Proinde P&I

Cargo Claims in Brazil

Practical Guidance

Cargo claims in Brazil

Practical Guidance

Content

1. Foreword

World's fifth largest and fifth most-populous country, Brazil is one of the leading producers and a top exporter of a host of mineral and agricultural commodities, in addition to animal protein and manufactured products. More than 90% of the country's foreign trade flows through a hundred ports and terminals spread across 7,500 kilometres of coastline along the Atlantic Ocean.

Lately, Brazilian ports have handled over one billion tonnes of seaborne cargo every year, with about 80% of this volume shipped abroad, mainly to China, the EU, the USA and Mercosur. Despite a large amount of freight carried by sea, the share of the Brazilian-owned fleet is marginal, with only 3% of national ships moving cargo in and out of the country.

Brazil is essentially a cargo-owning nation, and there has been little or no interest from the civil society and lawmakers over the years in getting the country to adopt global conventions on carriage of goods that afford a wide range of limitations and defences for the carrier. Instead, Brazil applies its own statutes which, in contrast, offer fewer immunities to the sea carriers.

In most jurisdictions claims concerning cargo liabilities are dealt with according to a long-established and well-known set of rules where factual circumstances determine the outcome of a dispute; conversely, handling cargo claims in Brazil can be a complicated task due to the intricate legal framework involved and some uncertainty that permeates specific issues of law.

The Brazilian judicial system is known for its inefficiency and slowness, with disputes taking years to reach a final judgment after a plethora of appeals. Claim indexation that adds substantial adjustment for inflation and interest is also deterrent for those seeking to resolve claims before Brazilian courts.

A recently enacted civil procedural law and amendments to the legislation established binding precedent mechanisms and fostered the adoption of alternative dispute resolution methods; nonetheless, litigation remains a costly and time-consuming exercise, still feared by foreign carriers and insurers who are unfamiliar with the vagaries of Brazil's legal system and might find it difficult to reasonably assess the risk involved before deciding how to respond to a claim.

Based on our practical experience of almost half a century dealing with various types of cargo claims, and in response to questions frequently asked by our clients, we prepared this guide to provide an overview of the applicable cargo liability regime, contracts, time bars, exclusions and limitations, processing of claims through court proceedings, ADR and arbitration, as well as procedures for claim settlement and release.

While this guide should not be used as a substitute for legal advice, we hope it will be a useful source of reference and practical information for our clients and associates, from whom we invite comments and suggestions for corrections and improvements. We will do our best to keep an up-to-date version of this publication available for free download on our website.

REPRESENTAÇÕES PROINDE LTDA.
January 2020

2. Civil liability system

2.1. Law regime

The Brazilian legal system derives from the Roman-Germanic tradition and is grounded on the civil law regime. The cornerstone of the country's legal framework is the Federal Constitution, which adopts as a fundamental right the principle of legality. Thus, the statutory rules generated by the legislative process are the primary and predominant source of Law. Regulatory gaps are bridged by jurisprudence, doctrine, analogy, socially accepted customs, and general principles of law and equity.

While Brazil has a law-based system, where judges apply the law according to their persuasion in light of the statutes, an amendment to the Constitution authorises the Supreme Federal Court (*Supremo Tribunal Federal* – STF) to decree, by two-thirds of its justices, that a ruling the high court hands down on a constitutional issue, which has been repeatedly challenged, becomes a binding rule upon all Brazilian courts and public administration entities[1]. Similarly, the recently-enacted *Código de Processo Civil* – CPC (Civil Procedure Code) introduced a binding case law system to avoid the filing of repetitive lawsuits on identical issues of law of general repercussion[2].

2.2. Sources of civil liability

Civil violations that give rise to the duty to repair damage are defined in the Civil Code that textually distinguishes between contractual and extra-contractual obligations. The breach of a contract imposes on the party at fault the burden of paying indemnity for the damage, plus interest, monetary adjustment and attorney's fees[3]. Under the substantive law, for there to be an unlawful act (tort), there should concurrently exist damage, intentional or culpable conduct and causal link between the resulting loss and the behaviour of the agent who will be liable for full compensation, including moral damage[4].

In overly simplistic terms, the underlying variance between contractual breach and tortious liability is that while there may be statutory or contractual limitations and exceptions available under the former, in the latter the debtor will generally be liable to pay full compensation and will only be released from this obligation in case of a fortuitous event or *force majeure*. [See section 6.1.1]

2.3. Duty to compensate

The party liable for the damage is responsible for fully repairing it. The liability for civil damage will, nevertheless, be strict only when so unambiguously determined by law or when one's activity implies potential risks to third parties[5]. Examples of when the law imposes the duty to repair regardless of fault are liabilities arising from injury to passenger or damage to luggage, where the carrier's responsibility will only be excluded if the damage results from a fortuitous peril[6]; and environmental pollution, where the polluter is responsible for the redress of the damage and its consequences, even in the absence of fault or malice[7].

---

[1] Art. 103-A and followers of the Brazilian Federal Constitution (as amended by Constitutional Amendment No. 45 of 2004). Until December 2017, the Supreme Federal Court (STF) had issued 56 binding rules (called "*súmulas vinculantes*" in Portuguese) on various issues of law

[2] Arts. 1,036 to 1,041 of Law n° 13,105 of 2015, Civil Procedure Code (*Código de Processo Civil* - CPC), came into force in March 2016 to replace the adjective law of 1973

[3] Art. 389 of Law n° 10,406 of 2002 (the Civil Code): "*For the non-fulfilment of the obligation, the debtor is liable for damages plus interests, monetary restatement according to official figures regularly established, and attorney's fee.*" Civil Code (free translation)

[4] Art. 186 of the Civil Code: "*The party who, through action or voluntary omission, negligence or imprudence, violates the right or causes damage to the other party, even if exclusively moral, commits an unlawful act.*" (free translation)

[5] Art. 927 of the Civil Code: "*Anyone who, by an unlawful act, [articles 186 and 187] causes damage to another party is liable to repair it. Sole paragraph: There will be a duty to compensate, regardless of fault, when specifically stated in the law, or when the activity performed by the party who caused the damage implies, by its nature, a certain risk to third parties.*" (free translation)

[6] Art. 734 of the Civil Code: "*The carrier is liable for damage caused to the persons transported and their luggage, except for reasons of force majeure, with any clause excluding liability being null and void. Single paragraph: It is lawful for the carrier to demand the declaration of the value of the luggage to limit indemnity.*" (free translation). Art. 735 of the Civil Code: "*The contractual liability of the carrier for injury to a passenger is not elided by third party fault against whom it has a regress action.*" (free translation)

[7] Art. 225, § 3, of the Federal Constitution; art.14, § 1º, of the National Environmental Policy (Law 6,938/1981)

Therefore, the duty to compensate necessarily entails the existence of a subjective fault and a causal link with the damage.

2.4. Level of compensation

Due to its compensatory nature, the redress cannot be higher than the loss suffered, as it would constitute unjust enrichment[8]. The duty to compensate embraces both material damage, including moral damage (pain and suffering), and reasonable loss of income. Punitive damage, indirect damage and consequential losses are excluded from the obligation unless otherwise expressly agreed by contracting parties with equal bargaining power[9].

The level of compensation for damage in tort is measured by the extent of the damage caused[10]. Under a standard contract, the carrier may limit its liability to the value of the cargo indicated on the bill of lading[11], and the Brazilian high courts have consistently accepted a limitation of liability based on the fact that the shipper had the option to declare the cargo value and pay the corresponding freight (*ad valorem*) earning the right to full compensation, but opted for the advantage of paying a lower standard freight based on the cargo gross weight or volume (*ad rem*)[12]. [See sections 4.2.3 & 7.2.1]

[8] Arts. 884 and 944 of the Civil Code

[9] Arts. 402 to 416 and 944 of the Civil Code

[10] Arts. 389 and 927 of the Civil Code

[11] Art. 750 of the Civil Code: "*the liability of the carrier, limited to the value appearing in the bill of lading, commences when it or its servants receives the thing and finishes when it delivers the thing to the consignee, or deposits it with the court if the consignee cannot be found.*" (free translation)

[12] In the multimodal transport, where the cargo value is not declared in the B/L, the compensation is limited to 666.67 SDR per package or unit; or to 2 SDR per kilogram of gross weight of goods lost or damaged, whichever amount is higher (art. 16 of Decree 3,411/2000, which regulates the Law of Multimodal Transport)

3. Regulatory framework

3.1. International conventions

Brazil is a party to the Brussels Convention 1924[13], which limits the shipowner's liability to the value of the vessel and freight; however, it has not signed – or signed, but has not ratified – the most relevant international cargo conventions that somehow exclude or limit the liability of the carrier for damage or loss of goods carried by sea, notably the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules.

