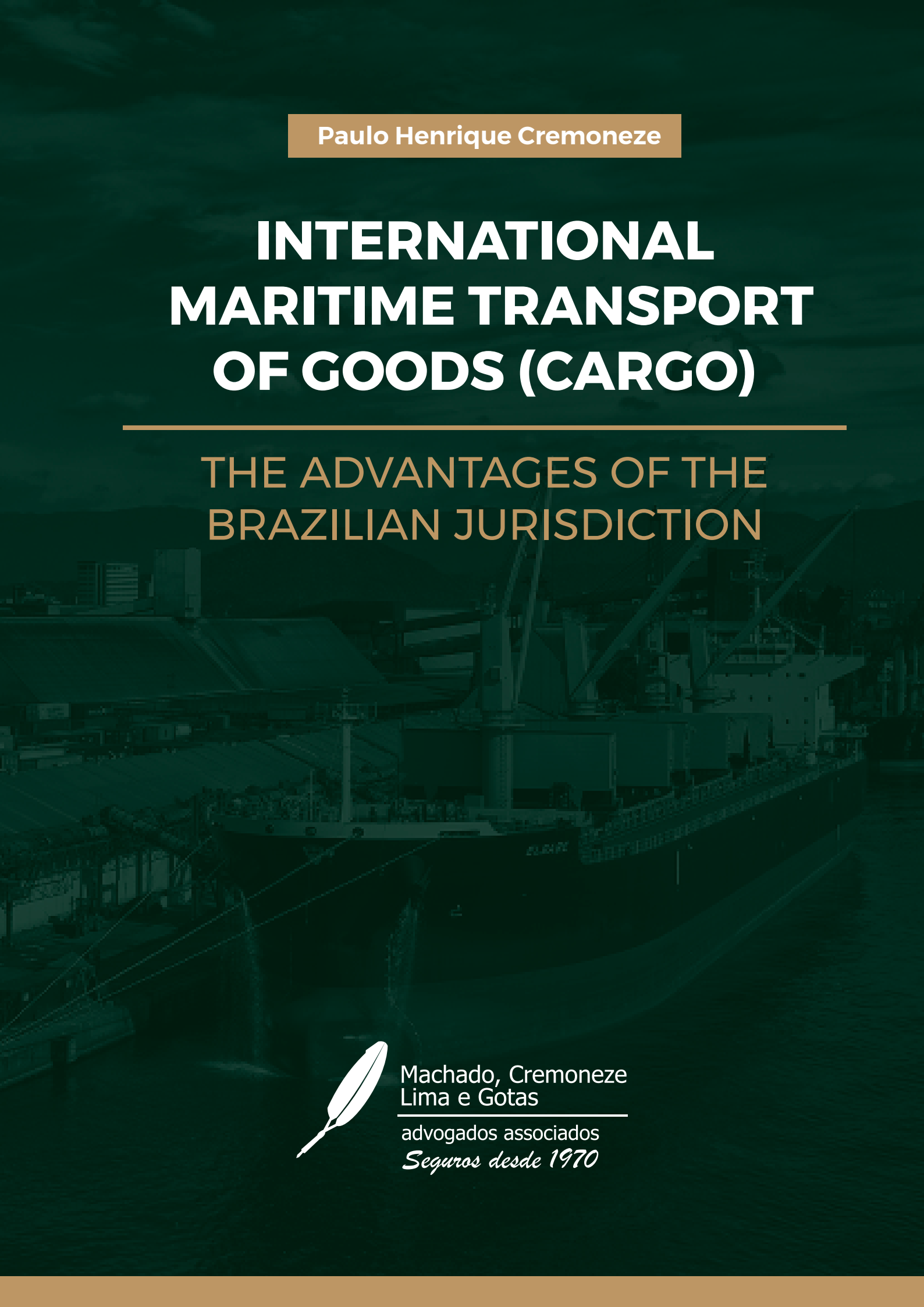
Paulo Henrique Cremoneze

INTERNATIONAL MARITIME TRANSPORT OF GOODS (CARGO)

