

WRECK REMOVAL: AN ANALYSIS BETWEEN BRAZILIAN MARITIME LAW AND THE NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF WRECKS¹

REMOÇÃO DE DESTROÇOS: UMA ANÁLISE ENTRE O DIREITO MARÍTIMO BRASILEIRO E A CONVENÇÃO INTERNACIONAL DE NAIROBI SOBRE A REMOÇÃO DE DESTROÇOS

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ABSTRACT: The present work aims to carry out a comparative analysis between the Wreck Removal Convention and Law N°. 7,542 / 1986, which deals with the same subject in Brazilian Jurisdictional Waters, emphasizing the need to ensure the prevention of the marine environment as well as the existence of risk insurance and other financial guarantees to contemplate the removal of wrecks in the face of a maritime casualty.

KEYWORDS: Removal; Wreckage; Accidents; Insurance; pollution.

RESUMO: O presente trabalho possui como objetivo realizar uma análise comparativa entre a Convenção sobre Remoção de Destroços e a Lei nº 7.542/1986, que trata do mesmo assunto em águas jurisdicionais brasileiras, ressaltando a necessidade de garantir a preservação do meio ambiente marinho e a existência de seguros de risco e outras garantias financeiras para contemplar a remoção de destroços, em face de um acidente marítimo.

PALAVRAS-CHAVE: Remoção; Destroços; Acidentes; Seguros; poluição.

1 INTRODUCTION: WRECKS IN BRAZILIAN WATERS

The pre-eminent necessity for financial supporting or a support of a convention on removal of wrecks or a fund to get removal of wrecks from emergency situation in terms of safety of navigation or vessels abandoned by the owner, as took place in the case of the AIS GIORGIS Merchant Ship and others as showed below indeed are problems that still have no regulation in the Brazilian maritime legal system, except to livestock cargos.

¹ DISCLAIMER: The present article does not represent the point of view of Brazilian Maritime Authority, but it is only an academic study of the author.

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On August 12th, 2011, the Santos newspaper *A Tribuna* reported³ at page C-6 (Porto & Mar section) that “the AIS GIORGIS ship suffered a fire aboard, culminating in its sinking, the largest accident took place at Port of Santos history on January 8th, 1974. The ship was berthed between the dock of warehouses 30 and 31 when she caught fire. The flames reached up to 50 meters high, with explosions that frightened the entire population.” In 2011, in order to widen and deepen the Santos channel, AIS GIORGIS needed to be removed with funds from the Growth Acceleration Plan (PAC), which cost R\$ 17.9 million (US\$ 4,3 million).

On June 27th, 2012, the ship SEAWIND sank in the port of Fortaleza, where it remains with no solution to the case. The ship was moored in the sheltered anchorage area of Mucuripe Port in Fortaleza, due to machine failures, labor issues and others problems since 2011. However, on June 27th, the water began to enter in the engine room through the bottom valve of the ship. Despite efforts to remove the water, the vessel sank the next day. The ship carried 4,000 tons of granite, 70 tons of IFO 100 bunker oil in its tanks and about 5 tons of oil in the ship's other facilities.”⁴

On October 06th, 2015, around 10:30 am, the NM HAIDAR tilted, submerging berthed to the quay while being loaded with livestock cargo (five thousand oxen), in the Port of Vila do Conde, municipality of Barcarena, in the Pará State, managed by the Docas do Pará Company (CDP). At that time, approximately 7,000 liters of MF380 marine oil were discharged; 90 tons of hay bales; 50 tons of rice bales and about 4,900 cattle perished in the waters of the port area, causing intense pollution that spread to the neighboring municipality of Abaetetuba. Currently, more than four year after the shipwreck, the aforesaid ship is still submerged in the Porto area, making livestock cargo exports difficult.⁵

³ HISTÓRIAS E LENDAS DE SANTOS - NAVIO SINISTRADO. Ais, ais... uma novela de 38 anos (6). (Disponível em: <http://www.novomilenio.inf.br/santos/h0080f.htm> Acesso em: 19DEZ2019).

⁴ Embaixadas da Bulgária e do Panamá poderão responder a processo por naufrágio no litoral [...] Notícia Completa: <https://tribunadoceara.com.br/noticias/cotidiano-2/embaixadas-da-bulgaria-e-do-panama-poderao-responder-a-processo-por-naufragio-no-litoral-cearense/> “The fact is that the company simply abandoned the vessel and the crew [...] Full Story: < <https://tribunadoceara.com.br/noticias/cotidiano-2/embaixadas-da-bulgaria-e-do-panama-poderao-responder-a-processo-por-naufragio-no-litoral-cearense/> Access on December 19, 2019.

