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Review article

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ANALYSIS OF THE INSTITUTE OF MARITIME TOWING IN BIMCO (TOWCON 2008 AND TOWHIRE 2008) AND THE UK STANDARD CONDITIONS – LESSONS FOR CROATIA

SUMMARY

The paper aims at discussing the Institute of Maritime Towage in BIMCO (TOWCON TOWHIRE 2008 and 2008) and the UK Standard Conditions and at seeing what de lege ferenda intervention of the Croatian legislator should make in order to harmonize the Croatian law with international standards. It reviews the concept and types of towing and the division of liability between tug and tow. Additionally, an overview on the Croatia Maritime Code is provided focused on the tort in the case of collision and salvage operation. Finally, the author is urging for rules on a reciprocal or mutual indemnification.

Key words: maritime towing, BIMCO (TOWCON 2008 and TOWHIRE 2008) conditions, the UK Standard Conditions, due diligence, collision, salvage

1 INTRODUCTION

The case of the maritime accident of the 290 metre long Costa Concordia cruise ship still causes great attention of the scientific and professional community. After a successful operation of removing the wrecks on 16th and 17th September 2013, which is estimated at the amount of approximately 600 million Euros and followed by a complex operation of towing from the island of Giglio (starting point) to (probably) the Italian scrap yard in the Tyrrhenian Sea (destination point). Towing, which is scheduled for spring 2014, will mean additional financial costs for the owner, because the total cost of the wreck removal, towing service and, finally, her scrapping will certainly be greater than the value of the construction of such a vessel. Thus, in addition to the economic and technical point of view, it is necessary to observe towing from the legal point or, specifically, from the contractual and tort liability.

The specificity of the Institute of Maritime Towage in international voyages is that all over the world there is no convention on maritime towage, while there are many conventions that are directly related to the Institute of Towage (e.g. Convention on Salvage, on the Transport of Cargo by Sea, etc.). The lack of a unified international act is replaced in practice by various forms of model contracts for business (commercial) purposes. For the towing at sea (ocean towage), standard contracts are commonly used: the "International Ocean Towage Agreement (Lump Sum)" (TOWCON) and the "International Ocean Towage Agreement (Daily Hire) (TOWHIRE)" recommended by the Baltic and International Maritime Council (BIMCO),[1] in 2008 and which have been accepted by continental states, the Republic of Croatia included. For harbour towage (port and harbour towage), especially in common-law states, rules of he UK Standard Conditions for Towage and other Services (Revised 1986) (UK Standard Conditions) published by the British Tug Owners Association (founded in 1934)[2] are applied. The existence of standard contracts does not restrict the freedom of the parties to conclude special agreements that will derogate some provisions of the standard contracts, while on the remaining contract the BIMCO provisions and the UK Standard Conditions will be applied (dispositive character of the provisions).[3]

On the other hand, in the Croatian Maritime Code (Official Gazette of the Republic of Croatia – OG, No. 181/04, 76/07, 146/08, 61/11 and 56/13 – Maritime Code), provisions of towage have not been changed since Law on Maritime and Inland Navigation (OG, No. 22/77, and OG No. 53/91 – Sailing law) which means that they are archaic and should be promptly amended with new international standards.

Based on a historical and comparative analysis, the author will show marine and liability regimes, limitations of liability and compensation of damages (indemnity) in towing. These basic questions in the field of law have been responded to by contemporary international acts, while in Croatia, it seems that those issues have not yet been seriously questioned.

2 CONCEPT AND TYPES OF TOWING

First of all, it is important to emphasize that there is no definition of the term "towing" in the Maritime Code (French: *remorquage*; Spainish: *remolque*; Italian: *rimorchio*; German: *schleppen*), which greatly complicates its identification with other similar institutes in maritime law, for example, salvage, assistance, removing of wrecks, etc. In the analysed domestic and foreign legal literature, there are different interpretations of the term. According to the academician Rudolf, towing includes only moving of ships or other vessels (which cannot run on their own power) at sea [1]. On the other hand, professor Lukšić has a more wider view and concludes that, in addition to inert sea, objects (dead ship, dead tow) can be towed by vessels which have their own power and the ship control ability [2]. Foreign legal theory and practice has accepted the definition of the UK Standard Conditions under which the towing includes every operation in connection with the holding, pushing, pulling, moving, implementation, direction or standing along the towboat (tow). Professor Tetley, in turn, reduces the towing service to a contract by which a ship is moved (removed) by the other boat and does not include the danger of salvage (*marine perils*) [3]. Secondly, Mari-

