



# Maritime casualties and incidents in Brazil

Practical Guidance

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## Foreword

Statistics from the Brazilian Navy's Directorate of Ports and Coasts (DPC) indicate that, over the last decade, nearly one thousand cases of maritime casualties and incidents have been recorded on national waterways per year, with 238 persons losing their lives each year. Most fatal accidents involved yachts, motorboats, and passenger boats, preponderantly in northern Brazil. Among ocean-going cargo vessels, personal injuries on bulk carriers were predominant.

Any casualty or incident of navigation involving vessels and platforms of all flags in national waters is subject to an inquiry by the Brazilian maritime authority, which also has jurisdiction to investigate casualties occurring on the high seas involving Brazilian citizens and vessels. Upon completion, the investigation findings are forwarded to the Admiralty Court (Maritime Tribunal), whose technical judges will determine culpability, impose administrative sanctions and fines and, where applicable, propose measures to prevent future accidents and improve navigation safety.

Although the judgement rendered by the specialised court is not binding and is always subject to judicial review, it has significant weight and is deemed accurate as technical evidence. In fact, the courts of law tend not to interfere in the substantive issues resolved by the Maritime Tribunal and adopt its decisions to rule on civil and tax disputes brought before the Brazilian legal system.

In this practical guide, we walk through the typical workflow of the processes involved in maritime authority's inquiries, the judgements of accidents and facts of navigation before the Maritime Tribunal, and their relevance to the outcome of maritime disputes. We also briefly explain how offences to the maritime traffic safety rules and the sanctions provided in the relevant regulation are processed. Finally, we describe how the Brazilian maritime authority undertakes its investigations into very serious marine casualties according to the IMO Casualty Investigation Code (CIC).

While this guide is not a substitute for legal advice, we hope it will be a valuable source of reference and practical information for our clients and associates. We will endeavour to keep an updated copy of this publication available on our website.

**REPRESENTAÇÕES PROINDE LTDA.**

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# 1. Administrative inquiries

## 1.1. Purpose

Casualties and incidents occurring aboard or involving vessels and platforms operating in Brazilian jurisdictional waters<sup>1</sup> are investigated through an inquiry launched by the local maritime authority for subsequent administrative adjudgment by the Maritime Tribunal. **[Chapter 2]**

The administrative inquiry is established in the Organic Law of the Maritime Tribunal (Law 2,180 of 1954)<sup>2</sup>. Its rules and procedures are detailed in the *Maritime Authority Standards for Administrative Inquiries on Accidents and Facts of Navigation and the Investigation on Safety of Marine Casualties and Incidents*, known as NORMAM-09/DPC<sup>3</sup>.

The purpose of the inquiry is to define the nature, cause, extent, circumstances and the party responsible for the accidents or facts of navigation for the case to be considered by the Maritime Tribunal. The maritime authority may also propose preventive measures to improve navigation safety and best practices to prevent similar events<sup>4</sup>.

## 1.2. Maritime authority

The role of maritime authority rests with the Commander of the Brazilian Navy under the Ministry of Defence<sup>5</sup>. It includes subsidiary duties, such as guidance and control of the merchant navy, the safety of maritime navigation, and enforcement of relevant laws at sea and inland waterways, in coordination with other relevant authorities.

The Brazilian Navy's Directorate of Ports and Coasts (DPC) represents the maritime authority in matters related to conduct and activities harmful to the environment, prevention and control of shipboard pollution and investigation of marine casualties and incidents. Locally, the duties of the maritime authority are exercised by the nearest port captaincy, agency, or delegacy.

## 1.3. Duty to report

Whenever known to the maritime authority, by any means of communication, an accident or fact of navigation, as defined by law, an administrative enquiry must be opened no later than five days. Otherwise, the Navy Commander or the Maritime Tribunal may order the local maritime authority to start the procedure upon request of an interested party or the Navy Special Prosecutor's Office (PEM)<sup>6</sup>.

Shipmasters, pilots, and offshore installations masters and managers must immediately report accidents or incidents of navigation to the nearest maritime authority directly or through the local agents<sup>7</sup>.

## 1.4. Jurisdiction

The jurisdiction to hold an administrative enquiry lies with the harbour master or delegate where the casualty or incident has occurred, in the vessel's first port of call or refuge, or, ultimately, as assigned by the Maritime Tribunal. In the case of a Brazilian vessel, the maritime authority of the port where she is registered takes precedence.

<sup>1</sup> As defined by legal regimes established for the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf, in accordance with the UN Convention on the Law of the Seas (UNCLOS), as regulated by Law 8,617/1993 and Decree 1,530/1995

<sup>2</sup> Law 2,180 of 5 February 1954, as amended, which provides for the Maritime Tribunal

<sup>3</sup> NORMAM-09/DPC: *Normas da Autoridade Marítima para Inquéritos Administrativos Sobre Acidentes e Fatos da Navegação* (IAFN) e *Para a Investigação de Segurança dos Acidentes e Incidentes Marítimos* (ISAIM) (Maritime Authority Standards for Administrative Inquiries on Accidents and Facts of Navigation and for the Investigation on Safety of Marine Casualties and Incidents), as revised by Ordinance DPC/MB/8 of March 2021

<sup>4</sup> Art. 13 of Law 2,180/1954

<sup>5</sup> Art. 17, sole paragraph of Complementary Law 97 of 9 June 1999

<sup>6</sup> Art. 33 of Law 2,180/1954; Item 0103 of NORMA-09/DPC

<sup>7</sup> Art. 8, V & art. 12 of Law 9,537/1997, known as *Lei de Segurança do Tráfego Aquaviário em Águas Jurisdicionais Brasileiras* - LESTA (Law for the Safety of Waterway Traffic in Brazilian Jurisdictional Waters); art. 33, § 2, of Law 2,180/1954; Items 0105 & 0112 of NORMAM-09/DPC

When a Brazilian-flagged vessel or a Brazilian seafarer is involved in a marine casualty overseas, the local Brazilian consular authority conducts the inquiry under the guidance of the Maritime Tribunal.

