

## SEAFARER SUBJECT GUIDE

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### USING LAWYERS IN BRAZIL

This Guide deals in general terms with using lawyers in Brazil. It aims to help a seafarer understand the legal profession in Brazil, and how to select, engage, and if need be, change his lawyer. This Guide does not, however, constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practice in Brazil.

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#### 1. What is the structure of the legal profession?

- 1.1 The legal profession is operated by attorneys. Attorneys work as sole practitioners or as part of a law firm ('private attorneys').
- 1.2 The Brazilian government also employs attorneys: (a) to represent the government in cases in which it has a part ('government attorneys'); and (b) to provide legal aid to citizens who are unable to afford their own attorneys ('public attorneys'). Government attorneys and public attorneys are hired by the government by means of public examinations for a full-time job.
- 1.3 When in need of legal assistance, a seafarer should engage a private or a public attorney. These attorneys can advise on any legal matter, including criminal and civil law matters. Regardless of seniority they can appear in any Court of Justice, even before the Superior Court of Justice (the highest court for non-constitutional matters) and the Supreme Court (the highest court for constitutional matters).

#### 2. How is the legal profession regulated?

- 2.1 Attorneys are regulated by the Ordem dos Advogados do Brasil ('OAB'), the Brazilian Bar. The OAB was established by Law No. 8906 of 4 July 1994. This Law also prescribes the main rules of conduct that attorneys must comply with. In addition to Law No. 8906/1994, attorneys are also bound by a strict Code of Ethics. Failure to comply with Law No. 8906/1994 or the Code of Ethics may result in penalties.
- 2.2 All attorneys must be registered with the state branch of the OAB and licensed to practise law within the Brazilian territory.

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### 3. How can a seafarer find a lawyer?

- 3.1 There are several ways in which a seafarer may find an attorney. If he is able to afford his own private attorney, he may find one at 'Who is Who Legal' (<http://www.whoswholegal.com/>) (website in English) or at 'Chambers and Partners' (<http://www.chambersandpartners.com/Latin-America>) (website in English). The OAB also has a list of attorneys, but this list is not based on the reputation of the lawyers and is not available online. However, a seafarer may check whether his attorney is in good standing with the Bar association at <http://cna.oab.org.br/> (website in Portuguese).
- 3.2 If a seafarer is unable to afford his own private attorney, he may request assistance from a public attorney (see below).
- 3.3 If a seafarer faces an investigation by the police or the Brazilian Maritime Authority (<https://www.dpc.mar.mil.br/pagina.html>) (website in Portuguese) concerning a marine accident or incident, the seafarer should appoint a criminal attorney. Certain specialist maritime law firms have suitably qualified criminal attorneys in their firms.
- 3.4 A seafarer's trade union may be able to recommend a suitable attorney, or the union may appoint an attorney on behalf of the seafarer. If the marine accident or incident concerns the operation of a ship, the ship owner's attorney may be able to represent the seafarer, provided there is no conflict of interest.

### 4. On what terms can a seafarer engage a lawyer?

- 4.1 The basic terms on which a seafarer can engage an attorney are released by the state branch of the OAB. Each state has its own rules. But all the rules basically provide that lawyers should enter into contracts prior to engaging in any activity. Although it is not necessary to set out the terms of the engagement in a contract, it is considered highly advisable to do so.
- 4.2 The contract should indicate the basic terms of the arrangement, including (a) the purpose of the engagement; (b) the scope of work of the attorney, including specific provisions to indicate whether the attorney is only being hired to deal with the matter in the first instance or until the case is over; and (c) the fees that will be charged for the work performed and the payment of disbursements.

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### 5. How will a seafarer be charged fees by his lawyer?

- 5.1 Attorneys normally charge a fixed fee that is established in view of the work to be performed. Contingency fees are also very common. Some law firms tend to charge by the hour. In this case, the hourly rates vary according to the seniority of the attorney working for the seafarer and the reputation of the law firm. The complexity of the matter may influence the number of hours needed to perform a given job.
- 5.2 The minimum fee that an attorney is allowed to charge for any given measure is established by the state branch of the OAB. Attorneys are bound to follow such rules, but the fee structures variable.
- 5.3 In addition, attorneys will charge for any disbursements they incur on behalf of the seafarer, such as court fees and fees for professional experts that they may instruct such as medical experts in personal injury claims.
- 5.4 It is important to note that, in addition to the fees of his own attorney, a seafarer in a civil case may have to pay the fees of the other party's attorney, in the event that he loses the case. The fees will be arbitrated by the judge and may vary from 10% to 20% of the value that is being discussed in the case. The defeated party also has to pay the court's costs.