[1] See http://www.bimco.dk/. (12/07/2013)
[2] See http://britishtug.com/. (12/07/2013)
[3] Maritime traditions are traditional source of law relating to the business of towing.

time Code does not make a conceptual difference between towing and pushing, which are not considered as synonymous, because pushing generally excludes the possibility of an independent control of the ship (pusher and vessels that are suppressed), while, when towing is concerned, there is a possibility of independent ship control when she has her own operational and control mechanism, so the responsibility is different. Thirdly, Maritime Code makes no difference in towing from the standpoint of the area or locality. Namely, towing is done in ports (port towing)[4] and outside ports (free towing / ocean towing). Fourthly, the Croatian Maritime Code has not specified any meaning of contractual and tort towing etc.

3 HISTORICAL SOURCES

Towing is as old as sailing.[5] The emergence of steam ships in the early nineteenth century meant a milestone in the development because tugs can carry out its activities independently of the wind. The first tug on the River Thames was Lady Dundas in 1832 [4]. In France, towing was called "*remorquage*" which means pulling, towing and hauling, and this name has been kept up to this day and has been widely accepted. In the lack of unification instruments, each country has built its own system of accountability of participants in the contract of towage.

Within the framework of Croatia, the concept of towing can be found in the statutes of medieval cities (*communes*). In chapter XXI of the sixth Book of the Split Statute of the year 1312, the towing of an unmanned floating ship is mentioned. The person, who *drags* such a ship into a bay or to a safe place outside the city port, because she could not be brought into the city port, is entitled to 40 solids at the discretion of the Curia for the service performed [5]. The provisions of the maritime law from the medieval statutes have been in force along the Croatian coast (except Dubrovnik) until the application of the legislative act *Editto Politico di Navigazione mercantile austriaca*, or of the *Code de Commerce*. The two legislative acts remained as our legal sources until the Second World War [6]. Pursuant to article 20 of the Regulations on Order in Ports (Official Gazette (OG) of the Federal People's Republic of Yugoslavia – FPRY, No.7/50), the Ordinance on Towing Vessels into the Seaports of the Federal People's Republic of Yugoslavia (OG, FPRY, No. 51/50) was implemented. Pursuant to article 11 of this Ordinance, the liability for damages arising in connection with towing are assessed under the contract, and if the contract does not refer a) to damages caused in mutual relations between the tug and the towed ship, the towed ship bears the damages, unless the damage is caused to the tugboat and is proved to be the result of the defect of the tugboat or of her own crew's default and b) to damages incurred to third parties in connection with towing – the towed boat is responsible for. If the damage incurred to third parties resulted from a collision with a tugboat, the towed boat has the right of recourse against the tugboat, if proof is given that the collision was caused exclusively by the fault of the tug crew or due to such defects of the tug that a high standing shipping company could have removed before starting the towing procedure. The Law on Contracts of Sea-going Ships Exploitation (OG, FPRY, No. 25/59) regulated the towing of ships in articles 106 to 115 [7]. When towing ships, for damages caused in mutual relations between the tug and the towed ship, unless otherwise agreed upon, the fault is assumed to be of the shipowner of the ship that the master of is controlling the towing procedure. If both the ships are at fault, each ship shares the fault on a pro rata basis, and if this ratio cannot be determined, both share the fault even-handedly. The tug and the towed ship are responsible jointly to third parties even if only one of the two is at fault, with the right of recourse [7]. For a collision in towing, the Law on Compensation due to Ships Collision (OG, SFRY, No. 11/66) was in force. The Navigation Act codified the maritime law into only one law, with the Regulations on Towing and Pushing included in article 640 up to article 648. Based on the concept of the Navigation Act, the first modern Maritime Code was adopted (OG, No. 17/94, 74/94 and 43/96) with the towing procedure stipulated in article 647 up to 655.