Limitations and provisions contained in international cargo conventions that are common elsewhere in the world do not operate in Brazil, and any reference to them stands null and void unless the contracting parties have willingly chosen a foreign jurisdiction in which those conventions apply. Nevertheless, there are certain limitations available in Brazil's domestic legislation. [See sections 6.2.1 & 6.2.2]

3.2. Main domestic legislation

Civil rights and obligations are codified in supplementary laws that broadly govern many aspects of public and private relations and everyday life. General principles established in the various codes are implemented by an intricate array of delegated laws, decrees, ordinances and resolutions.

The main set of federal statutes governing civil liabilities arising from the carriage of goods by sea is summarised below.

3.2.1. Civil Code of 2002[14]

The foundation of civil liability is laid down in the *Código Civil*, the last iteration of which was enacted in 2002 and came into force in 2003 to replace the substantive law of 1916. The 2002 Civil Code unified general principles of civil and commercial rules and struck out some of the provisions of the Commercial Code that regulated trade in general, including apportionment of liabilities and time bars for marine cargo claims.

Apart from changing relevant civil liability rules, the 2002 Civil Code introduced a whole new chapter to establish the general contractual principles and obligations regarding the remunerated carriage of persons and goods[15].

3.2.2. Commercial Code of 1850[16]

The *Código Comercial*, inspired by the Napoleonic Code, was promulgated in 1850, in the then Empire of Brazil. With the entry into force of the 2002 Civil Code, Part One of the substantive commercial law was revoked leaving behind some legal loopholes regarding liability in the carriage of goods by sea, particularly in respect of time bars and liability exclusions.

To date, the remainder of the Commercial Code continues to discipline maritime trade in general, inclusive ship registration and mortgages, marine insurance, contracts of carriage, charter parties, maritime liens, private and general average.

[13] The International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (1924 Brussels Convention) was introduced in the Brazilian legislation through Decree 350/1935

[14] Law n° 10,406 of 2002, *Código Civil* (Civil Code)

[15] Arts. 730 to 756 of the Civil Code

[16] Law n° 556 of 1850, *Código Comercial* (Commercial Code)

There is one bill pending in each of the two houses of the Brazilian National Congress for the edition of a new Commercial Code that includes a chapter that deals specifically with maritime law and commercial shipping to modernise the commercial legislation and update it with internationally adopted maritime law and practice. There is no prediction of when or if either bill will eventually be implemented[17].

3.2.3. Law-Decree 116 of 1967[18]

The rules laid down in the Civil Code concerning the carriage of goods in general do not stipulate precisely when the liability of the maritime carrier begins or when it ends. Law-Decree 116/1967 fills this gap to regulate the carriage of goods by sea, delimiting the exact moment when the legal custody over the cargo is transferred between the cargo owners, the carrier and the port entity, apportioning responsibilities for cargo loss or damage and providing for a limitation period of 1 (one) year from the completion of discharge from the vessel for filing of cargo claims.

Although Law-Decree 116/1967 is an act of the executive branch that precedes the Civil Code in time and falls below it in the hierarchy of laws, the federal statute is a special legislation that does not conflict with the precepts of the Civil Code or any other higher law; therefore, it remains in full force and effect, in accordance with the principle of speciality[19].

3.2.4. Law of Multimodal Transport of 1998[20]

This specific law regulates the multimodal carriage of goods in Brazil, sets out the rules for the issuance of multimodal bill of lading and outlines the rights and obligations of *Operador de Transporte Multimodal* – OTM (multimodal transport operator). One of the main features of the multimodal law is the limitation of liability of the OTM to the value of the goods or, where it is not declared, to a package limitation. [See section 6.2.2]

3.2.5. Customs Regulation of 2009[21]

Better known as *Regulamento Aduaneiro*, Decree n° 6,759 of 2009 organises and regulates the administration of customs activities related to the circulation, control and taxation of import and export goods and assets.

The Customs Regulation provides for penalties owing to cargo shortage, as verified upon discharge and recorded in an official document, as well as noncompliance with cargo manifest reporting requirements[22]. Customs penalties range from fines to forfeiture (loss of goods to the Federal Union), without prejudice to criminal liabilities for smuggling and embezzlement.

3.2.6. Law of the Ports of 2013[23]

The Law of the Ports regulates the direct and indirect exploration of the ports and port installations by the Federal Government and the obligations of the port operator to third parties, including its liability to the shipowner and the owner of the cargo for damage that it causes to the vessel or goods during the operations it performs.

---

[17] Project Law of the Chambers of Deputies PLC 1,572/2011 by deputy Vicente Candido; Project Law of the Federal Senate PLS 487/2013 by senator Renan Calheiros

[18] Law-Decree n° 116 of 1967 (as regulated by Decree 64,389/1969) "*regulates the operations related to the transport of goods by waterways in Brazilian ports establishing the responsibilities and dealing with cargo shortages and damages*" (free translation)

[19] The application of the principle of speciality ("*Lex specialis derogat generali*") in contracts of carriage is set out in art. 732 of the Civil Code, viz: "*In the contracts of carriage, in general, the precepts contained in the special legislation and international treaties and conventions apply, provided they do not conflict with the provisions of this Code*" (free translation)

[20] Law n° 9,611 of 1998 *Lei do Transporte Multimodal* (Law of Multimodal Transport), regulated by Decree 3,411/2000, as amended

[21] Decree n° 6,759 of 2009, as amended, *Regulamento Aduaneiro* (Customs Regulation)

[22] The *Sistema Integrado de Comércio Exterior* - SISCOMEX (Integrated Foreign Trade System) is Customs single window system

[23] Law n° 12,815 of 2013 *Lei dos Portos* (Law of the Ports)

Under the port law, the port operator is responsible for coordinating the port operations it carries out, while cargo handling aboard must be conducted under the guidance of the master or his servant who will remain accountable for the safety of the vessel during handling and stowage of the cargo on board[24].

3.2.7. Consumer Protection Code of 1990[25]

Strict liability, reversal of the burden of proof and a much longer limitation period are just but some of the onerous terms imposed on the supplier of goods and services under the *Código de Defesa do Consumidor* - CDC, which regulates consumer relations and protects the rights of the consumer, defined as the final recipient of the products or services provided[26].

In decisions rendered shortly after the entry into force of the 2002 Civil Code, which turned the issue of time bar into a grey area, some court decisions have come to accept the applicability of the CDC to international contracts of carriage of goods, meaning that these claims would be subject to the five-year time bar of the consumer law that shifts the burden of proof against the carrier. However, over the past decade, courts of appeal and the *Superior Tribunal de Justiça* – STJ (Superior Court of Justice) have repeatedly – and consistently – issued substantive judgments denying the incidence of the CDC in transport contracts in which the consignee is neither the end-user nor is economically vulnerable toward the carrier[27]. [See section 5.3]

[24] Arts. 26 & 27, § 1o & § 2o of the Law of the Ports

[25] Law n° 8,078 of 1990 *Código de Defesa do Consumidor* (Consumer Protection Code) – CDC

[26] Art. 2 of the CDC: "*Consumer is any natural or legal person who purchases or uses a product or service as a final recipient*" (free translation)

[27] Abstract of the Special Appeal to the STJ (REsp) 1.417.293/PR: "(…) *5. When the contractual relation between the parties is required for the performance of the entrepreneurial activity (intermediate operation), moved by the purpose of having profit, a consumer relation may not be invoked even if, in the restricted plan of the contracting parties, one of them is the legal receiver of the goods or rendered service, taking it out of the production chain. 6. Exceptionally, the Superior Court of Justice admits the application of the Consumer Protection Code to contracts executed by legal entities, when one of them, although the party may not technically be the final receiver of the product or service, is in a situation of vulnerability vis-a-vis the other. 7. Generally, the contract for carriage of goods is a service connected to the entrepreneurial activity of the importers and exporters of goods, who use it to take their products to respective consumers, transferring to them the cost in the final price (intermediate consumption). 8. In the case herein, the appellees are not the final receivers – in the legal and economic sense – of the carriage of goods by sea services rendered by the appellants, nor were the former recognized by the Court below as being in a vulnerability condition vis-a-vis the latter so as to attract the application of the Consumer Protection Code"* (free translation). Also, REsp 932.557/SP; REsp 1.162.649/SP; REsp 1.221.880/RJ; REsp 1.391.650/SP

4. Contract of carriage

4.1. Principle

Contracts of transport, in general, are ruled by the Commercial Code and the Civil Code[28] and may be governed by specific legislation or international treaties and conventions provided they do not conflict with the precepts of relevant civil and commercial laws. The parties may agree on an exclusive foreign jurisdiction as well as an arbitration clause. [See sections 7.1 & 7.7.1]

4.2. Bills of lading

Cargo claims are usually pursued based on a contract of carriage evidenced in the form of a bill of lading. Under Brazilian law, the B/L functions as proof of the contract of carriage, a receipt for the goods shipped, and a title of credit with the strength of a public deed. According to the adjective commercial law, there is plenty of information that must be included in the B/L form[29].

