REPLY BY THE BRAZILIAN MARITIME LAW ASSOCIATION (“ABDM”) TO THE CMI QUESTIONNAIRE OF MARCH 2016 ON THE STUDY RELATING TO VESSEL NOMENCLATURE

**1. Is there a statutory, regulatory or other definition in your legal system which conveys a meaning similar to the above definition of either "Vessel" or "Ship"? If so, which is (are) the terms and their corresponding definitions? Please provide details of all qualifiers to such definitions, such as minimum length, tonnage, registry, design, intended trade or usage, etc.**

ABDM Comments:

1.1. Yes, pursuant to maritime legislation (Law No. 9537 of December 11, 1997), the concept of “vessel” (“embarcação”) is expressly defined as any construction including floating platforms and, when towed, the fixed-type platforms, subject to enrolment with the maritime authorities and susceptible to locomotion through the water, under their own steam or otherwise, transporting persons or cargo (article 2, item V thereof).

1.2. Particularly with respect to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship (“navio”) is expressly defined as a vessel of any type which operates in water, including hydrofoils, air-cushion vehicles, submersibles and other floating crafts. Please note that the applicability of such concept shall be restricted to said law, which regulates the prevention, control and inspection of pollution caused by oil spillage and other harmful and dangerous substances in waters under Brazilian jurisdiction

1.3. The Port and Coastal Authority (*Capitania dos Portos*), under the authority of the Navy Command, of the Ministry of Defense, established under Brazilian Maritime Rule No. 1 approved by Ordinance No. 45 of May 11, 2005 as amended, the following types of vessels:

(A) Classified Vessel - any vessel bearing a Class Certificate or under a classification process before a recognized Classification Society acting on behalf of the Brazilian Government;

(B) Certified Vessels (EC) – all non-SOLAS vessels, which may be subdivided in:

 (I) Class 1 (EC1) – vessels which may be characterized under one of the followings situations:

(i) intended for the transportation of passengers, with or without propulsion, and with a Gross Tonnage higher than 50;

(ii) floating operating with more than 12 people on board, with a Gross Tonnage higher than 50;

(iii) not intended for the transportation of passengers, with or without propulsion, and with a Gross Tonnage higher than 50; or

(iv) floating with a Gross Tonnage higher than 100.

 (II) Class 2 (EC2) - all other non-SOLAS vessels.

(C) “SOLAS” vessels - means all merchant vessels used for international maritime voyages or employed in the merchant maritime traffic among Brazilian ports, oceanic islands, port terminals and offshore platforms, with exception to:

 (I) cargo vessels with Gross Tonnage lower than 500;

 (II) passenger vessels with Gross Tonnage lower than 500 and not used for international voyages;

 (III) vessels without mechanical propulsion;

 (IV) wooden vessels of primitive construction;

 (V) fishing vessels; and

 (VI) vessels with a ruled length lower than twenty-four (24) meters.

(D) Prototype - first vessel of a "Vessel Series" for which a Construction License has already been issued;

(E) Vessel Series (“sister ships”) – characterized due to a unit group with same characteristics, built at the same place and based on the same project;

(F) Passenger Vessel - all vessels transporting over 12 passengers;

(G) Fishing Vessel – all vessels intended exclusively and permanently for capturing live beings, which have the water as their main or more frequent natural habitat;

(H) Tanker Vessel - vessel built or adapted for the transportation in bulk of liquid loads of flammable nature. All other vessels which carry liquid bulk loads are considered as cargo ships;

(I) Flotel - vessel which renders support services to the activities of the offshore platforms (such as electric power generation, hotel services, maintenance utilities, among others);

(J) Floating - all floating structures without propulsion which operate at a fixed and determined place;

(K) Tugboat and/or Pusher - all vessels designed or adapted to perform the operations of towing and/or pushing;

(L) New Vessel:

(I) SOLAS - vessels which are defined as such under the applicable International Conventions and Codes ratified by the Brazilian Government; and

(II) Non-SOLAS – under a process of Construction, Alteration or Reclassification Licenses or request enrollment (in case of vessel that is not required to obtain the such License) after June 30, 2004;

(M) Existing Vessel - the one which is not a new vessel;

(N) Platform – fixed or floating structure or facility intended for activities directly or indirectly related to the research, exploration and exploitation of resources originated from the bed of inland waters and their subsoil or from the seabed, including the continental shelf and its subsoil.