[4] In ports open to international traffic in Croatia (e.g. Split, Rijeka, Šibenik), port authorities as competent national authorities, are obliged to publish a tender for the concession of the port towage activity. Based on the submitted tender documents, the port authority awarded the concession to best / highest quality bidder with whom it concluded a concession agreement. Recipient concessions (concessionaire) have a tariff for port towage services, which are defined by all the terms and pricing under which the services are provided. For ports that have not launched a tender for the concession (due to low traffic volume in these ports) these tariffs are also applied together with special tariff provisions, depending on the specifics of the individual within the port (port towing).

[5] See Lukšić, op. cit. p. 5.

4 CONTRACTS OF TOWING

Contracts of Towing are contracts on seaborne traffic (article 443 of the Maritime Code).[6] The tugboat operator is obliged by this contract to tow another ship or another shipping object with his own ship[7] and the towed ship owner is obliged to pay the agreed towing fee (article 634 of the Maritime Code). Consequently, it follows that the essential part of the contract is the clause according to which the tugboat operator must carry the towing service exclusively by his tugboat. Such a provision, is however outdated and restricts the freedom of maritime enterpreneurship. The UK Standard Conditions allow the tugboat operator towing with his or someone else's tugboat, and the tugboat operator is authorized to replace, at any time (before and after the conclusion of the contract of towing), one or more tugs or tenders with any other tugboat or tender and is authorized, with the consent of the towed ship operator, to conclude a tugboat lease agreement with another tugboat operator for the execution of the contract (article 5). The replacement of a tugboat is also granted by the BIMCO rules. Pursuant to article 17 of the TOWHIRE 2008, a tugboat operator has the contractual authority to replace at any time any tug or tugs with another appropriate tug before starting with the towing procedure, and may, if necessary, hire a tug of another tugboat operator. The replacing of the tugboat is still subject to the approval of the towed object operator.

4.1 The Start and End of Towing

The parties may specify that towing is performed: 1) to a specific location; 2) for a certain period of time and 3) to perform a specific task. It is generally considered that towing starts when a tugboat or tender is really at the disposal of the user of the towing services in a place that is designated by the user until the towing procedure has been completed and that is at the very moment when the tow rope is released from the towed object. Therefore, to start and end the towing procedure, it is essential to establish the facts at sea which are of utmost importance in case of a legal dispute, arising from, for example, a collision between the tugboat and the towed object.

Pursuant to article 636 of the Maritime Code, towing begins depending on the fact which of the following actions have previously occurred: 1) when the tugboat by order of the master of the towed ship is in a position to be able to perform towing [8] or 2) when the tugboat by order of the master of the towed ship has caught or released the towrope or 3) when the pushing of the towed ship has started or 4) when any other manoeuvre necessary for the towing of the ship has been performed. Towing ends depending on what has occurred later: 1) the execution of the final order made by the master of the towed ship to release the rope or 2) the stopping of the towed ship pushing or 3) any manoeuvre necessary for towing. So, the key role for starting and ending the towing procedure, according to the Croatian Maritime Code, is played by the master of the towed ship who is giving orders to the tugboat. What will happen, will towing start at all if, instead of the master of the towed ship, the order is given to the tugboat by another person of the towed ship operator? It seems that in this case, there would be no towing. If so, this provision on making a decision exclusively on the part of the master of the towed ship is out of date.

Contemporary international rules in this area are completely different from those of the Republic of Croatia. The UK Standard Conditions, however, does not define explicitly the master of the towed the ship as the only person who gives orders to the tugboat, as this can be done by any person authorized for by the operator of the towed object. Towing starts: 1) when the tugboat or the tender is in the position to accept orders directly from the user of the towing service i.e. from the operator of the towed object (hirer)[9] regarding the preservation, pushing, pulling, moving, carrying on, controlling, guiding or standing alongside the towed boat [9], or 2) when the tugboat pulls the ropes, cables or other mooring lines or 3) when the towrope is thrown to or taken over by the tugboat or tender. The end of the towing procedure is linked to the final order of the towed ship operator to stop with all activities related to towing or to the final removal of the towrope

[6] The written form is not mandatory but is, nevertheless, desirable as evidence in case of dispute.

