STS LNG in Brazilian jurisdictional waters: liability rules

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Introduction

The Brazilian natural gas industry is currently undergoing a redesigning process to adapt to, as well as to make feasible, the new scenario expected for the gas sector in the coming years. The need to foster this industry has been driven mainly from a local perspective, by the expected divestiture of state-owned Petrobras of the natural gas chain assets and by the federal government, which has launched several initiatives aimed at legal, regulatory and commercial improvement of this industry. In addition, the concerns regarding the transition to a lower-carbon energy matrix has pointed to natural gas as one of the main energy alternative sources. The concurrence of these factors has afforded a fertile market for the development of the natural gas industry and revealed a hugely attractive potential for investors.

In this context, LNG regasification terminals already play a key role, as they promote flexibility in the supply of natural gas, as well as diversifying national sources of supply. According to recent data,[1] projects of regasification terminals have been announced in several states in the country, having in common the provision of gas to gas-fired power plants (UTEs), which generally support the growth of natural gas projects. However, large regasification terminal projects, both onshore and by means of Floating Storage and Regasification Units (FSRUs), require large investment, which may in some cases cause bottlenecks and hamper the implementation of projects.

One of the possible alternatives capable of increasing the flexibility of cargo delivery operations and enabling smaller regasification projects is the transportation of LNG using smaller LNG carriers, by means of the transfer of LNG from large LNG carriers anchored or moored in ports with appropriate infrastructure, to small vessels, which would in turn transport the LNG to terminals that handle the activity of smaller FSRUs. No major infrastructure, such as the dredging of the port area to meet the draft requirements of the vessel, is required to sustain these operations.

This type of operation is solely based on a ship-to-ship (STS) model, which consists in the transfer of cargo

between vessels located in Brazilian jurisdictional waters and may be performed with moving or anchored vessels.[2] The STS is already widely used in the oil industry, as it allows for the maritime exportation of crude oil to be carried out in cheaper conventional tankers.

It is important to stress that LNG shipping is much safer than comparable crude oil shipping.[3] However, LNG is a highly flammable gas, and taking into consideration that LNG carriers can transport up to 160,000m^3, an LNG spill can cause huge damage and major indirect environmental pollution.

This article explores the implications of the performance of LNG ship-to-ship transfers in Brazilian jurisdictional waters, with focus on the liability regime under which the STS operations are performed, considering the great impact of those liabilities in case of environmental damage.

Applicable Liability Regime

While the oil industry has in the past witnessed major accidents involving great maritime oil spill accidents that ultimately led to the implementation of international conventions concerning specific civil liability regimes for such events,[4] it is true that no major accident involving natural gas has yet raised the same type of concern from the international community. Although an international convention regulating the civil liability of carriers of hazardous and noxious substances – among which natural gas would be included – has already been negotiated,[5] due to many different reasons, it has not yet come into force.

Any accident involving the spill or leakage of natural gas within jurisdictional waters will therefore be subject to Brazilian law, which has a strong focus on environmental protection. Its main source is the Federal Constitution, Section 225, and Federal Law 6.938/1981. The Federal Constitution sets out the importance of environmental protection and defines it as common heritage of the Brazilian people, being essential to a healthy quality of life of present and future generations. Federal Law 6.938/1981 reinforces the strict environmental treatment established by the Federal Constitution.

The Federal Constitution, Section 225, paragraph 3, sets forth that polluters are subject to criminal and administrative sanctions 'without prejudice to the duty to repair the damages caused to the environment'. Here it is relevant to clarify that Brazilian law has adopted a broad concept of 'polluter', which includes any person or entity directly or indirectly responsible for activity that causes environmental degradation, as per Section 3 (IV) of Law 6.938/1981.

Under Brazilian law, therefore, the polluter has the obligation to adopt all necessary measures to prevent damage to the environment and to bear all costs for its reinstatement. Section 4 (VII) of Law 6.938/1981 provides that the polluter will be subject to the obligation to compensate and indemnify all those harmed. In this same sense, Section 14, paragraph 1 states that 'the polluter is obliged to pay for the damages caused to the environment and to indemnify any third-party affected by his activity, regardless of his fault'. In addition to those severe provisions, it is not difficult to consider an agent or connected entity as a polluter, since it is enough to prove a link between the damage and the activity conducted by the agent, for him or her to fall within the definition of polluter, and thus to be held liable.

