Recognition of salvors' right to limit liability and other developments

International Maritime Law Seminar
London, Chile
21 September 2017

1. Introduction

In the context of a salvage and towage operation performed by a Chilean Tugboat in an area close to the Strait of Magellan, a limitation fund was constituted in Chile by the Owners of such Tugboat aimed to respond for the eventual damages suffered by different parties in connection with the subsequent sinking of the towed vessel. The Owners based their request as owners and proprietors of the Tugboat.

Plaintiffs opposed to such fund constitution, arguing, among others, that under Chilean law salvors would not be entitled to the limitation of liability.

2. Tonnage Limitation of liability [1]

The Chilean regulations that refer to tonnage limitation matters (ie, articles 889

[1] GTDT draft 26 May 2017

to 904 of the Chilean Commercial Code) are inspired by both the international conventions signed in Brussels in 1957 (the 1957 Convention) and in London in 1976 (the 1976 Convention).

With respect to the tonnage limitation figures, the Chilean Commercial Code follows the lines of the 1976 Convention.

The claims subject to limitation are as follows:

(i) death or personal injury and damage to property on board;

(ii) death or personal injuries caused by any person for whom the owner is responsible, whether on-board or ashore (in the latter case, his acts must be related to the ship operation or to the loading, discharging or carriage of the relevant goods);

(iii) loss of or damage to other goods, including the cargo, caused by the same person or people, grounds, places and circumstances given in (ii) above; and

(iv) resulting liability related to the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit under this regime are as follows:

(i) the shipowner as defined by Chilean regulations, i.e. the "*person or*

corporation, whether or not the proprietor of the vessel, who trades or dispatches it under his name.";[2]

(ii) the shipowner's staff;

(iii) liability insurers;

(iv) the operator,[3] carrier, charterer and ship's proprietor, if a different person or entity than (i) above; and

(v) individual employees of (iv) above, including the master and members of the crew, if sued.

3. Procedure for establishing limitation

The procedure for establishing a limitation fund in connection to general civil liability is regulated in the Chilean Commercial Code (article 1,210 et seq) an is mainly based on Chapter III of the 1976 Convention [(arts. 11 to 13)].

Its main features are as follows:

[2] Chilean Commercial Code, Article 882, First Paragraph.

[3] According to the Chilean Commercial Code, 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.*"

- **Competent courts**

It will be up to an appropriate court to investigate all of the matters referred to in the previous subheading and any that are an accessory or of consequence to them:

(i) when the limitation of liability refers to a vessel registered in Chile, it will be the civil court that lies within the jurisdiction of the port of registration of the vessel;

(ii) if dealing with a foreign vessel, the appropriate Chilean civil court of the port where the accident occurred or the first Chilean port of call after the accident or, failing either of these, whatever court has jurisdiction in the place where the vessel was first retained or where a guarantee for the vessel had first been granted; and

(iii) when such a procedure has still not been brought in any of the courts mentioned previously and the limitation of liability is filed in a plea, the same court before which it is being pleaded will be able to hear the case on limitation so long as it is an ordinary one. If dealing with a court of arbitration, copies of the pertinent background information will be sent to the court that is able to hear the case in accordance with the preceding points so that, before this court, the action aimed at constituting and distributing the limitation of liability fund can be brought.

In these cases, the plea for limitation of liability by constituting the fund may only be made when answering the lawsuit action.

- **Term for exercising limitation of liability by constituting a fund**

Except in the case of (iii) above, limitation of liability by constituting a fund may be exercised up to the moment in which the deadline expires for filing defences within foreclosure proceedings or within the deadline of the summons referred to in article 233 of the Civil Procedure Code in court-ordered enforcement proceedings.

- **Resolution declaring commencement of proceedings**

The court, after examining whether the applicant's calculations of the amount of the fund fall into line with the pertinent provisions, will issue a rule in which it will declare that proceedings have begun.

At the same time, it will rule on the options offered for the constitution of the fund, ordering them to be complied with, if it approves them.

In the same resolution it will mention the sum that the petitioner shall place at the disposal of the court to cover all costs of proceedings and it will appoint a receiver plus a deputy to conduct and carry out all of the acts and operations that he or she is entrusted with in this section.

