport its own goods or, as is more usual, make it available for the transport of goods for third parties, by means of sub-chartering or transport contract . Still in terms of the previous extensive analysis, the carrier before the shipper is not always, effectively, the shipowner (Martins, 2008b & Lacerda, 1999).

In the effective use of the ship by the charterer in the transport of goods from third party shippers, the carrier before the shipper will always be the charterer, however only in BCP the charterer will also be the contracting and executing carrier,

in addition to being the ship's owner. In VCP and TCP, the charterer will be the contracting carrier, but will not be the shipowner or executing carrier, a legal situation that remains with the charterer. Thus, in the event of damage to third-party cargo, the charterer, contracting carrier, has been considered directly responsible for paying the damages of the owner of the goods , without prejudice to a return action against the shipowner or third parties, depending on the case (Pereira & Schwind , 2015).

Responsibility for handling, loading and unloading of goods, in general, refers to the GC of the ship, therefore, the responsibility of the charterer in YCP and TCP, and the charterer in BCP. Dock is considered related, a priori, to GC. However, the hypotheses of damage related to the preservation of the NG are excluded, hypotheses in which the stowage will be related under the responsibility of the captain and, therefore, listed under the aegis of the NG of the ship. For the actual factual situation, as a general rule, the liability for damages resulting from the acts of the master, resulting from the NG by the charterer and linked to the GC, is borne by the charterer in time. Consequently, in cases of collision or collision by the ship, the charterer will be liable to third parties and in the same way to the charterer owner. It should also be noted that the captain and crew are hired by the bareboat charterer and are contractually subordinate to him (Martins, 2008b, Martins, 2008a & Ripert , 1954b, p.104).

From civil liability for damage resulting from poor stowage, hiring stowage is the responsibility of the carrier or shipper, under the terms of what is agreed between the parties. Thus, it will be up to the carrier to hire the stowage, if so agreed, or, then, it will be up to the shipper to hire the port administration to provide the stowage. Regardless of whether or not the carrier is the contracting party for stowage, as a rule, it will be subject to the responsibilities and obligations regarding loading, maintenance, stowage, transport, storage, care and unloading. In addition, the cargo handling service on board the vessel must be carried out in accordance with the instruction of its captain or its agents, who will be responsible for stowing or removing the cargo with regard to the safety of the vessel, whether in port, or traveling (Martins, et al., 2008b p.459).

Therefore, it is established that, during the loading and unloading of the goods, the carrier's liability towards the shipper is maintained; however, if the damages are caused by the stevedoring entity, the foreman or the port entity, the carrier may reimburse the amounts paid as compensation. In addition, jurisprudential precedents have been detected that understand that in vigilando is not attributable to the owner of the ship or his agents for the stevedoring services, attributing responsibility to the shipowner or the captain, a third party act, for an unlawful act, proven to have been committed by an employee of a service provider requested to such services (Didier Jr, et al., 2015).

Civil liability resulting from navigation accidents and facts lies in the non-contractual area, essentially damages concerning or resulting from navigation accidents and facts that imply an obligation to indemnify damages caused to third parties, to other vessels, related to the death or injury of third parties and damage caused to port structures. With regard to damage to the transported cargo, even if

resulting from accidents and navigation facts, it is consolidated, a priori, the understanding that liability is contractual if the accident or navigation fact occurred due to the fault of the carrier itself or, even , in the case of concurrent fault. Depending on the regulations in question, if there is common fault, the responsibility of each of the ships is proportional to the severity of the faults they incurred, respectively; however, if, by circumstances, the proportion cannot be determined or if the faults appear to be equivalent, divide the responsibility equally. The damage caused either to the ships, or to their cargoes, or to the effects or other property of the crews, passengers or other people who are on board, are borne by the guilty ships, in the same proportion, without solidarity with third parties (Martins , 2008 & Venosa, 2017).

The guilty ships are jointly and severally liable with third parties for damages caused by death or injuries, unless they have to pay a higher amount than what, according to the principle mentioned in the article under examination, they must bear definitively. In the event of damage to the transported cargo, the understanding is consolidated that the carrier is directly responsible to the recipient. Consequently, it must pay the full amount of the damages, pursuant to the respective contract, acting, regressively, if configured in this case, against the owner of the other vessel. The responsibilities described in articles two to four of the Brussels Convention are also applicable in cases where the collision was caused by the fault of a pilot, even if mandatory (Martins, 2008b).