THE ADVANTAGES OF THE BRAZILIAN JURISDICTION



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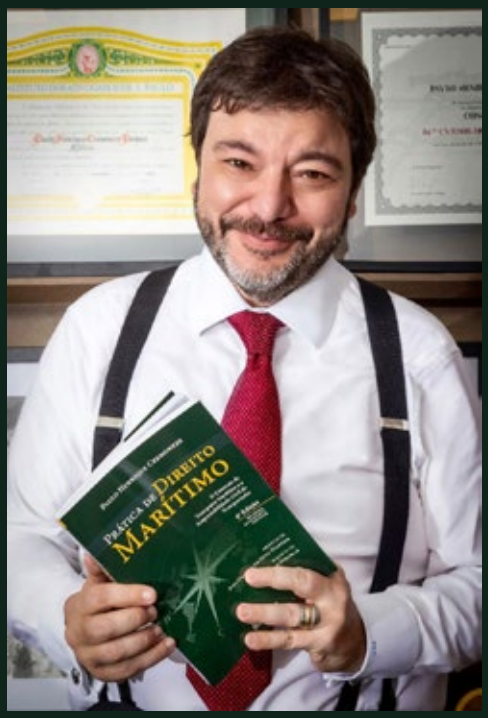

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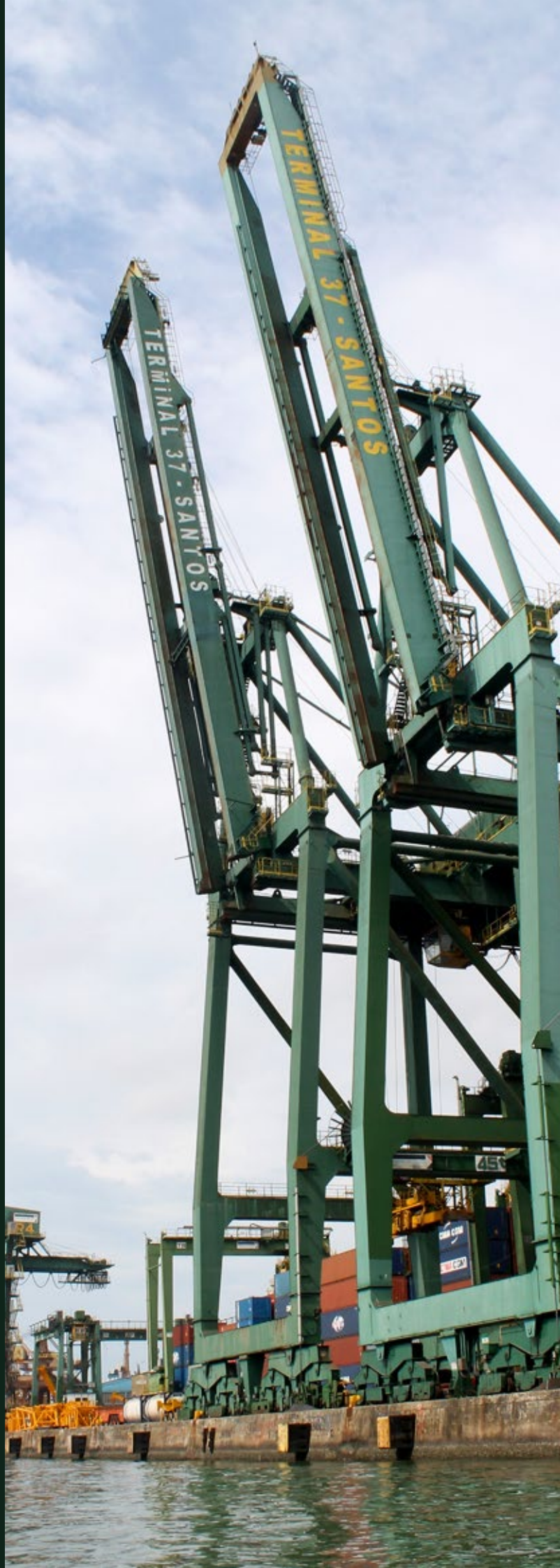


In response to a request from our professional partner of the United Kingdom and to better inform European, Japanese and American insurance companies, I present herein, in a very short narrative, practical, based on my long-standing professional practice, some of the reasons for which cargo insurers and/or owners should always, if possible, opt for the Brazilian jurisdiction rather than foreign jurisdiction.

Even before starting, I can assure you that Brazil, as incredible as it may seem, is the country that best deals with the Maritime Law in the whole world, doing it in accordance with the moral order and the common good, and not according to the almost exclusive will of some economic segments or, even, States' interests.

The Brazilian jurisdiction is the one that best provides for effective justice to disputes based on non-performance of obligations and respective liabilities, not bending to regulatory abuses, much less to contractual dirigisme.

Namely:

The Practice of Maritime Law in Brazil

In disputes involving contracts for the international carriage of goods by sea, it is recommended to opt, whenever possible, for the Brazilian jurisdiction.

There are many and good reasons for this option and it is possible to summarize them in one central idea: the Brazilian legal system is very favourable to the cargo owner or its insurer.

Brazil does not submit itself to any International Convention on Maritime Law.

The only Convention that Brazil signed, the one from Hamburg, in the 1970s of the last century, was not ratified by the National Congress, and therefore does not apply in the country.