 (I) Mobile Platform - means the generic designation of vessels used directly in the activities of prospection, extraction, production and/or storage of oil and gas. It includes the Semi-Submersible and Self-Elevating units, Drill Ships, Tension Leg units, Deep Draft (Spar) units, Stationary units of Production, Storage and Transfer (FPSO) and Stationary units of Storage and Transfer (FSO). Vessels intended for the execution of other works or services, even when presenting construction characteristics similar to the units fitting the above definition, must not be considered as "Platforms" for the purpose of application of the requirements established in these Standards and in other codes associated with oil-related activities.

 (II) Fixed Platform - means a construction placed in a permanent way at the seabed or inland waters, intended for the use in activities related to the prospection and extraction of oil and natural gas. It is not considered as a vessel when attached to the bed of inland waters or seabed.

**2. In your system, does the definition of "vessel" (or equivalent term) vary depending on the subject of a particular law? For example, does the definition differ for purposes of documentation, registry, flagging and mortgaging or when applied to seagoing labor, environmental, casualty, insurance or taxation law?**

ABDM Comments:

2.1. Although the concept of vessel is not otherwise specifically defined under the applicable tax legislation, Brazilian Federal Tax Authorities have a particular interpretation according to which an asset to be deemed as a vessel should be able to move on the water performing transportation of people or cargo. Based on such interpretation adopted in specific administrative decisions, Brazilian Tax Authorities do not apply the applicable vessel tax exemption (as further detailed below) to platforms and, as we understand it, such matter has still not been decided by Brazilian Superior Courts.

2.2. Pursuant to article 1, item “I” of Law No. 9481, of August 13, 1997, as consolidated in article 691 of the Income Tax Regulations (Decree No. 3000, of March 26, 1999), the Brazilian Withholding Income Tax is assessed at a zero rate in the case of payments remitted abroad as remuneration for the charter of vessels.

2.3. There are lower court decisions with the understanding that, for the purposes of such vessel tax exemption, an asset shall only be deemed as a vessel if its purpose is the transportation of people or cargo. Pursuant to such decisions although platforms would be able to move on the water, the purpose of such assets would be research, exploitation and prospecting of oil. Therefore, platforms would not be contemplated by such tax exemption.

2.4. Please note, however, that the legal concept of vessel established under Law No. 9537 of December 11, 1997 expressly contemplates platforms in such definitions characterizing the possibility of locomotion through the water as an essential element to such type of asset (rather than the transportation of people and goods).

2.5. As regards maritime insurance, please note that pursuant to article 685 of the Brazilian Commercial Code (Law No. 556 of June 25, 1850, as amended) any and all things, any and all interests with monetary value, which has been or shall be put at sea, may be object of maritime insurance, with due regard to any prohibition on the contrary. Additionally, Law No. 8374 of December 30, 1991, which regulates the mandatory insurance for personal damages caused by vessels or their cargo, defines vessel as vehicles destined to maritime or inland traffic, equipped with self-propulsion or not.

**3. Does your legal system provide for a unique process of seizure, foreclosure, forced sale or ranking and priority of claims against vessels that is different from such processes for other types of property? If so, please explain.**

ABDM Comments:

3.1. Please find below our comments on the protective measures to creditors against vessels under Brazilian Law:

Arrest and Privileged Claims over Vessels in Brazil

3.2. Law No. 13105 of March 16, 2015 (also known as the New Brazilian Code of Civil Procedure) establishes precautionary measures for urgent matters (as it would be the case of seizure and arrest, among others), to avoid a party to suffer serious damages hard to be recovered in a situation of dispute against another party. The requirements established by law in order to authorize the filing of a precautionary measure (and also the granting of the injunction) are:

(a) risk of damage or risk to the useful result of the proceeding (*periculum in mora*) --- meaning that the party cannot wait the dispute to be finally appreciated and decided, under the risk of suffering damages hard to be recovered in the meantime; and

(b) probability of right (*Fumus boni iuris*) --- consisting of the plausibility (existence of pre-established proof) that the plaintiff’s claims are grounded.

3.3. The New Brazilian Code of Civil Procedure indicates the arrest (“*arresto*”) as one of the precautionary measures, which is a protective measure to creditors consisting in the judicial seizure of the debtor’s assets for purpose of securing a future execution action. Please note, however, that such new legislation does not provide for specific requirements for the arrest as otherwise expressly regulated under the previous legislation on the matter. Therefore, there are jurists that understands that such previous requirements would still apply as standards.