These appointments shall fall upon persons who are on the list of receivers

mentioned in the Chilean Bankruptcy Law and it will not be necessary for their appointment to be ratified at a later date by the board of creditors.

- **Rules regarding cash and guarantees**

When money is handed over for the constitution of the fund, the court will deposit it in a bank, with the knowledge of the receiver and the interested parties. Any readjustments and interest obtained therefrom will be added to the fund to the benefit of the creditors.

If the fund has been constituted by means of a guarantee, its amount will accrue current interest wherever the court sits and it will be left on record in the document establishing the guarantee.

---

4 In what circumstances can the tonnage limit be broken?

Under Chilean law, there is no single express test for breaking limitation, such as that contained in article 4 of the 1976 Convention,[4] and the alternatives have to be concluded from different provisions contained in the Chilean Commercial Code[, which are explained below].

[4] Article 4 - Conduct barring limitation: A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

First, according to article 885 of the Chilean Commercial Code, the liability of the owner for his or her personal acts is subject to the general liability rules contained in the Chilean Civil Code.

Second, article 891 of the Commercial Code (wording based on Art. 4 of the 1976 Convention) establishes that [Limitation by Owner's staff]:

> *the limitation of liability of the shipowner may be petitioned by his or her staff in such cases and for the causes contemplated by law, unless it is proved that the loss resulted from their act or omission, [1] committed with the intent to cause such loss, or [2] recklessly and with knowledge that such loss would probably result.*

In addition, article 903 of the Chilean Commercial Code (based on article 6.3 of the 1957 Convention) states that:

> *When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from their own fault, unless it is proved that the loss resulted from their act or omission, [1] committed with the intent to cause such loss, or [2] recklessly and with knowledge that such loss would probably result.*
>
> *If, however, the master or member of the crew is at the same time the proprietor, co-proprietor, carrier, owner or operator of the ship, the*

limitation shall only apply to him or her where his or her fault is committed in his or her capacity as master or as member of the crew of the ship.

Note, however, that in connection with the general test for breaking limitation, we are of the view that the general test would be the test contained in article 891.

Up to know we are not aware of cases where tonnage limitation has been broken in Chile.

5. Case Study

5.1 Facts [5]

On 16th January 2009, during a voyage from Punta Loyola to Punta Arenas, the Captain of the POLAR MIST, a fishing vessel transporting approx. 9,506 gold bullions, reported steering problems while navigating in adverse weather conditions and sought rescue assistance. The crew were evacuated successfully by Argentinian Navy Helicopter, leaving her afloat and steaming ahead.

[5] Based on Whereas 37 to 40th, First Instance Judgment.

A Chilean flagged tugboat came abeam of Punta Dungeness, eastern mouth of the Magellan Strait. At this time the Tugboat headed toward the position of POLAR MIST radioed by the Argentine Coast Guard (PNA).

When the crew of the Tugboat sighted the POLAR MIST, the latter was not under control and steaming at 5-6 knots turning to starboard. The reported weather conditions were 30 knots wind blowing from the South West and an estimated South Westerly swell of 2m.

Following aborted attempts to slow the POLAR MIST by the Tugboat by means of snagging the POLAR MIST's propeller with a mooring line, two (2) crew members from the Tugboat successfully boarded the POLAR MIST. Said crew members stopped the vessel, but left the main and auxiliary machinery running and carried out a brief inspection of the vessel.

The boarding party was recovered from the POLAR MIST after they made preparations for and connected the main tow line from Tugboat. The Tugboat then commenced to tow the POLAR MIST.

However, it was stated by the Tugboat's Captain that the deck and flood lights aboard the POLAR MIST were extinguished. The reason for the lights going out at this time was not known. Then it was stated by the Tugboat's Captain that there was a noticeable degradation in the behaviour of the POLAR MIST, which was experiencing sudden sheering along with vibration in the tow line.

The POLAR MIST sank by the head; the Tugboat proceeded to sever the tow line and remained in the area on standby.

