



## Immigration controls on seafarers in Brazil

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Practical Guidance

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### Disclaimer

The purpose of this publication is to provide a source of practical reference on the matter of immigration regulations to the benefit of our clients and associates. While we have taken every care to ensure the information provided is correct and up to date, we give no warranty or representations about the accuracy, reliability and suitability of the data for the purposes to which it is applied. We accept no liability whatsoever for any loss or damage, direct or indirect, arising out of or in connection with the use and reliance on the information provided herein.

This publication is not legal advice nor is intended to be any comprehensive or to replace any other guidelines and regulations issued by the relevant authorities, flag States and liability insurers.

## 1. Foreword

Until recently, the backbone of the Brazilian government's immigration policy was the so-called Alien's Statute, a law enacted in 1980, when Brazil was still under the yoke of the military ruling, which largely criminalised the violation of migration rules and regarded immigration as a potential threat to the sovereignty of the country.

In November 2017, the new Brazilian Migration Law came into force to replace the obsolete Alien's Statute and embrace the fundamental principles and guarantees that are already enshrined in the Federal Constitution that succeeded the military period, including the promotion of human rights, repudiation of racism and discrimination, equal rights and free access to public services and social benefits to Brazilians and foreigners, along with reduction of bureaucracy.

While the Law has eliminated criminal sanctions for migratory offences, it has substantially increased the value of the fines that can now reach up to BRL 10 thousand for individuals, and up to BRL 1 million for companies that violate the immigration regulations.

New categories of visas have been created, each with multiple types to serve specific purposes. The permanent visa has been discontinued and long-term visitors who wish to live in or work in Brazil can now apply for residency in the country regardless of immigration status or visa type.

Visitors and immigrants in the maritime and offshore sectors will be issued with a visit visa for business (non-remunerated, short-term visitors) or a temporary visa for work (with or without a contract of employment in Brazil) if staying in the country longer than 90 days.

Seafarers entering the country on a deep sea going ships or a cruise ship sailing along the Brazilian coast for up to 90 days are exempted from visa providing they carry a valid seaman's book in line with the ILO Convention. Those who intend to work on a Brazilian ship or platform, irrespective of the duration of the employment contract, or to work aboard a foreign vessel without a contract of employment in Brazil for more than 90 days must obtain a temporary visa through the Brazilian consulates abroad.

Of particular interest to the industry were the normative resolutions issued in December 2017, which reiterated the obligation of foreign ships and platforms to hire rising proportions of Brazilian seafarers to compose the crew at all levels of qualifications and departments when operating in Brazilian waters for specific periods.

This guide aims to provide a practical overview of the main aspects related to foreign seafarers in Brazil and Brazilian seafarers on board foreign vessels in the light of the new legal framework. Many of the recent rules require specific regulation to be implemented in effect and we will strive to keep an updated version of this publication available for free download on our website.

We hope our clients and associates find this guide to be a useful source of practical information and we welcome your feedback for corrections and improvements.

**REPRESENTAÇÕES PROINDE LTDA.**

April 2018

## 2. Regulatory framework

### 2.1. Jurisdiction on immigration matters

The Federal Union has exclusive authority to legislate on matters of immigration<sup>1</sup> and the government delegates these constitutional duties to three cabinet-level federal ministries and an interministerial council that rule on various aspects of immigration and international labour issues.

Authority	Function and duties
<b>National Immigration Council (CNIg)</b>	The federal government deliberates collectively with representatives of civil society, trade unions and organisations through the <i>Conselho Nacional de Imigração</i> a collegiate body linked to the Ministry of Labour that formulates the immigration policy and coordinates immigration control activities.
<b>Ministry of Foreign Affairs, Itamaraty (MRE)</b>	Within the attributions of the <i>Ministério das Relações Exteriores</i> is the diplomatic representation and rendering of consular services through its Immigration Division, which controls the issuance of visas by the Brazilian consulates and representation offices abroad.
<b>Ministry of Justice and Public Security (MJ)</b>	The <i>Ministério da Justiça e Segurança Pública</i> analyses, opines and decides on matters related to migration controls, nationality, residency, removal measures and procedures for the recognition of refugee status and political asylum. Within the structure of the MJ, the <i>Departamento de Polícia Federal</i> (Federal Police Department) is in charge of the maritime policing, immigration control and security at ports, airports and ground crossings, issuance of passports, extensions of visa, amongst many other duties. The Federal Police manage the <i>Registro Nacional Migratório</i> (National Migration Registry) and have jurisdiction to investigate, adjudge defences and impose administrative penalties for violations of immigration rules.
<b>Ministry of Labour (MTb)</b>	The <i>Ministério do Trabalho</i> is the federal authority responsible for aspects related to foreign labour and for ensuring compliance with international conventions and domestic legislation pertaining to employment. It issues work and residency permits for foreigners and extends and converts these visas in accordance with the directives of the CNIg. These tasks are delegated to the <i>Coordenação-Geral de Imigração</i> (General-Coordination of Immigration - CGi).

