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CIVIL LIABILITY OF THE PORT OPERATOR: BRIEF CONSIDERATIONS OF CASE LAW IN PARANÁ, BRAZIL

*Frederico E. Z. Glitz**

ABSTRACT

The enactment of Law No. 12.815/2013 introduced a new regulatory framework for Brazilian port activity. In terms of delineating the civil liability of the port operator, this regulatory framework mirrors, to a large extent, the previously implemented regulatory framework. Although this could represent a signal to solidify the existing framework, it brings together the consolidation of a gap-filled text. The following jurisprudential analysis reveals few appreciated cases and research on the doctrine shows a total lack of references on the subject.

I. INTRODUCTION

THE normative framework of port activity in Brazil was amended by Law No. 12.815/2013, which sets out to regulate the operation of ports, port facilities, and other activities carried out by port operators.¹

To do this, the law conceptualized the port operator as the “pre-qualified legal person to exercise the passenger handling activities or movement and storage of goods, to or by water transport within the organized port area.”²

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1. Lei No. 12.815, de 5 de Junho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 2, XIII, de 5.6.2013 (Braz.).

2. *Id.*

The activity aimed at the port operator is quite extensive. If one considers that activity starts with the entry of the goods “in . . . warehouses, yards or other places designated for deposit” and only ends with the actual delivery of the ship, for example, Art. 2 of Decree-Law No. 116/1967,³ then one can say that we are facing one of the most fertile areas for examples of civil liability.

Nevertheless, the Brazilian courts have not reached a clear answer on this subject. There are some plausible explanations: there are contractual arrangements which can “encourage” the displacement of the thread for the contractual axis between the parties (incoterms and other risk transfer clauses would be good examples), and in Brazil, the multimodal transport operator assumes a truly wide range of liability,⁴ while affirming regressive remedy action.⁵

The enactment of Law No. 12.815 / 2013 retained the specific provision of the liability of the port operator.⁶ Although such liability could be deduced from the general legislation, it was formed in a way that does not clearly explain how the enforcement of such liability occurs.⁷

This paper proposes to investigate, based on past jurisprudence, what would be the likely interpretative guidance to hold the port operator liable for the damage that purely private third-parties might incur.

To answer this question, we sought to limit the search⁸ to only two courts: the Tribunal de Justiça do Estado do Paraná (State Court of Paraná), precisely because of its port, Paranaguá, and the Superior Tribunal de Justiça or “STJ” (Superior Court of Justice), because it has the function of standardizing the interpretation of Brazilian law by creating precedent. In order to prevent limitations on the search, which was carried out in the STJ, the research was conducted using three different combinations of search terms: “Port Operator” (generating 58 results); “Port Op-

3. Decreto No. 64.387, de 22 de Abril de 1969, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 2, de 23.4.1969 (Braz.).

4. Lei No. 9.611, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 12 - 13, de 20.2.1998 (Braz.).

5. Lei No. 9.611, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 12, de 20.2.1998 (Braz.).

6. Lei No. 12.815, de 5 de Junho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 2, XIII, de 5.6.2013 (Braz.).

7. “The port operator shall report to: I. the port administration for damage negligently caused to infrastructure, facilities, and equipment of the port administration holds, which is in his service or under his custody; II. the owner or consignee of the goods for damages that occur during operations that perform or as a result of them; III. the owner for damage incurred in the craft or goods given to transport; IV. the port worker for remuneration and related charges provided services; V. the local office of labor management of casual work by contributions not collected; VI. the competent authorities for the collection of taxes on temporary dock work; and VII. the customs authority for the goods subject to customs control in the period in which they are entrusted to him or when he has control or exclusive use area where they are deposited or should transit.” Lei No. 12.815, de 5 de Junho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 26, de 5.6.2013 (Braz.).

8. The research was completed on August 25, 2014.

erator” and “liability” (generating 0 results); and “Port Operator” and “responsibility” (generating 8 results).

