

DEALING WITH BIG CASUALTIES IN FOREIGN JURISDICTIONS

COMMENTS ON CIVIL LIABILITY DERIVED FROM POLLUTION CLAIMS UNDER CHILEAN LAW

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By Ricardo Rozas
Larraín & Rozas Abogados
Apoquindo 3001, 9th Floor
Santiago, Chile

Tel: (56-2) 4119200 – 4119204

Fax: (56-2) 4119300

Mobile: (56-9) 919 7993

<http://www.lyrabogados.cl>

Email: rrozas@lyrabogados.cl

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1. Legal Frame.

Under Chilean law there are three main potential scenarios in connection to civil liability for the damage derived from the spillage of hydrocarbons, namely:

a) Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo, which is subject to the CLC 1992.¹

b) Spillage of hydrocarbons from vessels not carrying oil in bulk as cargo, which is subject to the CLC 1969² and the supplementary norms set forth by the Chilean Navigation Law.³

c) Damage to the marine environment due to spillage or pouring of contaminating substances caused by land installations, which is subject to the Chilean Navigation Law.⁴

2. Spillage caused by vessels not carrying oil in bulk as cargo.

According to the Chilean Navigation law, the same civil liability regime established by the CLC 1969 will rule for the indemnification of the damage caused by the spillage of any kind of materials or waters, that occur within waters subject to national jurisdiction, regardless of the activity that the vessel or naval appliance that causes it may be performing, with the following supplementary norms:⁵

2.1. Joint and Several Liability.⁶

Liability for the damage caused will jointly and severally affect the proprietor, owner⁷ or operator,⁸ in any way, of the vessel, vessels or naval appliance that caused the spillage or discharge, i.e. the polluting vessel or naval appliance.

When there are spillages or discharges coming from two or more vessels that cause damage as a result of the same event, and the responsibility is relevant, this will be joint and several among all the proprietors, ship-owners or operators in any way of all the vessels from which the damage comes except in the case of collision where it will be reasonably possible to prorate the responsibility.

¹ Enacted by Supreme Decree No. 101, and published in the *Official Gazette* on July 16, 2003.

² Approved by Decree Law No. 1808 of 1977, and published in the *Official Gazette* on June 25, 1977.

³ Approved by Decree Law No. 2222 and published in the *Official Gazette* on May 31, 1978.

⁴ Chilean Navigation Law, Article 147.

⁵ Chilean Navigation Law, Article 144, First Paragraph.

⁶ Chilean Navigation Law, Article 144, Rule 1.

⁷ According to the Chilean Code of Commerce, Article 882, First Paragraph, the Owner or “*Armador*” is the “person or corporation, whether or not the proprietor of the vessel, who trades or dispatches it under his name.”

⁸ According to the Chilean Code of Commerce, Article 882, Third Paragraph, the “Operator” is the person who is not the owner but who executes transport and other vessel exploitation contracts according to a power of attorney granted by the former, assuming liability therefrom.”

2.2. Exemptions from Liability.⁹

The proprietor, owner or operator of the vessel or naval appliance shall be responsible for the damages that are caused, unless it is proved that they were caused exclusively by:

a) Act of war, hostilities, civil war or insurrection; or a natural phenomenon of an exceptional, inevitable and irresistible nature; and

b) Action or omission with malicious intent or fault of a third party other than the proprietor, owner or operator in any way of the vessel or naval appliance. The faults, imprudence or negligence of the dependents of the proprietor, owner or operator or of the crew cannot be alleged as cause of the present exception of liability.

2.3. Definitions.

a) Loss – It is understood to be any occurrence or series of occurrences having the same origin, which cause or can cause damage due to spillage or contamination in waters subject to the national jurisdiction or in the adjacent coasts.¹⁰

b) Contaminant Substance - Is understood to be any material whose spillage or origin is specifically prohibited, according to the domestic regulations.¹¹

2.4. Ecologic Damage Presumption.¹²

It is presumed that the spillage or pouring of contaminant substances in the marine environment causes ecologic damage.

2.5 Limitation of Liability.

In the case of damages caused by spillage of hydrocarbons, or other damaging substances, the Chilean Navigation Law permits the proprietor, owner or operator of a vessel or naval appliance, to limit liability for damages in each casualty up to a maximum in local currency (Chilean Peso or CH\$) equivalent to 2,000 gold francs per ton registered by the ship or naval appliance with a maximum of 210 million gold francs.