Table 1: Brazilian authorities in charge of migratory and foreign labour controls

### 2.2. Main legal framework

The keystone of the Brazilian immigration regulation is the Law No. 13,445, known as *Lei da Migração* (Migration Law)<sup>2</sup>. Sanctioned on 24 May 2017, it came into force six months after to fully replace the so-called *Estatuto do Estrangeiro* (Alien's Statute) of 1980<sup>3</sup>.

<sup>1</sup> Art. 22, XV, of Brazil's 1988 Federal Constitution

<sup>2</sup> Law No. 13,445 of 24/05/2017, herein referred to as Migration Law (*Lei da Migração*), entered into force on 21/11/2017 is regulated by Federal Decree No. 9,199 of 20/11/2017 (Decree 9,199/2017) and fully embrace underlying constitutional principles.

<sup>3</sup> Law No. 6,815 of 19/08/1980 – Alien's Statute (*Estatuto do Estrangeiro*), as amended.

The new Migration Law was regulated by Decree No. 9,199 of 21 November 2017 and implemented mainly in the form of normative resolutions (*Resoluções Normativas - RN*) issued by the CNIg.

In December 2017, CNIg issued a number of normative resolutions, some of particular interest to the seafarers and their employers, namely RN-01/2017 (general provisions on work and residency permits), RN-05/2017 (crew on cruise ships) RN-06/2017 (crew on cabotage ships, offshore ships and platforms) and RN-22/2017 (crew on fishing ships).

There are still regulatory gaps in the new legislation that are expected to be filled by the relevant authorities over the next few months.

### **2.3. Visa policy**

Brazil adopts the principle of reciprocity and in accordance with the provisions of bilateral treaties and agreements waives the need for a nonimmigrant to obtain an entry visa prior to travelling to Brazil if the stay is for up to ninety days. The Ministry of Foreign Affairs (MRE) maintains a list of countries and nationalities for which visas are required<sup>4</sup>.

Visas are always issued by Brazilian embassies<sup>5</sup>, consulates and diplomatic missions abroad, and it is not possible to obtain a visa upon arrival at airports, ports and ground crossings. Travellers who arrive at immigration checkpoints without a valid visa, where one is required, may be denied entry.

Depending on its purpose, the visa may be valid from one year to ten years, noting that the granting of a visa is a mere expectation of a right and does not guarantee that the visa holder can effectively enter Brazilian territory at any time.

### **2.4. Visa categories**

In short, the new law introduced five different categories of visas (visit, temporary, diplomatic, official and courtesy) to be issued by the Brazilian State to foreign nationals who seek to visit, work or live in the country, with multiple subcategories that vary according to the purpose of travel<sup>6</sup>. The most applicable to the executives, technicians and seafarers in the maritime and offshore industries would be the visit (business) and temporary (work) visas.

Visit visas are granted to short-stay foreign travellers who do not intend to immigrate or perform paid activities within the country, and visit for tourism (including meetings, conferences, seminars and congresses), transit, and business (including meetings, signing of contracts, auditing and consulting services and acting as crew of vessel or aircraft)<sup>7</sup>.

The maximum stay allowed under a visit visa is ninety days, renewable for a further period of ninety days, but only if the maximum stay in the country does not exceed 180 days in each migratory year, except for crewmembers whose maximum stay is limited to ninety days per migratory year<sup>8</sup>.

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<sup>4</sup> The MRE visa requirements according to nationalities can be verified on the website: [www.portalconsular.itamaraty.gov.br](http://www.portalconsular.itamaraty.gov.br). Under art. 119 of the Migration Law, visas issued prior to its enactment remain valid until their original expiration date and may be extended or converted into another type under the terms of the Law and its regulation

<sup>5</sup> Electronic visas (e-visas) for tourism and business are available to nationals from certain countries and can be applied for online at the website of VSF Global (<http://www.vsfglobal.com/Brazil-eVisa/index.html>)

<sup>6</sup> Art. 12 of the Migration Law and art. 5 of Decree 9,199/2017

<sup>7</sup> Art. 13 of the Migration Law and arts. 29 to 32 of Decree 9,199/2017

<sup>8</sup> Arts. 1 sole paragraph VIII, 19, 20, 21 & 29 § 7 of Decree 9,199/2017. A migratory year is a 12-month period counted from the day of the first entry in the Brazilian territory

Temporary visas, in turn, are granted to foreigners who wish to live in the country for a determined period of time for various reasons, such as research, health care, study, holiday-work and work as a seafarer, among many other specific purposes<sup>9</sup>.

The period of validity of the temporary visa, which is not confused with the maximum period of stay, is indicated in the visa itself and entry will not be allowed with a visa expired, unless in exceptional cases, at the discretion of the immigration authority. This visa category permits multiple entries limited to the maximum stay allowed within each migratory year, and temporary visa holders must register with the National Migration Registry (RNM) of the Federal Police within ninety days after the first entry, under penalty of a fine<sup>10</sup>.

## **2.5. Maximum period of stay**

The maximum period that a foreign national can stay in Brazil, which should not be confused with the period of validity of the visa, is defined by the Federal Police's immigration officer at the first immigration checkpoint in the country. The period of stay starts from the date of the first entry and stops when the visitor leaves the national territory<sup>11</sup>.