The Owners of the Tugboat filed a request to constitute a limitation fund, pursuant to articles 1210 et seq. of the Chilean Commercial Code, before the Second Civil Court of Valparaiso (the "Court of First Instance" or the "Court"), for the potential liability associated with the sinking of the POLAR MIST.[6]

The request was based on the company's alleged capacity as ship-owner of the Tugboat, whose capacity, in accordance with No. 3 of article 889 of the aforementioned Code, grants the authority to limit the company's liability "*for losses, harms or damages to other goods...*". According to Owners this limitation covered the damages suffered by the assisted vessel and her cargo.

5.2 Opposition to the limitation

Two opposition claims were filed against the constitution of the limitation fund, in accordance with article 1222 of the Chilean Commercial Code. One by the reinsurers of the cargo on-board the POLAR MIST and the other by the charterer of the aforementioned vessel.

The oppositions were based in the following alleged grounds for the unavailability of the limitation of liability requested by the Owners:

[6] Court file No. V-2-2011.

1. There were "*personal acts*" of the Owners of the tug, which are exempted from the right to limit liability.[7]

2. Subsidiary, the facts were not encompassed in article 889 No. 3 of the Chilean Commercial Code, since they are not associated with (i) the operation or exploitation of the tug or (ii) the loading, transportation or unloading of the carried goods.[8]

3. Subsidiary, the Owners acted as an assistant or salvor, and this capacity does not enjoy the benefit for limiting liability.[9]

4. Finally, article 891 of the Chilean Commercial Code, which refers to conducts barring limitation,[10] would be applicable. In other words, the loss or damages were caused by the Owners' staff own acts or omissions, *"[i] committed with the intent to cause such loss or damages, or [ii] recklessly and with knowledge that such loss or damages would probably result."*[11]

5.3 Decision

[7] Whereas 38.
[8] Whereas 39.
[9] Whereas 40.
[10] Based on Art. 4 of the 1976 Convention.
[11] Whereas 41.

The Court of First Instance rejected the four grounds alleged by Plaintiffs based on the following considerations:

1. Personal acts of the Owners of the Tug

Article 885 of the Chilean Commercial Code provides that: "*the liability of the ship-owner for his acts or personal acts, or resulting from acts of his dependents, or that take place on land, shall not be subject to the rules of [the Code of Commerce*] *and will be governed by ordinary rules of law*".

Therefore, according to the Court, if the factual assumption of this provision occurs, then articles 1210 et seq. of the Chilean Commercial Code would not apply, and accordingly, neither would the limitation of liability. The applicable regulatory body would be the general rules on liability of the Civil Code, which enshrine the principle of integral damage compensation.

However, the defendant (Owners), is a legal person, and therefore, if it incurs in personal acts ["actos o hechos propios"], it must necessarily do so through its corporate bodies, that is, natural persons that are, acting individually or jointly, authorized by law or the bylaws to make decisions. This means that the one that incurs in the direction of the acts must be the ship-owner, without it being possible to attribute such decision to the person that was in charge of the navigation of the vessel.

Plaintiffs were not able to demonstrate that Owners, in their capacity as owners of the Tugboat, incurred in personal acts that led to the sinking of the assisted vessel.

2. Facts not encompassed in No. 3 of article 889 of the Chilean Commercial Code, i.e. *losses, harms or damages <u>to other goods</u>*, since they are not associated with the operation or exploitation of the Tug or the loading, transportation or unloading of the carried goods.

Article 889 No. 2, subsection 2, states:

> "2º.- … *<u>if the person that caused the action is not on board</u>, his or her acts must necessarily be associated [i] with the operation or exploitation of the vessel, or [ii] with the loading, transportation or unloading of the carried goods;*

In addition, Article 889 No. 3 states:

> *3º.- For losses, harms or damages <u>to other goods</u>, including the cargo, caused by the same type of persons, reasons, locations and circumstances as those indicated in the preceding numeral*".

The collective and systematic interpretation of these rules, in the opinion of the Court, leads to the conclusion that only if the person identified as the originator of the incident is not on board the vessel, the damages to

"other goods" must have been caused by facts associated with the operation or exploitation of the vessel, or with the loading, transportation or unloading of the carried goods. That is to say, taking into consideration the factual antecedents of this case and the above mentioned interpretation, it can be sustained that if the crew of the Tugboat had not been on board of such vessel at the moment of towing the assisted vessel, the losses suffered by the later would have to be related to the operation or cargo transported.