Once a B/L has been issued, the carrier remains liable for transporting the goods with due diligence to the agreed destination and delivering them in sound condition within a reasonable time, failing which any party under the B/L, or a subrogated insurer, will be entitled to compensation[30].

The carrier will only be exempt from its contractual obligation if the damage is of a pre-shipment nature – and the B/L has been duly claused to reflect this previous condition, or if it can rely on any of the legal limitations and exclusions available in the Brazilian jurisdiction. [See sections 4.3, 6.1 & 6.2]

4.2.1. Terms and conditions

The reverse side of the B/L must contain the terms and conditions that apply to the carriage. Clauses that conflict with the principles of the Brazilian Law are rendered unwritten. The terms of the relevant charter party or similar contract must be incorporated into the B/L and clearly spelt out. If there is a divergence between them, the clauses of the B/L will prevail[31].

4.2.2. Reservation clauses

Standard clauses such as "*weight, measure, quantity unknown*", "*said to weight*", "*said to be*", or "*particulars furnished by shippers*" are acceptable, but do not preclude the duty of the carrier to deliver the cargo in the same quantity, weight and condition as described in the B/L. An exception where reservation clauses are legally enforceable would be cargo shortage in FCL[32] containers delivered by the carrier in good order and with the seal of origin intact[33].

4.2.3. Limitation clauses

Brazilian courts repudiate non-indemnity clauses, or pre-printed clauses providing for derisory compensations because of their adhesive nature, according to a long-standing abridged precedent decision by the STF[34]. Yet, jurisdiction, arbitration and limitation clauses may be accepted, if agreed by parties on an equal footing. [See section 6.2 & 7.1]

---

[28] Art. 730 of the Civil Code: "*By way of the contract of carriage, someone agrees to carry from one place to another goods or persons, in return for remuneration*" (free translation)

[29] Arts. 575 and 586 to 589 of the Commercial Code. Art. 1 of Decree 19,473/1930

[30] Art. 744 of the Civil Code: "Upon receipt of the thing, the carrier will issue the bill of lading mentioning the data that identify it, subject to the provisions of special law" (free translation). Art 749 of the Civil Code: "*The carrier will take the thing to its destination taking all the necessary precautions to keep it in good condition and deliver it within the set or expected timeframe*" (free translation)

[31] Art. 576 of the Commercial Code

[32] A Full Container Load (FCL) means a container packed and sealed by the shipper and unsealed and unpacked by the consignee

[33] B/L claused "*shippers load, stow and count*", "*FCL/FCL*" or similar indicating that the shipper was responsible for the description of the goods, packing and sealing of the container, but the carrier did not have the opportunity to check the contents and verify the accuracy of shipper's declaration, being only responsible for delivering the container in the same condition as received on board and with seal of origin intact

[34] STF Precedent (*Súmula*) 161 of 1963: "*Non-indemnification clause in contract of carriage is inoperative*" (free translation); art. 1 of Decree 19,473/1930: "*The bill of lading, issued by the sea, air and land carrier, proves the receipt of the goods and the obligation to deliver them in the place of destination. Any clause restricting, or modifying this proof or obligation shall be deemed not written*" (free translation, emphasis added)

4.3. Carrier's liability

The Civil Code distinctively defines the nature of the carrier's liability in the carriage of persons and goods. When transporting passengers, the carrier is liable, irrespective of its fault or that of third parties, for personal injury and damage to luggage, unless it is caused by *force majeure* (strict liability)[35]. In the transport of goods, in contrast, the carrier must preserve and transport the goods to the destination and deliver them in good condition, but will be exempt from liability if it can prove the existence of a legal exclusion or limitation or lack of causation (subjective liability)[36]. [See sections 6.1 & 6.2]

Although the fundamental civil law adopts, as a general principle, the theory of subjective liability based on the wilful or culpable conduct, majority Brazilian legal doctrine and jurisprudence considers that the liability of the carrier is strict, and its fault presumed. In practice, it suffices that a claimant produces evidence of the contract of carriage, the title to sue and the existence of a loss or damage to shift the burden of proof to the carrier. [See section 7.3]

4.4. Scope of carrier's liability

Under the general rule of the Civil Code on the carriage of goods, the carrier must deliver the cargo to the consignee or to whoever presents the endorsed bill of lading[37]. In the specific case of carriage by sea, the cargo is physically delivered by the vessel to a customs-bonded port or terminal whose keeper (bailee) remains responsible for the custody and subsequent effective release of the cargo to the rightful consignee after clearance by the customs authority and payment of the storage charges[38].

The period of responsibility and the exact moment of the transfer of custody between the sea carrier and the port entities are delimited by Law-Decree 116/1967. Under this special law, the carrier's liability commences at the moment the goods are received from the shipper or the port entity and subsists until they are delivered at the port of destination (tackle to tackle), in harmony with the provisions of the Civil and Commercial Codes[39].

Cargo is deemed delivered by the port entity to the vessel at the time it is lifted alongside the vessel if her own gear is used, or at the time it is unhooked inside the vessel if shore equipment is used. Conversely, cargo is deemed delivered by the vessel to the port entity when it is hooked inside the vessel if shore equipment is used, or when it is landed alongside the vessel if her own gear is used[40].

---

[35] Arts. 734 and 735 of the Civil Code

[36] Arts. 393 and 749 of the Civil Code

[37] Art. 754 of the Civil Code: "*The goods must be delivered to the consignee, or to whoever presents the endorsed bill of lading, who must check them and lodge a claim under penalty of lapse or rights.*" (free translation)

[38] Further information on cargo delivery in Brazil at: https://proinde.com.br/manuals/cargo-clearance-and-delivery-in-brazil-practical-guidance/

[39] Art. 750 of the Civil Code: "*The responsibility of the carrier, limited to the value appearing in the bill of lading, commences when it or its servants receive the thing and finishes when it is delivered to the consignee, or deposited in court if the consignee cannot be found".* Art. 519 of the Commercial Code: *"The Captain is the true bailee of the cargo and any other effects that he receives on board and as such he has the duty of their custody, good stowage and conservation and their prompt delivery at sight of the bills of lading (articles 586 and 587). The liability of the Captain for the cargo commences from the moment he receives it and continues until he delivers it at the agreed place or the place which is in use at the port of discharge.*" (free translation)

[40] Art. 2 of Law-Decree 116/1967: "*The responsibility of the port entity commences with the entry of the goods in its warehouses, yards or other places designated for storage and only ceases after effective delivery to the vessel or to the consignees. §1 the effective delivery to the vessel is considered from the commencement of loading operation alongside by way of vessel's gear. §2 the goods loaded or discharged to auxiliary ships owned by or acting on behalf of the port entity are considered effectively delivered to the latter, against receipt, that will be liable for shortages and damages to packages stowed therein if it has not been promptly reported. §3 the goods delivered to the warehouse of the carrier or loaded or discharged to auxiliary ships owned by the carrier or acting on its behalf, are deemed delivered into the custody and responsibility of the carrier.*" (free translation).

Art. 3 of Law-Decree 116/1967: "*The responsibility of the vessel or craft commences upon receipt of the goods on board and ceases with the delivery of the goods to the port entity or municipal wharf at the port of destination, alongside the vessel. § 1 the effective delivery on board is considered when the goods are handled by vessel's gear, from the commencement of the operation alongside the vessel. § 2 the goods to be discharged from the vessel by port entity or municipal wharf gear, or for its account, are considered effectively delivered to the latter from the beginning of hoisting of the cargo from within the vessel.*" (free translation)

5. Time bars

5.1. Limitation periods

The Civil legislation distinguishes between *prescrição* (prescription), the civil law equivalent to the statute of limitations in the common law system, and *decadência* (peremption), in that the former occurs when the enforcement of a right is barred due to the expiration of the statutory term, while the latter occurs when the right itself expires because it was not timely exercised. Either way, when the claim is time-barred or when the claimant's right has lapsed, the judge must dismiss the lawsuit with prejudice[41].