The length of time within which a foreign national can stay in Brazil without the need for a visa varies from country to country and depends on reciprocal but is always determined at the sole discretion of the immigration authority at the time of entry. For instance, a visitor from a visa-waived country who could theoretically stay in Brazil for up to ninety days without a visa may actually be allowed to stay in the country for a maximum period of only thirty days.

The period of stay actually granted by the Federal Police is stamped on the immigration card (or e-mailed to the applicant in the case of e-visas<sup>12</sup>) and is strictly controlled through a database interconnecting immigration checkpoints.

It is essential that the maximum period of stay is carefully monitored so that the application for a time extension is submitted in due time – or the traveller leaves the country before the period of allowed stay expires – to avoid a daily fine and a possible deportation order<sup>13</sup>.

The request for an extension of the stay, where one is permitted, must be made before the expiration of the period granted upon entry. The applicant must submit the time extension form, a valid travel document and the proof of payment of the fee to the Federal Police<sup>14</sup>.

Fines for overstay are the most common type of immigration penalty on seafarers in Brazil.

<sup>9</sup> Art. 14 of the Migration Law and arts. 33 and 38 of Decree 9,199/2017

<sup>10</sup> Arts. 40 & 41 of the Migration Law; arts. 14 to 18, 172, 174, 175 and 307 III of Decree 9,199/2017

<sup>11</sup> Art. 19 of Decree 9,199/2017

<sup>12</sup> Electronic visas are only for 'visit visas' and are currently available to nationals of Australia, Japan, Canada and USA and application can be done over the internet through the website of VSF Global

<sup>13</sup> Art. 109 II of the Migration Law; art. 307 II of Decree No. 9,199/2017

<sup>14</sup> Arts. 19 to 23 of Decree 9,199/2017

### 3. Foreign seafarers

#### 3.1. Seafarer's identity documents

As defined in the international conventions adopted by the International Labour Organisation (ILO), and for the purposes of the Brazilian immigration regulations, any member of the crew holding a valid seafarer's identity document (seaman's book) and performing professional duties on board a ship is considered a seafarer<sup>15</sup>.

Brazilian Migration Law accepts seaman's book as a valid travel document with the same standing as a passport, a laissez-passer and other forms of personal identification<sup>16</sup>.

In 2010, Brazil ratified the ILO Convention C185 of 2003, resulting in the automatic renunciation of ILO Convention C108 of 1958<sup>17</sup>. ILO C185 eventually came into force in the country in 2015, when it expressly repealed the decree that regulated the earlier convention in the domestic legislation<sup>18</sup>.

Despite the express denunciation of ILO C108, the Federal Police have been accepting seaman's books issued under this Convention to permit shore leave, transit or transfer of seafarers, though only ILO C185 is effective.

Seafarers holding a seaman's book not issued by any such Conventions may remain on board the vessel but may not come ashore<sup>19</sup>.

#### 3.2. Visa requirements

Visit visas to seafarers who are not engaged in paid activities in Brazil are limited to a maximum, non-extendable period of stay of up to ninety days in any migratory year<sup>20</sup>.

If the seafarer entered the country on an ocean-going vessel or a cruise ship sailing along the Brazilian coast for a stay of no more than ninety days per migratory year, he should be exempt from a visa if he carries a valid seaman's book issued by a country signatory to the ILO Convention<sup>21</sup>.

To work on a Brazilian-flagged vessel or platform<sup>22</sup>, irrespective of the length of the contract of employment, or on board a foreign-flagged vessel without any employment relationship in Brazil for more than ninety days, the seafarer must apply for a temporary work visa<sup>23</sup>.

#### 3.3. Migratory controls on seafarers

The Federal Police monitor and control seafarers moving within the country and are also responsible for maritime policing and the security of Brazilian ports and airports. They perform the migratory control of seafarers at the first and the last ports of call (or airport of crew change) in Brazil<sup>24</sup>.

<sup>15</sup> Art. 6 of ILO C185; art. 4, sole paragraph of Normative Resolution No. 5 of December 2017 (IN 5/2017)

<sup>16</sup> Art. 5, V, of the Migration Law

<sup>17</sup> The Seafarers' Identity Documents Convention No. 108 (ILO C108), adopted by the International Labour Organisation – ILO in May 1958, was introduced in the Brazilian domestic legislation by way of Decree No. 58,825 of June 1966. This Convention established that seafarers holding a seaman's book issued by their home country, by the vessel's flag state or by the country where the seafarers' employer is domiciled.