### **1.5. Definitions**

By way of example, the regulation provides an explanatory list of definitions of "accidents of navigation" and "facts of navigation".<sup>8</sup>

#### **1.5.1. Accidents of navigation**

The following events are considered "accidents of navigation":

- Shipwrecking
- Stranding or grounding
- Collision or allision
- Flooding or leakage
- Fire or explosion
- Beaching
- Putting into port (port of refuge)
- Jettisoning
- Damage to or defect of the vessel or her fittings that puts her, lives and property at risk

#### **1.5.2. Facts of navigation**

The so-called "facts of navigation", in turn, comprise acts that could impair or pose a threat to the integrity and safety of the vessel, persons and property aboard. Facts of navigation include but are not limited to:

- Poor rigging of the vessel (including lacking or unsuitable equipment and spare parts)
- Unworthiness of the vessel for the service or place she is employed
- Crew incompetence or insufficiency
- Putting into port (deviation)
- Bad cargo stowage and lashing in containers or on vessel's deck or cargo holds (including poor cargo packaging that jeopardises lives and property onboard)
- Unjustifiable refusal to assist shipwrecked persons and vessels in distress
- Use of the ship or part thereof to commit crimes and misdemeanours
- Presence of stowaways

### **1.6. Application**

Vessels, platforms, and seafarers of all nationalities sailing in Brazilian jurisdictional waters and Brazilian-flagged vessels in open seas are subject to administrative inquiries by the local maritime authority. The procedure also applies to shipowners, operators, charterers, shippers, agents, consignees, class societies, shipbuilders and repairers, shipping agents, marinas, yacht clubs and virtually every legal or natural person involved in a maritime casualty or incident.

According to standards of international law, the inquiry may extend to foreign vessels involved in an overseas casualty in which a Brazilian citizen has been seriously injured or has caused severe damage to a Brazilian vessel or facility or the environment<sup>9</sup>.

<sup>8</sup> Arts. 14 & 15 of Law 2,180/1954; item 0106 of NORMAM-09/DPC

<sup>9</sup> Art. 40 of Law 2,180/1954; Item 0202 of NORMAM-09/DPC

## 1.7. Exemptions

### 1.7.1. Diversion and deviation

Vessels that justifiably put into the port are exempt from administrative inquiries, providing the authorities are notified in advance and consent to the unexpected port call. It includes diversion to seek refuge if the vessel's safety is endangered; carry out emergencies repairs or replenish bunkers, freshwater or stores; disembark ill persons for medical assistance and land corpses of persons who died of natural causes at sea; or load newly booked cargo<sup>10</sup>.

If a vessel diverts to land injured persons or stowaways, the maritime authorities may open an administrative inquiry to determine the circumstances of the incident.

Unjustifiable deviations, such as putting to the port as a result of deficient rigging or equipment, poor voyage planning and cargo collapse due to inadequate stowage, are typified reasons for holding an enquiry.

### 1.7.2. Pollution cases

While marine pollution is an event that requires investigation into aspects of navigation safety and protection of the environment, it falls outside the jurisdiction of the Maritime Tribunal. The matter is governed by specific legislation that imposes criminal sanctions and strict civil liabilities on those involved in conduct and activities harmful to the environment<sup>11</sup>.

### 1.7.3. Navy vessels

National and foreign-flagged navy ships are not subject to administrative enquiries unless they are engaged in commercial activities.

## 1.8. Procedures

### 1.8.1. Sailing pass

The maritime authority will only grant the sailing pass when the shipboard investigation has already been carried out, statements and documentary evidence necessary collected, and the vessel is seaworthy<sup>12</sup>.

On a case-by-case basis, the harbour master may authorise a vessel to depart bound for another Brazilian port, where the local maritime authority would continue taking evidence through a letter rogatory. In the case of a liner or cabotage vessel, the harbour master may allow her to continue the voyage and collect pending evidence when she next calls at that port.

### 1.8.2. Collection of evidence

During the evidence collection phase, the maritime authority officer in charge of the inquiry assembles formal statements from the master, crew and other witnesses, documentary and technical evidence, such as logbooks and VDR data, to gather enough information to determine the cause of the event and the party responsible for it.

<sup>10</sup> Item 0107 of NORMA-09/DPC

<sup>11</sup> Law 9,605/1998, which provides for criminal and administrative sanctions derived from conduct and activities harmful to the environment and Law 9,966/2000, as regulated by Decree 4,136/2002, which provides for the prevention, control and inspection of pollution caused by the release of oil and other harmful or dangerous substances in waters under national jurisdiction; 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); art. 225, § 3, of the Federal Constitution; art.14, § 1º, of the National Environmental Policy (Law 6,938/1981)

<sup>12</sup> Art. 5 of Law 9,537/1997 (LESTA)

Documents written in a foreign language must be sworn translated into Portuguese for the account of the shipowner, operator, or local agent.

An essential piece of evidence involved in a typical administrative inquiry would involve<sup>13</sup>:

- Statement of facts by the master's or interested party
- Copies of vessel's certificates
- Formal depositions given the master, pilot, and crew involved in or aware of the event
- Copies of the deck and engine logbooks covering at least the last 24 hours before the event
- Expert examination on the vessel by Navy inspectors
- Class survey report
- Vessel's plans and arrangements
- Cargo manifests, bills of lading and stowage plans, where applicable
- Plotted charts, passage plan, decoded VDR data

Given its inquisitorial nature, the enquiry does not entail the adversary system. The parties concerned cannot interfere or participate in the collection of evidence. However, in due course or at the authority's request, they can provide evidence to assist in determining the cause and responsibility for the event under investigation<sup>14</sup>.

### **1.8.3. Formal depositions**

The head of the enquiry will summon the deponent, by written notification, to appear at the offices of the maritime authority on a date and time designated to give a formal deposition as a witness.

The deponent will be qualified and asked to provide information under oath to clarify the facts. Minors can be heard as informants, but without committing themselves to tell the truth.

A sworn interpreter must accompany foreign deponents unless they can speak Portuguese fluently. In the absence of a certified interpreter, the maritime authority may assign another person fluent in English to act as an "ad hoc" interpreter under oath.