5.2. Peremption (lapsing of right)

The carrier is liable to the consignee for partial loss or damage to the cargo, as verified at the time of discharge and recorded in the damage report or certificate of discharge issued by the port entity (bailee), provided that the cargo interests lodge a formal protest against the carrier within 10 (ten) days after cargo delivery, otherwise the right to claim compensation may expire[42]. The rationale behind the need of a formal protest is to provide the carrier with a chance to preserve its rights from the outset by collecting evidence and arranging cargo surveys and measurements to ascertain the nature, cause, extent and circumstances of the loss or damage and any opportunity of recovery from third parties.

Although judges tend to exercise discretion as to the need for a protest when considering a cargo claim, the jurisprudence prevailing at the state appellate courts is for the dismissal of lawsuits based on the lack of a formal protest by cargo interests, even in claims brought by insurers on subrogation.

5.3. Prescription (limitation period)

Until 2002, the time bar for contractual cargo claims was unquestionably 1 (one) year from the date of the cargo discharge, or the date it should have been discharged, as then explicitly prescribed in the Commercial Code[43]. At that time, the right to claim could be successively extended in court for equal periods, and the length of the limitation period was not a matter for discussion.

It turns out that the 2002 Civil Code, which came into effect in January 2003, repealed the first part of the commercial law, removing with it the provision for a one-year time bar for cargo claims; nevertheless, the new substantive law did not specify the limitation period applicable to marine cargo claims; instead, it introduced a novel time bar of 3 (three) years for reparation of civil damages in general.

Despite the specific regulation (Law-Decree 116/1967) remaining in full force and unequivocally setting a one-year time bar for cargo claims, in line with modern legislation, such as the 1988 Law of Multimodal Cargo Transport and the 2007 Law of Road Cargo Transport[44], isolated court rulings issued in the wake of the implementation of the 2002 Civil Code have acknowledged the arguments put forward by cargo claimants that the three-year period of the new civil statute applied to contracts of cargo carriage.

To add to the controversy, some court decisions at the time ruled that the transport of goods is a consumer relation subject to the Consumer Protection Code (CDC), which not only brings about the strict liability of the service provider but also imposes the burden of proof, plus a five-year time bar, resulting in legal uncertainty as to what would be, after all, the limitation period for cargo claims in Brazil. [See section 3.2.7]

[41] Art. 487, II, of the CPC

[42] Sole paragraph of art. 754 of the Civil Code: "(…) *Sole Paragraph: In case of partial loss or damage not perceptible at first sight, the consignee retains right of action against the carrier provided it denounces the damage within ten days from delivery*" (free translation)

[43] Art. 449 of the revoked part of the Commercial Code

[44] Art. 22 of Law of Multimodal Transport; art. 18 of Law n° 11,442 of 2007, *Lei de Transporte Rodoviário de Cargas* (Law of Road Cargo Transport)

Lately, reiterated substantial decisions by state courts of appeals and the STJ, the highest court in the land for non-constitutional matters, have consistently resolved the issue with the application of the one-year time bar from the date of discharge set by Law-Decree 116/1967 due to the principle of speciality, whereby a supervening general law does not tacitly repeal an earlier specific law as long as it remains compatible with the newly enacted higher statute.

As regards subrogated cargo claims, the prevailing case law of the appellate courts holds that the one-year period begins from the date of discharge from the vessel and not from the date on which compensation was paid to the insured who had the title to sue the carrier. The STJ has also limited the right of subrogated underwriters to claim within one year of the discharge by invoking Precedent (called *Súmula*, in Portuguese) 151 set by the STF[45], which, although inspired by the now revoked article 449 of the Commercial Code (one-year time bar), has not been overruled by either the new Civil Code or the STF itself and therefore remains in force.

Under the current legal framework, cargo claims in Brazil would be subject to three distinct time bars, depending on the nature of the liability involved, the applicable contract and the economic balance between the contracting parties. [Table 1]

Term	Situation	Initial term
1 (one) year	Cargo claim under a contract of carriage[46]	Completion of discharge (or when the goods should have been discharged)
3 (three) years	Cargo claim in tort (unlawful act)[47]	Completion of discharge (or when the goods should have been discharged)
5 (five) years	Cargo claim under a consumer relation[48]	When the consumer knew about the damage or defect

Table 1: Time bars for cargo claims in Brazil

5.4. Time extension

The limitation period may be extended only once and for an equal term[49], that is, if a claim is subject to a time limit of three years, the right to claim will be renewed for a further three years within which the claim should be amicably settled, or court proceeding commenced; otherwise, the right to claim will expire regardless of the merits of the case.

Time limits established by law cannot be changed or extended at the discretion and liberality of the interested parties, as it is considered a matter of public policy[50]. Administrative (or contractual) time extensions by agreement between the parties, which are common in other jurisdictions, are not legally binding before the Brazilian courts.

The time bar can only be extended through a straightforward application to the court – called a *Protesto Interruptivo de Prescrição* - PIP (motion for interruption of the prescription). Basically a judicial notification, the PIP is a precautionary proceeding initiated by any interested party – usually the shipper, consignee or subrogated underwriter, in the case of cargo claims. The procedure does not require a response or permission from the party against whom the time for filing a lawsuit has been protected.

[45] A *Súmula* (abridged decision) is a consolidation of the reasoning of prior judgments by the Supreme Federal Court (STF). STF *Súmula* 151 of 1963 states: "*The recovery action for cargo shortage or damage to cargo carried by ship expires in one year.*" (free translation)

[46] Art. 8 of Law-Decree 116/1967; art. 8 of Decree 64,387/1969; art. 22 of the Law of Multimodal Transport and STF Precedent 151

[47] Art. 206 of the Civil Code

[48] Art. 27 of the Consumer Protection Code

[49] Arts. 202 to 204 of the Civil Code

[50] Art. 192 of the Civil Code

Whenever the judge grants the time extension, a court notice is served on the party (the debtor)[51] who will have the right to challenge the validity of the PIP when and if the substantive claim is eventually referred to the court within the renewed limitation period.

The commencement of legal proceedings, arbitration or mediation automatically interrupts the flow of the limitation period, but the filing of an out-of-court claim does not, though the debtor may explicitly or tacitly waive the time bar after its consummation, without prejudice to the rights of third parties[52].

5.5. Time suspension

Maritime accidents, such as collapse of stow, collision, grounding, fire and damage to fixed and floating objects which may result in loss or damage to cargo and attract the liability to the carriers, are adjudged by the *Tribunal Marítimo* (Maritime Tribunal), also referred to as Maritime Court or Admiralty Court[53].

The Maritime Tribunal comprises seven judges who collegiately decide on maritime casualties and facts of navigation to establish the party responsible for the event, impose administrative sanctions and indicate preventive measures to improve navigation safety. Although this administrative court is not competent to rule on matters of civil liability and its judgments are not binding on the courts of law, its decision may influence the outcome of a cargo claim and has significant weight as technical evidence in legal proceedings. In fact, the findings of the Maritime Tribunal constitute *prima facie* evidence, though always subject to review by the judicial authority[54].

In principle, the time bar does not count against any interested parties in the assessment and the consequences of accidents and facts of navigation until the administrative proceeding of the Maritime Tribunal comes to an end[55].

5.6. Stay of proceedings

The Civil Procedure Code provides for a stay of proceedings when the matter being considered in a court of law derives from an accident or navigational fact under the jurisdiction of the Maritime Tribunal, though the adjective law does not define for how long such a stay should last[56].

As this is a new matter, case law on this procedural aspect is yet to be formed. In practice, civil judges have halted the lawsuit when the issue under discussion in the administrative maritime court is relevant to the conclusion of the claim. However, following the constitutional principles of procedural agility and a reasonable duration of the process[57], the suspension, when granted, is subject to a specific deadline after which procedural acts are resumed regardless of whether the Maritime Tribunal's judgment is still pending.

[51] Service may be by registered mail with receipt of delivery or through a process server (court clerk). In case of foreign entities, the court notification is served through the agents, branch or legal representative in Brazil

[52] Art. 191 of the Civil Code

[53] The *Tribunal Marítimo* (Maritime Tribunal) created in 1931 and governed by Law 2,180/1954, is an administrative, autonomous body auxiliary of the judiciary branch and linked with Ministry of Defence and the Brazilian Navy Command. It is based in Rio de Janeiro and has jurisdiction throughout Brazil to judge accidents and facts of navigation and manage the Brazilian ship registry

[54] Art. 18 of Law 2,180/1954: "*The technical matter of the decisions from the Maritime Tribunal in respect of accidents and facts of navigation are piece of evidence presumed correct however liable to review by the Judiciary Power*." (free translation). Art. 19 of Law 2,180/1954: "*When discussing in court an issue arising out of a matter under the jurisdiction of the Maritime Tribunal, which technical or technical-administrative aspect falls within its attributions, a copy of the final decision must be attached to the court proceeding*." (free translation)

[55] Art. 20 of Law 2,180/1954: "*No time bar counts against any of the parties interested in the assessment and in the consequences of the accidents and facts of waterborne navigation until there is a final decision of the Maritime Tribunal*." (free translation)

[56] Art. 313, VII, of the CPC: "*The proceeding will be halted*: (…) *VII- When the matter under court consideration derives from accident or fact of navigation within the competency of the Maritime Tribunal*." (free translation)

[57] Art. 5, LXXVIII, of the Federal Constitution

6. Exclusions & limitations

6.1. Legal exclusions

6.1.1. Fortuitous event/*force majeure*

Liability is excluded when the damage results from a fortuitous event (Act of God) or *force majeure*. Although the legal doctrine distinguishes – and strongly disagrees – between the two modes of exculpation of liability, the Civil Code considers both just the same[58].