3.4. The right of arrest does not come ahead of the owner’s right in a vessel. According to the Brazilian Commercial Code (Law No. 556 of June 25, 1850, as amended), the requirement for granting the arrest of a vessel is that the outstanding credit must fall under any of the legal payments set forth in articles 470, 471 and 474 of the Brazilian Commercial Code (known as “privileged claims”). Privileged claims under the Brazilian Commercial Code, which shall create a statutory mortgage over the vessel, are as follows: (i) salaries owed for onboard services; (ii) all maritime fees and taxes (that is, fees due to the ports administrators and tax obligations); (iii) expenses for surveillance and maintenance of a ship; (iv) crew payment; (v) overdue payment of a ship’s purchase price; (vi) debts arising from the ship construction agreement; and (vii) repair expenses involving a ship and its equipment.

Enforcement of Foreign Mortgages in Brazil

3.5. In Brazil, rights over vessels shall be governed by the laws of the country of the flag that the vessel is flying. In case of a dispute in Brazil, Brazilian courts shall apply a foreign law, to the extent that such foreign law does not contravene Brazilian national sovereignty, public policy or good morals.

3.6. In this regard, please note that Brazilian courts shall have jurisdiction whenever the defendant is domiciled in Brazil, the obligation has to be performed in Brazil or the fact under dispute has been originated in Brazil. Brazilian courts, however, shall have exclusive jurisdiction in actions relating to real property situated in Brazil. Brazilian courts would also have jurisdiction in case of any action seeking repossession of a vessel or in case of arrest, provided that the vessel is located within Brazilian territorial waters, the exclusive economic zone or the continental shelf of Brazil. Please also note that, in accordance with the rules on conflicts of law established by Decree-Law No. 4657 of September 4th, 1942 as amended by Law No. 12376 dated December 30th, 2010, whenever a foreign law shall be applied, the provisions of such foreign law shall be observed, regardless of any reference that may be made by such foreign law to other laws.

3.7. With respect to a foreign mortgage over the vessel, therefore, we understand that Brazilian courts would have jurisdiction to decide on the mortgage in relation to provisional remedies, i.e. protection measures related to the status of the mortgagee's rights over the vessel and to the protection of the vessel from depreciation or destruction.

3.8. Under Brazilian law, the enforcement of a mortgage can only be made through a judicial proceeding, in which case the judge shall determine that the mortgaged property be attached and appraised by an appraiser appointed by the judge. Upon the appraisal of the mortgaged property, such property shall be sold at a public auction, the proceeds of which will be applied to the payment of the principal and interest of the debt, judicial expenses and legal fees. The balance amount, if any, shall be returned to the debtor. Alternatively, the property may also be adjudicated to the mortgagee, with the leave of the court, or sold by the creditor, either directly or through a broker accredited with the court, in which case the judge shall determine the term for the sale to be effective, the mechanism for its publicity, the minimum price, the payment conditions and collateral requirements, as well as the brokerage, if applicable.

3.9. As a general rule, the registration of a mortgage under Civil law will be valid for the term of 30 (thirty) years. Upon expiration of such term, the relevant mortgage may be renewed only with a new deed and new registration. On the other hand, the specialization of the mortgage shall be renewed after 20 (twenty) years.

3.10. Please also note however that, according to the Brazilian Civil Code, mortgage over vessels shall be governed by specific law.

**4. Has the 1993 Convention on Maritime Liens and Mortgages ("MLM-93") been adopted or followed in your jurisdiction?**

ABDM Comments:

4.1. No, Brazil is not a signatory of the Convention on Maritime Liens and Mortgage 1993 (“MLM-93”).

4.2. On the other hand, Brazil is a party to the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1926/Maritime Liens and Mortgages Convention of 1926 (“Brussels Convention”), which was ratified by the Decree No. 351 of October 1, 1935.

**5. In your jurisdiction is the acceptance by a registrar or other governmental body of property as a "ship" or "vessel" or equivalent term dispositive of its status under your law?**

ABDM Comments:

5.1. No, registration of maritime property (*Registro de Propriedade Marítima* – “RMP”) shall grant the nationality, validity, assurance and publicity of the vessel’s ownership in Brazil. In order to be valid against third parties, the ownership rights and security interests over Brazilian vessels shall be registered with the Maritime Court.