If environmental damage occurs, the Ministério Público may prosecute those who are deemed as polluters, pursuing the reinstatement of the environment and compensation of victims, without prejudice to any legal action brought by parties who suffered any consequence of the damage, including claims for moral

damages.

Considering the above-mentioned liability regime, in case of accidents involving STS operations, the shipowner, the cargo-owner, the services provider and all those involved in the operation may be deemed a 'polluter' for all purposes of the law. Moreover, all of them, jointly or separately, are liable without limit for any environmental damage caused by their actions.

Consequences

When it comes to developing a project, one of the main concerns of the investors is the risk to which they will be exposed. In the case considered above, it is highly significant. Even though, as said before, LNG shipping is much safer than crude oil shipping, during STS operations, LNG spill is more likely to occur due to technical problems or human error in the coordination or in the actual performance of the operation.[6]

The international community has adopted special regimes of strict and limited liability of the shipowner in cases of maritime accidents involving some types of damages.[7] Brazil has only become party to one of these conventions – CLC/1969 – and even in relation to it, applicability remains a matter of debate. Limitation of liability in regimes like these does not imply that the victims will be left unassisted. To the contrary, as the maximum limits of indemnification tend to be increased to better secure the possibility of recovery by the victims, and international funds are created to support such regimes, the drive of these conventions is always also to seek adequate reparation for the victims.

In contrast to what has developed in relation to civil liability for oil spills, there is no special regime currently in force with similar provisions to the CLC/1969 for natural gas spill. Regardless of the discussion on whether Brazil is compliant with CLC/1969, and whether it is compatible with the Federal Constitution, the fact is that not even a discussion like this would take place in relation to damages arising from any accident involving natural gas STS operations. This means that local environment legislation, imposing obligations of full recovery and compensation, would certainly apply.

The limitation of liability regimes that have emerged in the past for situations involving maritime accidents came about for different reasons. Concepts such as strict and limited liability, combined with channelling of claims to the shipowner, brought predictability to the maritime industry, reducing risks and, as a consequence, promoting investments.

The uncertainties related to environmental liabilities exposures in Brazil, on the other hand, are a very important element that could potentially discourage, to some extent, investments in projects of this nature in the country or, at least, increase costs arising from such uncertainties (ie, insurance and financing costs). Such a scenario may result in reducing the attractiveness of the sector, which by its nature is destined for smaller projects and, therefore, with moderate returns and less appetite for risk.

Conclusion

LNG STS in Brazilian jurisdictional waters has the capacity to anchor small projects and to meet the demand for natural gas in certain regions that are currently not able to sustain the development of huge port infrastructure. Once developed, the demand can result in economic growth and make room for greater LNG

projects in the future.

However, one of the greatest challenges that such an attractive solution may face is related to a severe liability regime which, in the international community, was replaced some time ago by other more economically feasible alternatives that successfully combine predictability for the industry, on one side, and assurance of reparation for the victims, on the other .

Notes

[1] MINISTÉRIO DE MINAS E ENERGIA, *Informe: Terminais de regaseifcação de GNL nos Portos Brasileiros. Panorama dos Principais Projetos e Estudos,* Rio de Janeiro, 2018, 7.

[2] IBAMA, **http://ibama.gov.br/component/content/article?id=748 (http://ibama.gov.br/component/content/article?id=748)** accessed 13 July 2018.

[3] Dodge, Edward, *How Dangerous is LNG?* **https://breakingenergy.com/2014/12/22/how-dangerous-is-lng (https://breakingenergy.com/2014/12/22/how-dangerous-is-lng/)** accessed 13 July 2018.

[4] International Convention on Civil Liability for Oil Pollution Damage (CLC), **www.imo.org/en/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx (http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx)** accessed 13 July 2018.

[5] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), **www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Liability-and-Compensation-for-Damage-in-Connection-with-the-Carriage-of-Hazardous-and-Noxious-.aspx (http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Liability-and-Compensation-for-Damage-in-Connection-with-the-Carriage-of-Hazardous-and-Noxious-.aspx)** accessed 13 July 2018.

[6] Nikiforuk, Andrew, *How safe is LNG? Not as safe as the BC Government has claimed,* **https://thetyee.ca/News/2017/04/28/How-Safe-is-LNG (https://thetyee.ca/News/2017/04/28/How-Safe-is-LNG/)** accessed 13 July 2018.

[7] Eg, International Convention on Civil Liability for Oil Pollution Damage (CLC); International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER); Nairobi International Convention on the Removal of Wrecks; and Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL).

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