Unless the parties voluntarily agreed otherwise, the carrier shall be exempt from liability if it can prove that the cargo loss resulted solely from an unforeseeable, unavoidable and irresistible peril and that the shipowners, master and crew took all reasonable measures to minimise and mitigate losses. A typical example of such a defence is the cargo damage resulting from adverse weather during sea passage, where a well-founded note of sea protest has been issued and ratified in court as required by the relevant legislation[59].

6.1.2. Inherent vice and hidden defect

Inherent vice (intrinsic defect), hidden defect and vice of origin, including improper packaging and poor stuffing of cargo units and FCL containers, and any underlying problems undetectable at the time the carrier took over cargo custody are typical causes of exclusion of liability, as provided for in various statutes[60].

6.1.3. Victim fault

Victim's fault as an exclusion of liability is defined in the Civil Code, which states that if the claimant has culpably contributed to the damage, any compensation due to him will be fixed considering the degree of his concurrent fault[61]. Of course, there will be no obligation to compensate if the damage occurred solely and exclusively because of the victim's own fault.

6.1.4. Third-party fault

In certain circumstances, the carrier may have the right to invoke third-party fault to exclude liability, such as where the port operators caused the cargo damage during or as a result of the loading or unloading operations[62].

The carrier may not be exonerated from its liability to a paying passenger for injury caused to him by third parties but may seek reimbursement of the compensation paid from the third party liable for the damage.

In the multimodal transport, the OTM remains responsible to the cargo owner for losses caused by its subcontractors but has the right to pursue a recovery from them[63].

---

[58] Art. 393 of the Civil Code: "*The debtor shall not be liable for damages resulting from a fortuitous event or force majeure, unless expressly accepted them. Sole paragraph: The fortuity or force majeure is verified in the necessary fact, which effects could neither be avoided nor resisted*" (free translation)

[59] To build up a heavy weather defence in Brazil, a sea protest must be issued by the master and will only produce legal effect if ratified before the judicial authority in the first port after the event within 24 hours of arrival. Protests registered in public notary offices are not legally valid (arts. 766 to 770 of the CPC; art. 664 of the Customs Regulation). Further information on court ratification of sea protest can be found at: https://proinde.com.br/circulars/ratification-of-notes-of-sea-protest-before-the-brazilian-authorities/

[60] Arts. 621 and 711, § 7, § 8, § 10 of the Commercial Code; art. 4, § 4, of Law-Decree 116/1967; art. 784 of the Civil Code; art. 16, I & II of Law of Multimodal Transport

[61] Art. 945 of the Civil Code: "*If the victim has participated culpably for the harmful event, his indemnity shall be fixed considering the seriousness of his fault in comparison with that of the causer of the damage*" (free translation)

[62] Art. 26 of the Law of the Ports: "*The port operator answers to: (…) II – The owner or consignee of the goods for damage or losses caused during the port operations it carriers out or as a consequence thereof; III – The shipowner for damages caused to the vessel or to the goods handed in for transport*" (free translation)

[63] Arts. 734 and 735 of the Civil Code; art. 12 of Law of Multimodal Transport

6.1.5. Shortage allowances

Some loss and wastage of cargo in bulk across the logistics chain is conceivable and, sometimes, unavoidable, due to operational factors and the intrinsic nature of the product carried. Cargo may be wasted due to dusting and spillage during the conveyance, loading, unloading and transportation in different types of vehicles, loss of water content to the bilge wells and, sometimes, as a result of the chemical and physiological properties of some liquid and solid cargoes that may liquify or evaporate and, thus, lose mass and volume.

While in the international bulk cargo trade a 'customary shortage' or 'customary trade allowance' is acceptable, generally around 0.5% of the manifested figure, in Brazil there are no agreed trade allowances, deductibles or statutory tolerances for short delivery, except for tax purposes. The tolerance across Brazilian ports typically ranges from 0.6% to 5% of the quantity recorded in the bill of lading, depending on which state court has jurisdiction.

Most Brazilian state courts agree that some level of wastage of bulk cargo is permissible and, by analogy, applies the 1% allowance provided for in the Customs Regulation, and, to a lesser extent, the 5% tolerance foreseen in other tax laws – noting that the bill for a new Commercial Code pending before the Federal Senate also foresees a 5% allowance[64]. The civil courts of the southern states of Santa Catarina and Rio Grande, in turn, have longstanding jurisprudence tolerating short deliveries of up to 0.6% of the quantity manifested in the bill of lading.

The method for quantifying solid bulk cargo varies from port to port and is regulated regionally by the local Customs House, which may establish specific practices for each customs-bonded facility within a given port. Weighing on shoreside equipment and measurement by draft survey are techniques widely adopted in Brazilian ports.

Regardless of how the shore figure is postulated, vessels can, and should, conduct their draft surveys and exercise their right to challenge the accuracy of the shore figures whenever unreasonable discrepancies are detected. Whether the carrier will be able to rely on the draft reading, to clause the mate's receipts and bills of lading (upon loading) or repudiate cargo claims (after discharge), will depend on the quality of the measurement performed and the appraisal of the judge who will hear the case.

In the case that a vessel discharges the same type of bulk cargo at more than one Brazilian port on the same voyage, the aggregate of the quantity actually delivered should be determined, again by analogy with the Customs Regulation, by comparing the total amount discharged with the full cargo manifest for Brazil (procedure termed 'Final Checking of Manifest')[65].

There are no statutory shortage allowances for breakbulk or containerised cargoes, which must otherwise be delivered exactly as manifested, except for any pre-shipment condition noted in the B/L or the existence of legal exclusion.

6.2. Legal limitations

6.2.1. Cargo value limitation

The Civil Code establishes that the liability of the carrier is limited to the cargo value shown in the B/L[66]. Any loss beyond the cargo itself would, consequently, be excluded from the obligation to indemnify. [See section 4.2]

[64] Customs Regulation; Law-Decree 37/1966. Law 10,833/2003. Arts. 859, II, & 863, III, of Law-project 487/2013

[65] Arts. 658 & 659 of Customs Regulation

[66] Art. 750 of the Civil Code

6.2.2. Package limitation

Civil courts do not accept limitations that provide for negligible compensations when compared to the value of the cargo, as this would be the same as non-indemnification, which is forbidden. On the other hand, limitations based on the number of packages or weight are already provided for in special laws that regulate multimodal and road transport. Courts are increasingly entertaining this institute with the argument that the shipper could have declared the cargo value and paid an *ad valorem* freight to be entitled to full compensation but chose to pay a nominal *ad rem* freight, thus, having to bear the burden of choice. [See sections 2.3, 2.4 & 6.2.3]

6.2.3. Multimodal transport limitation

The Multimodal Law enumerates multiple causes of exclusion of carrier's liability[67]. It limits the multimodal transport operator's liability to the cargo value stated in the B/L and applies a limitation per package or weight if the shipper fails to declare the value of the cargo unless the damage was caused by fault or deceit of the multimodal operator (OTM) or its subcontractors, in which case no limitation applies[68]. [See section 3.2.4]

6.2.4. Vessel and freight limitation

Brazil is a signatory to the 1924 Limitation Convention[69] whereby the shipowner has the right to limit liability by physically abandoning the vessel, her freight and accessories as maximum compensation for the damage caused. This limitation, nonetheless, applies only to shipowners and vessels from one of the very few States Parties to the Convention.

6.3. Unenforceable limitations

6.3.1. International conventions

Brazil has not adopted any of the international conventions that limit or exclude cargo liabilities, and therefore none of the limitations and exclusions outlined in those conventions applies to claims in the Brazilian jurisdiction unless the contracting parties have voluntarily elected a foreign jurisdiction where those conventions are in force.