The captain is responsible for criminal acts, for the practice of contractual acts carried out in the exercise of his duties, for any legal acts carried out on behalf of the shipowner and for the consequences resulting from them, for all accidents occurring to the ship and the cargo during the expedition and for the acts performed by him, as well as for the faults committed by the people of the crew who are under his orders. The commander's responsibility is personal and subjective, based on guilt in the broad sense, intentional or culpable acts (Miller, et al., 2011).

Under the aegis of the Commercial Code, art. 529 with art. 608, the captain is liable for all losses and damages that, due to his fault, omission or malpractice, survive the ship or the cargo, without prejudice to criminal actions to which its malpractice or fraud may give rise. With regard to cargo, the captain is considered the true depositary and representative of the shipowner on board, and must also supervise loading and unloading operations efficiently, in accordance with safety standards. Thus, it will be up to the commander to carry out the effective supervision of loading and unloading operations, under penalty of being held responsible. The master must transport the goods and take care of the cargo in normal and extraordinary circumstances and deliver to the consignee (Rosa, et al., 2017).

In the event of damage to the cargo or an accident on board the ship, the master is obliged to prevent the spread of damage that has already occurred, preventing and paralyzing, to the extent that circumstances allow the loss, destruction or deterioration of goods. In addition, it must take all necessary measures so that damage or loss caused by accidents does not spread or increase (Martins, 2008b).

As a rule, the shipowner is responsible for losses and damages resulting from harmful unlawful acts by its agents or principals. This is an extra-contractual and complex liability, that is, indirectly linked to the person responsible. Complex liability represents an exception to the principle of liability, which enshrines, a priori, the duty to indemnify the agent causing the damage. Complex responsibility can only be framed in specific legal hypotheses, such as the hypothesis of responsibility for the fact of others and for the fact of things. Specifically, the Civil Code, in art. 932, III, advocates the responsibility of the employer or principal for its employees and representatives, in the exercise of the work that competes with them, or because of it. Pay attention, moreover, to Precedent n. 341 of the STF: The fault of the employer or principal for the culpable act of the employee or agent is presumed. According to the previous analysis, strict liability or professional risk of the shipowner is enshrined, attributing to him responsibilities, regardless of fault, essentially in the civil sphere (Juste Ruiz, 1999).

With regard to the shipowner's civil liability for unlawful acts committed by the master, as a rule, the shipowner's strict liability for the master's acts related to commercial management functions also prevails, that is, in the usual hypotheses, the master acts as agent of the shipowner. in the exercise of nautical management, the captain's personal responsibility. Thus, in the event that the carrier is not the ship's owner, it will not cease. Your liability to the owners of the goods. However, depending on the factual hypothesis, it is up to him to act regressively against the shipowner, who is effectively employed by the captain and crew (Tartuce , 2017 & Martins, 2008a).

One of the most controversial issues in maritime law refers to the pilot's civil liability. The issue, however, is little addressed in international doctrine. Effectively, the theme is extremely relevant, yet riddled with complexity. Consequently, it needs further analysis. Despite the fact that the issue engenders a deeper analysis and viable legislative reform, it is essential to mention some considerations. With regard to the responsibility of pilots for accidents and facts of navigation, precedents are essentially detected in American and English jurisprudence that exclude, as a rule, pilots from being civilly liable, consolidating that they are administratively responsible for the errors or omissions of their profession, without prejudice to the criminal liability they incur. The argument is based on the legal point of view of configuring the pilot with only one advisor, an advisor to the commander who maintains responsibility for the maneuvers. And even in the event of mandatory pilotage , there is no reduction in the powers and responsibilities of the commander. From this point of view, the fundamental mission of the pilot is based on assisting the captain in the technical guidance of the ship in certain areas, providing him with indispensable elements for the execution of the maneuver in line with the safety and success of the operation (Ripert , 1954b , Sá , 2017 & Martins, 2008b).

With regard to navigation accidents and facts, some setbacks in environmental law stand out. A priori, art. 25, § 1, I, of Law n. 9966/2000 legitimizes the responsibility of the ship's owner, who may be the shipping agent, to respond for environmental damage. In terms of fiscal responsibility, however, the court has been

arguing for the inadmissibility of the proposed claim against the shipping agent. Regardless of the hypothesis of malfunctions or navigation accidents, the validity of service of process established abroad in the person of the maritime agent is enshrined. Precedent 363 of the STF provides for this (Nader, 2016 & Freitas, 2008).

In the event of losses, jurisprudential understanding is enshrined arguing that, although it is unnecessary to prove the guilt of the transport company for the reparation claim regarding the non-delivery of goods that it was obliged to make, the indemnity claim is inadmissible if it is not demonstrated that the well did not reach its recipient. The complaint must essentially argue the causal link and attach proof of the BL contract, of the inspection if necessary and of the damage resulting from the malfunctions, losses or delays, without prejudice to other arguments and evidence that may be necessary for the casuistry itself (Silva, 1994 & Scatolino , 2015).