[7] See par. 2, art. 5 Maritime Code.

[8] It follows that the order of pilots to the tug is not of legal significance.

[9] The English word / term hirer means the towed object operator or operator or shipowner of the towed ship who uses the towing services, a contract being concluded thereof with the tug operator. In this paper, the words operator and shipowner are therefore used as synonymous.

so that the tugboat or tender has freed herself from the towed ship.[10] In BIMCO models, the towing duration is determined with regard to geographical and/or time constraints. Towing starts: 1) upon the arrival of the tugboat on the location of the pilot or 2) upon the arrival of the tugboat at the usual waiting place (customary waiting place) or 3) upon the arrival of the tugboat at anchorage being the towing starting point (place of departure) – depending on what occurred before, and ends by removing the towropes from the towed object at the final destination (place of destination), and thus the towed object is again delivered to the towed object operator. Out of the general rules on the towing duration, there are exceptions relating to the professional crew (riding crew) or to other persons that the tugboat operator provides to the towed object operator, and who are on board the towed object. In this case, the period of responsibility may be much longer and can include the span of time up to the riding crew signing off the towed object (for example, when an incident occurs at sea and the ship has to change of the planned route).

4.2 The Share of Liabilities between the Tugboat and the Towed Ship

Towing is potentially a very dangerous and a very risky business at sea with a 1) tugboat, a 2) towed object and a 3) pilot obligatory included in the harbour towing procedure. The tugboat is sometimes in the situation to tow an object of an extremely high economic value and, therefore, to operate a towing procedure is extremely important with regard to the distinction of the legal nature of the contractual relation, i.e, whether it is a temporary service contract or a towage agreement or a contract of carriage. In the end, this is also essential for the legal consequences arising therefrom. Unfortunately, the Maritime Code has not made an appropriate share of liabilities of the parties to the towage agreement, thus representing its absolutely weakest point (article 634 up to 642 of the 2004 Maritime Code).

4.2.1 Contractual Liabilities of the Tug Operator and of the Towed Object Operator (hirer)

4.2.1.1 The 2004 Maritime Code

It is thought, unless otherwise stipulated, that the master of the towed ship operates the towing procedure (article 635 of the 2004 Maritime Code). Providing the parties have not agreed upon differently, the Code specifies that the risk of operating the towing procedure falls on the master of the towed ship (or more correctly to the operator of the towed object). It is absolutely clear that assuming a risk a liability tied to this risk is assumed as well. In case of damage to the ship, the operator of the towed object (hirer) is responsible on the basis of a presumed guilt, but is entitled to a limitation of his liability if he is not qualified guilty in person (*culpa lata* or *dolus*).

Is the operator of the towed ship (hirer) responsible in case the tugboat is towing an unmanned floating craft (dead tow)? If a tugboat is towing an unmanned floating craft, the tugboat operator must, by applying the usual precautions, maintain the seaworthiness of the towed object in such a condition as when received for towing (paragraph 1 of article 637 of the Maritime Code). A conclusion follows that when the tugboat is towing an unmanned craft (operated tow), the tugboat is responsible on the basis of a presumed guilt and will not be held responsible if there is a proof that the usual measures have been applied (due diligence) to maintain the seaworthiness of a towed object in such a condition as when received for towing. *Argumentum a contrario,* the tugboat will be held responsible for if not acting as previously mentioned, whereas the tugboat has been found guilty.