The progress of the investigation cannot be hindered by the lack of deposition from absent or missing persons, in which case the maritime authority will proceed with the inquiry and enter this circumstance in the conclusion report<sup>15</sup>.

### **1.8.4. Legal assistance**

Deponents have the right to be accompanied by a lawyer registered with the Brazilian Bar Association (OAB) and a power of attorney. The lawyer cannot directly interfere with the procedure but can advise the client to protest if his rights are neglected or if necessary corrections are not included in the written deposition. A lawyer who disturbs the testimony with undue interferences may be asked to leave<sup>16</sup>.

### **1.8.5. Records of the inquiry**

The deponent is entitled to a copy of the testimony he signs, personally, by request or proxy. Copies of the records will only be provided to the interested parties at their expense after the inquiry is completed.

<sup>13</sup> Arts. 35 & 36 of Law 2,180 of 1954; Items 0108 to 0110 of NORMAM-09/DPC

<sup>14</sup> Item 0108 of NORMAM-09/DPC

<sup>15</sup> Items 0109 & 0111 of NORMAM-09/DPC

<sup>16</sup> Item 0109, "g", of NORMAM-09/DPC

### 1.8.6. Inquiry conclusion

The head of the inquiry will issue a conclusion report within 90 (ninety) days. This time limit may be – and often is – extended for successive periods, as agreed by the harbour master<sup>17</sup>. Those found responsible for the accident or fact of navigation will be notified to submit an optional preliminary defence within 10 (ten) days from the receipt of the notification. The absence of such a defence does not prejudice the rights of the accused parties.

After the deadline for filing of preliminary defence has elapsed, regardless of whether one has been lodged or not, the maritime authority will forward the investigation's findings to the Maritime Tribunal of Rio de Janeiro for administrative judgment or filing.

An inquiry can take up to six months or more before being processed and sent to the administrative court. The duration varies from port to port and depends on the complexities of the case and the resources available.

No sanction or fine will be applied to those found responsible for an accident or fact of navigation until the Maritime Tribunal has rendered a final and unappealable decision<sup>18</sup>. **[Chapter 2]**

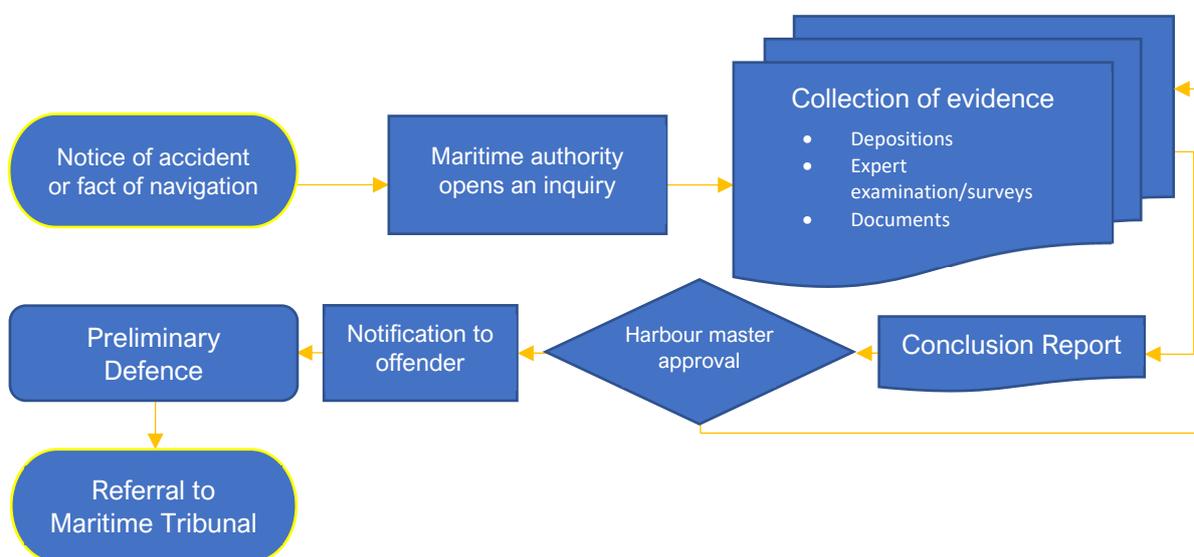


Figure 1: flowchart of administrative inquiries on accident and fact of navigation. Source: NORMAM-09/DPC/Law 2,180/1954

### 1.9. Incidence of accidents of navigation

According to information from DPC, in the past decade, no less than 9,165 accidents and facts of navigation involving 2,382 fatalities were registered by port captaincies and agencies throughout Brazil. On average, there were 917 cases with 238 deaths each year, which represents an astonishing fatality rate of 26%<sup>19</sup>. **(Figure 2)**

Last year, 905 cases were recorded, in which 257 people lost their lives, and 324 went missing. The largest number of cases involving bodily injuries and deaths were reported in the 4<sup>th</sup> Naval District (DN) jurisdiction, followed by the areas of the 8<sup>th</sup> and 9<sup>th</sup> DNs<sup>20</sup>. Most incidents consisted of personal injury, explosion or fire, sinking and allision.

<sup>17</sup> The local maritime authority controls the timeframes. In case of inquiries not concluded after one year, a time extension can only be granted by the Commander of the Naval District after examining the reasoning of the request

<sup>18</sup> Art.33 of Law 9,537/1997 (LESTA)

<sup>19</sup> *Inquéritos Administrativos sobre Acidentes e Fatos da Navegação (IAFNs), Quadros Estatísticos de IAFNs 2020*, (Administrative Inquiries on Accidents and Facts of Navigation (IAFNs), IAFNs Statistical Tables - Year 2020, data consolidated until 31/03/2021)

<sup>20</sup> The administration of the Brazilian Navy is divided into nine *Distritos Navais* – DN (Naval Districts) , namely: 1<sup>st</sup> DN (covering the states of Rio de Janeiro, Espírito Santo and southeast of Minas Gerais), 2<sup>nd</sup> DN (Bahia, Sergipe, north and southwest of Minas Gerais); 3<sup>rd</sup> DN (Ceará, Rio Grande do Norte, Paraíba, Pernambuco and Alagoas), 4<sup>th</sup> DN ( Amapá, Pará, Maranhão and Piauí), 5<sup>th</sup> DN (Rio Grande do Sul and Santa Catarina), 6<sup>th</sup> DN