<sup>18</sup> The Seafarers' Identity Documents Convention (Revised) No. 185 (ILO C185) was adopted by ILO in June 2003 with the purpose of enhancing security and affording uniformity to the seafarer's identification document. Brazil ratified ILO C185 in 2010 and enacted it through Decree No. 8,605 of December 2015 that expressly revoked Decree 58,825/1966 that regulated ILO C108. Unlike the ILO C108, the new Convention provides that the seaman's book can only be issued to a national or to a permanent resident of the issuing country

<sup>19</sup> Art. 173 Decree No. 9,199/2017

<sup>20</sup> Arts. 20 and 29, § 3 of Decree No. 9,199/2017

<sup>21</sup> Art. 14, § 7 of the Migration Law; art. 29, § 7, I of Decree No. 9,199/2017

<sup>22</sup> Art. 38 of Decree 9,199/2017. "For the application of provision of subsection VII of § 2, foreign vessels or platforms are considered, among others, those used in offshore support navigation, exploration, exploitation, cabotage navigation, geophysical survey, dredgers and fishing vessels" (free translation)

<sup>23</sup> Arts. 29, § 7, II & 38, § 1, § 2, VII, of Decree No. 9,199/2017

<sup>24</sup> Art. 38 of the Migration Law; art. 168 of Decree No. 9,199/2017

Regardless of whether the seafarer holds an ILO-compliant seaman's book or a valid passport, the immigration authority may require evidence of the seafarer's intent in the country and proof of his financial standing and may also limit the length of his stay in the country<sup>25</sup>.

A seafarer who does not meet the requirements for admission may exceptionally be allowed in provided that the carrier or his agent undertake before the immigration authority to pay the expenses incurred during his stay and subsequent repatriation<sup>26</sup>.

The maximum period within which a seafarer can stay in the country without a visa begins to count from the date of the immigration clearance at the first Brazilian port of call and only stops counting when the vessel leaves from the last national port or when the seafarer is repatriated. The period of stay of on-signers and off-signers is counted from the date of the arrival or departure at the first or last immigration checkpoint in Brazil.

Daily fines may be imposed on seafarers who exceed the maximum period of stay<sup>27</sup>.

### **3.4. Employment contracts**

Foreign seafarers working on Brazilian ships must hold a temporary work visa and have an individual contract of employment signed in Brazil in accordance with the Brazilian Consolidation of Labour Laws (*Consolidação das Leis do Trabalho - CLT*)<sup>28</sup>.

The contract of employment should be made with a company established in Brazil which will be responsible before the Brazilian authorities and unions for the operation of the vessel and the management of the crew.

### **3.5. Residence permits**

Seafarers who sail professionally along the Brazilian coast without a contract of employment in the country are entitled to obtain a residence permit from the Brazilian Ministry of Labour when their stay in the country exceeds ninety days. The application for a residence permit can be made in-country and will be valid for up to two years for seafarers serving on board all types of ships and platforms<sup>29</sup>.

The permit may be issued to multiples addresses and the seafarer may work on different ships or platforms within the fleet of the same crew management.

Holders of a residence permit must register with the *Registro Nacional Migratório - RNM* (National Migration Registry) within 30 days of the granting of the permit subject to a daily fine for non-compliance<sup>30</sup>.

<sup>25</sup> Art. 6, Paragraph 9 of ILO C185; art. 45 of the Migration Law; arts. 170 & 171 of Decree 9,199/2017

<sup>26</sup> Arts. 41 & 42 of the Migration Law; arts. 172, 174 & 175 of Decree 9,199/2017

<sup>27</sup> Art. 109 II of the Migration Law; art. 307 II of Decree No. 9,199/2017

<sup>28</sup> Arts. 29 § 7 II, 38 § 1 II § 2, VII & 147 § 1, II of Decree 9,199/2017; Law-Decree No. 5,452 of 01/05/1943 as amended, known as Consolidation of the Labour Laws (*Consolidação das Leis do Trabalho - CLT*)

<sup>29</sup> CNIg RN-01/2017 (granting of residence permits to foreigners), RN-05/2017 (cruise ships), RN-06/2017 (cabotage vessels, offshore ships and platforms) and RN-22/2017 (fishing ships)

<sup>30</sup> Arts. 66 & 307 IV of Decree 9,199/2017



## 4. Brazilian seafarers

### 4.1. Compulsory hiring regulations

With the publication of Normative Resolutions RN-5/2017, RN-6/2017 and RN-22/2017, the CNIg has just reaffirmed the obligation that already existed under the repealed regulatory framework in which if a foreign vessel or platform remains in continuous operation within Brazilian jurisdictional waters<sup>31</sup> for specific periods, part of the crew must be composed of Brazilian seafarers at all technical levels (officers, graduates and nongraduates) and in all departments (deck and machinery) of the ship or platform in rising proportions according to the time it operated in Brazil<sup>32</sup>.

The timeframes and proportion of the Brazilian workforce to be hired on foreign vessels and platforms have been virtually unchanged in the new regulation and a period of grace has been granted to allow cruise ship operators to adapt to the new set of regulations, as shown in table 2.

Ship type/trade	Period of operation <sup>33</sup>	Proportion of Brazilian crew <sup>34</sup>
Offshore supporting vessels <sup>35</sup>	More than 90 days	1/3 (one third-34%)
	More than 180 days	1/2 (one half-50%)
	More than 360 days	2/3 (two thirds-67%)
Exploration and prospecting vessels and platforms <sup>36</sup>	More than 180 days	1/5 (one fifth-20%)
	More than 360 days	1/3 (one third-34%)
	More than 720 days	2/3 (two thirds-67%)
Vessels in cabotage trade <sup>37</sup>	More than 90 days	1/5 (one fifth-20%)
	More than 180 days	1/3 (one third-34%)
Cruise vessels <sup>38</sup>	More than 30 days	15% until December 2021 25% after December 2021
Fishing vessels <sup>39</sup>	More than 90 days	2/3 (two thirds-67%)

Table 2: Rate of engagement of Brazilian seafarers on board foreign ships and platforms operating in Brazilian waters

To count the period of operation of the vessel in Brazilian waters, her departure and return to the country within less than fifteen consecutive days will not be considered as an absence from Brazil and, therefore, the time will continue to count as if the vessel had never left the national territory.