Consequently, on the one hand, the operator of the towed object (hirer) is responsible for the damages done to the tugboat operator when running a towing procedure, while on the other hand the tugboat operator is responsible to the operator of the towed object (hirer) when running a towing procedure of an unmanned floating craft. In both the cases, it is a presumed guilt for damages. The responsibility of the operator of the towed object and of the tugboat operator should be measured according to the rules which apply to the global (general) limitation of the operator's liability, meaning that the operator of the towed object or of the tugboat loses the right to the limitation of

[10] The phrase "whilst towing" means the actual time spent in towing services, i.e. from the beginning to the end.

liability if it is proved that the damage is caused by acts or omissions that the operator has done, either with the intent to cause a damage or recklessly, knowing that such a damage or loss would probably be the result of (paragraph 1 of article 390 of the Maritime Code).[11]

However, the general rules on the limitation of liability will not be eligible if the tugboat operator assumes a contractual obligation to keep the cargo on the towed object (paragraph 2 of article 637 of the 2004 Maritime Code), or when contracting the transport of cargo by towing it on board his own or other owner's ships (paragraph 3 article 637 of the 2004 Maritime Code). Thereupon, in case of damages, the provisions on a special carrier's limited liability for damages to cargo (goods) shall be applied (paragraph 4 of article 637 of the 2004 Maritime Code), based on a presumed guilt (*cogent provisions*). However, the carrier is not liable for damages to cargo (goods) caused by an unseaworthy ship if he proves that he has paid due attention to (article 552 of the 2004 Maritime Code).[12] If, however, damages to cargo carried on board the towed object have occurred during towing operations and are caused due to a nautical fault (while plying or manoeuvring) of the crew (*excepted perils*), the carrier is not at all liable for damages to cargo (article 550 of the 2004 Maritime Code).

4.2.1.2 The UK Standard Conditions and TOWCON 2008 – 2008 TOWHIRE

Unlike the Croatian Maritime Code that divides liabilities between the parties involved in the towing operations and handles it in a very general way, the observed international standards have divided the tugboat and the towed object liability area very carefully.

The UK Standard Conditions represent the standard form of a contract traditionally inclined to the tugboat operators.[13] It contains a large number of exclusion clauses in their favour, as are the following ones: 1) during towing, the master and crew of the tugboat or service boat (tender) are in service of the towed object operator and exclusively under his rule and, therefore, the towed object operator (hirer) is responsible for every action or omission carried on by them in terms of his orders (article 3), and 2) the tugboat will neither assume liability nor be responsible for any damage committed by a tugboat or service boat (tender), as well as for the losses and for any claim for damages lodged by a person not being a party to the contract, and thus the towed object operator (hirer) will be the one responsible for, will have to pay and indemnify the tugboat operator for the damages caused or occasioned on in the course of towing (article 4). Namely, the towed object operator is controlling the towing procedure, which means that the liability of the tugboat for the actions and omissions carried on by the tugboat crew is excluded, so that contractual liabilities are presumed in case of damages being the liability of the towed object operator and he must prove that in controlling the towing procedure he has act with due diligence and if not, he will be liable for the damages caused.

However, the liability for towing is not entirely a one-way street in which the liability to indemnify (as a collateral to the legal obligation) exclusively burdens the towed object operator (hirer). The tugboat operator must be capable of performing actions that he has been hired for at any weather conditions and in circumstances within reason. This includes a qualified and seaworthy ship, a trained crew, updated equipment and accessories.[14] There is his tacit guarantee or implied obligation that he will make the most of all his competencies and skills in everyday operations, unless there is a justifiable reason for which he has not been liable for [10]. In other words, a tugboat, at the beginning of the operations, must be seaworthy in a general, special and specific meaning of the term, and the tugboat operator is liable if found guilty, the failure being proved by the plaintiff [11]. For example, the plaintiff must prove that the damage was caused due to the personal failure of the tugboat operator in taking no reasonable care in the seaworthy condition of the tugboat at the beginning of the towing procedure. The personal liability of the tugboat operator in taking reasonable care refers only to the persons of the tugboat operator who have the ultimate control, to the tugboat operator management and to authorized persons that he benefits from.

[11] The 1976 Convention on the Limitation of Liability for Maritime Claims (LLMC), as amended by the 1996 Protocol, was ratified by the Republic of Croatia.

[12] Pursuant to article 3 and 4 of the 1924 Hague rules.

[13] See Rainey, *op. cit.,* p. 11.

[14] See Obligations Act (OG 35/05, 41/08 and 125/11) in paragraph 2 of article 10.