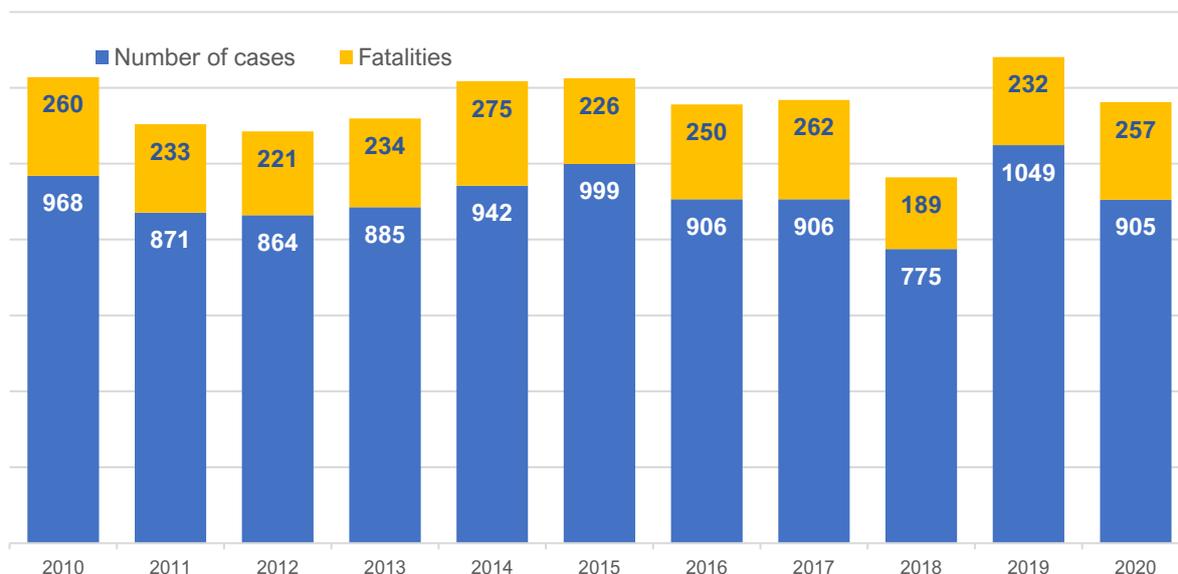
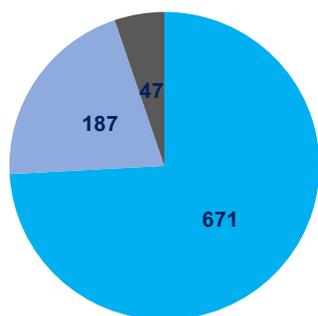


Figure 2: number of inquiries on accidents and facts of navigation launched by Brazil's maritime authority 2010-2020. Source: DPC

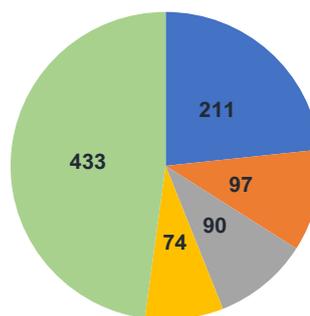
The vast majority of cases recorded in 2020 included small crafts and pleasure boats (yachts, motorboats, dinghies, and canoes) followed by passenger boats and bulk carriers. (Figure 3)

Number of cases involving fatalities (2020)



■ No victims ■ Fatalities ■ Missing

Number of cases by type of ship (2020)



■ Yatch/motorboat ■ Dinghy ■ Small boats ■ Bulk carriers ■ Others

Figure 3: (left) number of fatalities in maritime accidents and (right) cases by type of ship involved 2020. Source: DPC

The highest number of fatalities occurred in passenger boats, where 48 people died, and eight disappeared, mainly in the rivers of the Amazon region, where waterway transport is prevalent.

Last year, 164 of the administrative inquiries held by the maritime authority involved cargo vessels, 106 of them IMO-registered. Twenty fatalities were recorded in 2020, 40% less than in the previous year. Accidents involving ocean-going cargo vessels consisted mostly of allisions (FFO), bodily injuries, groundings and strandings, collisions, machinery failures, and floodings or sinking. These were more frequent in the 8<sup>th</sup> DN, which has jurisdiction in key ports such as Santos and Paranaguá. The main flags involved in those accidents were Panama, Brazil, Liberia and the Marshall Islands. (Figure 3)

(Mato Grosso and Mato Grosso do Sul), 7<sup>th</sup> DN (Tocantins, Goiás and Federal District), 8<sup>th</sup> DN (São Paulo, Paraná and south of Minas Gerais), 9<sup>th</sup> DN (Roraima, Acre, Amazonas and Rondônia).

## 2. Administrative judgements

### 2.1. Nature of proceeding

The inquiries on casualties and incidents of navigation undertaken by the maritime authority are subject to consideration by the Maritime Tribunal through an administrative proceeding under the adversarial system with full right of defence.

While the administrative judgement does not address civil liability issues, nor is it binding on the courts of law, it can decisively influence the outcome of a judicial dispute and bears significant weight as technical evidence in legal proceedings. In fact, the findings of the Maritime Tribunal constitute *prima facie* evidence, though they are always subject to review by a judicial authority<sup>21</sup>.

### 2.2. Parties involved

#### 2.2.1. Maritime Tribunal

Maritime casualties and incidents ascertained in administrative inquiries are judged by the *Tribunal Marítimo* (Maritime Tribunal), also referred to as Maritime Court (or Admiralty Court), which among other duties, also manages the Brazilian ship registry.

Created in 1934<sup>22</sup>, in the City of Rio de Janeiro, then Brazil's capital, the Maritime Tribunal is governed by Law 2,180 of 1954. It is an autonomous administrative body auxiliary to the Judiciary, linked to the Ministry of Defence and the Brazilian Navy Command, under the Executive branch concerning military personnel and budgetary resources for its operation. It has jurisdiction throughout the Brazilian territory to rule on accidents and facts of navigation.