The search terms purposely omitted any accents. The last combination resulted in: three cases of purely tax matters, three cases purely administrative in nature and only two cases in which the STJ says the port operator is facing civil liability. The search resulted in nothing to analyze regarding any essential aspect of the STJ’s reasoning, as the matter of factual review is prohibited by the same court. Therefore, the STJ could not provide the answer to the proposed question.

In the Court of Justice of Paraná, the research was conducted with a combination of search terms: “Port Operator” (also omitting accents) with the added requirement that the terms should appear in the judgment. The research discovered eleven cases, which resulted in two cases being exclusively labor matters (accident and safety) and another referred to the declaration of the port operator for purposes of the statute of limitations. Thus, eight remaining cases will be the focus of this article.

In addition, this research is based almost exclusively on jurisprudential analysis for two reasons: (i) seeking to understand how the “authentic” interpreter sees the main logistics activities of international trade and, perhaps, its main “problem”⁹ and (ii) revealing the doctrinal research of scarce resources not only on the port issue itself, but also on the issue of the civil liability of the Port Operator. While the matter is extremely relevant, the issue still remains unanswered and unexplored. In addition, there is little state law on this topic.

II. ANALYSIS OF THE ENCOUNTERED CASES

The previous legislation, Article 11 of Law No. 8.630/1993,¹⁰ had very similar wording to that of the current Article 26 of Law No. 12.815/2013.

Therefore, it can be very useful to understand how these articles were understood in the cases arising out of Law No. 8.630/1993 in order to

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9. Another “problem” that can be mentioned is the port infrastructure and the consequent delay costs in the embarkation/disembarkation of the cargo. Frederico E. Z. Glitz, *Favor Contractus: Alguns Apontamentos Sobre O Princípio da Conservação do Contrato no Direito Positivo Brasileiro e no Direito Comparado*, 1 REVISTA DO INSTITUTO DO DIREITO BRASILEIRO DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA, 475 – 542 (2013), available at http://www.fredericoglitz.adv.br/upload/tiny_mce/CAPITULOS_DE_LIVROS/GLITZ_-_Favor_contractus_-_al-guns_apontamentos_sobre_o_principio_da_conservacao_do_contrato.pdf.
10. The port operator reports to: I. the Port Administration, for damages culpably caused to infrastructure, facilities and equipment that it is the holder or, being third property, that are at your service or under their custody; II. the owner or consignee of the goods, for damages that occur during the performance of operations or as a result of them; III. the owner, the damage caused to the vessel or goods given to transport; IV. the port worker, the compensation offered and their charge of services; V. the local agency of hand labor of causal work management, for the contributions not collected; VI. the competent bodies, for the collection of the taxes on temporary dock work. Lei No. 8.630, de 25 de Fevereiro de 1993, DIÁRIO OFICIAL DA UNIÃO [D.O.U.]: art. 11, de 26.2.1993 (Braz.).

conclude what the tendency would be of interpreting the current legislation.

It should be noted that this is an argumentative exercise, insofar as there are twenty years separating the two laws. These laws developed as consolidated jurisdictional tendencies. The similarity of wording may indicate elements of interpretation and even raise more questions by current interpreters.

It should be highlighted that all eight cases found in the case law of the Court of Paraná, following the criteria outlined in the introduction, were awarded under the aegis of the repealed legislation.

2.1 The first case discusses the liability of the Port Authority of Paranaguá and Antonina (APPA) due to the collapse of a container (during movement of the container) and the consequent damage.¹¹ The insurer subrogated the credit intended to blame the APPA because it would be his duty to carry out the port operations (including the operation of the necessary machinery—in the case of the portainer).