### 6. Can a seafarer get legal aid in a criminal case?

- 6.1 Regardless of his nationality, a seafarer may get legal aid from public attorneys in criminal cases, if he is unable to afford his own attorney without jeopardising his own or his family's livelihood. Under Law No. 1060/1950, a seafarer in such a situation is not required to pay the fees of the other party's attorney or the court's costs. The seafarer may be granted legal aid by stating that he is unable to afford his own attorney. However, if this statement is proved to be misleading, he will have to pay ten times the court's costs. The law does not provide for clear-cut parameters and generally public attorneys have some discretion to request documents attesting that a seafarer is unable to afford his own attorney without jeopardising his own or his family's livelihood.
- 6.2 If the seafarer can afford an attorney, he can still be granted legal aid in order not to pay the fees of the other party's attorney or the court's costs.

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### 7. Can a seafarer get legal aid in a civil case?

- 7.1 Regardless of his nationality, a seafarer may get legal aid from public attorneys in civil cases, if he is unable to afford his own attorney without jeopardising his own or his family's livelihood. Under Law No. 1060/1950 a seafarer in such a situation is not required to pay the fees of the other party's attorney or the court's costs. The seafarer may be granted legal aid by stating that he is unable to afford his own attorney. However, if this statement is proved to be misleading, he will have to pay ten times the court's costs. The law does not provide for clear-cut parameters and generally public attorneys have some discretion to request documents attesting that a seafarer is unable to afford his own attorney without jeopardising his own or his family's livelihood.
- 7.2 If the seafarer can afford an attorney, he can still be granted legal aid in order not to pay the fees of the other party's attorney or the court's costs.

### 8. Can a seafarer get any other free legal advice?

- 8.1 Most university law schools have centers that provide free legal advice to people in need. If the seafarer prefers not to contact a public attorney, he may search for a university and inquire if the university has such a center. In this case, the attorney is treated as a private attorney.
- 8.2 There is no legislation which provides for an official to adjudicate free of charge any dispute between a seafarer and the ship owners.

### 9. Can a seafarer sue his lawyer?

- 9.1 A seafarer may sue his attorney if he has acted with gross negligence in, for example, failing to pursue the proceedings on behalf of the seafarer on a timely basis. If an attorney misses a deadline to file a reply or an appeal, for example, the seafarer may sue his attorney.
- 9.2 In civil cases, generally such lawsuits are handled under the so-called 'theory of the chance missed' and the courts will review the likelihood of a ruling in favour of the seafarer and grant him damages for the chance he missed of having a favourable ruling.

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9.3 In criminal cases, the seafarer generally has a number of opportunities to amend the mistake of his attorney and the courts will still consider his pleas in search of the material truth.

### **10. How can a seafarer complain about his lawyer?**

10.1 If the seafarer is dissatisfied with the service of the attorney who represents him, the seafarer should report the complaint to the state branch of the OAB. The complaint may be quite simple, without formality, and must be filed before the state branch of the OAB. It is not possible to file a complaint online.

10.2 After the complaint is filed, each state branch of the OAB will follow its own procedure, but ultimately the case will be tried by the Ethics Tribunal of the OAB. The Ethics Tribunal may impose several sanctions on the attorney, including disbarment. The attorney will be allowed to present his full defence.

10.3 It should be noted that the Ethics Tribunal may not award damages to the seafarer. If the seafarer seeks damages, he must engage another attorney and file a lawsuit.

10.4 The seafarer may also engage a new attorney at any time, both to deal with the matter and to file a lawsuit against his former attorney.

### **11. How can a seafarer change his lawyer?**

11.1 A seafarer may terminate the services of his attorney at any time and appoint a new attorney. The seafarer's previous attorney is mandated to render all documents in his possession relating to the matter to the new attorney. The previous attorney has no lien for unpaid fees and he may suffer sanctions (including criminal sanctions) in the event that he retains the seafarer's. However, the seafarer is still required to pay the fees for the work performed and the previous attorney may sue the seafarer in case of default.

11.2 The seafarer should bear in mind that changing attorneys could involve delays and additional expenses, especially if the seafarer's case is at an advanced stage, as the new attorneys will need to read the documents and familiarise themselves with the case.

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### 12. Is a foreign seafarer treated differently?

- 12.1 Foreign seafarers who pursue civil claims or who face criminal prosecution in Brazilian courts are not treated differently to Brazilian nationals.
- 12.2 Generally, foreign seafarers must post a bond in order to guarantee the payment of the fees of the other party's attorney, as well as the court's costs, whenever they file a lawsuit. This requirement does not exist if the seafarer has real estate in Brazil that guarantees such payments.
- 12.3 However, it is always important to check whether the country of citizenship of the seafarer has any legal cooperation agreement signed with Brazil. In this case, the requirement of the bond may be waived. The requirement may also be waived where the seafarer is unable to afford such costs without jeopardising his own or his family's livelihood.

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