The benefit is lost if the casualty has been caused by fault or neglect of the proprietor, owner or operator of the vessel.¹³

The exercise of the right to limit the indemnifications is ruled by the following:

a) Fund Constitution - Whoever pretends to enjoy the limitation must constitute a fund before the tribunal established in Title IX or before that who may be competent according to the CLC 1969, whose sum will amount to the limit of liability explained above at the first paragraph of this section 2.5. The fund can be constituted either by depositing the sum or by producing a bank or other guarantee, considered sufficient by the tribunal. Once the right to limitation has been established by any of those who are responsible, its effects will benefit all the others who were entitled to impetrate it, as explained above.¹⁴

⁹ Chilean Navigation Law, Article 144, Rule 2.

¹⁰ Chilean Navigation Law, Article 144, Rule 3.

¹¹ Chilean Navigation Law, Article 144, Rule 4.

¹² Chilean Navigation Law, Article 144, Rule 5.

¹³ Chilean Navigation Law, Article 145, First Paragraph.

¹⁴ Chilean Navigation Law, Article 145, Rule 1.

b) Fund Distribution - The fund shall be distributed among the creditors pro rata to the amount of their respective claims, previously accepted. But the reasonable expenses or sacrifices, in which the authority incurred to prevent or minimize the damages for contamination, will enjoy preference over the other creditors of the fund. If those who are responsible do not exercise the right to limit liability, those reasonable expenses or sacrifices will enjoy the same privilege that would correspond on the vessel to her salvors. This same rule of priority will benefit the reasonable expenses and sacrifices in which a third party may incur spontaneously or at the request of the authority, to prevent, or minimize the damage whether at sea or its adjacent coasts. However, in the case of expenses or sacrifices that benefit property of the same claimant, they shall not enjoy the preference established herein. If the expenses on reasonable sacrifices to prevent or minimize the damage should have been performed by the same person responsible for the spillage, the amount previously accepted may be charged pro rata with the rest of the general creditors of the fund.¹⁵

c) Right of Subrogation - If before the distribution of the fund is made effective, any of those who are responsible or their dependents, or an insurer or guarantor had paid indemnifications based on damage for spillage included in the fund, it shall be subrogated up to a total sum paid in the rights that the indemnified person had in the distribution of the fund. This subrogation does not exclude those which could also operate according to the general rules.¹⁶

d) Reserve - Any of those who are responsible or third parties who are interested may request the court to reserve the adequate sums to cover the quotas of those credits which still were not recognized, but had they been, they would have been entitled to receive the sums with the rest imputable to the fund.¹⁷

e) Gold Franc - The franc mentioned for the limitation of liability, as pointed out above at the first paragraph of this section 2.5., will be a unit constituted by sixty-five and a half milligrams of gold of millesimal fineness 900. For conversion to national currency the exchange rate certified by the Central Bank of Chile will be taken as a basis. The amount of the fund will be that which results from applying the equivalence corresponding to the day of the constitution, on the factors explained above at the first paragraph of this section 2.5.¹⁹

f) Tonnage - For these purposes it will be understood that the tonnage of the vessel or naval appliance is the net tonnage plus the volume that, to determine the net tonnage, the gross tonnage has been deducted for the concept of space reserved to the engine room. In the case of a vessel or naval appliance that cannot be measured applying the current rules for the calculation of the tonnage, the tonnage to be considered for these effects, is forty per cent of the weight in tons (of 2,240 lbs. of weight) or the cargo that the ship or naval appliance can transport or support.²⁰

¹⁵ Chilean Navigation Law, Article 145, Rule 2.

¹⁶ Chilean Navigation Law, Article 145, Rule 3.

¹⁷ Chilean Navigation Law, Article 145, Rule 4.

¹⁹ Chilean Navigation Law, Article 145, Rule 5.