⁵ Naufrágio de navio com 5 mil bois vivos em Barcarena completa um ano. Available at <<http://g1.globo.com/pa/para/noticia/2016/10/naufragio-de-navio-com-5-mil-bois-vivos-em-barcarena-completa-um-ano.html>>. Access on 30 August 2019.



Ships have a potential of pollution and creating hazards to the safety of navigation as well as to the marine environment. This fact demands strict application of the law, acts and general rules at sea, in Maritime Jurisdiction Waters.

Brazil is a country which has wide dimensions around 5.700.000 Km² solely in Brazilian waters. Moreover, with the auction of oil and gas at pre-salt area later 2019, the industry of petroleum will be returning its growing fast. It is possible to figure out the traffic of ships in the Brazilian waters will increase again and also the probability of a “Maritime Casualty” to come taking place.

2 NATIONAL LEGISLATION, SUSTAINABLE AND MARINE ENVIRONMENT PROTECTION.

2.1 Marine environment protection: duty and obligation all of society.

The Brazilian coast is very rich in fishing resources and thousands of people depend on the maritime waters as a livelihood. Likewise, Brazilian waters have an enormous diversity of marine biology such as: reefs, seaweeds, migratory routes of whales and all the areas of environmental protection. Thus, a ship that becomes a Wreck can represent a serious threat to the marine environment and the economic relation concerning fisheries activities when it is faced to a “Maritime Causality”. So, it is of the utmost importance to remove a Wreck in order to ensure safety of navigation even as to avoid damages to the marine environment and fishing resources.

The Brazilian Constitution of 1988 stressed in article 225 that: “All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.”⁶ Thus, the Government and the community have a very important responsibility to maintain a sustainable marine environment. Indeed, the fact of WRC ratification reaffirms the position of Brazil in maintaining of safety of navigation and prevention of marine environmental.

⁶ BRAZIL. Câmara dos Deputados. Constituição da República Federativa do Brasil/1988, Available at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf> Access on 19 March 2020.



2.2 Differentiated treatment to the marine environment

The Supreme Court of Brazil held that in the Brazilian Constitution there are not unconstitutional rules and, nevertheless, principles like protection of environment and economic development have to be in harmony. Thus, “the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: [...] environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes.”⁷

In spite of Brazil does not have particularly sensitive sea areas identified in accordance with the revised Guidelines for the Identification and Description of Particularly Sensitive Sea Areas, adopted by the IMO by Resolution A.982 (24), as amended. It has however a lot of sensitive sea areas in the Domestic Law that may be taken into account.

2.3 Brazilian legal devices to carry out the wreck removal

The Law 7,542, of 26th September 1986 deals with Wreck Removal in Brazil. It “provides about the research, exploration, removal and demolition of property or things sunk, sunken, stranded and lost in under national jurisdiction waters, on the ground of navy and its increased and on marginal lands as a result of accident, dumping or misfortune at the sea, and gives other matters.”⁸ However, there are gaps in the aforesaid Law on loss for abandonment, in respect to marine insurance as well as on establishing penalties for owners who refuse to comply with the Brazilian Maritime Authority (Autoridade Marítima Brasileira - AMB) determinations, especially when faced with emergency situations.

Thus, considering the owner is failing in complain the requirements established by AMB the Law allows that Authority to remove, sink or take any acts to keep maritime safety, to prevent marine pollution or to guarantee the safety of life at sea.

⁷Article 170, VI of Brazilian Constitution/1988.

⁸ BRAZIL. Planalto. Law 7,542, 26 September 1986. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7542.htm> access on 19 March 2020.



The second legal rule to mention the removal of wrecks is Law 12,815 / 2013 (New Port's Law), which evidences in article 17, paragraph 1, item VII, that "it is attribution of the organized port, called port authority: (...) to promote the removal of vessels or hulls of vessels that may hinder the waterway to access the port". In other words, the Port Authority (Autoridade Portuária - AP) has the subsidiary burden of removing only vessels or hulls that may impair the access to the port. Thus, even if casualty occurs within the port area, but does not affect access to the port, the responsibility for providing safety navigation and pollution prevention belong the AMB, however the liability to removal of the wrecks keeps to the ownerships whose cases in some circumstances have no maritime insurance or financial security to remove their properties or goods.

Article 2º of Law 7,542/1986 combined with article 4º, VII of Law 9,537/1997 ensure to AMB attributions to establish rules about wreck removal in domestic law in order to deal with administrative matters in respect of marine environment protection. So, the Maritime Authority has drafted the NORMAM 10/DPC, which has as purpose to "establish standards and procedures for authorization of resource, removal, demolition or exploration of property belonging to third parties or the Union and the tourism underwater archaeological sites incorporated into the domain of the Union."⁹

Furthermore, it is important to note that the AMB has three powers given by Law 9,537/1997 which are to safeguard life at the sea, to ensure safety navigation and protection of marine environment by pollution of ships, platforms and its installation supplies. There are also other subsidiary functions. Therefore, the implementation of WRC would be carried out by AMB.