With respect to this issue, the opposition claim filed by the cargo reinsurers argued that only two crewmembers of the Tugboat went on board the POLAR MIST, upon performing the first inspection and subsequent mooring, and that during the towing maneuvers there was no one on patrol aboard the POLAR MIST.

That being the case, the only pending issue is to determine whether the damages suffered by the sinking of the POLAR MIST fall under the hypothesis of "*losses, harms or damages to <u>other goods</u>, including the cargo*".

The formula used by the legislator is undoubtedly broad, that is, no limitations seem apparent, except in the sense that the damages were "*caused by the same type of persons, reasons, locations and circumstances indicated in the preceding numeral*". No. 2 of the same article only establishes a reduction of the legal assumption in the case that the originator was not on board the vessel, which has already been discarded.

According to the Court, it was an undisputed fact that the Tugboat towed the POLAR MIST and that, while it was performing this maneuver, the latter sank. Then, the damages caused by the sinking of the POLAR MIST, with respect to the Tugboat and the procedure being performed by this vessel, correspond to “other goods”.

3. Salvors would not be entitled to limit liability

Article 889 of the Chilean Commercial Code expressly provides that the ship-owner can limit its liability, without excluding its faculty for being, simultaneously, salvor of another vessel. According to Court, the same method of regulation is evident from the Brussels Convention of 1957.

Thus, in the opinion of the Court, the correct manner of interpreting the laws applicable to this case consists in affirming that the salvor or assistant which is also the proprietor and ship-owner of the rescuing vessel, can limit its liability.

According to the Court, the conclusion is even broader: if the salvor holds any of the capacities in respect of which the right to limit liability exists, said salvor can do so.

4. Conducts barring limitation

According to the Court, [i] own acts or omissions, committed with the intent to cause loss or damages occur when *"the carrier, with a positive intent,*

via action or omission, causes damages or provokes losses", [ii] whilst acting recklessly and with knowledge that such loss or damages would probably result occurs when *"negligence is so gross, that by itself is almost a positive intent...[and that] the damaging event must be such that allows for a presumption that the perpetrator knew that the loss would likely occur..."*[12]

The first hypothesis clearly matches the definition of malice contained in article 44 of the Chilean Civil Code, i.e "*the positive intention to cause damage to another's person or property*".[13]

However, the reckless action or omission under circumstances that allow for a presumption that knowledge existed about the likelihood of the occurrence of damages, is a new notion, within those existing under said article 44. It could be analogous to gross negligence, that is, *"that which consists in failing to manage third party businesses with the care that even negligent and imprudent people normally exercise in their own business."*

Nevertheless, this negligence appears to be vested with circumstances that are more qualified than those of gross negligence, because the perpetrator of the damages envisages the occurrence of the same. In this line of reasoning, the definition of reckless negligence –according to the Court- is far more

[12] *CORNEJO FULLER, Eugenio, Derecho Marítimo Chileno. Explicaciones Sobre el Libro III del Código de Comercio: De la Navegación y el Comercio Marítimos,* Ediciones Universitarias de Valparaíso de la Universidad Católica de Valparaíso, 2003, pgs. 252-253*).*

[13] Art. 44 of the Chilean Civil Code: "*El dolo consiste en la intención positiva de inferir injuria a la persona o propiedad de otro*".

similar to the concept of prospective malice (*dolo eventual*) created under the legal literature of Criminal Law.

Based on the evidence submitted, the Plaintiffs, who were those bearing the burden of proof, failed to provide conclusive and sufficient information that could prove that the Tugboat proceeded with the intention of causing harm, nor that the same acted recklessly and under circumstances that give rise to a presumption that knew that the damages would probably occur.

In light of the above, the Court of First Instance rejected the Plaintiffs' opposition lawsuits and upheld the limitation fund.

Subsequently, both the Valparaiso Court of Appeals and the Chilean Supreme Court upheld the judgement of the Court of First Instance.

6. Final Comment

The summarised Decision is one of the most relevant substantive decisions confirmed by the Chilean Supreme Court and should provide certainty in futures cases on several issues, including the salvors' right to limit liability and the criteria to be used for breaking limitation in case of reckless negligence.