6.3.2. Master or crew fault or neglect

The error or negligence of the master, crew, shipowners or pilots is not acceptable as an exclusion of liability. It is because shipowners are strictly liable for the actions and omissions of their employees, servants and advisers, without prejudice to a third-party recovery[70].

[67] Art. 16 of the Multimodal Law excludes carrier liability for act or fact attributable to the shipper or the consignee, packaging inadequacy, when this may be attributable to the shipper, cargo inherent or latent vice, handling, loading, stowage and unloading carried out directly by the cargo shipper or consignee or their agents or servants and force majeure and fortuitous case

[68] The indemnity would be fixed at 666,67 Special Drawing Rights (SDR) per package or unit or 2 SDR per kilogram of gross weight of the damaged or lost goods, whichever amount is higher

[69] The International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels (1924 Limitation Convention) was enacted into Brazilian legislation through Decree n° 350 of 1935. The Convention was ratified by a small number of countries and limits shipowner's liability to the value of the vessel plus freight and the accessories with a limit

[70] The carrier would be found liable if there is an error in navigation as under the Civil Code (art. 932, III) the employer is liable for civil reparation of damage caused by action or omission of its employees and servants

7. Cargo claims

7.1. Jurisdiction

Brazilian judicial authority is competent to settle conflicts when (i) the defendant, regardless of nationality, is domiciled in Brazil[71], (ii) the obligation should have been fulfilled in the country, or (iii) the legal basis is a fact that occurred or an act that was performed in Brazilian territory[72].

Claims from Brazilian interests would customarily be entertained in the domestic jurisdiction, either because the contract of transport was concluded in Brazil or because the adjusted obligation should have been performed in the country. On the other hand, the parties are free to choose another jurisdiction, as the adjective law determines that "*No Brazilian Judicial authority is competent for the processing and trial of lawsuits when there is an exclusive jurisdiction clause in an international contract, if the defendant raises this argument in the defence*"[73].

State civil courts have general jurisdiction over civil and commercial disputes, except if the claim involves a federal public entity or a Brazilian Navy ship in which case the jurisdiction lies with the federal courts that are also competent to hear tax-related disputes, such as customs penalties. Except for the state court of Rio de Janeiro, where corporate courts are dedicated to handling commercial and shipping matters, there are no specialised courts in Brazil, so the same judge (or justices) who presides over all types of commercial, civil, family and, sometimes, criminal cases will also hear cargo claims.

7.2. Burden of proof

It suffices that the claimant provides evidence of the contract, title to sue and damage during the period of carriage to lodge a claim against the carrier which will have the onus of proving the presence of any of the causes of exclusions and limitations available under the Brazilian jurisdiction[74].

7.3. Title to claim

Any party under a contract of carriage is entitled to sue the carrier for breach of its obligations, including an endorsee of the bill of lading or a cargo insurer subrogated under a valid insurance policy.

A shipowner or charterer other than the contractual carrier may also be exposed to a claim in tort, whether alone, jointly or severally, even if it is not a party to the relevant contract. It is relatively common in container trade for cargo claims to be pursued directly against the vessel owner or operator (or the vessel provider, in the case of joint service agreements), rather than the charterer or the non-vessel operating common carrier (NVOCC) that issued the 'Master' or 'House' B/L, as long as the claimant can prove that the loss occurred while the cargo was on board a given vessel[75].

7.4. Legal subrogation

In the case of an insured loss, upon payment of the indemnity in the terms and limits of a valid insurance policy, the insurer automatically subrogates the rights and actions of the insured party to recover from the liable party, up to the amount of indemnity paid.

---

[71] A corporate person with a branch, agency or establishment in Brazil is domiciled in the country for founding jurisdiction (art. 21 of the CPC)

[72] Arts. 21 and 22 of the CPC. The Brazilian courts are also competent to resolve claims falling under the consumer legislation, when the consumer is a Brazilian resident

[73] Free translation of art. 25 of the CPC. Art. 63 of the CPC states: "*The parties can change the jurisdiction based on the value of the claim and the territory, choosing the venue where the action deriving from rights and obligations should be filed. § 1 The choice of forum is only enforceable when declared in a written document and expressly stated in relation to a specific legal transaction. § 2 The venue chosen in a contract is binding on the heirs and successors of the parties*" (free translation)

[74] Art. 373 of the CPC

[75] In this context, the shipowner ultimately found liable (actual carrier) has the right to recover from the charterer issuer of the B/L (contractual carrier) depending on the circumstances of the incident and the terms of the contracts. In certain situations, the contractual carrier would be entitled to a redress from the actual carrier either through an impleader in a cargo claim or through an action for indemnity

There is no need for the insurer to produce a specific form as the subrogation is evidenced by the receipt of indemnity acknowledged by the insured[76].

Cargo recovery agents must present a power of attorney from the party with the right to claim.

7.5. Dispute resolution

While there are other means to resolve conflicts out of court, litigation is the most commonly adopted method for cargo disputes in Brazil, even though the state court system is overburdened with millions of appeals waiting several years to be heard.

To alleviate the backlog of lawsuits pending judgment in the various degrees of jurisdiction, the newly enacted CPC introduced changes to foster alternative forms of dispute resolution and devised procedures to punish litigants with frivolous claims and procrastinatory appeals.

As with the STF's *súmulas vinculantes*, the CPC has instituted a type of abstract review system to curb repetitive suits and set binding precedents on issues of general public repercussion[77]. The adjectival law also promotes litigation prevention and amicable settlement of disputes through in-court settlements and pre-emptive procedures (anticipated production of evidence)[78]. [See sections 2.1, 7.6.5 & 7.7]

7.6. Court proceedings

The Federal Constitution guarantees the full right of defence through adversarial proceedings, due process of law and equal protection in a two-tier legal system, with the right to appeal to a higher court if there is a violation of a federal statute or a constitutional precept. The Constitution also affords legal certainty and respect for the vested right, perfect legal act and *res judicata*[79].

With few exceptions, the jurisdictional activity concerning civil liability, including cargo claims, is delivered by the state court system, which comprises trial courts with a single judge in the first instance of jurisdiction and, in the second instance, state courts of appeal with chambers where the justices render decisions alone or in judging panels. Judgements issued by these courts may be overturned by means of special appeal to the STJ or extraordinary appeal to the STF as long as they pass stringent admissibility tests to verify the plausibility of an alleged violation of federal law or a constitutional issue, respectively.

Due to the deficient and congested judicial system, a claim of a substantial amount pending in court can become a profitable investment for a plaintiff who can afford to wait for the outcome of the dispute for years to come, while the amount of the claim continues to accrue fixed interest and monetary restatement. On the opposite side of the dispute, the defendant's position is aggravated not only by the continued appreciation of the amount claimed, often above the yield on financial investments, but also by lengthy and costly proceedings that may lead to a doubling of the financial exposure after a few years waiting in court. A foreign defendant runs the additional risk of currency fluctuation during lengthy court proceedings. [See sections 7.6.5 & 7.6.6]

---

[76] Art. 728 of the Commercial Code: "*If the insurer pays a damage to the insured thing, it will be subrogated in all rights and actions that the insured has against a third party; and the insured cannot act in any way to the detriment of the insurer's vested right*" (free translation). Art. 786 of the Civil Code: "*Once the indemnity is paid, the insurer subrogates itself, within the limits of the respective amount, to the rights and actions that compete to the of the insured against the one that caused the damage*" (free translation). STF *Súmula* No. 188: "*The insurer has the right to recover from the causer of the damage the amount effectively paid, up to the limit of the insurance policy*". (free translation)

[77] Arts. 1,036 to 1,040 of the CPC. To create a legal precedent ('*requisito da repercussão geral*' or general repercussion requirement) whenever there are multiple appeals waiting on a decision, the court of appeals will select two or more of those lawsuits and forward them to the STJ, or to the STF if the appeal pertains to a constitutional precept. Similar lawsuits will be halted until the high court render a decision which will thereafter be applied by the lower courts in cases dealing with similar legal issues

[78] Art. 3, § 3 of the CPC. Art. 381 of the CPC: "*The early production of evidence shall be admissible in cases in which:* (…) *II - the evidence to be produced may render viable an amicable settlement by the parties themselves or another suitable means of dispute resolution; III - prior knowledge of the facts may either justify or avoid the filing of the lawsuit.* (…)" (free translation)

[79] Art. 5, XXXVI of the 1988 Federal Constitution

7.6.1. Confidentiality

As a rule and following the constitutional principle of publicity of the Justice, cargo claims under judicial consideration are public and accessible to any interested party. One of the few exceptions in which judicial secrecy is imposed is when the dispute involves arbitration that contains a confidentiality clause in the arbitration agreement[80]. [See section 7.7.1]

7.6.2. Security

The claimant is not required to put up security to initiate proceedings before the civil courts unless he is a non-resident Brazilian or a foreign citizen or company without real property or assets in Brazil to ensure payment of legal costs and prevailing attorney's fees, in which case the judge will discretionarily fix a sum as collateral, typically up to a quarter of the claim[81].