The Court, however, understood that the management of the port “has no liability for the withdrawal or the loading of ships, solely for the deposit and storage of goods and containers after these are discharged” and that such a discharge would occur by “private companies” contracted by the ship’s captain and owner of the goods.¹² The Chamber emphasized that the criterion for such enforcement of liability would be fault, for example, as a means of subjective liability.¹³

2.2 The second case involves the reimbursement for compensation paid for damages caused to the ship’s hull.¹⁴ The Court of Paraná, also using Article 11 of Law No. 8.630/1993 assigned this liability to the “port operator.”¹⁵ The details of the case revealed that the liability of the operator was reinforced by an express contractual clause in which he assumed contractual responsibility for damage caused to the vessel and other equipment. In this case, the Court did not refer to any accountability criteria beyond the contractual term and the device of Article 11 of Law No. 8.630/1993.¹⁶

2.3 The third case involves a discussion of fault regarding glass cargo in containers and the liability of a particular operator.¹⁷ In this case, such containers were removed from the ship and loaded onto a truck, but along the way (in the harbor) the cargo fell and ended up damaged.¹⁸ With these facts, the Court’s discussion focused on whether or not the

11. T.A.P.R. -7, Ap. Civ. No. 179195-3, Relator: Miguel Pessoa, 16.4.2003, 6, DIÁRIO DA JUSTIÇA [T.J.P.R.], 12.11.2004 (Braz.).

12. *Id.*

13. *Id.*

14. T.J.P.R., Ap. Civ. No. 345315-4, Relator: José Anticeto, 16.10.2008, 121, DIÁRIO ELETRÔNICO DO TRIBUNAL DE JUSTIÇA DO PARANÁ, 17.04.2009 (Braz.).

15. *Id.*

16. *Id.*

17. T.J.P.R., Ap. Civ. No. 0379168-0, Relator: José Anticeto, 13.11.2008, 98, DIÁRIO ELETRÔNICO DO TRIBUNAL DE JUSTIÇA DO PARANÁ, 13.03.2009 (Braz.).

18. *Id.*

liability would be on the port operator.¹⁹

The Court held that because the damage did not occur during the loading and unloading activities, the operator could not be liable.²⁰ In this case, the Court of Paraná expressly demanded the need to demonstrate the element of blame for the liability of the port operator.²¹

2.4 The fourth case involves an indemnity claim of a company that had a lesser quantity of cargo delivered (disembarkation) than that which was boarded.²² In this case, the judge held that the port operator was exercising a “federal public service” (the content of Article 1 of Law No. 8.630/1993) and, therefore, their liability would be objective.²³

This is the first time that such a view was taken in the Court of Paraná. Some data, however, is even more significant: (i) the precedent cited as the basis for the judgment is the case law previously discussed in Section 2.2, where no accountability parameter is mentioned, and an express contractual clause accountability is present; (ii) until then, the same Chamber of the Paraná Court decided the same cases based on Article 11 of Law No. 8.630/1993 as being subjective liability.²⁴

2.5 In the fifth case, the Court discussed joint and several liabilities between the carrier and the port operator for partial loss of the cargo.²⁵ The Court, in interpreting Article 11 of Law No. 8.630/1993, held that the liability of the port operator would be delimited by the loading and unloading operation, and cannot be extended to any damage caused during transport (hence, why one can not speak in solidarity).²⁶ This same understanding had, somehow, been given in the case described in Section 2.3.²⁷

2.6 In the sixth case the same facts of the previous case were involved, but this time, the issue involved security-based compensation of claims because the port operator had an indemnified client with losses at the time of the shipment of the cargo.²⁸ In the first instance, the Court concluded that there was no causal link between the activity of the operator and the alleged damage suffered, for which there would be no such compensation.²⁹

The judgment emphasized that the operator would not only have liability limited (“exercise of public activity”), but also would not have to con-

19. *Id.*

20. *Id.*

21. *Id.*

22. T.J.P.R., Ap. Civ. No. 596147-9, Relator: José Anticeto, 29.10.2009 (Braz.).

23. *Id.*

24. *Id.*

25. T.J.P.R., Ap. Civ. No. 566481-7, Relator: Albino Jacomel Guerios, 14.01.2010 (Braz.).

26. *Id.*

27. *Id.*

28. T.J.P.R., Ap. Civ. No. 679795-3, Relator: Denise Kruger Pereira, 08.07.2010, 551, DIÁRIO ELETRÔNICO DO TRIBUNAL DE JUSTIÇA DO PARANÁ, 17.01.2011, 134 (Braz.).