All Maritime Law cases are governed exclusively by Brazilian laws: 1) The Civil Code (Art. 730 et seq); 2) Decree no. 116/67; 3) Decree no. 2681/12, among other special laws.

The entire set of Brazilian laws provides that in the case of nonfulfilment of an obligation to carry goods the sea carrier is presumably liable for the losses incurred.

This is, without a doubt, a great advantage.

In being [the carrier] presumably liable for loss or damage during the course of the carriage, the interested party (cargo owner or insurer in subrogation) does not have the burden of proving the fault of the sea carrier – it is the sea carrier who must prove its innocence.

And the list of causes that exempt the sea carrier from liability is very limited, restricted to three causes: force majeure, fortuitous event and (unsuitability of) packing or inherent vice.

It is important to stress that to the sea carrier it will not suffice just to claim any of these causes of exemption from liability, the carrier must prove it technically.

Even more, the carrier must provide proof within a context of reasonableness and plausibility, as established by the Superior Court of Justice, the most important Brazilian court for disputes involving civil liability.

So, the occurrence of a strong storm is not enough for the carrier to allege fortuitous event in its favour for loss or damage to cargo, it is necessary to provide evidence that that same storm was

unforeseen, unavoidable and truly irresistible.

Today, in Brazil, few are the cases in which the Judicial Branch recognizes the fortuitous nature of a storm or of any climatic adversity.

All this rigour is justified because the Brazilian Law establishes that the contract for the carriage of goods is an obligation of result, through which the carrier undertakes to deliver the cargo in the same order and condition, as received.

It would be no exaggeration to repeat that all loss and damage to cargo imply presumptions of fault and liability to the carrier, and that it has the duty of proving, upon reversal of the burden of proof, its eventual innocence in concrete cases.

And that, the winning professional experience authorizes to state, is very difficult for the carrier.

However, the legal presumption of liability against the carrier and the non-applicability of International Conventions are not the only advantages for the cargo owner or insurer in subrogation.

Another important advantage is that the Brazilian Civil Law interprets the contract for the international carriage of goods by sea as a contract of adhesion, and therefore with limitations as to the full applicability of its clauses.

In Brazil, the contract of adhesion does not adjust to the universal concept of “pacta sunt servanda”.

Since only one of the parties, the carrier, imposes its will – whereas the other parties are obliged to adhere to what is imposed – the Brazilian law and justice analyse with precaution the contents of contractual rules and even consider some abusive, in line with the concept of “hardship”.

Traditionally, the Brazilian justice does not recognize as valid and effective the clauses of choice of jurisdiction, arbitration and limitation of liability.

In fact, with regard to limitation of liability it may be said that it is illegal because it hurts the principle of full civil recovery, Art. 944 of the Civil Code, and unconstitutional because it offends the fundamental guarantee set forth in Article 5, V, of the Federal Constitution.

So, regardless of the question of payment or not of freight “ad valorem”, Brazilian judges tend not to apply limitation of liability to sea carriers.

These abusive clauses are even more ineffective when the plaintiff bringing a lawsuit is an insurer legally subrogated to the rights of the cargo owner (the insured).

There is, therefore, a very good and favourable scenario to cargo owners and their insurers, and consequently a very hostile scenario to sea carriers.

The law and legal precedents in Brazil favour the legal concept of recovery of indemnification paid.

Another advantage is financial.

Explaining: in addition to inflation adjustment, common to all jurisdictions in the world, in Brazil there is the so-called “moratory interest”. For each month of litigation, as from the service of summons on the sea carrier, interest will accrue on the amount of the loss at a rate of 1% (one percent) – which increases a lot the sum total. The aim of the moratory interest is to motivate the party that foresees a defeat to seek a compromise, while compensating for the long wait, in some way, the winner of the litigation, if plaintiff.

Brazilian judges are very serious and qualified because they are officially vested with power/authority in their functions through rigorous test and title examinations. Fortunately, the corruption scandals that are badly affecting Brazil, involving legislators and govern leaders, are not observed on the magistracy, and this is especially true with judges hearing business causes, such as Maritime Law causes.

Perhaps the only downside of litigating in Brazil is the slowness, a little bit longer than what is seen in First World Countries: United Kingdom, Japan, United States, Germany, Italy, etc.

This slowness, however, has been considerably modified by the computerization of the justice system, something really good.

The legal costs in Brazil are approximately equal to 1% of the amount awarded in the lawsuit.

In case of loss of a lawsuit, it is necessary to pay something between 10% and 20% of the adjusted amount of the action (without interest or other charges) as "payment of the winner's legal costs".