No security is required from the defendant until a condemnatory judgment is handed down, except if the claimant can present sound evidence of irreparable loss to the useful outcome of the suit if an interlocutory relief for security is not granted immediately (*periculum in mora*) as well as high probability of the alleged right (*fumus bonis juris*), in which case the court might demand counter-security from the claimant[82].

Security may be provided in the form of a judicial deposit in cash, bank guarantee or surety bond. P&I letters of undertaking are acceptable only if expressly agreed by the claimant.

7.6.3. Service of process

Before being summoned to response to a lawsuit, the defendant may be subpoenaed by the court, at least 30 (thirty) days in advance, to attend a conciliatory or mediatory hearing, except where there has already been a preliminary repudiation of the claim or the parties expressed their disinterest in an amicable settlement of the dispute. [See section 7.7]

Writ of summons against a foreign shipowner or charterer without domicile, branch or legal representation in Brazil may be served on the shipping agent who attended the vessel in the port involved at the time of the fact or else the summons has to be made by letter rogatory processed between the Brazilian court and the judicial authority at the defendant's domicile.

7.6.4. Timeframes

The defendant has 15 (fifteen) business days to file a defence. If a conciliation or mediation hearing has been held, the term for response will be from the date of such hearing or when the parties have indicated that they do not wish to settle. Otherwise, the time limit starts from the time the receipt of service is attached to the court records[83].

There are no set deadlines for lawsuits to come to a final and unappealable judgment. Depending on the state court concerned and the complexity of the dispute, a lawsuit may have to wait for up to two years or more until the lower court judgement is rendered, and somewhere between three and five years or longer before a decision by the court of appeals. If the parties exercise all their rights over the numerous motions and appeals available and the case eventually reach the high courts (STJ and STF), it might take another two years or much more until all appeal opportunities are exhausted and the suit finally becomes *res judicata*.

[80] Art. 37 of the Federal Constitution; arts. 8, 11, 26, III, 189, IV, & 194 of the CPC

[81] Art. 83 of the CPC provides that no security should be required i) when there is an exemption established by an international agreement or treaty signed by Brazil; ii) in an execution of an instrument enforceable out of court to satisfy the judgment; and iii) in a counterclaim

[82] Arts. 300 to 302 and 497 of the CPC

[83] Art. 335 of the CPC. Art. 224 of the CPC: "*Unless otherwise provided, time limits shall be calculated excluding the day on which they start running and including the day of their expiry*" (free translation)

7.6.5. Evidence and witnesses

All legal and morally sound means of evidence capable of proving the truth of the facts on which the claim or defence is based are acceptable to persuade the judge. In the Brazilian system, the judge is involved in the investigation of the facts and may determine the production of further evidence, including the appointment of court experts and subpoenaing of witnesses, noting that no party is obliged to produce evidence against itself[84].

Anticipated production of evidence that may justify the commencement of legal proceedings, or render viable an amicable resolution, is possible when the interested party convinces the judge that there is founded concern that piece of evidence will perish or become difficult to gather if not collected at an early stage. [See section 7.5]

The documentary evidence produced by the parties is attached to the court-records (physically or electronically) and is not served to each other. With few exceptions, documents written in a foreign language can only be filed when sworn translated into Portuguese. First, the judge examines the witnesses, and then the parties' attorneys may pose questions by addressing the judge who, if agreeable, asks the witnesses to answer[85].

7.6.6. Litigation costs

The plaintiff pays the initial **legal costs**, calculated as a varying percentage of the claim amount, as well as all fees and expenses incurred with procedural acts it performs, with each party funding its own litigation costs. Additional court fees are due to the court by the appellants. The party that has no financial means can benefit from free legal aid.

Lawyer's fees for legal services are due by the retaining parties and may be agreed upon as a lump sum, a percentage of the disputed amount, or billed on an hourly or daily basis, with a retainer fee typically being advanced on the onset of proceedings. As a rule, lawyer's fees are not recoverable from the losing party.

Upon final judgment, the unsuccessful party will be ordered to reimburse the prevailing party for legal costs incurred, including fees and expenses for court experts and witnesses, from the outset of proceedings to the satisfaction of the final judgment. Besides, the loser will also have to pay **winning lawyer's fees**, set by law between 10% and 20% of the claim award, at the judge's discretion[86]. The winning lawyer's fee should not be confused with the fee agreed between the lawyer and the winning party, who must still pay its lawyer's fees under the retainer agreement, regardless of the winning lawyer's fees paid by the defeated party. Unless otherwise provided by the parties, no lawyer's fees are due under out-of-court settlements, where each party generally pays for its legal counselling, if any. [See section 7.6.8]

7.6.7. Claim amount

Monetary adjustment for inflation (indexation), from the date of damage, as well as **legal interest**, accrued from the service of process on the defendant, are added to the principal amount of the claim monthly until the final judgment is satisfied[87].

---

[84] Art. 5, LXIII, of the Federal Constitution. Arts. 369 to 374 & 379 of the CPC

[85] Arts. 192 & 442 to 463 of the CPC

[86] Costs and expenses include pleadings, translations, compensation for travel expenses, expert's fees and witness' travel allowance (arts. 82 to 84 of the CPC). Art. 85 of the CPC rules that the winning lawyer's fees, known as "*honorários de sucumbência*" are payable by the defeated party to the winning party's lawyer from 10% to 20% of the updated claim award considering the prevailing lawyer's degree of dedication, the place where the work was performed, the nature and complexity of the suit, the work performed and the time spent. The level of the previously set winning lawyer's fees may be increased by the court of appeals considering the additional work carried out by the prevailing lawyer. Arts. 22 & 23 of Law n°8,906/1994 - Statute of the *Ordem dos Advogados do Brasil* – OAB (Brazilian Bar Association)

[87] Arts. 291 to 293 & 322 of the CPC. Included in the principal claim amount are legal interest, adjustment for inflation and winning lawyer's fees. In claim in torts, the legal interest accrues from the date of the damage

While monetary restatement is calculated according to the indexation table of the State Justice, legal interest on civil lawsuits is ordinarily set at 1% (one per cent) a month[88].

7.6.8. Claim award calculation

Due to continued indexation and interest accrual, the amount of a cargo claim pending in court can dramatically increase each year. Currency fluctuations also have a significant impact on foreign defendants' financial exposure and risk management, for better or worse, depending on the exchange rate policy and the economic scenario prevailing during the litigation.

Head of the claim	Amount/R$	Calculation basis/US$ equivalent
Original claim amount (Jan/2018)	**R$ 10,000.00**	Cargo damage in Jan/2017; lawsuit filed Jan/2018 = US$ 3,022.98 @ r.o.e. 01/01/2017
a) Updated claim amount (Jan/2017 to Jul/2019)	R$ 10,918.33	R$ 10,000.00 x 71.966713 (Jul/2019) = R$ 10,918.33 65.913635 (Jan/2017)
b) Legal interest (Jan/2018 to Jul/2019)	R$ 2,074.48	19 months @ 1% = 19% over "a"
c) Winning lawyer's fee	R$ 1,299.28	10% over "a" + "b"
d) Legal costs & expenses	R$ 285.84	2% legal costs and court fees
Total claim award (Jul/2019)	**R$ 14,577.93** (▲ 46%)	'a' + 'b' + 'c' + 'd' = US$ 3,816.92 @ r.o.e. 01/07/2019 (▲ 26%)

Table 2: Update of legal claims under court consideration (Source: State Court of São Paulo - TJSP)

For example, a claim for BRL 10,000.00 filed in court in January 2018, for damage occurred in January 2017, would be worth about BRL 10,918.33 in July 2019. In the same example, after adding legal interest, winning lawyer's fee and court costs, the amount of the updated claim award would reach the sum of BRL 14,577.93, an impressive 46% increase in local currency (or 26% in US dollars) in just one year and a half of court litigation. [Table 2]

7.7. Alternative dispute resolution

Brazil has recently updated its legal framework on alternative dispute resolution (ADR) systems and has ratified global conventions on mediation and arbitration, and enforcement of foreign arbitral awards.

The various forms of ADR are increasingly being adopted in the corporate, energy, infrastructure and offshore sectors, with a growing number of arbitral institutions being established across the country, some of which specialising in maritime, shipping and port matters. In contrast, cargo interests, carriers and insurers rarely resort to any of these methods to settle cargo claims.