Notwithstanding, the Brazilian domestic law, through Law 9,605/1998, that regulates "Environment Crimes", has embodied a classification in article 54 that covers some situations like "Maritime Causality" and hence of a Wreck, especially when there are "pollution of any kind at levels that result or may result in damage to human health, or which cause the death of animals or significant destruction of flora", having as a consequence the occurrence pollution by release

⁹ BRAZIL. Diretoria de Portos e Costas. Norma da Autoridade Marítima 10/DPC, Available at: <https://www.marinha.mil.br/dpc/sites/www.marinha.mil.br.dpc/files/normam10_0.pdf> access on 19 March 2020.



of “solid, liquid or gaseous, or debris, oil or oily substances, in violation of the requirements established in laws or regulations.”. For all these reasons, the agents (master, owner, and so on) can be convicted to an imprisonment from one to five years.

Other important feature to take note is that some subject matters should be included into the Law 7,542/1986 because WRC contains some issues concerning the administrative, civil, maritime law and, *prima facie*, provides more powers to AMB such as loss of goods and materials and removal of wreck into Exclusive Economic Zone (EEZ) of “Affected State”.

In conclusion, it is possible to note and to have in mind that Brazil has a complete legislation on removal of wrecks and the internalization of International Convention on Removal of Wrecks (WRC) would be in perfect harmony to Brazilian domestic law as we can see along this paper.

2.4 International Commitments

Brazil has ratified important conventions concerning the environment protection, in view of the great importance that it has been given to these matters, for instance: Declaration of the United Nations Conference on the Human Environment, 1972, United Nations Convention on the Law of the Sea, 1982 (UNCLOS)¹⁰, The Rio Declaration on Environment and Development (1992)¹¹ and many important conventions on marine protections, but in respect to limitation on liability Brazil has been keeping out of date holding Conventions like Brussels Convention of 25 August 1924 (limitation on liability of shipowners) and CLC/1969 (International Convention on Civil Liability for Oil Pollution Damage, 1969).

3 WRECK: THREAT TO THE MARINE ENVIRONMENT AND NAVIGATION SAFETY.

3.1 What is Wreck?

The Nairobi International Convention on Removal of Wrecks (WRC) is a Convention drafted by the International Maritime Organization (IMO), adopted by a diplomatic conference

¹⁰BRAZIL. United Nations Convention on the Law of the Sea was adopted in 1982, Montego bay, ratified under Decree 99.165, 12 march 1990, published by Official Diary of Union on 13 march 1990.

¹¹BRAZIL. Rio Declaration on Environment and Development 1992, Ratified by Decree 2.519, 16 march 1998, published by Official Diary of Union on 17 march 1998.



held in Kenya, in 2007, and has the main aim the safe removal of wrecks to ensure safety of navigation and lives at sea, goods and property, as well as the protection of marine environment. Thus, WRC, in article 1 (2), states that Ship “means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.”

Wreck includes maritime casualties and it has as a result, pursuant article 1 (4): “a) a sunken or stranded ship; or (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or (d) a ship that is about, or may reasonably be expected to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.”¹²

3.2 When a ship becomes a wreck?

3.2.1 - Wreck in accordance to WRC

WRC is concerned with the risk to maritime navigation and the protection of environment. In that circumstance the owner shall be obliged to remove the wreck. In practice, two considerations: first, the owners Hull and Machinery and P&I cover the removal of wrecks in most of cases on strandings which results in a wreck. Second, according to Brazilian law, only ships that endanger the safety of navigation, the prevention of pollution and the safeguarding of human life at sea should be removed.¹³

The Brazilian Maritime Authority (Brazilian Navy) rules have stressed in item 0408, paragraph **b** - EMBARCAÇÕES ABANDONADAS (Abandoned Ships), NORMAM 08/DPC about wreck removal that:

¹² BRAZIL. Comissão Coordenadora dos Assuntos da Organização Marítima Internacional. **The Nairobi International Convention on the Removal of Wrecks adopted Nairobi**, adopted by a diplomatic conference held in Kenya in 2007, 18 May 2007. Available at: <https://www.ccaimo.mar.mil.br/sites/default/files/conv_wrc.pdf> Access on 10 March 2020.

¹³KEPPLERUS, Katarina, The Importance of Solving Legal Problems Regarding Wrecks – Risks Posed by Dangerous Wrecks in Swedish Waters, p. 11. Available at: <http://www.sjofartsverket.se/upload/vrakutredning/Bil.3.%20The%20importance%20of%20solving%20legal%20problems%20regarding%20wrecks_Katarina%20Kepplerus.pdf> access on 19 March 2020.