#### 4.1.1. Foreign ships and platforms<sup>40</sup>

Offshore support vessels that remain in continuous operation longer than ninety days must employ Brazilian seafarers for one-third of the crew; after 180 days of uninterrupted operation, half the crew must be Brazilians; and from 360 days onwards, two-thirds of the hands on board must be composed of Brazilians.

<sup>31</sup> The Brazilian territorial waters comprehend a 12-mile wide strip of the ocean, measured as of the low tide line of the continental and insular shelf, such as indicated in large-scale nautical charts officially acknowledged by Brazil

<sup>32</sup> The Normative Resolutions No.71, 72 and 81 of 2006 were expressly revoked by RN-5/2017, RN-6/2017 and RN-22/2017, respectively

<sup>33</sup> For the purpose of calculating the period of operation, the departure and return of the vessel for a period of less than 15 consecutive days shall not be considered as absent from Brazilian jurisdictional waters

<sup>34</sup> The number of crewmembers required will be dictated by the safety manning certificate issued by the Flag State

<sup>35</sup> Vessels used in maritime logistic support to vessels and facilities engaged in research and mining activities and hydrocarbons

<sup>36</sup> Exploration or prospecting vessels, platforms, fixed or floating installations or structures, intended for activities directly or indirectly related to the research, exploitation and exploration of resources coming from inland waterbed, subsea and sea, including continental shelf and its subsea

<sup>37</sup> Cargo vessels used in cabotage (carriage of persons or goods between ports or points within Brazil through the sea and/or inland waterways)

<sup>38</sup> Cruise vessels used for tourism within the Brazilian territorial waters for more than 30 days

<sup>39</sup> Fishing vessels chartered to Brazilian company and operating within the Brazilian territorial waters for more than 90 days

<sup>40</sup> CNIg RN-6/2017

Exploitation or prospecting vessels and platforms must employ one-fifth of Brazilian crewmembers when operating in Brazil for more than 180 days; after 360 days of continuous operation, one-third of the crew must be made of Brazilians; from 720 days, the crew must comprise at least two-thirds of Brazilian seafarers.

Vessels engaged in the cabotage trade for more than ninety days of continuous operation must employ one-fifth of Brazilian seafarers, and after 180 days, the rate must be one-third of Brazilian crewmembers.

#### **4.1.2. Foreign cruise ships<sup>41</sup>**

Cruise vessels operating in Brazilian jurisdictional waters longer than thirty days must have a minimum of 25% of the crew composed of Brazilian seafarers at various technical levels and in multiple activities as defined by the shipowner or his representative. Vessels cruising between overseas ports and Brazil for up to 45 days carrying mostly tourists who embark or disembark in foreign ports are exempt from this obligation.

CNIg allowed a period of grace for the cruise seasons of 2018/2019, 2019/2020 and 2020/2021 during which time the proportion of Brazilians will be kept at 15%, with the prospect of an increase in the number of calls of cruise vessels. From December 2021 onwards, the rate of Brazilian seafarers on board foreign-flagged cruise ships will be 25%.

Operators with multiple vessels may compensate the percentage of the proportion of Brazilian workforce considering the average rate of the fleet.

#### **4.1.3. Foreign fishing vessels<sup>42</sup>**

In foreign fishing vessels chartered to a Brazilian company and operating continuously in Brazilian jurisdictional waters for more than ninety days, two-thirds of the seafarers must be made of Brazilians at all technical levels and departments.

## **4.2. Employment contracts**

Brazilian seafarers recruited in Brazil to work only during the cruise season must be employed by a company established in the country in accordance with national labour laws and regulations or a local agent who is responsible before the Brazilian authorities for the operation of the vessel and the management of the crew<sup>43</sup>.

## **4.3. Compulsory insurance**

Under the Migration Law, the Brazilian seafarer hired by a foreign ship or shipowner with headquarters or branch in Brazil operating in Brazilian waters, to work on a foreign vessel in the cabotage or ocean-going trade is entitled to insurance at the expense of his employer.

The insurance policy must be valid for the duration of the contract of employment and in accordance with the provisions of the Brazilian Vessel Register (*Registro Especial Brasileiro - REB*), and provide cover for occupational accident, total or partial disablement and death, without prejudice to the benefits afforded by a more favourable insurance policy in force abroad<sup>44</sup>.