²⁰ Chilean Navigation Law, Article 145, Rule 6.

g) Fund constituted by an Insurer - The insurer or any other person who provides the financial guarantee for any of those who are responsible, may constitute the fund in the same conditions and with the same effects, as if it was constituted by any of those who are responsible.²¹

h) Bar to other actions - Where, after a loss, any of those who could be responsible for the damage, constitutes the fund and is entitled to limit its responsibility, none of its other assets can be pursued. Likewise, the arrest, retention or attachment of the vessel or other property imposed as a guarantee for the compensation of the damages that had their origin in the loss will cease.²²

3. Procedure to constitute and distribute the Limitation Fund.

The procedure to constitute and distribute the limitation fund pointed out above at the first paragraph of section 2.5. above, is regulated in the Chilean Commercial Code (articles 1,210 et seq.). Its main features are as follows:

3.1. Need to constitute the Fund.

The persons who may consider themselves to have a right to limit liability, or the underwriter, as the case may be, may appear before the competent court and request that proceedings be commenced to constitute the fund, verify and liquidate the claims and to make the distribution according to law.

3.2. Rules regarding the Constitution of the Fund.

The request to open proceedings should indicate the event that caused the loss or damage, the maximum amount of the fund or funds that will be constituted, and the manner in which the fund will be constituted, be this in money or by means of security the sufficiency of which will be decided by the court.

If the court approves the calculations as complying with the law, it will declare the proceedings initiated, will order the constitution of the fund and will appoint a titular and a deputy trustee (locally known as “Sindico”) to conduct and execute all the proceedings.

Once this decision is issued by the court, the trustee will inform all the creditors whose names were included in the request of the constitution of the fund, by registered mail. The trustee will also publish an extract of the same information and the list of claimants in the Official Gazette and in a daily newspaper where the court functions, indicating that the claimants have 30 consecutive days as from the last of these publications in order to verify their claims and attach the substantiating documents. Within this same time limit, any of the claimants may oppose the limitation, alleging that the legal requirements to exercise such right have not been complied with. Within the same time period, the claimants may challenge the quantum of the fund.

²¹ Chilean Navigation Law, Article 145, Rule 7.

²² Chilean Navigation Law, Article 145, Rule 8.

3.3. Distribution of the Fund amongst Claimants.

The trustee will prepare a list of claimants with a right to participate in the distribution of the fund and shall propose to the judge the payment of the claims. The distribution shall be done in accordance with the rules on preferences and privileges established in Book Three of the Chilean Commercial Code.

When there exist disputed claims or a claim has not been proved, the trustee shall make the proportional reserves which he deems prudent, and meanwhile will distribute the rest of the fund.

4. Penalties and Fines.

4.1. Authority.

It corresponds to the Maritime Authority to apply the penalties and fines for contravention of the norms contained in the Chilean Navigation Law in connection to the spillage of hydrocarbons and other noxious substances.²³

4.2. Maximum Fines.

The penalties and fines that may be relevant shall be applied administratively by the Maritime Authority. Except for what is provided below, the fines will not exceed 1,000,000 gold pesos.²⁴

Apart from the penalties that may be applied to the members of the crew of the vessels due to breach of their professional duties, in the case of infringement of what is provided in articles III and IX and other obligations imposed by the International Convention for the Prevention of Pollution of the Sea by Oil 1954 (“OILPOL 1954”),²⁶ the proprietor or owner of the vessel from which the illegal spillage comes, will be penalized with a fine of up to 5,000,000 gold pesos, regardless of the place where the infringement occurred.²⁷

The infractions of the norms of the International Convention on the Dumping of Wastes at Sea 1972 (London Dumping Convention, “LDC 1972”)³⁰ will be penalized with the same fine notwithstanding the Maritime Authority may dictate the rest of the compulsory measures that may be necessary to put an end to the noxious spillage.²⁸

4.3. Fines Graduation.

The graduation of these fines is set forth by the Regulations for the Control of Aquatic Contamination (the “Regulations”).²⁹ The main provisions are as follows:

²³ Chilean Navigation Law, Article 149 in conjunction with Articles 142 and 143.

²⁴ Chilean Navigation Law, Article 150, First Paragraph.

²⁶ Approved by Decree Law No. 1807 of 1977, and published in the *Official Gazette* on June 25, 1977.

²⁷ Chilean Navigation Law, Article 150, Second Paragraph.

³⁰ Approved by Decree Law No. 1809 of 1977, and published in the *Official Gazette* on June 25, 1977.

²⁸ Chilean Navigation Law, Article 150, Third Paragraph.

²⁹ Enacted by Supreme Decree No. 1 of 1992, and published in the *Official Gazette* on November 18, 1992.