Initially, a survey for ascertaining the ownership of the ship and the owner or its operator among others shall be compelled to make their removal and / or demolition when he is known. If the owner expressly declares his resignation to the property or does not express an interest in making their removal and / or demolition, the goods will be considered lost and incorporated into the domain of the Union (Federal Government). In the event the ship came to be considered a risk to navigation, threat of harm to others or the environment, unless the owner meets the stipulations of the CP (Captaincy) / DL (Delegacy) / AG (Agency) which will require the Naval District instructions for solving the problem.¹⁴

In addition, in accordance with article 1 paragraph 4 of WRC, cited above, there is a new and broader concept of wreck than Brazilian legislation.

Moreover, the WRC does not apply to “war ships or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.”¹⁵

4 WHY TO RATIFY WRECK REMOVAL CONVENTION

4.1 How is the Wreck Removal Convention in practice?¹⁶

Initially, the responsibility to remove a wreck belongs to the registered owner¹⁷. This involves prevention, mitigation or elimination of the hazard created. If the Affected State determines that a wreck constitutes a hazard in accordance with the criteria described by WRC¹⁸, that State shall immediately inform the Flag State and the registered owner¹⁹ and shall establish a reasonable deadline to the owner to remove the wreck²⁰. If the deadline was not attempted by the owner, the Affected State may remove the wreck at the registered owner’s expense.²¹ Then the

¹⁴ BRAZIL. Diretoria de Portos e Costas. Norma da Autoridade Marítima Brasileira Nº 08/DPC, Available at: <https://www.marinha.mil.br/dpc/sites/www.marinha.mil.br.dpc/files/NORMAM-08_DPCRev1Mod%2011.pdf> access on 10 March 2020.

¹⁵ Article 4, paragraph 2.

¹⁶ Boer, Jan E. de, CMI Yearbook 2007-2008, **The Nairobi Perspective: Nairobi International Convention on the Removal of Wreck**, p. 336.

¹⁷ Article 9, paragraph 2.

¹⁸ Article 6.

¹⁹ Article 9, paragraph 1 (a).

²⁰ Article 9, paragraph 6 (a).

²¹ Article 9, paragraph 6 (b).



Affected State will carry out the measures reasonably necessary to remove such wreck, which poses a hazard and will cease to be, as soon as the wreck has been removed.²² Moreover, the State Party will determine that the owner gives full information to the Affected State²³ concerning the wreck. Afterwards, at the registered owner's expense, the Affected State will provide the location and marking.²⁴ Lastly, "nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, as amended."²⁵

Furthermore, Brazilian Law 7,542/1986 addresses the issues expressing:

Art 10. The Maritime Authority may undertake the operations of research, exploration, removal or demolition of the things or goods (properties) referred to in article 1 of this law, at the account and risk of the person in charge, if he has not provided or managed to carry out these operations within the established legal deadlines.

Art 11. The Maritime Authority shall determine that the person in charge, before initiating the requested or determined research, exploration, removal or demolition, of the things or goods (properties) referred to in art. 1 of this law immediately and preliminarily adopt measures to prevent, reduce or control the risks or damages to the safety of navigation, to third parties and to the environment.

§ 1 The determined measures must consist of:

I - in the maintenance, if possible, on board, or in a place close to the vessel the Commander or an Officer or a Crew member; and

II - in the demarcation or signaling of things or goods.

§ 2 In the absence of immediate compliance with such measures, or when it is impracticable or there is no time to summon the person in charge, the Maritime Authority may adopt measures at the account and risk of the person in charge.

4.2 Legal basis for State Party application of the Convention

First of all, the coastal states have sovereignty to apply their domestic law for removing the wreck that constitutes a hazardous to the environment and safety of navigation in accordance with article 2 of UNCLOS. However, the UNCLOS and Intervention Convention/1989 only make mention to the measures for avoiding damages to their coast line that may occur from maritime causality. Now, without to import in "exercise sovereignty or sovereign rights over any

²² Article 2, paragraph 3.

²³ Article 5.

²⁴ Article 10, paragraph 1.

²⁵ Article 10, paragraph 2.



part of the high seas”²⁶, the States can take actions to implement measures for the removal of any wreck that imply on hazards to the marine environment and safety of navigation.

4.3 Objectives and general principles

In accordance to article 2, the central idea is: to remove a wreck which poses a hazard in the Convention area, by State party, taking into account that the measures to do that should be proportional to the hazard and “such measures shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed”. However, the aforesaid measures should not “unnecessarily interfere with the rights and interests of other States.”

The second principle is co-operation that should be adopted for contracting parties before maritime casualty. In that point of view, there could exist bilateral agreements²⁷ to ensure the safety of navigation, preventing marine pollution as well as the investigation of casualty I order to facilitate all services accomplished in the matter. The co-operation should be one hand of double way.