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<sup>41</sup>CNIg RN-5/2017

<sup>42</sup>CNIg RN-22/2017

<sup>43</sup> Art. 7 of CNIg RN-5/2017, which sole paragraph defines a cruise season as "the period from 30 days before departure of the vessel to the first Brazilian port of call until 30 days after the departure of the vessel from the last Brazilian port of call, including the period of eventual absence from Brazilian waters (free translation)

<sup>44</sup> Art. 80 of the Brazilian Migration Law; art. 261 of Decree 9,199/2017

## 5. Offences and penalties

### 5.1. Legal grounds

The Federal Police are in charge of assessing infractions to the immigration regulations and imposing sanctions, which may range from a fine to compulsory removal measures ascertained through an administrative proceeding where the infractor is entitled a full defence in the adversarial system<sup>45</sup>.

### 5.2. Misconducts and sanctions

Under the new immigration law, the following conducts are considered administrative infractions<sup>46</sup>:

Gradation of offences	
Misconduct	Penalty
<b>i. Enter the country without permission (without a valid travel document or a visa)</b>	▪ Deportation if the offender does not leave the country or does not regularise his migratory situation within the legal term
<b>ii. Stay in the country after the maximum period of stay allowed</b>	▪ Fine per day of overstay and deportation if the offender does not regularise his migratory situation within the legal term
<b>iii. Failure to register within 90 days of entry to the RNM when directed to do so</b>	▪ Daily fine
<b>iv. Failure to register within 30 days to the RNM for a permit when directed to do so</b>	▪ Daily fine
<b>v. Transport to Brazil a person who is without a valid travel document</b>	▪ Fine per person carried
<b>vi. Carrier's failure to comply with an undertaking for irregular persons</b>	▪ Fine
<b>vii. Evade migratory control when entering or departing the country</b>	▪ Fine

Table 3: offences to immigration regulations and corresponding penalties under the Brazilian Migration Law

### 5.3. Immigration fines

There are no set values for each category of immigration offence; however, the new Migration Law sets minimum and maximum values from BRL 100 to BRL 10,000 to individuals and from BRL 1,000 to BRL 1 million to legal entities, per infraction and with a minimum unit of BRL 100, as depicted in table 3<sup>47</sup>.

#### 5.3.1. Assessment and fixing of fines<sup>48</sup>

The quantification of the immigration fine must take into consideration the economic condition of the infractor, the eventual recidivism and the seriousness of the infraction. The quantum of the penalty may be increased to the maximum extent possible if the immigration authority finds that, as a result of the comfortable economic situation of the offender, the application of the minimum amount would render the punishment ineffective.

<sup>45</sup> Arts. 106 to 108 of the Migration Law and art. 300 to 306 of Decree No. 9,199/2017

<sup>46</sup> Arts. 109 to 110 of the Migration Law and art. 307 of Decree No. 9,199/2017

<sup>47</sup> Art. 108 of the Migration Law and art. 301 of Decree No. 9,199/2017

<sup>48</sup> Arts. 304 & 305 of Decree No. 9,199/2017

### 5.3.2. Recidivism<sup>49</sup>

Offenders who commit more than one immigration infraction within one year are considered recidivists for the purpose of grading the fine.

In the first recurrence, the amount will be doubled, in the second triplicated, in the third quadrupled and from the fourth occurrence, the amount of the fine will be quintupled.

For assessment of relapsing of corporate persons, the criterion to be used will be the repetition of the misconduct and not the number of foreigners involved<sup>50</sup>.

### 5.4. Irregular crewmembers

In certain circumstances, the Federal Police may exceptionally allow the entry of a visa-required crewmember (or passenger) without a proper visa providing he holds a valid travel document (a seaman's book, a passport or a laissez-passer). The Federal Police may also admit a foreign national without a valid travel document as long as the carrier or his agent signs a bond of responsibility undertaking to defray the ensuing costs and expenses with the irregular traveller<sup>51</sup>.

A crewmember who, due to a force majeure, has to interrupt an international trip, may be allowed entry in Brazil if the carrier or his agent undertakes to pay for the expenses<sup>52</sup>.

### 5.5. Stowaways

The Federal Police may permit the disembark of stowaways provided the carrier undertakes to bear the costs incurred with his stay in Brazil, without prejudice to a fine for each stowaway carried. These include victualing, lodging, security and healthcare of the stowaway, plus the costs associated with identification, documentation and repatriation, if not eligible to seek refuge<sup>53</sup>.

Our guide "*Stowaways in Brazil: practical guidance and periodical review*" provides specific advice on stowaways and is available for free download on our website.

### 5.6. Illegal migration

While criminal sanctions against an illegal traveller were removed from the Migration Law<sup>54</sup>, the new legislation introduced provisions in the Brazilian Criminal Code to impose a penalty of prison of three to five years for companies and individuals responsible for admitting irregular foreigners in what the law has termed promotion of illegal immigration, which consists of arranging the unlawful entry of a foreign national in the country with the objective of obtaining a financial gain<sup>55</sup>.

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<sup>49</sup>Art. 306 of Decree No. 9,199/2017

<sup>50</sup> Arts. 302 and 303 of Decree No. 9,199/2017

<sup>51</sup> Arts. 40 & 41 of the Migration Law

<sup>52</sup> Arts. 41 and 42 of the Migration Law

<sup>53</sup> Art. 172 of Decree 9,199/2017

<sup>54</sup> Art. 123 of the Migration Law establishes that no one shall be deprived of his liberty for migratory reasons, except in the specific cases provided for in the Law.