The Maritime Tribunal comprises seven judges, three military and four civilians appointed by the President of the Republic. The judges collegiately decide on maritime accidents and facts of navigation, seeking to establish the party responsible for the event, impose administrative sanctions and indicate preventive measures to improve navigation safety<sup>23</sup>.

#### 2.2.2. Navy Special Attorney's Office

The *Procuradoria Especial da Marinha* – PEM (Navy Special Attorney's Office) was constituted in 1931 alongside the Maritime Tribunal to exercise the function of Special Attorney as representative of the State before the administrative court. PEM is directly subordinate to the Minister of the Navy and is responsible for applying the Federal Constitution, the laws and acts emanated from the public powers concerning waterway transportation<sup>24</sup>.

#### 2.2.3. Union Public Defender's Office

Those indicted in an administrative proceeding before the Maritime Tribunal must present their defence through a lawyer registered with the Brazilian Bar Association (OAB). Under the broad defence principle, those who cannot afford a lawyer or are absent are entitled to legal guidance and assistance from the *Defensoria Pública da União* – DPU (Union Public Defender's Office).

<sup>21</sup> 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)

<sup>22</sup> The Administrative Maritime Tribunal was created through Decree 24,585/1934. After the passing of its Organic Law (Law 2,180/1954), the administrative court was renamed simply as Maritime Tribunal

<sup>23</sup> Arts. 1 to 9, 13 to 15, 33 & 41 of Law 2,180/1954

<sup>24</sup> Law 7,642 of 1987 regulates the *Procuradoria Especial da Marinha* – PEM (Navy Special Attorney's Office)

DUP's jurisdiction and functions are established in the Organic Law of the Maritime Tribunal and its internal rules<sup>25</sup>.

## **2.3. Procedures**

### **2.3.1. Launching and allotment**

An administrative proceeding on accidents and facts of navigation commences at the Navy Special Attorney's Office (PEM) initiative, at the request of an interested party<sup>26</sup>, or by order of the Maritime Tribunal itself.

Once it concludes an administrative inquiry, the local maritime authority refers it to the Maritime Tribunal, which secretariat will record the case and allocate it, by drawing lots, to a rapporteur-judge and a revisor-judge<sup>27</sup>.

The rapporteur submits the findings of the maritime authority to PEM, which, within 10 (ten) days, must review the case and issue a reasoned report moving to i) bring public charges (representation) against those responsible for the accident or fact, or opine on private charges filed by an interested party; ii) dismiss the case<sup>28</sup>; or iii) sustain the lack of the jurisdiction of the Maritime Tribunal to hear the case and propose its referral to the competent authority.

### **2.3.2. Service of process**

Upon receipt of PEM representation – or denial of its motion for dismissal of the case –, the rapporteur will order the summoning of the accused party.

Service will be made through a court clerk, by courier with delivery receipt or by delegating duties to the harbour master whose jurisdiction the defendant resides. If the defendant is a Brazilian living abroad, the Brazilian consular agent will serve the summons.

If the place of residence is unknown or uncertain, the notification of the administrative proceeding will be made through a public notice. When dealing with foreign nationals residing outside Brazil, as in the case of visiting seafarers, the Maritime Tribunal will forward the summons through the nearest Brazilian consulate, with a copy to the vessel's agents to be sent to the shipowners.

Failure to properly serve the summons on the accused party leads to the nullity of the administrative proceedings<sup>29</sup>.

### **2.3.3. Defence**

The accused party is ensured ample right of defence in the adversary system. He must present his written defence within 15 (fifteen) days of the summons, specifying the evidence he intends to produce during the evidentiary (discovery) phase<sup>30</sup>.

<sup>25</sup> Art. 5, LV, of the Federal Constitution; Complementary Law 80 of 1994, which regulates the Public Defender's Offices

<sup>26</sup> Those who have a legitimate economic or moral interest in the judgment of the accident or fact of navigation can bring a private representation, within 30 days following the term of 180 days of its occurrence, if by the end of this period, no respective inquiry has entered the Maritime Tribunal

<sup>27</sup> Arts. 41 & 42 of Law 2,180/1954

<sup>28</sup> If the case is dismissed, it will remain available for 2 months, during which time it can be reopened at the request of an interested party. If the rapporteur-judge does not agree with the dismissal of the case, he will return the records to PEM for compulsory bringing of charges within 5 days

<sup>29</sup> Arts. 53 to 55 of Law 2,180/1954

<sup>30</sup> Art. 56 of Law 2,180/1954

The appointment of a lawyer entered with the Brazilian Bar Association (OAB) is mandatory. If the defendant cannot afford legal assistance or cannot be found, a public defender of the Union Public Defender's Office (DPU) will be assigned by the court to defend the case<sup>31</sup>.

Once the defence has been presented, the rapporteur will open the discovery phase, for a maximum period of three months, extendable at the judge's discretion, during which time evidence should be produced.

#### **2.3.4. Evidence**

All types of evidence accepted by law are admissible before the Maritime Tribunal. The procedures for collecting evidence are outlined in the Maritime Tribunal internal rules and, subsidiarily, in the Brazilian Civil Procedure Code<sup>32</sup>.

The body of evidence obtained during the inquiry will be taken as uncontested, provided that it is not refuted by later proof to the contrary or by notorious facts. Likewise, the fact alleged by one party and not contested by the other will be admitted as true if not disproven by the body of evidence.

The judge may hear a third party whom the parties or witnesses have referred to as being aware of facts or circumstances or order them to disclose documents of interest to the case's outcome. He may also order inspections, expert examinations and other means of evidence collection.

#### **2.3.5. Final allegations**

After the evidentiary stage is completed, each party will have 10 (ten) days, successively, to add the final written arguments to their pleadings before the case records return to the rapporteur-judge for review, draw a report and request the scheduling of the judgement<sup>33</sup>.