The article 2 will give context to the other principles that are described in later articles in the convention. Reasonableness and proportional measures necessary to remove the hazard are important tenets and they apply to the owner, insurer and State. It is according to Brazilian law (article 5, *caput*, Law 7,542/1986).

4.4 Scope of Application

4.4.1 – Geographical Limits

According to article 3, paragraph 2, the geographical limits of article 1 (1) of the WRC, that involves the definition of “Convention area”, may be extended and also applied to the territorial and territorial sea of State Party when there are wrecks located within the Convention area, that means:

“Convention area” means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an

²⁶ Article 2, paragraph 4.

²⁷ Find out in SOHN, Louis B. at All. Law of the Sea in a Nutshell. 2 ed. USA: West Publishing, 2010, p. 78-79.



area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

Inter Alia, when a State Party opts to extend the geographical limits to the territorial and territorial sea in terms of article 3 (2) will be applied the exceptions of article 4 (4) to the territory, including the territorial sea. Article 3 (2) is known as the ‘opt-in clause’²⁸. On the other hand, WRC is a significant document to Brazil because covers all the Exclusive Economic Zone (EEZ), mainly, its continental shelf which has many shallow waters.²⁹

It is important to highlight that WRC does not have its own regime of limitation it takes into account the Convention on Limitation of Liability for Maritime Claims, 1976, LLMC/1976. Thus, the value of removal of wrecks in internal waters may be high and limitation of liability of registered owner may not be enough to carry out the services of aforesaid removal.

4.4.2 – Navigational and Environmental risks are added.

Article 1 (5) covers the risk of safety navigation and environment when lay down to the hazardous definition the threat of danger or impediment of navigation or harmful consequences to the marine environment. In this respect, the WRC complements the article 221 of UNCLOS taking into account the risk of safety navigation and environment.

In addition, Brazil has ratified the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, and International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended (CLC/69), for these reasons in accordance to articles 4 and 11, paragraph 1 (a), there are no possibilities of overlapping and conflict among WRC and the aforesaid Conventions, then will not be necessary to exclude clauses.

²⁸ Martínez Gutiérrez, N.A., *Limitation of Liability in International Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, London and New York: Routledge Taylor & Francis Group, 2011, p. 171.

²⁹ For example the STELLAR BANNER (JUN/2020) case, a ship stranded around 20 miles of Brazilian coast in a sand bank.



4.4.3 – Platforms and objects drifting are included therein

Platforms are included in definition of ship. It is important to Brazil because its maritime zones encompass a great number of platforms³⁰ and now a compulsory insurance can cover a possible removal of wreck in EEZ taking into account there exist many hereof working in shallow waters. Moreover, special attention needs to be given to the “any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea”³¹ that also can be dealt with removal of wreck.

4.5 Exclusions

Pursuant article 4, this Convention shall not apply:

a) Before Intervention Convention;

b) to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless Brazil wants to be bound by Convention when then will notify “the Secretary-General, thereof, specifying the terms and conditions of such application”.

c) If Brazil opts to apply the WRC in its territorial and territorial sea, it will be exempt for:

i) Article 2, paragraph 4;

ii) Article 9, paragraphs 1, 5, 7, 8, 9 and 10; and

iii) Article 15.

iv) In respect to the Article 9, paragraph 4, to attain the limitation therein.

4.6 Reporting Wrecks

Article 5 deals with “Reporting Wrecks”. It is a very important information that should be given after the accident in order to restrict the area for ensuring safety of navigation and to response a marine pollution damage avoiding overall other accidents. However, this report should

³⁰ Article 1, paragraph 2.

³¹ Article 1, paragraph 4



be made by the master or the operator of the ship only after the flag State authorizes. In this respect the WRC was not good, different from MARPOL and OPRC/90, that Brazil has ratified, whose report shall be made immediately after the accident to the coastal state affected. The report of wrecks shall contain, for instance: the precise location of the wreck, the type, size and construction of the wreck, the nature of the damage to, and the condition of, the wreck, etc.

Concerning marine pollution cases, the Law 9,966/2000 shows that:

Art. 22. Taking place any incident in organized ports, port facilities, pipelines, ships, platforms and their support facilities, which may cause water pollution under national jurisdiction, it must be **immediately reported** to the competent environmental agency, the Maritime Authority and the regulator of the oil industry, regardless of the measures taken to control it. (Underlined)

The communication should be realized in accordance to annex 2 of Decree 4,136/2002 specifying among other information: Identification of the ship or facility that originated the incident; Date and time of the first observation; Estimated date and time of the Incident; Geographical location of the incident. And also to implement the obligations asserted in article 11(1), II of Law 7,542/1986 is dealt with at item 0314 of NORMAM 17/DHN³².

4.7 Determination of hazard

Article 6 creates important criteria for the determination of the hazard that should be taken into account by the Affected State in order to grant more precision in the information, for example: the type, size and construction of the wreck, depth of the water in the area, tidal range and currents in the area, etc.