<sup>55</sup> Art. 115 of the Brazilian Migration Law introduced an article of law in the Brazilian Criminal Code (Law-Decree No. 2,848 of 1940) to regulate the crime of promotion of illegal migration, it reads as follows: "Art. 232-A – To promote, by any means, with the purpose of obtaining an economic advantage, the illegal entry of foreigners in the national territory or of Brazilian in a foreign country. Penalty: imprisonment, from 2 (two) to 5 (five) years, and a fine. § 1. In the same penalty, anyone who promotes, by any means, for the purpose of obtaining an economic advantage, the exit of the foreigner from the national territory to enter illegally into a foreign country. § 2. The penalty is increased from 1/6 (one-sixth) to 1/3 (one-third) if: I. the crime is committed with violence; or; II. The victim is subjected to an inhuman or degrading condition. § 3. The penalty foreseen for the crime shall be applied without prejudice to those corresponding to the related offences" (free translation)

**5.7. Compulsory removal measures**

Subject to the terms of the Refugee Convention<sup>56</sup> and legal provisions and treaties dealing with stateless persons and other humanitarian situations, the Brazilian authorities may order the removal of foreign nationals to their country of nationality or origin or to another country that accepts them in compliance with the international treaties signed by Brazil<sup>57</sup>.

Measure	Situation
<b>Repatriation<sup>58</sup></b>	<ul style="list-style-type: none"> <li>It is an administrative measure for the return of a person whose situation is not in conformity with immigration regulations, such as the traveller without a valid travel document or a visa adequate to the length and purpose of his stay in the country.</li> <li>Repatriation would typically be the case of a stowaway or a seafarer without an ILO-compliant seaman’s book or an adequate visa.</li> </ul>
<b>Deportation<sup>59</sup></b>	<ul style="list-style-type: none"> <li>It derives from an administrative procedure and is preceded by the personal notification to the deportee, expressly stating the irregularities verified and a term for regularisation of his migratory situation, not less than 60 days, extendable for an equal period upon an undertaking of the impeded person to keep his household information up-to-date.</li> <li>When the deportee voluntarily leaves the country, the deportation order is deemed as complied with; otherwise and after the expiration of the legal term without regularisation of the migratory situation, the deportation will be carried out by the Federal Police.</li> </ul>
<b>Expulsion<sup>60</sup></b>	<ul style="list-style-type: none"> <li>It consists of an administrative measure whereby the impeded person is removed from the country without the right to re-entry for a specific period.</li> <li>Expulsion measures apply to those condemned by a final and unappealable judgment regarding the practice of genocide, crimes against humanity, war crime or crime of aggression as defined by the Rome Statute<sup>61</sup>, and common intentional offences that are punishable with a penalty of imprisonment</li> </ul>

**Table 4: compulsory removal measures foreseen in the Brazilian Migration Law**

The costs and expenses incurred with the removal measures will be borne by the Federal Union, but only if all efforts to recover them from the irregular person, the carrier or a third-party responsible have failed<sup>62</sup>.

<sup>56</sup> UNHCR’s 1951 Convention Relating to the Status of Refugees was adopted in Brazil through Law No. 9,474 of 22/07/1967

<sup>57</sup> Art. 46 to 48 of the Brazilian Migration Law and art. 178 to 180 of Decree No. 9,199/2017

<sup>58</sup> Art. 49 of the Brazilian Migration Law and art. 185 and 189 of Decree No. 9,199/2017

<sup>59</sup> Art. 50 and 51 of the Brazilian Migration Law and art. 187 to 191 of Decree No. 9,199/2017

<sup>60</sup> Art. 54 of the Brazilian Migration Law and art. 192 to 206 of Decree No. 9,199/2017

<sup>61</sup> The 1998 Rome Statute of the International Criminal Court was promulgated in Brazil through Decree No. 4,388 of 25/09/2002

<sup>62</sup> Art. 212 of Decree No. 9,199/2017

## 6. Defences and safeguards

### 6.1. Safeguards available

The carrier is legally responsible for the crew members, passengers, stowaways and refugees carried on board the vessel and the only exclusion of liability available is when the violation of the immigrant regulations arose as a direct consequence of *force majeure* or a fortuity.

Penalties resulting from offences to the immigration laws may be challenged through an administrative proceeding or legal proceeding where the accused party infractor is ensured ample defence in the adversary system with the right of appeal.

Immigration fines are subject to a limitation period of five years, counting from the date of the alleged infraction. In the event of a permanent or continuous violation of the rules, the term will count from the time on which the misconduct has ceased<sup>63</sup>.

### 6.2. Administrative procedure

The party accused of violating immigration regulations is entitled to file an administrative defence directly with the Federal Police, which will hear the appeal and render a decision<sup>64</sup>.

The visitor or immigrant who is a pauper in the legal meaning of the term has the right to a full defence through a public defender.

There are no defined timeframes within which the defences must be judged by the Federal Police, and the timing varies according to the police station in charge of the administrative procedure.