In order to illustrate the thesis of Reiney of the privileged position of the tugboat, we shall give a practical example. On the basis of the UK Standard Conditions, tugboat operator and the towed object operator conclude a particular agreement on harbour towage services.[15] Mutual rights and liabilities are explicitly specified. The towed object operator binds himself: 1) to provide to the tugboat operator in due time all necessary information, certificates and approvals that he may ask for regarding the services, 2) to guarantee that the towed object and/or the cargo loaded on board comply with all regulations in force, and 3) that the towed object is seaworthy. In relation to the limitation of liability and claims, the following stipulation is usually contracted and it absolutely protects the interests of the tugboat operator: 1) the tugboat operator is neither liable for the damage nor is he obliged to indemnify for any personal injury or death, regardless of the way in which or the place at which the damage was caused, including injuries made to the master of the ship and/or to the crew and/or to any other person on board a tugboat or a service boat and/or damages caused to maritime facilities, that may arise out of or in connection with the provisions of the contract of towing, regardless of the tugboat operator being at fault or of the tugboat being not seaworthy and not fitted out, or of the failure on the whole or on the part of the tugboat or tender. The provision of the UK Standard Conditions on the liability of the tugboat operator for the death or injury caused by him is hereby considered deleted; 2) the tugboat operator, within limits prescribed by law, excludes from application all associated warranties, guarantees, and conditions arising from the contract; 3) the tugboat operator will remain subject to any warranty which derives from the 2010 Competition and Consumer Act (including the Australian Consumer Act) as amended, if and up to the limits in which the Act is applied, in which case the tugboat operator limits his liability for indemnification, due to the failure to fulfil such a guarantee, to the re-tendering of services or to the payment of the re-tendered services in such a way as determined by the tugboat operator, and 4) the towed object operator must notify the tugboat operator in writing of any claim for damages that he intends to lodge against him, arising from or being related to this agreement, within six (6) months upon the tugboat operator has met or has failed to meet the obligations that the request applies to and he must start legal proceedings against the tugboat operator within one (1) year upon the motive to lodge the claim has appeared. If any of these assumptions is not fulfilled, the towed object operator shall lose the right to lodge a claim against the tugboat operator as well as all other rights, arising from or being related to this Agreement [12], regardless of the type and number thereof.

On the other hand, both the BIMCO recommended model contracts (TOWCON 2008 and TOWHIRE 2008) contain a number of provisions aiming at restoring the balance between the interests of the tugboat operator and the towed object operator. Rules on reciprocal or mutual indemnification are colloquially called "knock-for-knock indemnities", and are stated in the clause „Liability and Indemnity", being identical for both models of the contract. The balance is achieved in such a way that each party bears its own liability and binds itself to indemnify its workers and all persons and agents engaged in mutual operations against bodily injuries or death, with an exception relating to damages to or loss of their own equipment. Furthermore, neither the tugboat operator nor the towed object operator will be liable to each other for consequential losses or damages, whether direct or indirect ones (e.g., loss of profits). Reciprocal liability is valid exclusively during the towing procedure (*supra*).

Rules on knock-for-knock indemnities do not exclude any liability for damages caused to the other contracting party. On the part of the tugboat, there is a liability for ensuring the seaworthiness of the towing tugboat.[16] Namely, the tugboat must exercise due diligence to ensure the seaworthiness of the tugboat, in a general, special and specific meaning of the term, at the beginning of the towing procedure, but, however, the tugboat operator does not give any contractual or implied warranties.[19] The tugboat operator has the right to substitute a tugboat or the tugboats at any time before or after the beginning of the towing procedure, but will then take over the responsibility if the tugboat of an-

[15] See http://www.pacificbasin.com/en/towage/pdf/Standard_Towage_Agreement_2013 pdf (12/07/2013)

[16] The tug owner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tug owner gives no other warranties, express or implied.

other tugboat operator is used, and the substitution of the tugboat must be approved by the towed object operator as well. On the other hand, the towed object operator shall provide all permits and certificates for the towed object from authorized organizations, and is also obliged to ensure the tow-worthiness of the towed object. Both the tugboat operator and the towed object operator are responsible for the illegal termination of the contract of towing. Finally, the tugboat operator has the right to use all rights regarding the limitation of liability, while the tugboat operator and the towed object operator can take advantages of the *Himalaya* clause, on the basis of which the circle of persons entitled to benefits of liability limitations is becoming wider.

