SUBJECTS OF NAVIGATION

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I. INTRODUCTION

The most economically relevant maritime navigation is that which is carried out in a professional and organized manner for the achievement of economic gain. This is commercial navigation and navigation in the service of commerce, which is basically contemplated in the historical sources of Maritime Law and which, in current terms, can be qualified as entrepreneurial navigation.

This navigation has as its vehicle or technical instrument the merchant or fishing vessel and as its main subject the shipowner, shipowner or entrepreneur of navigation.

The study of the regime of the shipowner/owner and other subjects of navigation is an easy task in our current law, given the anachronism of the Code of Commerce and the confusion, not only terminological, that can be seen in the delimitation of the different figures typically and present in the reality of traffic (owner, shipowner, shipowner, captain, maritime agent, etc.).

In any case, this study is unavoidable, since the shipowner/owner, conceived as a shipping entrepreneur, is one of the axes around which this Maritime Law is built.

The definition of the persons involved in maritime navigation is of great importance for legal, registration and liability limitation purposes.

II. HISTORICAL BACKGROUND

In the early days it was common to find that the shipowner was the shipowner, maritime merchant, shipper and captain. The owner of the ship bought the merchandise in one port to take it to another and sell it there, profiting from the resale.

In the Middle Ages, associative modalities appeared for the realization of maritime trade, which came to replace the individual exploitations, with the purpose of distributing the great risks of navigation. The owner or co-owner of the ship agreed with the navigator, with the merchant shippers and with the crew, the realization of a maritime voyage to trade goods. While the possible profits obtained were distributed among all, according to the agreed quotas; and the losses, if any, were borne by all except the crew.

Already in the 14th century, a clear separation between the navigation company (arming and shipping of the ship) and the company buying and selling the transported goods began to take place, a split that was undoubtedly a consequence of the appearance and

implementation of maritime goods insurance, which preceded that of the hull and made merchants lose their interest in accompanying the goods personally during the sea voyage. This led to the 18th century, when the shipping business (including the outfitting of the ship) was mainly carried out by individual merchants, who had merchant sailing ships built and outfitted, owned or co-owned by them, and who were bound to the shippers (land-based merchants engaged in the sale and purchase of goods) by charter parties.

Thus the French Commercial Code identifies the shipowner with the owner (because it did not conceive that the ship could be operated by a different person) and so do the Italian Codes of 1865 and 1882 with respect to the shipowner and the German Commercial Code of 1861.

In contrast to the first generation of European Codes, the German Commercial Code of 1897 defined and regulated, together with the figure of the shipowner-owner, that of the shipowner who operates another's ship. This same figure had been recognized, since ancient times, in Anglo-Saxon law, which, together with the owner, included the person of the shipowner/non-owner shipowner.

Finally, the most modern maritime legislations now clearly distinguish the figure of the owner (who can be at the same time shipowner/owner) and that of the shipowner/owner who is not an owner. This is because it is the ownership of the company that operates the ship and the ownership of the ship that is the decisive element that serves to qualify a person as a maritime merchant or shipowner. In the Anglo-Saxon regime, the English term "owner" has several conceptions because it is used to designate the owner, as well as the shipowner and the charterer of the vessel.

III. OWNERSHIP OF THE VESSEL

Most of the Ibero-American legislations do not define what should be understood as shipowner. At least, this is so in the Uruguayan, Brazilian, Chilean and Paraguayan Codes of Commerce and in the Argentine Navigation Law, which do not define what should be understood by shipowner, so that it would be necessary to resort to the rules of common law to understand that it is the owner or holder of the right to enjoy and dispose of the vessel. On the other hand, the Law of Navigation and Maritime Commerce of Mexico defines the owner as "the individual or legal entity that holds the real right of ownership of one or more vessels".

"The ownership of merchant vessels may be vested indistinctly in any person who by the general laws has the capacity to acquire" (art. 1045 of the Commercial Code) and "vessels are acquired by the same means established for the acquisition of things in commerce (art. 103 of the Commercial Code).