#### 6.2.1. **Notice of Infraction**

The *auto de infração* (notice of infraction)<sup>65</sup> is the document issued by the immigration authority to record an infringement. It must contain a detailed description of the offender's misconduct and the legal framing.

#### 6.2.2. **Term for defence**

The deadline to file an administrative appeal is ten days counted from the date the offender (or his legal representative, i.e. the agents) took knowledge of the notice of infraction.

No bond or security needs to be placed with the immigration authority and the enforcement of the fine will be halted until a final decision.

The infractor who does not lodge a defence within the legal term will be considered default and his departure from the country does not interrupt the ordinary running of the administrative procedure<sup>66</sup>.

If the Federal Police maintain their decision, an appeal against said decision may be filed with the Federal Police Regional Superintendence within ten days counted from the date the decision was published on the website of the Federal Police<sup>67</sup>.

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<sup>63</sup>Art. 304 of Decree No. 9,199/2017

<sup>64</sup> Art. 107 of the Migration Law and art. 300 of Decree No. 9,199/2017

<sup>65</sup> Art. 309 of Decree No. 9,199/2017

<sup>66</sup> Arts. 309 § 5 & 311 of Decree No. 9,199/2017

<sup>67</sup> Art. 309 § 9 of Decree No. 9,199/2017

### **6.2.3. Enforcement of fines**

After the rendering of the final administrative decision, the infractor will have thirty days, counted from the day the decision was officially published, to make the payment failing which the debt will be referred to the Attorney General of the National Treasury (*Procuradoria-Geral da Fazenda Nacional* - PGFN) for enrolment on the federal debt roster and tax foreclosure<sup>68</sup>.

### **6.3. Court proceeding<sup>69</sup>**

The alternative to administrative procedure to challenge arbitrary decisions of the immigration authority is to refer the dispute to a federal court, where the chances of overturning the fines are higher than in the administrative instance for no better reason than the fact that the defence will be heard by the very same authority that levied the fine which would rarely reconsider its position.

The federal justice system comprises a three-tiered structure: the trial court at the first instance, the the regional federal court at the second instance and, at the highest level of appeal, there are the Superior Court of Justice and the Federal Supreme Court<sup>70</sup>.

In order to suspend the enforcement of the immigration fine, it is necessary to place security in court (in the form of a bank guarantee, surety bond usually with a 30% uplift or cash deposit in a court-controlled interest-bearing account) as the legal proceeding unfold. If the immigration fines are confirmed, the amount deposited or the security posted will be cashed and released by the federal court to the Federal Union; if the penalties are found groundless, the security will be cancelled or the cash deposit refunded along with legal accruals.

The downside to resort to litigation is that the federal courts are usually overly busy and may take two to five years in average for a first instance decision, plus another four to six years for the second instance decision. Nevertheless, in case the security was posted in cash, where the effects of inflation and indexation on the original amount are curbed, challenging immigrations fines in court may be a better choice because the federal courts tend to rule according to the prevailing jurisprudence of the higher courts and the best legal doctrine.

### **6.4. Payment of the fine**

Both the administrative procedure and the court proceedings may be discontinued at any stage of the process by paying the fine for the updated amount according to the official government index.

Fines for overstay may be converted into a reduction proportional to the length of stay, in case of re-entry in the country, at the discretion of the Federal Police<sup>71</sup>.

Payment of the fine does not prevent the immigration authority from denying entry if the visitor exceeds the maximum period of stay allowed for each migratory year<sup>72</sup>.

<sup>68</sup> Art. 309 § 11 of Decree No. 9,199/2017

<sup>69</sup> Ordinance PGFN No. 1,153 of 13/08/2009, issued by the Attorney-General of the Federal Treasury (*Procuradoria-Geral da Fazenda Nacional* - PGFN), regulates the provision of surety bond for debts in the federal roster

<sup>70</sup> Federal Regional Court (*Tribunal Regional Federal* - TRF) is the federal court of appeal, the Superior Court of Justice (*Superior Tribunal de Justiça* - STJ) is the highest court for non-constitutional rules of law and the Federal Supreme Court (*Supremo Tribunal Federal* - STF) is the last resort which would only have jurisdiction to resolve conflicts involving eventual violation of constitutional principles

<sup>71</sup> Art. 300 § 2 of Decree 9,199/2017

<sup>72</sup> Art. 300 § 3 of Decree 9,199/2017

## 7. Conclusion

The Migration Law has significantly rewritten the Brazilian immigration policy and regulations, and while the novelties introduced by the new regulatory framework are predominantly positive for the maritime and offshore industry, as it clarified specific issues that were in grey areas under the previous legislation, there are still some issues that need to be addressed and new procedures implemented through normative resolutions and other administrative acts from the relevant authorities.

As this is an essential body of legislation, it is anticipated that there will be several challenges in the practical implementation and full understanding of the new set of rules by the Brazilian authorities, the international businesses and their foreign employees.

We are monitoring the application of the immigration regulations and the impact on the maritime and offshore industry. This manual will be updated regularly, so we encourage you to visit our website regularly to download the most up-to-date version of this publication and take the time to have a look at other practical guides we publish.

April 2018

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