The Polar Mist saga continues: Meaning of personal acts of the owner and other developments

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1. Introduction

As commented in the 2017 IMLS, 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 that under Chilean law salvors would not be entitled to the limitation of liability due to the following considerations:

(i) There were "*personal acts*" of the Owners of the tug, which are exempted from the right to limit liability.

(ii) The facts were not encompassed in article 889 No. 3 of the Chilean Commercial Code,[1] which refers to claims subject to limitation, particularly the loss of or damage to other goods or property, 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.

(iii) The Owners acted as an assistant or salvor, and this capacity does not enjoy the benefit for limiting liability.

(iv) Article 891 of the Chilean Commercial Code, which refers to conducts barring limitation,[2] 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."*

Last year we commented that the Valparaiso Second Civil Court that heard the case (the Court of First Instance)[3] rejected the four grounds alleged by Plaintiffs. We also pointed out that both the Valparaiso Court of Appeals and the Chilean Supreme Court upheld the judgement of the Court of First Instance. We analysed in detail the implications of the decision in connection with the recognition of salvor's right to limit liability and conducts barring limitation.

[1] Based on Article 1(b) of the International Convention relating to the Limitation of the Liability of Owners of sea-Going Ships (the 1957 Convention).
[2] Based on Art. 4 of the 1976 Convention.
[3] Court File No. 3437-2011.

On this occasion we will refer to the other two pending aspects, namely (a) meaning of personal acts of the owner and (b) claims subject to limitation, particularly the scope of loss of or damage to other goods or property.

2. Tonnage Limitation of liability

As explained last year and for context purposes, the Chilean regulations that refer to tonnage limitation matters (ie, articles 889 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 1976 Convention.

3. Claims subject to limitation

Under Article 889 of the Commercial Code, the owner (ie, the "person or corporation, whether or not the proprietor of the vessel, who trades or dispatches it under his [or her] name"), can limit its liability in the following cases:

- death or personal injury and damage to property on board;[4]
- death or personal injury caused by any person for whom the owner is responsible, whether on board or ashore (in the latter case, the acts must relate to the ship's operation or the loading, discharging or carriage of relevant goods);

[4] Based on Art. (1)(a) of the 1957 Convention and Art.1(a) of the 1976 Convention.

- loss of or damage to other goods, including cargo, caused by the above person or people, grounds, places and circumstances;[5] and
- resulting liability concerning the damage caused by a vessel to harbour works, dry docks, basins and navigable waterways.[6]

4. Persons entitled to limit liability

Besides the shipowner, other people entitled to limit their liability under the Chilean tonnage regime include:

- the shipowner's staff;
- liability insurers;
- the operator, carrier, charterer and ship's proprietor, if different to the shipowner's staff; and
- individual employees in the previous bullet point, including the master and crew members, if sued.

5. Procedure for establishing limitation

The procedure for establishing a limitation fund in connection to general civil liability is regulated by Article 1,210 *et seq* of the Commercial Code and is mainly based on Articles 11 to 13 of Chapter III of the 1976 convention.

[5] Based on Art. (1)(b) of the 1957 Convention.
[6] Based on Art. (1)(c) of the 1957 Convention and Art.1(a) of the 1976 Convention.

6. Case study

6.1 Facts

On January 16 2009, during a voyage from Punta Loyola, Argentina to Punta Arenas, Chile, the captain of a fishing vessel transporting approximately 9,506 gold bullions reported steering problems while navigating in adverse weather conditions and sought rescue assistance. The crew were evacuated successfully by an Argentine navy helicopter leaving the boat afloat and steaming ahead. Despite attempts by a Chilean tugboat to rescue the fishing vessel, the latter sank. The tugboat owners filed a request to constitute a limitation fund before the Valparaiso Second Civil Court for the potential liability associated with the sinking of the fishing vessel. The request was based on the company's capacity as shipowner of the tugboat.

Two opposition claims were filed against the constitution of the limitation fund based on four main grounds. All these grounds were rejected by the First Instance Court.

6.2 Personal acts of the Owners [7]

Plaintiffs opposed to the fund constitution, arguing that there were "*personal acts*" of the Owners of the tug, which are exempted from the right to limit liability.

In this respect, 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*

[7] Recital 38 of the First Instance Court judgment.

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*".

According to the First Instance Court, if the factual assumption of this provision occurs, then articles 1210 et seq. of the Chilean Commercial Code relating the procedure for establishing a limitation fund 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.

The First Instance Court held that the defendant (Owners) is a legal person, and thus, if it incurs in personal acts ["*actos o hechos propios*"], it must necessarily do so through its corporate bodies, ie, the 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 himself, not being possible to attribute such decision to the person that was in charge of the navigation of the vessel, ie, the tug captain.

It was held that Plaintiffs failed 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. Accordingly, this opposition ground was rejected.

6.3 Loss of or damage to any other goods or property [8]

The second opposition ground alleged by Plaintiffs was that, in their view, the facts were not comprised by article 889 No. 3 of the Chilean Commercial Code,[9]

[8] Recital 39 of the First Instance Court judgment.

which refers to claims subject to limitation and particularly the loss of or damage to other goods or property, since they would have not been associated with (i) the operation or exploitation of the tug or (ii) the loading, transportation or unloading of the carried goods.

Article 889 No. 2, subsection 2, of the Chilean Commercial Code states:

> "2º.- ... *if the person that caused the action is not on board, 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 of the aforementioned Code states:

> *3º.- For losses, harms or damages to other goods, including the cargo, caused by the same type of persons, reasons, locations and circumstances as those indicated in the preceding numeral* [2°.-]".

- Person causing the incident not on board

The First Instance Court held that the collective and systematic interpretation of these rules, 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. According to the First Instance Court, taking into consideration the factual

[9] Based on Article 1(b) of the International Convention relating to the Limitation of the Liability of Owners of sea-Going Ships (the 1957 Convention).

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 that vessel (the Tugboat) at the moment of towing the assisted vessel (the fishing 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 Plaintiff affirmed 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 aforementioned fishing vessel.

According to the First Instance Court, the above narrative was confirmed by the available evidence. In this respect, the First Instance Court held that it was undeniable that the circumstance required under article 889 No. 2, ie, that the person causing the incident is not on board his/her vessel, was not met. Accordingly, it does not correspond to demand from Owners that the losses experienced by the POLAR MIST were related to the operation or cargo transported by the Tugboat.

- "*Losses, harms or damages to other goods, including the cargo*".

According to the First Instance Court, the formula used by the legislator is undoubtedly broad, that is, no limitations seem apparent, except in the sense that the damages are actually "*caused by the same type of persons, reasons, locations and circumstances indicated in the preceding numeral* [2]". In this respect, Article 889 No. 2 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 First Instance 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". Furthermore, the First Instance Court held that Owners, when applying for limitation of liability, properly framed the harmful consequences suffered by the POLAR MIST and her cargo and thus rejected Plaintiffs' opposition ground.

7. Final Comment

As pointed out last year with occasion of the recognition of salvors' right to limit liability and the criteria to be used for breaking limitation in case of reckless negligence, the summarised Decision is one of the most relevant substantive decisions confirmed by the Chilean Supreme Court and should provide certainty in futures cases relating to the meaning of personal acts of the Owners and loss of or damage to other goods.