Accepted, however, the incidence of the Consumer Protection Code, the prescriptive period of the claim to repair for damages caused by the fact of the service is five years, in line with art. 27 of the aforementioned Code, starting the counting of the period from the knowledge of the damage and its authorship. It is necessary to specify, as appropriate, the theme related to the applicable legislation and the jurisdictional competence regarding indemnity actions for damages resulting from navigation accidents. With regard to jurisdictional jurisdiction, it is inferred that, as a rule, the legal systems refer to the jurisdiction of the place of the fact and the regency of the *lex fori* to judge navigation accidents that occurred in territorial waters. In the event of an incident occurring on the high seas, the rule is within the jurisdiction and applicability of the law of the flag State. Furthermore, in the event of accidents involving ships flying different flags, as a rule, there will be concurrent jurisdiction.

Final considerations

The theme proposed by the article addressed a delicate topic within the institute of responsibilities, discussed within the scope of Administrative, civil and procedural law in national and international law, aiming at port operators and all contractually guarantors of labor, until the end of boarding along the route from the point of departure to the point of arrival obtained the charge of protecting the property of a third party.

The issue of civil liability within maritime and port law ends up being always debated internationally, since Brazilian legislation, as being flexible, does not meet the demand that is requested internationally, however once it is debated, in terms of individuals and legal issues that increasingly use the integrated system of ports in Brazil, ends up with the national ports being obliged to certain demands, these demands being the object of analysis of this article (Popa & Strer , 2016).

In terms of transport, Brazil does not have the degree of legislative specialization that is expected from an eminently exporting country, whose main means of transporting products is by sea. Although recently edited, the Brazilian Civil Code deals very generically with the transport of things, not particularizing the modes of transport, which should be subject to specific legislation in the future. However, as

mentioned, the charter modality is partially regulated by the Commercial Code which, when enacted, did not even imagine that both trade between nations and maritime navigation itself would reach the level of sophistication experienced by them today. Which, therefore, also requires a more modern law, whose guidelines are capable of disciplining the relationships arising from these contracts, which we can observe in the treaties and decrees to which Brazil is a signatory, everything is generated from supply and demand legislation to demand-specific authorization.

In this context, the aforementioned article could not fail to analyze the characterization of the hundreds of specific and derivative norms that directly and indirectly affect the Brazilian port system, from its scope little remembered administratively and covering the doctrinal concepts verified by specialists in civil law, port systems , administrative law and procedural matters. From which this work turned to analyze in detail the practical cases, in consolidation of the norms that are aware of the subject. In the understanding of the courts and according to doctrinaires, and main historical writers on the subject, it is visible that the problem in the issuance of sumulas by superior courts to be regulated in concrete cases will eventually stagnate, in this context there are sumulas that range from arbitration and confiscation tax and administrative duties for soy, coffee and beef, to the apprehension of tens of tons of mineral derivatives such as sand and other materials. Causing millions of losses in logistics due to bureaucratic issues.

According to the understanding demonstrated throughout the article, two different contracts are evident regarding the international maritime transport of goods: the transport contract and the maritime charter contract, which, consequently, lead to a differentiated analysis of the respective responsibilities. Notwithstanding such differentiation, civil liability in general, points out as the initial assumption of the duty to indemnify the violated duty of conduct. In contractual liability, the examination of the duty of conduct violated from the examination of guilt that begins with the verification of the agent's conduct vis a vis its contractual obligations. It is also based on the following elements that seem indispensable to the configuration of civil liability, regardless of the distinction between contractual and non-contractual liability: the harmful, voluntary, or attributable fact, caused by the agent by voluntary action or omission, causing the demonstration of intent , negligence , recklessness or malpractice characterizing guilt, incurring in violation of individual subjective rights; occurrence of property or moral damage; causal link between the damage and the unlawful conduct of the agent. Contractual civil liability derives from non-compliance with contractual obligations or delay in the total or partial performance of obligatory relationships resulting from a business act.

Such points are relevant since contractual civil liability is regulated in Brazilian Law by the Civil Code, in arts . 389 to 407; Consumer Protection Code; administrative principles; sumulas; Enforcement agents and federal courts; international decrees and treaties as a signatory to Brazil and in Doctrinal understandings. In the maritime transport of goods, contractual civil liability is included for damages, losses and delays arising from non-compliance with the contractual obligations attached to the transport contract or the charter contract.

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