#### **2.3.6. Judgement**

The judgment starts with the reading of the report by the rapporteur, followed by the parties' oral arguments in support of their final allegations, cognisance of preliminary issues raised, and discussion of the matter under consideration.

The Maritime Tribunal can only deliberate with at least half plus one more of its judges, the majority of votes deciding the cases brought to the plenary. The voting commences with the rapporteur followed by the other judges in reversed order of seniority. If there is a tie, the President of the Maritime Tribunal will exercise the casting vote.

Once the judgment has been rendered, the President will announce the decision and designate the rapporteur to draw up the sentence (called *acórdão*, in Portuguese) or, if he has been defeated, the judge whose vote has prevailed.

According to the Law, the court decision must contain:

- a) the definition of the nature of the accident or fact and its circumstances;
- b) the determination of the causes;
- c) the apportionment of responsibilities, the sanction imposed and the basis for it;
- d) indication of preventive and safety measures for navigation, when applicable

<sup>31</sup> Arts. 3; art. 5, LV, of the Federal Constitution

<sup>32</sup> Arts. 57 to 64 of Law 2,180/1954

<sup>33</sup> Arts. 65 to 67 of Law 2,180/1954

The judgement will be published in a court session within 10 (ten) days of the trial, with a copy sent for publication in the official gazette<sup>34</sup>.

### 2.3.7. Administrative appeals

The appeals admitted at the Maritime Tribunal are i) request for hearing *en banc*<sup>35</sup>; ii) interlocutory appeals<sup>36</sup>, and iii) motion for clarification (bill of review)<sup>37</sup>. Each type of appeal has its own requirements and specific deadlines that can substantially influence the duration of the proceedings.

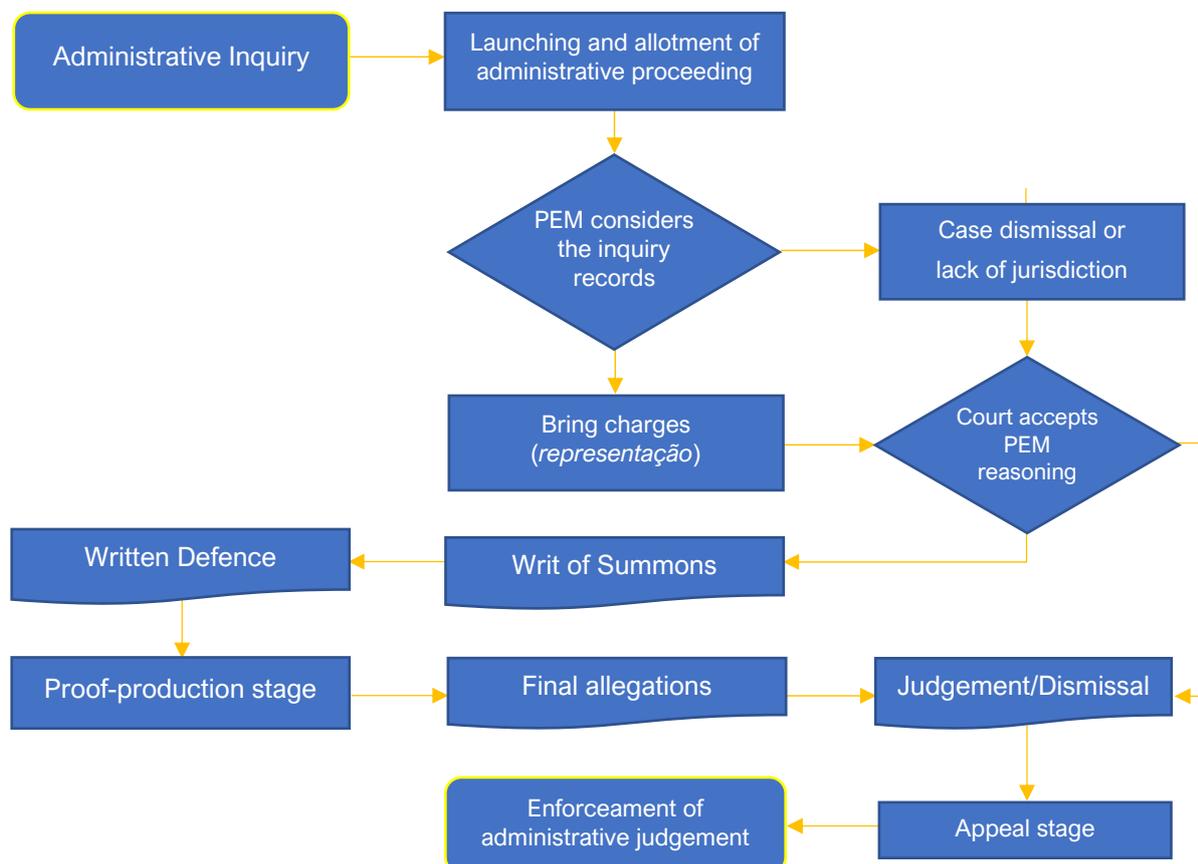


Figure 4: flowchart of administrative judgements on accident and fact of navigation by the Maritime Tribunal. Source: Law 2,180/1954

### 2.4. Penalties

Once there is no room for further appeal, and the decision becomes final, the Maritime Tribunal will issue a writ of execution (*guia de julgamento*, in Portuguese) for the party found responsible for complying with the judgement, including paying any fines and costs within 10 (ten) days<sup>38</sup>.

The punishment to be applied should match the gravity of the offence. The administrative court will grade the penalty pondering the background, economic standing and personality of the party responsible, together with the degree of seriousness of the deceit or guilt, the circumstances and consequences of the violation.

