

## Proinde Circular 30-08-2016: ratification of notes of sea protest before the Brazilian courts

### 1. Introduction

Under Brazilian Law, a sea carrier may be exempted from liability for cargo loss or damage if an inherent vice, a fortuitous case or force majeure (Act of God) is established<sup>1</sup>.

Unlike other jurisdictions where a note of sea protest tendered by the vessel's command due to heavy weather or any other atypical occurrence produces legal effects simply by registering the document in a public notary's office, in Brazil the carrier can only invoke the occurrence of fortuity/force majeure as a valid exclusion of liability if the sea protest is ratified by the competent judicial authority<sup>2</sup>.

### 2. Material and procedural requirements

Apart from complying with the statutes of the country whose flag the vessel flies, the Master must ensure that a sea protest lodged on board and entered into the deck logbook is submitted to a competent judge at the first port of call after the event no later than 24 (twenty-four) hours after vessel's arrival, to have it ratified by the court<sup>3</sup>.

The application for court ratification of the sea protest must be filed by a qualified lawyer and accompanied by a transcript of the logbook entries and copies of the pages where such entries are found, the personal document of the Master and his witnesses, crew list, vessel's certificate of registry and, where applicable, manifest of the cargoes lost or damaged together with the identification of their consignees, noting that documents in a foreign language must be translated into Portuguese, when necessary, and foreign witnesses who do not speak Portuguese must be assisted by a sworn interpreter attending the hearing on oath. The application must be allotted urgently and sent to the judge on duty who will hear, on the same day, the Captain and a minimum of two witnesses and a maximum of four who must appear in court spontaneously without need of a subpoena<sup>4</sup>.

### 3. Court ratification

Upon the court hearing, the judge must order the calling of the cargo consignees and any other interested third party by appointing a guardian for the absentees.

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<sup>1</sup> Arts. 393 and 734 of the Brazilian Civil Code (Law No. 10,406 dated 10 Jan 2002, as amended)

<sup>2</sup> Art. 505 of the Brazilian Commercial Code (Law No. 556 dated 25 Jun 1850), establishes, in free translation: "All witnessed proceedings and protests tendered on board to prove claims, damages or any losses, must be ratified with an oath by the Captain before the competent authority of the first place where he arrives, who will question the Captain, officers and crewmembers and passengers as to the veracity of the facts and their circumstances, in light of the navigation logbook, if it has been saved"

<sup>3</sup> Art. 766 of the Brazilian Civil Procedure Code states, in free translation, that: "all sea protests entered into the navigation logbook must be submitted to a judge at the first port of call, within twenty-four hours of the arrival of the vessel, to have it ratified by the court"

<sup>4</sup> Arts. 767 and 768 of the Brazilian Civil Procedure Code

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Once the judge has satisfied himself of the veracity of the information provided by the Captain and witnesses considering the entries made in the logbook and other material evidences, the judge will ratify the note of sea protest by a ruling and the court-records will be delivered to the plaintiff (through his lawyer)<sup>5</sup>.

#### 4. Recommendations

The court ratification of sea protest does not always imply in release of carrier's liability as regards loss or damage to carried goods even if the document is duly ratified by a judge. The Brazilian courts have been scrutinising more and more accurately the statements given, particularly in respect of heavy weather protests, where the casual link between the natural phenomenon and its intensity and the damage caused. The supporting evidences, such as weather forecasts and reports, are also closely scrutinised in the course of cargo claims discussed in court.

The law obviously does not define what is a heavy weather; however, the jurisprudence has been deciding that to be rated as unforeseeable and irresistible tempest, the weather should be graded force 9 or higher in the Beaufort Scale. Therefore, it is important that the note of sea protest contains details of the circumstances and severity of the event, such as degree of rolling and pitching, wind force, sea condition, etc to prove the overwhelming phenomenon befalling the vessel.

#### 5. Conclusion

While the ratification of the note of sea protest is usually a simple, relatively cheap and effective procedure, we have seen cases where the vessel concerned effectively faced bad weather during the sea passage, but eventually could not resort to the legal exclusions simply because no protest was issued, or a protest was issued but it was not homologated by the court.

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<sup>5</sup> Arts. 769 and 770 of the Brazilian Civil Procedure Code