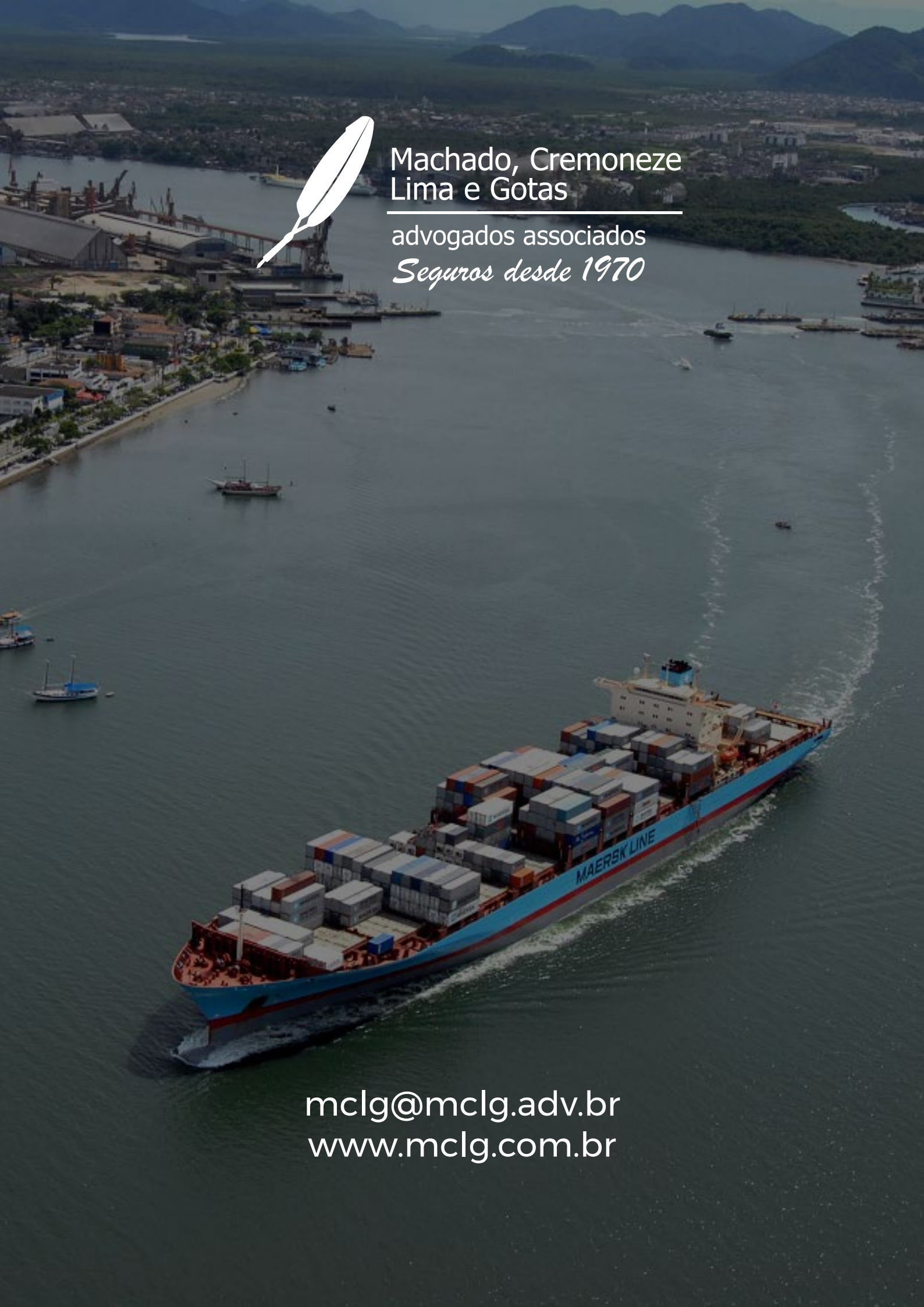
The payment of the winner's legal costs is nothing more than the amount of the legal fees due to the lawyer of the prevailing party in a litigation.

To litigate in Brazil, the following documents are necessary:

1. Power of Attorney with clause "Ad Judicia" and the Articles of Association of the legal entity;
2. Receipt of indemnity payment (in case of an insurance company in subrogation);
3. International bill of lading for the carriage of goods by sea;
4. Protest of the consignee (in some cases);
5. Loss adjustment documents.

Some documents must be translated into Portuguese language, adding the work's cost of a sworn translator – which is set by law and follows international standards.

If the company or insurer does not have a corresponding branch, a partner company in Brazil, it shall be necessary a cash guarantee, returned by the end of the legal dispute, in case of victory.



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