4.2.2 Tort in Case of Collision

Who, how and how much is somebody liable in case of collision? For damages (actual damages and lost profits) arising from the collision of ships taken in tow or between them and third ships, the provisions of the Maritime Code on Indemnification due to the Collision of Ships are applied (article 748 of the 2004 Maritime Code). Pursuant to this Code, the liability for the damage is applied: 1) to damages that the ship, persons or things on board the ship have suffered due to ship collisions; 2) to damages that one ship has caused to another ship when manoeuvring or when the ship failed to perform the manoeuvre or for non-compliance with the regulations on the safety of navigation, although a collision between ships has not occur [13]; 3) to damages caused by an anchored or berthed ship, or if caused to an anchored or berthed ship; 4) to damages caused to each other by ships sailing in the same towing convoy or in the same pushing convoy, and 5) to damages caused to ships in collision by radioactive substances or by both radioactive and toxic substances or by explosive or other dangerous substances of nuclear fuel or by substances of radioactive waste and the provisions of article 824 to 840 of the 2004 Maritime Code (article 749 of the 2004 Maritime Code) are applied. For damages caused in all the abovementioned cases, it is the owner or operator who is liable for when the damage is proved to be caused by his fault (the principle of the proven fault of the ship) (article 750 of the 2004 Maritime Code). However, if the damage has been caused by the fault of two or more ships, each ship is liable in proportion to her fault and if the extent of their fault cannot be determined, their liability for the damage is divided into equal parts (article 752 of the 2004 Maritime Code).

If the collision of the ships has caused death or bodily injury to a person, the ships causing such a death or bodily injury share a jointly liability as the collision occurred due to the ships being at fault, and the shipping company that has over paid shall have the right of recourse against other shipping companies (article 754 of the 2004 Maritime Code). If the damage is caused by accident or by *vis major* or if the cause of the collision cannot be determined, the damage is covered by the injured party (article 755 of the 2004 Maritime Code). Finally, for damages resulting from collisions, the shipping operators bear a limited liability on the principles of a general (global) limitation of their liability, while for damages caused to passengers and cargo, provisions of the contract on the carriage of passengers and cargo are applied (a special limitation of liability) (article 758 of the 2004 Maritime Code) [14].[17]

5 TOWING AND SALVAGE

Towing and salvage are two different maritime and legal concepts that separate the keyword “danger” but together can be the subject of a towing contract made between the tugboat operator and the towed object operator. Towing can be converted to the salvage mission when in the course of towing the towed object comes into danger, and the tugboat saves it [15]. According to the 1989 Convention on Salvage, the salvage operation means, “any act or performance undertaken to assist a ship or any other property in danger in navigable waters or through any other waters” [16].[18] The additional difference is reflected in the fact that towing

[17] The Republic of Croatia, on the basis of the 1991 Notification on Succession (OG. 1/92) is a party to the following Conventions: 1) The International Convention for the Unification of Certain Rules Relating to the Collision of Ships (Brussels, 1910). 2) The International Convention for the Unification of Certain Rules Relating to the Criminal Jurisdiction of the Crash and other Navigational Accidents (Brussels, 1952). 3) The International Convention for the Unification of Certain Rules Relating to Civil Jurisdiction to Crash (Brussels, 1952) and 4) The Convention on the International regulations for Preventing collisions at Sea (London, 1972.).

[18] The Convention entered into force on 14th July 1996, The Republic of Croatia ratified the European Convention on 10th September 1998 (OG-IT, No. 9/98) and cancelled the 1910 International Convention for the Unification of Certain Rules of Assistance and Rescue, together with the 1967 Protocol. (OG-IT, No. 5/99)

can be voluntary and mandatory [17] and is, as a rule, a commercial activity, while salvage is the duty of every shipping company in saving people, but it is a commercial business when salvage assets is concerned..