<sup>34</sup> Arts. 68 to 74 of Law 2,180/1954

<sup>35</sup> The final decision on the merits of the case is subject to appeal through a motion for reconsideration. It applies exclusively on new matters, or based on evidence collected after the end of the evidentiary phase, or even when the decision is not unanimous and, in this case, the appeal must be restricted to the object of the divergence (art. 106 of Law 2,180/1954)

<sup>36</sup> Interlocutory appeals can be filed against the judges' or president's orders and decisions. They are restricted to the point that it has challenged, to which the court must limit its decision (art. 111 of Law 2,180/1954)

<sup>37</sup> A motion for clarification (similar to a bill of review) may be opposed when the judgement presents ambiguities, obscurity, contradictions or omissions (art. 113 of Law 2,180/1954)

<sup>38</sup> Arts. 115 to 126 of Law 2,180/1954

Penalties vary in nature from a mere rebuke to suspension or cancellation of Brazilian seafarers' licenses, prohibition or suspension of national vessels from navigating and revoking owners' registration. In the case of foreign seafarers, the penalty of license cancellation is switched into banning them from performing duties in Brazilian waters for up to one year<sup>39</sup>.

A fine may cumulatively be imposed on those found liable for the accident or fact of navigation. Its amount will be fixed within the legal limits and will take into account the economic situation of the offender<sup>40</sup>.

In administrative proceedings involving a crime or misdemeanour to be punished, the Maritime Tribunal will judge the matter within its competence and refer the case to the judicial authority for prosecution<sup>41</sup>.

## **2.5. Time bar**

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<sup>42</sup>.

## **2.6. Stay of legal 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.

As the procedural code is a relatively 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 outcome of the claim under judicial consideration. Nonetheless, following constitutional principles of procedural agility and a reasonable duration of the process<sup>43</sup>, the suspension, when granted, may be subject to a specific deadline after which procedural acts should be resumed regardless of whether the Maritime Tribunal's judgment has been rendered or not.

<sup>39</sup> Arts. 121 to 126, 129 & 131 of Law 2,180/1954

<sup>40</sup> Arts. 121, 127 & 131 of Law 2,180/1954

<sup>41</sup> Art. 21 of Law, 2,180/1954

<sup>42</sup> 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)

<sup>43</sup> Art. 5, LXXVIII, of the Federal Constitution

## 3. Maritime traffic infractions

### 3.1. Purpose

Offences to the maritime traffic rules are subject to administrative proceedings, under the terms of the Law of Waterway Traffic (LESTA) as regulated (RLESTA)<sup>44</sup>, which provides for penalties sanctions against natural and corporate persons.

### 3.2. Application

All non-navy vessels, platforms, and seafarers in Brazilian jurisdictional waters, regardless of nationality or flag, are subject to the rules and sanctions established in the maritime traffic safety regulations.

### 3.3. Master's duty

Under LESTA, the master is ultimately responsible for enforcing the precepts of laws, regulations, and international conventions for safeguarding human life, the environment, navigation safety, the vessel herself and cargo, and maintaining discipline. He can be fined and have his license suspended<sup>45</sup>.

### 3.4. Duty to compensate

Under the general principle of reparation enshrined in the Brazilian Civil Code, the party liable for the damage is responsible for repairing it fully<sup>46</sup>. Therefore, damage caused to fixed and floating objects, such as buoys, signalling and navigation lights, jetties, other vessels, and maritime structures, must be repaired irrespective of any disciplinary sanctions imposed under LESTA/RLESTA.

### 3.5. Nature of infractions

RLESTA enumerates several potential violations of maritime traffic rules. These include lack of adequate crew certification, poor rigging and manning, inadequate hull marks and lights, fire-fighting equipment, exceeding speed or load line limits, breach of cargo stowage and waterway traffic rules, to name a few.

A foreign vessel that presents statutory irregularities or precarious operational conditions or otherwise poses a threat to the environment, human lives, or maritime traffic safety may be prevented from entering or leaving a port, ordered to leave Brazilian waters or deviate<sup>47</sup>.

### 3.6. Administrative measures

In case of violation of traffic safety rules, the regulation allows the maritime authority to take measures such as the seizure of certificates, detention, embargo, and removal of vessels from commercial traffic without prejudice to the imposition of penalties. The administrative measures must be suspended once the reason for their application has ceased.

The irregularities that gave rise to the administrative measures must be remedied within 90 (ninety) days, under penalty of the vessel being sold in a public auction or incorporated into the assets of the Federal Union. The shipowner remains responsible before the maritime authority for the expenses incurred with the collection and custody of the seized vessel.

<sup>44</sup> Law 9,537/1997, *Lei de Segurança do Tráfego Aquaviário em Águas Jurisdicionais Brasileiras* (LESTA) (Law for the Safety of Waterway Traffic in Brazilian Jurisdictional Waters), as regulated by Decree 2,596/1998 (RLESTA)

<sup>45</sup> Art. 8 of Law 9,537;1997 (LESTA)

<sup>46</sup> 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." Art. 944 of the Civil Code: "Compensation is measured by the extent of the damage. Single paragraph. If there is an excessive disproportion between the severity of the fault and the damage, the judge may equitably reduce the indemnity". (free translation)

<sup>47</sup> Art. 5 of Law 9,527/1997 (LESTA)

### 3.7. Fines

Violation of maritime traffic rules subjects the offenders to sanctions that range from fines to suspension or cancellation of licenses for specific periods.

#### 3.7.1. Fine ranges

Fines are graded in groups from A to G, the latter being the heaviest. Each group has a broad range of values, fixed at the authority's discretion according to the type and severity of the offence, as follows<sup>48</sup>:

<b>Fine Group</b>	<b>Fine Range (BRL)</b>
<b>A</b>	R\$ 40 to R\$ 200
<b>B</b>	R\$ 40 to R\$ 400
<b>C</b>	R\$ 40 to R\$ 800
<b>D</b>	R\$ 40 to R\$ 1,600
<b>E</b>	R\$ 40 to R\$ 2,200
<b>F</b>	R\$ 80 to R\$ 2,800
<b>G</b>	R\$ 80 to R\$ 3,200

#### 3.7.2. Aggravating circumstances

The fines can be increased exponentially in case of recidivism, use of the vessel to commit an unlawful act, drunkenness and use of narcotics or toxic substances, and a severe threat to the physical integrity of persons.

#### 3.7.3. Penalty suspension

Whenever an infraction to the maritime traffic regulations is found during an administrative inquiry on an accident or fact of navigation, as defined in NORMAM-09/DPC, the penalties provided for by RLESTA cannot be enforced until the final decision of the Maritime Tribunal, except in cases involving marine pollution<sup>49</sup>.