5.2. Maritime property is presently regulated in Brazil by Law No. 7652 of February 3, 1988 as amended by Law No. 9774 of December 21, 1988 (“Law No. 7652/88”). Brazilian vessels are those entitled to fly a Brazilian flag. The following requirements must be observed for a vessel to fly a Brazilian flag: (i) the owner of the vessel shall be either an individual with Brazilian nationality or a Brazilian company; (ii) the vessel’s captain shall be an individual with Brazilian nationality; (iii) the chief engineer of the vessel shall be an individual with Brazilian nationality; and (iv) at least two thirds of the vessel’s crew shall be individuals with Brazilian nationality.

5.3. Brazilian vessels (other than marine war vessels) shall be enrolled with the Port and Coastal Authority (Capitania dos Portos) of the place either where the ship owner or ship carrier is located or where the vessel is to operate. Vessels with a gross tonnage over 100 tons must also be registered with the Maritime Court, regardless of the modality of navigation they perform.

5.4. On the other hand, foreign vessel may be provisionally registered with the Brazilian Maritime Court to fly a Brazilian flag (the so-called *Registro Especial Brasileiro* - “REB”) during the relevant period for utilisation of the vessel in Brazil by a Brazilian shipping company (*Empresa Brasileira de Navegação*, also known as “EBN”), even though such vessel is owned by a foreign company, subject to compliance with certain specific requirements. Brazilian vessels are also eligible for registration with REB.

5.5. Please note that REB is not a register of title and merely supplements the RMP and cannot replace said document. Such registration is subject to the suspension of the right to fly the flag of the country where the vessel is originally registered for the period of its operation in Brazil.

5.6. The REB contains administrative and tax benefits given to Brazilian ship-owners, with a view to increasing the competitiveness of the Brazilian shipping market in relation to the foreign ship-owners, which operate their ships at a reduced cost by flying convenience flags.

**6. If property is categorized as a "vessel" in another jurisdiction and is so registered and flagged, but would not be a vessel under the definition in your jurisdiction, would the courts or relevant authorities in your jurisdiction treat that property as a vessel for all purposes, including arrest and foreclosure? Or would the Courts in such a circumstance decline to enforce an asserted claim or mortgage if the subject is not a vessel under your jurisdiction?**

ABDM Comments:

6.1. Considering that REB (the so-called *Registro Especial Brasileiro* - “REB”) is merely a supplementary registry, not being a register of title, it shall not reflect any annotation on mortgages over foreign vessel.

6.2. Only Brazilian vessels are eligible for registration as property by the Maritime Court, while foreign vessels are subject to specific authorizations and enrolments (not related to property registration).

**7. Are there any reported decisions in your jurisdiction which address the legal classification of any of the following property:**

**1. non-self-propelled barges**

**2. self-propelled barges**

**3. accommodation barges**

**4. Mobile Offshore Drilling Units**

**5. wind turbine towers (floating or permanently fixed)**

**6. jack up drill rigs**

**7. construction barges**

**8. submarines**

**9. seaplanes**

**10. hydroplanes (air cushion)**

**11. Vessels under construction**

**12. unmanned vessels**

**13. Vessels devoted temporarily or permanently to storage of bulk commodities**

**14. Vessels in "cold layup"**

**15. Derelict Vessels or "Dead Ships"**

**16. Vessels under Conversion or Renovation.**

**If there are any reported decisions on the foregoing, please attach copies. If there are numerous decisions, please attach the most recent or most indicative of your national court's views.**

ABDM Comments:

7.1. To come.

[7.2. We have located judicial decisions with respect to (i) non-self-propelled barges (appellate court, 2011), (ii) vessels under renovation (appellate court, 2011) and (iii) vessels under construction (appellate court, 2011), as per the attached documents.]

**8. We attach a most excellent summary by Professor Bulent Sozer of Istanbul regarding the variations in definitions, usages and limitations on application of terms in many international conventions. Please identify any of the Convention usages and limitations which are at variance with equivalent terms in your national system and explain the variations.**

ABDM Comments:

8.1. Please refer to item 1 above. Brazilian maritime legislation expressly defines the concept of vessel characterizing as its core element the capability of navigation, including, when towed, fixed-type crafts, and subject to enrolment with Brazilian Maritime authorities.