4.8 Locating wrecks

In accordance to article 7 of WRC, thereafter an accident Brazil has to report the nature and location of the wreck as a matter of urgency. This service has been made by the Navigational Radio-Warnings from Brazilian Navy and consists of “messages transmitted to vessels for the purpose of providing "urgent information" relevant to safe navigation, in compliance with the

³² BRAZIL. Diretoria de Hidrografia e Navegação. NORMAS DA AUTORIDADE MARÍTIMA PARA AUXÍLIOS À NAVEGAÇÃO NORMAM-17/DHN Available at: <<https://www.marinha.mil.br/dhn/sites/www.marinha.mil.br/dhn/files/normam/NORMAM-17%20%28REV.4%29.pdf>> Access on 20 March 2020.



provisions of Rule 4 of Chapter V of SOLAS(1974).” Chapter V of NORMAM 28/DHN³³ deals with important obligation of SOLAS Convention.

4.9 Marking of wrecks

In respect to the article 8, which deals with “Marking of wrecks”, the affected State should mark the Wreck with internationally accepted system of signals, including the marking in appropriate nautical publications. This service is also made by Brazilian Navy named "Warnings to Mariners" that are periodical publications issued in the form of leaflets, with the main purpose of providing mariners and general users with information destined to update nautical charts and publications in Brazil, according to the recommendations in Rule 9 of Chapter V of the International Convention for the Safety of Life at Sea (SOLAS/74).³⁴ Such subject matter is dealt with at item 0314 of NORMAM 17/DHN³⁵.

4.10 Measures to facilitate the removal of wrecks

Pursuant article 9 of WRC, the Affected State shall inform the State of registry of the ship and shall consult this State in regarding to the measures to be carried out to remove the wreck. This removal should be made with the expenses of the registered owner that shall provide to the competent authority (affected State), the evidence of insurance or other financial security. This article is very important because the dialogue is realized between the authorities of the involved States involved.

There is freedom of choice for the owner to contract any “salvor” but before the removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety of navigation and protection of the marine environment. However, the Affected State

³³ BRAZIL. Diretoria de Hidrografia e Navegação. NORMAS DA AUTORIDADE MARÍTIMA PARA NAVEGAÇÃO E CARTAS NÁUTICAS NORMAM 28 / DHN Available at: <https://www.marinha.mil.br/dhn/sites/www.marinha.mil.br.dhn/files/normam/normam_28.pdf> Access on 20 March 2020.

³⁴ Diretoria de Hidrografia e Navegação, *op. cit.*

³⁵ BRAZIL. Diretoria de Hidrografia e Navegação. NORMAS DA AUTORIDADE MARÍTIMA PARA AUXÍLIOS À NAVEGAÇÃO NORMAM-17/DHN Available at: <<https://www.marinha.mil.br/dhn/sites/www.marinha.mil.br.dhn/files/normam/NORMAM-17%20%28REV.4%29.pdf>> Access on 20 March 2020.



may intervene in the removal, in order to ensure safety and protection to the marine environment, to establish a deadline for the removal of the wreck or also the Affected State may remove the wreck making the owner pay for the expenses when such owner does not meet requirements on standards of maritime authority. Indeed, such requirements are established in article 5 of Law 7,542/1986, NORMAM 10/DPC and NORMAM 16/DPC.

The salvage master should present a plan as required by NORMAM as soon as possible, principally, when there are oil and other substances onboard such ship in the imminence to be spilled.

4.11 Owner Liability

The International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, 1924³⁶, was ratified by Brazil and it is the most important law enforced in this respect in Brazilian domestic law. It is important to highlight that this Convention set out the limit of liability of “the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of: [...] (5) Any obligation to remove the wreck of a sunken vessel, and any obligations connected therewith;”³⁷ in amount of that “shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.”³⁸

In our opinion, there is no reason to Brazil staying binded to 1924 Convention. The LLMC has a limit to WRC upper to 1924 Convention. So we understood that denunciation of mentioned convention of 1924 should be pursued.

In the Nairobi Convention, the liability of the owner is dealt with articles 7, 8, 9, 10 and 11. Article 5 should be included because the precise and immediate information concerning the wreck must be given with urgency. Some of these liabilities were dealt with item 4.1 of this paper and they are:

³⁶ BRAZIL. Planalto. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, 1924, adopted in Brussels on 25 August 1924, Ratified by Brazil and enforced by Decree nº 350, of 1º October de 1935. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/D350.htm> Access on 20 March 2020.

³⁷ International Convention for the Unification (...), *op cit*, article 1 paragraph 5.

³⁸ *Idem*, article 1, last paragraph.