### 3.8. Administrative and judicial appeals

Penalties for offences to maritime traffic safety are imposed through an infraction notice issued under the adversary system with a broad right of defence. Legal assistance is not mandatory during the administrative process, but it is highly recommended<sup>50</sup>.

The offender will have 15 (fifteen) business days, counted from the receipt of the notification, to present an administrative defence, failing which he will be considered in default. The authority, then, will have 30 (thirty) days to render a duly substantiated decision.

An appeal to the higher instance of the maritime authority may be filed within 5 (five) working days, counted from the date of the notification of the decision, without suspensive effect. The authority must hear the appeal and issue a final decision within 30 (thirty) days<sup>51</sup>

There is no bar for the party indicated as an offender to resort to a federal court to challenge the sanctions imposed by the maritime authority. However, the suspensive effects on the lawsuit only occur after the judicial deposit of the fine, if any. If the action is successful, the deposit is refunded with monetary reinstatement for inflation.

<sup>48</sup> Values prevailing in May 2021, with values ranging from approx. USD 8/USD 38 (Group A) to USD 16/USD 607 (Group G)

<sup>49</sup> Art. 33 of Law 9,537/1997 (LESTA)

<sup>50</sup> Arts. 22 & 23 of Law 9,527 (LESTA)

<sup>51</sup> While LESTA requires prior deposit of the amount of the fine to allow the appeal, Binding Precedent 21 (Prior Deposit) by the Brazilian Federal Supreme Court (STF) rules that "the requirement of prior deposit or enrolment of money or goods for admissibility of administrative appeal is unconstitutional" (DJe nº 210/2009, dd. 10/11/2009)

## 4. Maritime safety investigations

### 4.1. Purpose

The Brazilian Maritime Authority adopts the Casualty Investigation Code (CIC) and follows the Safety Investigation of Maritime Casualties and Incidents (MCI) procedures<sup>52</sup>. A Portuguese version of the CIC is annexed to NORMAM-09/DPC.

The MCI does not replace administrative inquiries. On the contrary, an inquiry must have already been held for the MCI to start<sup>53</sup>.

### 4.2. Jurisdiction

The Navigation Casualty Inquiries and Investigations Department of the Directorate of Ports and Coasts (DPC) is responsible for analysing safety accident investigations involving Brazilian vessels abroad and vessels of any flag in Brazilian waters, as outlined in the CIC. The local port captaincy or agency is responsible for collecting evidence on site.

### 4.3. Definitions

Under the CIC, "marine casualties" are an event, or a series of events, causally related to the operations of a vessel, resulting in consequences such as<sup>54</sup>:

- Death of, or severe injuries to a person
- A person missing from a vessel
- Loss, presumed loss or abandonment of a vessel
- Material damage to a vessel
- Stranding or disabling of a vessel, or the involvement of a vessel in a collision
- Material damage to a marine infrastructure external to a vessel that could seriously endanger the vessel's safety, the safety of another vessel or a person
- Severe damage to the environment, or the potential for severe damage to the environment, brought about by the damage caused by one or more vessels

"Marine incidents", in turn, are events other than marine casualties arising out of the operations of a vessel that has endangered or, if not corrected, would endanger the safety of a vessel, her crew or any other person or the environment. A marine casualty or incident excludes a deliberate act or omission with the intent to cause harm to the safety of the vessel, a person or the environment.

### 4.4. Procedures

The MCI must be launched within 5 (five) days after the maritime authority became aware of a very serious casualty involving a Brazilian vessel within its jurisdiction. The same term applies for DPC launching an MCI for events involved foreign-flagged vessels. Once initiated, the MCI can only be called off by DPC<sup>55</sup>.

<sup>52</sup> The International Standards and Recommended Practices for an Investigation about Safety of Maritime Casualties and Incidents, known as Casualty Investigation Code (CIC), approved by IMO Resolution MSC.255(84), and the Procedures of Safety Investigation of Maritime Casualties and Incidents (MCI)

<sup>53</sup> Item 0202 of NORMAM-09/DPC

<sup>54</sup> Item 0204 of NORMAM-09/DPC

<sup>55</sup> Item 0203 of NORMAM-09/DPC

The CIC provides that the Flag State of the vessel or vessels involved in a casualty or incident in the deep sea or on an exclusive economic zone must notify other states substantially concerned as soon as possible. If the event occurs in the territory of a coastal state, the flag state and the coastal state must exchange a notification and, together, notify other states affected.

DPC will report a casualty or incident to the embassy or consular representation of the flag state in Brasilia and the commander of the Naval District concerned. The harbour master or delegate conducts the investigation locally. He is responsible for notifying the local agents, the shipowner or charterer, and the master of the vessel involved about the procedure<sup>56</sup>.

#### **4.5. Investigation conclusion**

The MCI must be completed within 90 (ninety) days of launch but can be successively extended by DPC, depending on the difficulty of the case. The local harbour master will forward the Report of Maritime Safety Investigation to DPC for review and approval and subsequent disclosure to the International Maritime Organisation – IMO, the national and international maritime communities, and the public.

Unlike the administrative enquiry to investigate accidents and facts of navigation, the MCI does not aim at assigning fault or determining responsibilities. Instead, its purpose is to avert or minimise future similar casualties or incidents<sup>57</sup>.

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<sup>56</sup> Item 0207 of NORMAM-09/DPC

<sup>57</sup> Items 0205 & 0206 of NORMAM-09/DPC

## 5. Conclusion

Although the Maritime Tribunal has functional jurisdiction over maritime casualties, depending on the extent of the accident, there may also be concomitant proceedings running before civil and criminal courts. If the case involves a breach of maritime traffic regulations or marine pollution, the relevant authorities can also commence independent administrative proceedings.

Despite the fact that Maritime Tribunal's decisions are not binding with respect to civil liability, they constitute strong evidence that can decisively influence the resolution of disputes and lawsuits. Therefore, shipowners, charterers, and their liability insurers must closely monitor the progress of such cases, from the moment the investigation is launched until the judgement by the administrative court.

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