8.2. Accordingly, we understand that the following definitions of ships and vessels would be compatible to and/or included in the Brazilian law concepts of vessel and ships, as applicable and subject to the specific comments made in each item:

I - Concept of vessel for Maritime Operations in general (item 1.1. above)

(a) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1924 - “Ship” means any vessel used for the carriage of goods by sea. Brazil has not ratified such Convention;

(b) United Nations Convention on Conditions for Registration of Ships, Geneva,

1986 - "Ship” means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of less than 500 gross registered tons. Brazil has not ratified such Convention;

(c) International Convention on Salvage, London, 1989 – “Vessel” means any ship or craft or any structure capable of navigation. This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of seabed minerals resources. Brazil has ratified such Convention by the Legislative Decree No. 263 of June 12, 2009. Pursuant to Brazilian maritime legislation, the concept of vessel shall apply to platforms, except in case such crafts are attached to the seabed;

(d) Rules for the Assessment of Damages in Maritime Collisions, Lisbon, 1998 - "Vessel" means any ship, craft, machine, rig or platform whether capable of navigation or not, which is involved in a collision. Brazil has not ratified such Convention. Pursuant to Brazilian maritime legislation (Law No. 2180 of February 5, 1954) aircrafts, either floating or flying, shall be deemed as merchant vessels, in case of collision or any type of damaged caused to merchant vessels;

(e) International Convention on Limitation of Liability for Maritime Claims, London, 1976 - This Convention shall not apply to: (i) air-cushion vehicles; (ii) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof. Brazil has not ratified such Convention;

(f) Convention on the International Regulations for Preventing Collisions at Sea,

London, 1972 - The word “vessel” includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transport on water. Brazil has ratified such Convention by the Decree No. 80.068 of August 2, 1977;

II - Concept of ship for environmental law purposes (item 1.2. above)

(a) Athens Convention Relating to the Carriage of Passenger and their Luggage By Sea, Athens, 1974 - "Ship" means only sea-going vessel, excluding an air-cushion vehicle. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation, the concept of ship also applies to air-cushion vehicles;

(b) Athens Convention Relating to the Carriage of Passenger and their Luggage By Sea, 1974 and the Protocol of 2002 to the Convention vehicle - "Ship" means only a sea-going vessel, excluding an air-cushion. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship also applies to air-cushion vehicles;

(c) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualities, Brussels, 1969 – “Ship” means (i) any sea-going vessel of any type whatsoever, and (ii) any floating craft with the exception of an installation or device engaged in the exploration and exploitation of the sea-bed and the ocean floor and the subsoil thereof. Brazil has ratified such Convention by the Decree No. 6.478, of June 9, 2008. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), platforms and support installations to platforms or to port installations are expressly defined thereto and subject to the legal provisions established thereunder;

(d) International Convention for the Prevention of Pollution from Ships, London, 1973 and Protocol, London, 1978 – “Ship” means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms. Brazil has ratified such Convention and Protocol by the Decree 2.508, of March 4, 1998. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship encompasses any type of vessel that operates in water (rather than only in marine environment) and the concept of platforms is expressly defined thereunder;

(e) International Convention on Civil Liability for Oil Pollution Damage, London,

1992 – “Ship” means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard. Brazil has not ratified such Convention. Pursuant to Brazilian environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship shall apply to any type of vessel operating in water;

(f) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 1992 – “Ship” has the same meaning as in Article I of the 1992 Liability Convention. Brazil has not ratified such Convention;

(g) International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 2001 – “Ship” means any seagoing vessel and seaborne craft, of any type whatsoever. Brazil has not ratified such Convention;

(h) International Convention on Liability and Compensation for Damage in Connection With the Carriage of Hazardous and Noxious Substance by Sea, London, 1996 – “Ship” means any seagoing vessel and seaborne craft, of any type whatsoever. Brazil has not ratified such Convention;

(i) International Convention on Oil Pollution Preparedness, Response and Co-Operation, London, 1990 – “Ship” means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, and floating craft of any type. Brazil has ratified such Convention by the Decree No. 2.870 of December 10, 1998. Please refer to our comments in item 8.2.II.(d); and

(j) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1988 – “ship” means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any floating craft.
Brazil has ratified such convention by the decree nº 6136, of June 26, 2007. Pursuant to environmental legislation (Law No. 9966 of April 28, 2000), the concept of ship applies to any type of vessel which operates in water and fixed type platforms are included under the concept of platform expressly defined thereunder.

**9. Are there any instances involving your jurisdiction in which inconsistent or conflicting definitions of "vessels", "ships" or equivalent terms have impacted results in any legal proceeding of which you are aware? If so, please provide details.**

ABDM Comments:

9.1. Yes, as discussed in item 2 above, Brazilian Tax Authorities have a particular interpretation as regards the concept of vessel which adversely impacted transactions involving platforms.