

CMI International Working Group in the Fair Treatment of Seafarers

QUESTIONNAIRE

Response of The Brazilian Maritime Law Association

PART I (Answers to these Questions are essential)

Question 1:

Who has responsibility for administering and enforcing maritime safety and marine pollution prevention and control in the waters under the jurisdiction of your State?

Maritime Authority has responsibility for administering, enforcing maritime safety, marine pollution prevention and control in waters under of Brazilian State. According to Brazilian law, the Maritime Authority is represented by the Director of Coasts and Ports (Diretor de Portos e Costas).

Question 2:

When maritime accidents and/or marine pollution incidents occur within the waters under the jurisdiction of your State, what process of accident investigation is legally required?

The process of accident investigation will be taken in three different spheres: administrative, civil and criminal. It is important to note that all the processes are independent and they are taken without prejudice to one

another. The Brazilian Domestic Law (Administrative, Civil and Criminal law) will be applied.

Question 3:

Do your State's maritime accident and/or marine pollution investigative processes contemplate criminal charges against any ships' personnel involved and, if so what action may be involved?

The Brazilian State legal system contemplates criminal charges applied to persons responsible in some very specific cases, as case of negligence, willful misconduct or criminal malice, for example.

Question 4:

If there is no criminal process, what other investigative process is utilized?

Administrative and civil investigative processes.

Question 5:

Does your State's investigative process permit detention of seafarers and, if so, under what circumstances and with what safeguards?

Yes, in some very specific cases of criminal process. For further information, please see reply to question 6 below.

Question 6:

If seafarers are required to be present for an investigation, trial or other hearing will they be permitted to leave your State until such investigation, trial or other hearing takes place?

In the penal sphere the answer is positive (after the seafarers' depositions to police authorities), unless there are specific circumstances to the contrary, such as when the wrongdoer is caught *in flagrante delicto* or in case of preventive detention in order to protect the collection of evidence by the police or public prosecutors.

Concerning civil sphere seafarers are prevented from leaving the country only if it is necessary to carry out an anticipated discovery with a view to preserving evidence in respect of a casualty/incident. But in normal circumstances this is achieved (by means of collection of relevant documents, deposition of seafarers, etc., in preventive judicial proceedings) in just a few days.

Finally, with regard to administrative sphere, seafarers must remain in the Brazilian territory as long as necessary for the Maritime Authority (through local Port Captaincies) to complete their inquiries on the accident. Again, normally, this is achieved also in a few days.

Question 7:

Does your State require a financial surety to ensure that seafarers return for any subsequent hearing and, if so, how is the amount of such a surety determined and what form is required?

Usually, a Term of Commitment has to be sign. Besides this, according to the case, there is a fee (not refundable) to be paid.

Question 8:

Is your State's maritime administration or other authority given legal responsibility for the protection, rights and welfare of all seafarers and, if so, how is this responsibility administered?

Yes. According to the place there will be alongside Brazilian coast an authority who represents the Director of Ports and Coasts (Diretor de Portos e Costas), who will administrate the incidents. However, Federal Police can also be involved and take the responsibility for the protection, rights and welfare of seafarers.

PART II (Answers to these Questions would be most helpful)

Question 9:

If a maritime accident resulting in serious pollution occurs in waters under the jurisdiction of your State that involves a foreign-flag vessel with a crew of different nationalities, what is the expected role of vessel crew members held responsible in the subsequent investigative process?

First, it must be noted that, as a matter of Brazilian law, the circumstance of the crew being of different nationalities is irrelevant.

Second, as pointed out in our reply to question no. 6 above, seafarers are required to provide the Brazilian authorities with the information/evidence in respect of the ship and their conduct. The time during which they may be prevented from leaving the country while collection of information/evidence is in course is set out in the response to question no. 6 as well.

Question 10:

If the accident, as outlined in Question 9, is due to negligence but not willful misconduct by responsible crew members, will your State proceed

only with pollution damage claims under the accepted international civil liability and compensation system?

No, in pollution cases, even in if the accident is due to negligence (and not to willful misconduct) proceedings in the three aforementioned spheres (civil, penal and administrative) will take place. Liability in civil and administrative spheres is a strict one, i.e., regardless of fault on the part of the wrongdoer, while penal liability in pollution cases is based on fault only.

In respect of pollution damage claims it must further be noted that only two international civil liability regimes (limitation conventions) in maritime area in force in Brazil. These are (i) the 1924 International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Vessels and (ii) the CLC/69. And, anyway, it is doubtful/controversial whether or not the limitation provisions of these two Conventions apply to environmental damage (i.e., damage to environment itself), as opposed to damage to third parties, such as fishermen, tourist activities, etc.

Question 11:

If the answer to Question 10 is ‘No’, what other processes or procedures will be undertaken by your State?

See answer to question 10.

Question 12:

If the maritime accident outlined in Question 9 occurred outside your State's Territorial Seas, although damage occurs in areas under your State's jurisdiction, would the procedures involved be different?

No, the procedures involved will be the same as applied in question nine.

Question 13:

Regardless whether your State's investigative process utilizes the criminal justice system or any other system, will the relevant vessel crew members be detained? If so:

a. What is the legal reason for such detention?

When a criminal process is taken, detentions may occur according to the situation. Brazillian Criminal Law is based on presumption of innocence and, thus, no one is subject to detention before a final judgment is issued unless caught *in flagrante delicto* or in other very specific cases (which authorizes the preventive detection).

What rights will the accused/detained crew member have during the process, and do such rights differ from those available to citizens of your State? The human rights will be assured to the accused/detained person. Basically, the rights are the same of a Brazilian citizen, such as: privilege against self-incrimination, full defense, process under adversarial system, due process of law, etc.

b. Will full reasons and/or charges be provided to those detained?

Yes, they will.

c. What is the expected length of such detention?

The flagrant detention is supposed to take ten days. But, it may change for a preventive detention. When a preventive detention is applied, it is

supposed to take, at maximum and theoretically, eighty one days. The preventive detention is supposed to take thirty days.

d. Where and how will the seafarers involved be detained?

Either civil or federal police station, according to the case.

e. What access to legal advice and/or defense will such personnel have available to them?

Basically, the person can indicate a lawyer or a public attorney will be automatically constituted.

f. Will the vessel's representatives, agents, family members, labour organization representatives or lawyers be given immediate and full access to those detained?

Not exactly. His lawyer can have this access at anytime, but other people must observe the visitors' regulations (there may be specific time for visitors).

g. Will the relevant seafarers have the legal right not to answer questions that may be considered self-incriminating, if so advised?

Yes, the accused person has the right of not responding self-incriminating questions.

Question 14:

Does your Association have any other comments, suggestions or recommendations on this subject?

No.