In order to acquire and transfer ownership of a vessel, it is necessary to have the capacity to assume rights and contract obligations, in accordance with the applicable rules of common law, in terms of legal capacity and capacity to act.

Many of our legislations, such as the Uruguayan Code of Commerce, do not distinguish between an individual owner and a legal entity owner. What it does is to contemplate the ownership of the vessel to a single person, or to several persons (condominium, co-ownership). In this case, except for the specific determinations regulated by maritime law, these companies are subject to the special rules on commercial companies.

A) **Ways of acquiring ownership**: Ships can be acquired by different ways, some common and others typical of maritime law, specifying the transfer of property rights either in favor of private parties or of the State.

a) Contract of sale: the contract of sale of ships is always of a commercial nature. Although it depends on each legislation, normally the sale and purchase of smaller vessels (for example, less than six tons) can be made, in view of their small size, in the same form as that of other movable property, without solemnity of any kind, and even verbally. On the other hand, for larger vessels (e.g. over six tons), the drafting of a written document and its transcription in a Ship Registry is expressly required. The written document may be either a public or private instrument, without requiring the execution of a public deed for ships, as is the case for real estate. In practice, the sale and purchase is carried out through the use of forms with pre-drafted clauses (e.g. Saleform 2012 - Normegian Shipbrokers Associations; Bimcosale; Nipponsale 1999 - The Japan Shipping Exchange Inc.).

b) Construction contract: Although it is not a way of acquiring, it is a contract aimed at the transfer of ownership. Within this, there are two different forms, the construction on its own account and the construction made by a shipyard to which the work is entrusted. As in the case of sale and purchase contracts, it is common to use standard forms, such as BIMCO's Newbuildcon.

c) Succession: as with all movable and immovable property, ships are part of the patrimony of their owners and are transmitted to their successors, either by law or by testamentary disposition.

d) Acquisitive prescription: it is the way of acquiring the domain or certain real rights through possession during a period of time and with the requirements established by law, such as peaceful, uninterrupted, public possession and as owner. The term will depend on the legislation of each country; for example, in Uruguay it will be 10 years for possessors with just title and good faith, and 20 years for possessors without just title and good faith.

e) Confiscation: this is a mode of acquisition by the State. It consists of the appropriation of an asset, as a penalty, generally accessory. As it happens in the case of the repressive customs regime that authorizes the secondary confiscation of small boats.

f) Seizure: consists in the appropriation, in time of war, by a belligerent State of an enemy vessel or of a neutral vessel carrying contraband of war or under other special conditions provided for by public international law.

g) Requisition: a procedure which may be used by the State, in certain cases of necessity or public utility, to appropriate the use or ownership of movable property belonging to private individuals.

h) Abandonment to the insurer: by means of which the insured may, in certain cases, receive the total indemnity agreed in the insurance contract, leaving the insured items in the possession of the insurer (for example, constructive total loss).

i) Abandonment in favor of the State: in many legislations it is provided for as a way of transferring the ownership of a ship in favor of the State. For example, in the case of sunken or stranded vessels in jurisdictional waters and are an obstacle or risk to navigation, by complying with certain legally established steps, the State may provide that the vessel will be abandoned in its favor.

B) Publicity: Another important aspect to be highlighted is the need to publicize the owners, shipowners and vessels through registration. This responds to two needs: the first one to the granting of the right to the use of the flag and its attribution of the nationality; and, the second one, to the domain of the vessels, both with respect to the ownership of the property right, as well as of the charges or encumbrances that affect it.

IV. VESSEL OWNER

The natural or legal person who assembles the vessel and makes it sail at his own risk and at his own expense. To arm a vessel means to provide it with everything necessary to sail, i.e.: crew contracts, provisioning, certificates, etc.).

Although it does not exist nowadays, the doctrine distinguished two types of OWNERS, static and dynamic. The static owner is the one who builds and equips the vessel to sail, and the dynamic owner is the one who operates the vessel, i.e. the one who has the navigation company.