29. *Id.*

tinually demonstrate how the official documents illustrate that the loss of the cargo would be equivocal.³⁰ Therefore, the Court once again returned to the foundation (see Section 2.4) that the liability of the port operator would be objective due to the Port Authority.

2.7 The seventh case involves the application of the retirement decision, which requires the port operator to pay; in return, the insurer paid the amount of compensation to the insured as a result of the losses suffered (cargo disappearance from the port operator's warehouse).³¹ The Court upheld the decision, however, it did so without clarity as to whether the operator's liability was objective or subjective.³²

2.8 The eighth and final case found in Paraná case law involves a case of a compensation action in which the insurer sought the security-based compensation from severance pay for partial loss of the cargo (declared cargo at the point of origin/unloaded cargo).³³ The Court held the operator strictly liable (citing the case reported in Section 2.4 as precedent).³⁴ Although there are only a few cases that were heard by the Court of Paraná, some conclusions can be drawn.

III. CONCLUDING NOTES

Through just eight cases, the Court of Paraná revealed an interesting trend: the liability of the port operator moves from a subjective standard to an objective one. Today, this understanding is consolidated in the Court.

Also, it seems to be consolidated with the understanding that the liability of the port operator, in Paraná law, is objectively based on the liability of the Port Authority. This understanding was the foundation of a single trial, and was repeated in another trial (explicitly).

While it may be that the Paraná State Court decides the liability of the port operator as a case of strict liability based on the management's responsibility, such justification is hardly based on any of the cases decided by the Court.

On the other hand, the limited doctrine on the subject prefers to address the civil liability of the port operator in terms of objective liability, but is done, normally, because of the activity that the operator exercises. This, incidentally, seems to be the best option on the subject. This is because the port operator does not exercise proper activity of the Port Authority, neither granted nor delegated as a public service.³⁵ It is from

30. *Id.*

31. T.J.P.R., Ap. Civ. No. 887733-2, Relator: Denise Antunes, 16.08.2012, 995, DIÁRIO ELETRÔNICO DO TRIBUNAL DE JUSTIÇA DO PARANÁ, 23.11.2012, 235 (Braz.).

32. *Id.*

33. T.J.P.R., Ap. Civ. No. 901630-0, Relator: Braga Bettega, 30.08.2012 (Braz.).

34. *Id.*

35. Not only that, the very Article 21 of Decree No. 8033/2013 which regulates Law No. 12.815/2013 provides: 'Contracts between concessionaire and third parties shall be governed by the rules of private law does not establish any legal relation-

activities performed by a third-party that, managing the risks to which the business is subject, retains the profit that the entire business activity is focused on.³⁶

Such is the explanation that civil liability gives for the damages arising from the exercise of such activity and, justly, the “risk,” or objective liability. The assertiveness of such logic encountered, today, supports Article 931 of the Brazilian Civil Code.

Other “evidence” can still be pursued: (i) No. 12.815/2013 refers to a specific liability, mentions the criteria for “fault” (such as Art. 26, paragraph I) and (ii) traditionally all activity is regulated by legislative and jurisprudential tradition in Brazil based on objective liability.

Apart from the objective liability, the analysis of the case law from the Paraná Court also revealed two other data points: (i) in principle, the extension of liability to the port operator would delimit loading and unloading operations, even if any faults happen in the transport within the port itself and (ii) the extent of such liability via joint liability would not be admitted.

In spite of any difference as to the reasoning, the analysis of the Paraná Court decisions reveals how, in the face of scarce regulatory resources and almost nonexistent doctrinal sources, the institutions of the Port Law arrive at some kind of technical legal solution.

ship between the third party and the grantor, subject to regulatory and supervisory activities of Antaq. Decreto No. 8.033, de Junho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.06.2013 (Braz.).

36. Other “evidence” in this sense is that Art. 37 of Decree No. 8033/2013 provides for the indication when representatives of “business class” in the Council of the Port Authority mentions the port operators. Decreto No. 8.033, de Junho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.06.2013 (Braz.).

Updates