- a) Reporting wrecks (article 5);
- b) Locating, marking and removing the wreck (article 7, 8 and 9);
- c) All duties and responsibilities established under the International Safety Management Code, as amended (article 1, paragraph 9); and
- d) Maintain insurance or other financial security (article 12, paragraph 1)

On the other hand, the owner will be exempted of liability if he proves that:

- a) Resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
- b) Was wholly caused by an act or omission done with intent to cause damage by a third party; or
- c) Was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

4.12 Exceptions to liability

The registered owner shall not be liable under this Convention for the costs mentioned in article 10, paragraph 1, if, and to the extent that, liability for such costs would be in conflict with other Conventions dealing with Liability (CLC/69 as amended, HNS/1996 as amended, etc.). The proposal to join the CLC/1992 by accession was forwarded to the Ministry of Foreign Affairs, according to the Navy Office, on 22 January of 2021.

In addition, the Salvage Convention is applicable to national law, and such law or convention shall apply to questions regarding the remuneration or compensation payable to salvors to the exclusion of the rules of WRC.

4.13 Compulsory Insurance or other financial security

According article 12 (1), the registered owner of a ship of 300 gross tonnage and above shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution, to cover liability under this Convention in an amount equal to the limits of liability under the applicable national or international limitation regime not exceeding the limits of article 6 (1) (b) of the LLMC/1976, as amended. “This provision, which has the effect of



limiting the insurer's liability, was introduced due to the fact that many States have exercised the right of reservation under the article 18 of LLMC Convention removing the right to limit in respect of wreck removal expenses. It was felt that, the Convention would require shipowners to maintain insurance for unknown amounts, and that it was unlikely that P&I Clubs would be able to provide such cover.”³⁹

It is important to highlight that “any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability.”

It is important to note that the compulsory insurance established in the WRC goes beyond normal insurance. P&I Clubs, mainly the members of the International Group, are the main insurers and in the context of the Convention as well as are responsible for issuing blue cards. In this respect, Claimants have a right of recourse directly to the insurer or security provider and they may file for suit against the provider in order to fulfill their obligation. In this regard, P&I have no defense. This is one of the great advantages of the Convention.

On the other hand, P&I that operate fixed premium insurance generally have several exception clauses, and, before a court, may get successful in their defense. In this sense, it is recommended that the IMO Circular Letter 3,364/2014 should be applied, in order to demand the documents contained in item 2 hereof.

Another important point is the fact that States Parties have an obligation in not permitting any ship entitled to fly its flag to operate without insurance or other financial security at any time unless a certificate has been issued under article 12, paragraphs 2 or 14.

4.14 Time limits

Article 13 of WRC states that in three years from the date of declaration of the wreck will prescribe the right to recover the costs spent to removal of aforesaid wreck and in six years where the maritime casualty consists a series of occurrences.

³⁹ Idem, p. 174.



4.15 Settlement of disputes

According to article 15, the States in dispute should look for a solution to this issue “in the first instance, through negotiation, enquiry, mediation, conciliation, arbitration,⁴⁰ judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.”

If there is no judicial settlement in the lapse of a year, it will be applied Part XV of UNCLOS and the declaration made under paragraphs 3 and 4, of article 15 of WRC shall be deposited with the Secretary-General, who shall transmit copies thereof to the States Parties.

4.16 Entry into force

The Convention shall enter into force twelve months following the date on which ten States have ratified itself. Nonetheless, WRC entered enforce on 14/04/2015, it has 48 State Parties and 73.62 % World Tonnage.

5 CONCLUSIONS

Currently, as an example of wreck removal took place in Paranaguá State of Santa Catarina at the Terminal Catalina is the Vicuña Case. The ship a VLCC exploded when it was loading at the Terminal and sunk in the same place. The ship was removed by Britania P&I Club as well as all measures to response the oil spilled of that ship. The amount of all indemnity was around R\$ 95 millions (US\$ 19 millions in 22/03/2020).

Furthermore, it is important to address that although the WRC does not provide the State Part with additional powers to order removal of wrecks, it ensures that the shipowner must have adequate insurance to cover the cost of aforesaid removal. Indeed, such WRC obligation goes in the same way established by Brazilian domestic law requirements to ships calling at Brazilian ports in respect to have P&I coverage with a solid insurer such as a member of International Group of P&I or a bank financing at the same level.

⁴⁰ Find out in CAMACHO, Wellington Nogueira. **Direito da Arbitragem Marítima**. Rio de Janeiro: Progresso, 2019, p. 123-153.



Thus, in order to ensure an effective control of maritime zones in respect to the safety of navigation and the protection of marine environment mainly on removal of wrecks, there is no contrast between removal of wrecks convention and the Laws 7,542/1986; 9,537/1997 and NORMAM 08/DPC; NORMAM 10/DPC and NORMAM 16/DPC.