In article 639 of the 2004 Maritime Code, towing and salvage operations are regulated in particular (as opposed to collision that is referred to at a different place in the Maritime Code). The following cases are listed: 1) if the towed ship is exposed to danger due to circumstances for which the tugboat operator, under a contract of towing, is not liable for and the tugboat is involved in salvage operations, and the tugboat operator, in case of a successful salvage is entitled to salvage money; 2) the tugboat operator is not entitled to salvage money if it follows, under the contract, that the salvage money is covered by the towing money; 3) if the towing money is contracted only in a case of a successfully completed towing, the tugboat operator has the right to the towing money even when towing is not a success, and if he can prove that the failure of towing is on the part of the towed ship operator; and 4) if the towing money is not stipulated in the contract only for the case of a successfully completed towing, the tugboat operator has no right to the towing money if the towed ship operator can prove that the failure of towing lies on the tugboat operator (paragraph 4).[19]

When the tugboat operator performs salvage operations, he is obliged to exercise due diligence. If appropriate, the obligation may limit his liability pursuant to article 386 of the 2004 Maritime Code.

6 TOWING AND GENERAL AVERAGE

The provisions of this Code on General Average shall be also applied on the relations between the tugboat and the towed ship (article 640 of the 2004 Maritime Code). The key elements of the general average are: 1) extraordinary sacrifice or expense (extraordinariness of events); 2) intentionality and reasonableness of the action; 3) common danger (risk), and 4) same benefits in the same maritime adventure [18]. Articles 789 to 807 of the 2004 Maritime Code are applied to the indemnification for damages that, out of the general average, participants in the maritime venture can suffer. The Rules on General Average in the Croatian legislature are adopted pursuant to the 1994 York Antwerp Rules (they do not have the character of an international convention), and which were revised in Vancouver a decade later. However, the parties may contract to regulate mutual relations arising from damages and costs of the general average, and they can exclude the application of the General Average principles.

7 CONCLUSION

The provisions of towing in the 2004 Maritime Code are really outdated and it is necessary to amend them in accordance with the latest standards. We have identified the following deficiencies: 1) lack of definition of towing; 2) lack of distinction in institutes of towing and pushing; 3) lack of distinction between the port and out-of port towing 4), provision on exclusive power of the towed ship master to determine the beginning and end of towing operations is old-fashioned, and 5) too much autonomy to the parties in determining the liability rules for damages.

In this regard, it is proposed: 1) to determine towing as all operations in connection with holding, pulling, moving, implementation or guidance or standing by the towed maritime object; 2) pushing must be marked as an operation in which the tugboat pushes the object that has no possibility of self-control; 3) port towing is performed in ports while the out-of port towing includes coastal and ocean-going towing, i.e. the free towing, and 4) orders for the start and end of the towing operation for a towed object is given to the tugboat by any authorized person of the towed object. However, it is crucial to explicitly define the share of liabilities between tugboat operator and the towed object operator that can not be excluded by contract. The tugboat operator is liable if the tugboat from the beginning of the operation is not fit for performing actions for which she is hired, which includes a qualified and seaworthy ship, a trained crew, updated equipment and accessories at the time and circumstances which it is reasonable to expect. On the other hand, the towed object operator is liable if he has not

[19] Paragraph 3 and 4, article 639 of the 2004 Maritime Code should be fixed in paragraph. 2, article 634 of the 2004 Maritime Code as *sedes materiae.*

provided all the necessary permits and certificates for the towed object from authorized institutions, and if he has not ensured the towed object to be seaworthy. The law should also stipulate that the tugboat operator has the right to substitute the tugboat at any time up to the end of the towing operation.

Finally, based on the 2008 TOWCON and 2008 TOWHIRE, the author has proposed *de lege ferenda* to prescribe rules on reciprocal or mutual indemnification (clause "knock-for-knock indemnities"). This will achieve a balance of interests between the tugboat operator and the towed object operator in such a way that each party bears its own liability and the obligation to indemnity for bodily injuries made to or death of workers and persons or agents who are serving in operations, with one exception that refers to damage or loss of their own equipment. Furthermore, neither the tugboat operator nor the towed object operator will not be liable to each other for consequential losses or damages whether directly or indirectly (e.g. loss of profits). Reciprocal liability would be applied exclusively during the towing operations.

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