4.3.1. Spillage Classification. ³⁰

- a) Minor Spills – Up to 5 cubic meters of hydrocarbons.
- b) Medium Spills – From 5 up to 500 cubic meters of hydrocarbons.
- c) Major Spills – From 500 cubic meters of hydrocarbons upwards.

4.3.2. Antecedents to be considered by the Maritime Authority when applying Fines or Sanctions. ³¹

Notwithstanding of 4.3.1 above, the Maritime Authority will review, at least, the following antecedents:

- a) Measures adopted by the infringing party to prevent or minimize the damages caused by the pollution;
- b) Reiteration of similar infringements;
- c) Omission of spill notice by the infringing party to the Maritime Authority;
- d) Other circumstances that aggravate or attenuate the liability of the infringing parties.

4.3.3. Applicable Fines. ³²

a) Minor Spills – Up to 100,000 gold pesos. In the case of fines imposed to the proprietor or owner of the vessel in connection to the infringement of the OILPOL 1954 and LDC 1972, as pointed out in 4.2 above, the fine may be increased up to 250,000 gold pesos.

b) Medium Spills – From 100,001 up to 500,000 gold pesos. In the case of fines imposed to the proprietor or owner of the vessel in connection to the infringement of the OILPOL 1954 and LDC 1972, as pointed out in 4.2 above, the fine may be increased up to 2,500,000 gold pesos.

c) Major Spills – From 500,001 up to 1,000,000 gold pesos. In the case of fines imposed to the proprietor or owner of the vessel in connection to the infringement of the OILPOL 1954 and LDC 1972, as pointed out in 4.2 above, the fine may be increased up to 5,000,000 gold pesos.

Notwithstanding the above, based on a grounded resolution, the Maritime Authority is entitled to apply a fine superior to that that should correspond to its graduation, provided that two or more circumstances that aggravate liability concur. Additionally, in case of spills verified in internal waters or in a protected area, the Maritime Authority must apply the fine immediate superior as per the above graduation. ³³

4.4. Reiteration.

The application of penalties and fines for a certain event does not prevent the application of others in case of reiteration. ³⁴

³⁰ Regulations, Article 162.

³¹ Regulations, Article 163.

³² Regulations, Article 164.

³³ Regulations, Article 165.

³⁴ Chilean Navigation Law, Article 150, Last Paragraph.

4.5. Summary Investigations (ISA).

The penalties and fines for the infringements referred to in section 4.2. above will be applied after a summary investigation of the events conducted by the Maritime Authority. Those affected may appeal or request reconsideration from the Maritime Authority, after depositing the fine imposed, within the deadline of 15 days, accounted since the notice.³⁵

4.6. Restrictions to the Master.

The master of the breaching vessel, notwithstanding to the arrest to which the vessel may be subject, cannot abandon the country if he does not pay the fine imposed to the proprietor or owner or does not guarantee the payment to the satisfaction of the Director of the Maritime Authority.³⁶

5. Competent Tribunal in Pollution Cases.

A Minister of the Court of Appeals competent at the place where the facts occur will take cognizance in first instance:³⁷

a) Of the lawsuits to demand the return or indemnification of the expenses or sacrifices incurred by the adoption of reasonable preventive measures to prevent or minimize the damages by contamination that could derive from a loss, regardless of the place where it has occurred, that caused such measures or sacrifices.

b) Of the lawsuits on indemnifications of damages caused to the State or private parties by spillage or contamination, either in the maritime medium or in the littoral, coming from a spillage or pouring into the sea of any fuel, waste, material or other elements to which the Chilean Navigation Law refers.

c) Of any other action that arises from the application of the CLC 1969, OILPOL 1952 and LDC 1972; that have not been specifically subjected to the cognizance of another tribunal or authority, with exception of the lawsuits on constitution and distribution of the limitation fund that may taken place.

The same tribunal will also take cognizance of the actions that arise from a collision when damages due to pollution are derived therefrom.³⁸

By Ricardo Rozas
LARRAIN & ROZAS ABOGADOS

³⁵ Chilean Navigation Law, Article 151.

³⁶ Chilean Navigation Law, Article 152.

³⁷ Chilean Navigation Law, Article 153.

³⁸ Chilean Navigation Law, Article 154.