The OWNER is the one who has the possession of the vessel, without prejudice that he can have the possession and be at the same time the owner. Indeed, when the owner abandons the quietism of his property right and exploits the vessel directly.

We can also distinguish different types of OWNER:

a) Shipowner-owner, which is the owner of the vessel who is in charge of its commercial exploitation, assigning it to the performance of shipping tasks for the benefit of third parties. This situation is very common in regular lines.

b) Non-owner shipowner, who operates a vessel that does not belong to him and whose use was granted to him by the owner. This situation is reached by a previous contract between the shipowner and the person who will operate the vessel. This will depend on several circumstances, but, in several occasions the owner may cede the use of the vessel not armed or equipped. In this case we would be dealing with a bareboat charter. This would not be a charter party but a simple bareboat charter. In this case, the owner is obliged to allow the use and enjoyment of the leased vessel, guaranteeing its seaworthiness. In another case, the owner may assign the use and enjoyment of the vessel armed and equipped, provided with its captain and crew. In the latter case, a peculiar situation arises, which is that there would be an assignment of the crew adjustment contracts (which is not possible in all legislations).

c) Ship co-partnership, to which we have already made a reference and which is a corporate grouping, of a special nature and which is dedicated to the operation of a ship. Normally this activity is carried out through an OWNER-manager (ship manager). This is not strictly speaking an OWNER because it does not operate the vessel for itself, but does so on behalf of the company formed by the joint venture.

d) Shipowner State, in principle it would not present any difference with the private shipowner and is regulated by the same commercial rules.

e) Individual shipowner and shipowning company, the former being of very little importance, while the latter refers to the modern shipowning company, of the large corporations.

The operation of the ship raises several problems since we must consider the liability of the owner, the owner-owner and the non-owner shipowner.

If the general principles were to be applied, we could say that the shipowner whether owner or not, as the owner of the shipping company is liable for the acts and contracts performed by the master, as well as for wrongful acts. In the same way, we should say that the non-owner owner is not liable for the contracts or wrongful acts performed in the shipping activity.

a) Owner's liability: he is liable for damages that may be caused to third parties as a consequence of his own acts or those of his dependants, especially of the members of his crew, both in the contractual and non-contractual sphere. Normally the owner is liable for the consequences of the operation of the vessel, whether it is carried out by himself or through a shipowner.

b) Owner-owner liability: As above, the shipowner-owner is liable for damages caused to third parties as a result of his own acts or those of his dependants, both in the contractual and non-contractual sphere.

c) Liability of the non-owner shipowner: He is liable for the contracts he has entered into, by himself or through his representatives (captain, maritime agent); and he is liable for the wrongful acts of his subordinates.

d) Limitation of liability: It is a traditional principle of maritime law to limit the liability of the shipowner. This principle is based on several reasons: a) on the conception of the ship as patrimony or fortune of the sea; as a thing on which the liability of the claims arising in the course of navigation falls; b) on the fact that the master, to whom the navigation activity is entrusted, develops the same, far from the control of his principal; and, c) on the fact that those who submit to the risks of the sea, share the consequences of the acts of the master and his dependents. This institute constitutes a true exception to the general principle of full compensation for damages. This limitation has been severely criticized, especially by cargo interests and cargo insurance in particular.

At present, its purpose is to establish fixed limits that allow the OWNER to take out insurance within reasonable costs and to distribute the risks of the sea among all the parties involved in the shipment.

There are different systems for limiting liability. Among the first are the French system by means of abandonment in kind; the German system called real execution, where there is unlimited liability but creditors may not execute more than the ship and freight; the tariff system, where the amount of the debt is limited to an established maximum (English system of an amount per ton of tonnage); and, finally, the Italian system where liability is limited to the value of the ship and the amount of freight obtained for the voyage.

Abandonment owner: Although it depends on the abandonment system to be applied (abandonment in kind could only be done by the shipowner), the power to limit liability is both of the shipowner and the OWNER.
Creditors to whom the limitation may be opposed: In principle, it can only be opposed to those credits related to the vessel and its shipment, related to the voyage.

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