Brazil has been working widely to maintain the safety of navigation and protection of marine environment and has ratified important Conventions drafted by IMO.

6 BIBLIOGRAPHY

BOER, Jan E. de, CMI Yearbook 2007-2008, **The Nairobi Perspective: Nairobi International Convention on the Removal of Wreck**, p. 336.

BRAZIL. Câmara dos Deputados. Constituição da República Federativa do Brasil/1988, Available at: <http://www.stf.jus.br/repositorio/cms/portaStfInternacional/portaStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf> Access on 19 March 2020.

_____. Câmara dos Deputados. United Nations Convention on the Law of the Sea was adopted in 1982, Montego bay, ratified under Decree 99.165, 12 march 1990, published by Official Diary of Union on 13 march 1990. Available at <<https://www2.camara.leg.br/legin/fed/decret/1990/decreto-99165-12-marco-1990-328535-publicacaooriginal-1-pe.html>> Access on 20 March 2020.

_____. Câmara dos Deputados. Law 9.966, 28 April 2000, published by Union Official Diary on 29 April 2000. Available at: <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=150248> Access: 23 March 2020.

_____. Comissão Coordenadora dos Assuntos da Organização Marítima Internacional. The Nairobi International Convention on the Removal of Wrecks adopted Nairobi, adopted by a diplomatic conference held in Kenya in 2007, 18 May 2007. Available at: <https://www.ccaimo.mar.mil.br/sites/default/files/conv_wrc.pdf> Access on 10 March 2020.

_____. Comissão Coordenadora dos Assuntos da Organização Marítima Internacional. International Convention on Oil Pollution Preparedness, Response And Co-Operation, 1990, Adoption: 30 November 1990; Entry into force: 13 May 1995. <<https://www.ccaimo.mar.mil.br/codigos-e-convencoes/convencoes/oprc>> 14 January 2020.

_____. Diretoria de Portos e Costas. Norma da Autoridade Marítima 10/DPC, Available at: <https://www.marinha.mil.br/dpc/sites/www.marinha.mil.br.dpc/files/normam10_0.pdf> access on 19 March 2020.

_____. Diretoria de Hidrografia e Navegação. NORMAS DA AUTORIDADE MARÍTIMA PARA AUXÍLIOS À NAVEGAÇÃO NORMAM-17/DHN Available at:



<<https://www.marinha.mil.br/dhn/sites/www.marinha.mil.br.dhn/files/normam/NORMAM-17%20%28REV.4%29.pdf>> Access on 20 March 2020.

_____. Diretoria de Hidrografia e Navegação. NORMAS DA AUTORIDADE MARÍTIMA PARA NAVEGAÇÃO E CARTAS NAÚTICAS NORMAM 28 / DHN Available at: <https://www.marinha.mil.br/dhn/sites/www.marinha.mil.br.dhn/files/normam/normam_28.pdf> Access on 20 March 2020.

_____. Ministério do Meio Ambiente. Rio Declaration on Environment and Development 1992, Ratified by Decree 2.519, 16 march 1998, published by Official Diary of Union on 17 march 1998. Available at: <https://www.mma.gov.br/estruturas/conabio/_arquivos/dec2519_98conabio.pdf> Access on 23 March 2020.

_____. Planalto. Law 7.542, 26 September 1986. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7542.htm> access on 19 March 2020.

_____. Planalto. International Convention for the Prevention of Pollution from Ships (MARPOL). Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II). Ratified by Brazil under Decree 1530, 22 June 1995.

_____. Planalto. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, 1924, adopted in Brussels on 25 August 1924, Ratified by Brazil and enforced by Decree nº 350, of 1º October de 1935. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/D350.htm> Access on 20 March 2020.

CAMACHO, Wellington Nogueira. **Direito da Arbitragem Marítima**. Rio de Janeiro: Progresso, 2019.

EUROPE COMMISSION. **Report on liability and compensation for financial damages sustained by places of refuge when accommodating a ship in need of assistance**. available at: <[https://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0715/COM_COM\(2012\)0715_EN.pdf](https://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0715/COM_COM(2012)0715_EN.pdf)> Access on March 22, 2020.

MARTÍNEZ Gutiérrez, N.A., **Limitation of Liability in International Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes**, London and New York: Routledge Taylor & Francis Group, 2011.

KEPPLERUS, Katarina, **The Importance of Solving Legal Problems Regarding Wrecks - Risks Posed by Dangerous Wrecks in Swedish Waters**, http://www.sjofartsverket.se/upload/vrakutredning/Bil.3.%20The%20importance%20of%20solving%20legal%20problems%20regarding%20wrecks_Katarina%20Kepplerus.pdf 15 December 2019.

SOHN, Louis B. at All. **Law of the Sea in a Nutshell**. 2 ed. USA: West Publishing, 2010, p. 78-79.