In line with the modernisation of the civil legislation – and to ease the extensive caseload of the courts – the CPC widely encourages parties to resolve disagreements consensually through conciliation and mediation. In fact, the adjective law requires the parties to be summoned to a conciliatory or mediatory hearing before litigation, though there is no obligation to reach an amicable solution on this occasion[89].

[88] Art. 406 of the Civil Code: "*When default interest is not agreed or is agreed without a stipulated rate or is determined by law, will be set at the rate that is in force for default payment of taxes due to the National Treasury*". Art. 161 of Law n° 5,172 of 1966 *Código Tributário Nacional* – CTN (National Tax Code): "*The credit not fully paid at maturity shall be increased by default interest, regardless of the reason for the default, without prejudice to the imposition of applicable penalties and the application of any guarantee measures provided for in this Law or in a tax law. §1. If the law does not provide otherwise, interest for late payment is calculated at the rate of one percent per month.*" (free translation, emphasis added)

[89] Art. 3 of the CPC: "*Neither injury nor threat to a right shall be precluded from judicial examination. § 1 Arbitration is allowed, in accordance with the statutory law. § 2 The State must, whenever possible, encourage the parties to reach a consensual settlement of the dispute. § 3 Judges, lawyers, public defenders and prosecutors must encourage the use of conciliation, mediation and other methods of consensual dispute resolution, even in the course of proceedings.*" (free translation). Attendance to the conciliatory hearing is compulsory, unless the parties have previously objected to any settlement, or when self-composition is forbidden by law (arts. 165 & 334 of the CPC)

7.7.1. Arbitration

The Brazilian Arbitration Law was enacted in 1996[90], but it was not until 2001, when the STF affirmed the constitutionality of this statute, that arbitration, as an alternative to the slow and inefficient judicial system, spread throughout the country, whose activities, both in number of cases and Brazilian parties, rank high in the ICC's International Court of Arbitration statistics.

Brazil is a contracting party to the 1958 New York Convention since 2002[91], and, in 2015, it widened the scope of the Arbitration Law to introduce provisions for a choice of arbitrators, provisional remedies and interim reliefs, and arbitral letter to allow cooperation between the judiciary and the arbitral tribunal as well as halting of the limitation period.

The public administration may rely on arbitration to settle disputes related to disposable rights, and it is possible to incorporate an arbitration clause into an adhesion contract, but this provision should be highlighted in the document and freely and expressly accepted[92].

7.7.2. Conciliation and mediation

In the wake of the reform of the Arbitration Act and the entry into force of the new CPC, the Brazilian Mediation Act[93], enacted in 2015, came to regulate, for the first time, the mediation process under domestic law.

Whereas the international practice does not make much distinction between conciliation and mediation, the civil procedural law adopts conciliation when there is no prior relationship between litigants, who are then encouraged to reach an agreement, and resorts to mediation when there is a pre-dispute relationship and litigants are technically advised to identify consensual solutions to their mutual benefit[94].

The parties may submit themselves to out-of-court conciliation and mediation at any time during arbitration or legal proceedings. The final term of mediation, when the parties reach an agreement, is a judicially enforceable title when ratified in court.

7.8. Claim settlement

Cargo claims can be resolved amicably by the parties at any time to prevent or terminate a dispute[95]. A settlement made in the course of a pending lawsuit is generally not confidential – unless there is a confidentiality clause in an arbitration agreement. The parties must expressly request the court to close the case and extinguish the lawsuit and, ideally, the payment of the agreed amount should only be made after the judge ratifies the settlement agreement.

In or out-of-court cargo claim settlements must be made in exchange for a full receipt of claim release signed by the claimant. The terms and conditions of the settlement agreement must be carefully drafted, particularly with regard to payment terms, payment of lawyer's and expert's fees, legal costs and expenses, release of security, payment of taxes, bank charges, penalty for late payment, and other provisos.

[90] Law n° 9,307 of 1996, *Lei de Arbitragem* (Arbitration Law), as amended by Law n° 13,129/2015

[91] The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was regulated by Decree n° 4,311/2002

[92] Arts. 1 to 4 of the Arbitration Law

[93] Law n° 13,140 of 2015, *Lei de Mediação* (Mediation Law)

[94] Arts. 165 & 166 of the CPC

[95] Arts. 320 & 840 of the Civil Code

8. Conclusion

It is unlikely that in the immediate future Brazil will adopt global conventions, such as the Hague Rules, Hague-Visby and the Hamburg Rules, or any other international regime that stipulates exclusions and limitations of liability; nonetheless, it is expected that the eventual enactment of a new Brazilian Commercial Code will reclaim the commercial rules from the Civil Code of 2002 and completely overhaul the commercial legislation to modernise and update it with the prevailing international practice of commercial and maritime laws.

The maritime community is hopeful that, despite some resistance from Brazilian cargo interests, any of the two bills being discussed in the National Congress will eventually be passed to resolve or mitigate legal uncertainties, simplify commerce rules and align the domestic regulation with modern international regimes to boost foreign trade and improve the business environment.

Until a new commercial law is enacted, the recent Civil Procedure Code, coupled with legislative reforms, have enhanced binding precedent mechanisms and alternative dispute resolution, should help the courts deal with a huge backlog of lawsuits eliminating spurious or repetitive claims and rendering faster and better-quality decisions.

January 2020

Editor: Ricardo Martins
ricardo.martins@proinde.com.br

SANTOS (MAIN OFFICE)	**REPRESENTAÇÕES PROINDE LTDA.**		
Address	Rua Itororó, 3 – Sala 31 11010-071 – Santos-SP Brazil		
Telephone	+ 55 13 4009 9550	**General Email**	proinde@proinde.com.br
RIO GRANDE	**REPRESENTACOES PROINDE LTDA.** **c/o FARINON, CARVALHO DA SILVA**		
Address	Rua Barão de Cotegipe, 443 – Sala 610 96200-290 – Rio Grande-RS Brazil		
Telephone	+55 53 3233 1500	**General Email**	proinde.riogrande@proinde.com.br
RIO DE JANEIRO	**REPRESENTAÇÕES PROINDE (RIO) LTDA.**		
Address	Av. Rio Branco, 45 – Sala 2402 20090-003 – Rio de Janeiro-RJ Brazil		
Telephone	+ 55 21 2253 6145	**General Email**	proinde.rio@proinde.com.br
VITORIA	**REPRESENTAÇÕES PROINDE LTDA.** **c/o WS COMÉRCIO E SERVIÇOS MARÍTIMOS LTDA.**		
Address	Rua Professor Elpidio Pimentel, 320 – Sala 401 29065-060 – Vitória-ES Brazil		
Telephone	+55 27 3337 1178	**General Email**	proinde.vitoria@proinde.com.br
SALVADOR	**REPRESENTAÇÕES PROINDE LTDA.** **c/o PERINÁUTICA LTDA.**		
Address	Rua Miguel Calmon, 19 – Sala 702 40015-010 – Salvador-BA Brazil		
Telephone	+55 71 3242 3384	**General Email**	proinde.salvador@proinde.com.br
RECIFE	**REPRESENTAÇÕES PROINDE (NORDESTE) LTDA.**		
Address	Av. Visconde de Jequitinhonha, 209 - Sala 402 51021-190 – Recife-PE Brazil		
Telephone	+55 81 3328 6414	**General Email**	proinde.recife@proinde.com.br
FORTALEZA	**REPRESENTACOES PROINDE LTDA.** **c/o ABACUS REPRESENTAÇÕES LTDA.**		
Address	Rua Osvaldo Cruz, 01 – Sala 1408 60125-150 – Fortaleza-CE Brazil		
Telephone	+55 85 3099 4068	**General Email**	proinde.fortaleza@proinde.com.br
BELÉM	**REPRESENTAÇÕES PROINDE (BELÉM) LTDA.**		
Address	Travessa Joaquim Furtado, Quadra 314, Lote 01 – Sala 206 68447-000 – Barcarena-PA Brazil		
Telephone	+55 91 99393 4252	**General Email**	proinde.belem@proinde.com.br
MANAUS	**REPRESENTACOES PROINDE (NORTE) LTDA.**		
Address	Av. Theomario Pinta da Costa, 811 – Sala 204 69050-055 – Manaus-AM Brazil		
Telephone	+55 92 3307 0653	**General Email**	proinde.manaus@proinde.com.br

Our offices are open Mondays to Fridays from 08:30 to 12:00 and from 14:00 to 18:00. Any matter requiring attention outside office hours should be communicated through our after-hours numbers. Emails are not monitored outside office hours.

www.proinde.com.br