TOWAGE CONTRACT

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LA LEY URUGUAY

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THE TOWING CONTRACT

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I. BACKGROUND

Towage arose almost as soon as maritime transport began. In its beginnings it was limited to providing assistance to ships for manoeuvres or displacements, such as: "halaje" or towline traction (performed from land by the physical force of man or animal); "atoaje", performed by mechanical means employing fixed apparatus from land, which is still used in river or canal navigation, when the traction exerted by the ship is dangerous or difficult [1] (locomotives in the Panama Canal allow ships using the locks to stay in the centre of the structure and avoid collision against the walls).

[1] Manual de Derecho de la Navegación Marítima by José Luis Gabaldón Gardía and José María Ruiz Soroa, Second Edition 2002, Marcial Pons Ediciones Jurídicas y Sociales S.A., p. 572.

During sailing, it was of limited importance; propulsion was linked to the sea and the wind, which made long-distance ocean towing extremely risky. Thus, in "general terms, the development of this activity in traditional navigation was limited to the traction exercised in boats or rowing boats in the vicinity of the coast and in ports or estuaries, mainly to meet the needs created in situations of danger for a ship, immobilisation due to lack of wind, difficulties of displacement or manoeuvres caused either by the circumstances of the place or by the existence of adverse winds or tides"[2].

It is only with the use of the steam engine that a powerful and controlled traction force can be used; and, with the wireless telegraph and the use of the radio that long-distance towing services can be requested. From this time onwards, the towing industry began to gather momentum; an activity which can be divided into salvage, deep-sea towing, inland transport, supply and assistance in manoeuvring other vessels.

The Netherlands was one of the pioneers in the towing industry, with a special focus on salvage towing. It installed in several strategic areas, where there was heavy traffic, several tugboats that were dedicated to the rescue of ships in exchange for large sums of money. He also built a large fleet of tugs for dredgers that were used in eastern India and for towing ships from one port to another.

In the United States, the development of the industry was slow and it was not until after the Second World War that the industry grew, but especially for military purposes.

In post-war times, the industry entered a period of change and new and larger tugboats began to be built to replace those used during the war. Germany and Japan returned to the market and Italy and Greece entered, purchasing vessels from the United States.

[2] El Contrato de Remolque de Aurelio Menéndez, Biblioteca Tecnos de Estudios Jurídicos, págs. 17 y 18, Edición 1964

In the early days of offshore oil operations, support was provided by fishing vessels, cargo ships or refitted warships. It was not until 1955 that the first vessel specially designed for this type of operation was built, the EBB TIDE, a vessel 36 metres long by 9.5 metres wide and a totally new design for the time, with a bridge entirely at the bow and a cargo deck at the stern that occupied the entire vessel (27.5 metres long by 8.2 metres wide).

Today, a large towage industry has developed, driven by the specialisation of shipbuilding in the manufacture of ships specialising in the various areas of towage. This is how the professional exploitation of towage in its varieties - manoeuvring, transport and support for off-shore operations - came into being.

II. LEGAL REGULATION

Our Code of Commerce does not regulate towing, it barely mentions it and this is logical because at the date of its promulgation (1865), towing had not acquired great importance since it was very difficult to tow rowing or sailing vessels. One of the first regulations on towing is to be found in Law No. 12.091 of 5 January 1954, which in its Article 1° reserves towing services in waters under Uruguayan jurisdiction to vessels flying the national flag. There are also Maritime Provisions, approved by the National Naval Prefecture, which regulate more technical aspects of the characteristics of the towing service, such as: Maritime Provision No. 89 of 29 July 2003 regulating the praticage service of towing transports, towing and pushing convoys; Maritime Provision No. 147 of 28 August 2014, concerning the requirements related to the certification of fixed point traction and propulsion system and tugs; and, Maritime Provision No. 148 of 20 August 2014 implementing the National Advisory service in convoy of tugs and barges of another flag navigating in the Uruguay River.

Despite this legislative absence, practice has been incorporating standard forms or contracts both for manoeuvring tug and transport tug which, as is common in this discipline, are compilations of customs and usages relating to this type of contract. For example, the Baltic and International Maritime Council (BIMCO) published two forms, the TOWCON and the TOWHIRE. Both contracts are for towage transport but one provides for a lump sum (lump sum) and the other for a daily rate of hire (daily rate of hire). Another type of standard contract is known

as the United Kingdom Standard Conditions for Towage and Other Services (UKSCT), which is more commonly used for shunting[3].

III. CONCEPT

A towage contract can be defined as a contract whereby one party (tug) undertakes, in exchange for a price, to move a vessel or floating device (towed) by water or to support it in its manoeuvring, either by pulling it, pushing it or by providing its motive power in any other way, which does not involve risk or danger.

This definition has the following characteristics: a) it includes the two main categories of towing, manoeuvring towing and transport towing; b) unlike other definitions, it does not distinguish between maritime towing and river towing; and, c) it delimits the figure of towing with one of the activities carried out by tugboats, such as salvage.

Thus, there are different categories of towing:

a) Manoeuvring towage: This is the service performed by a tug to a vessel to enter or leave a port, or to manoeuvre in it; or to cross a channel or a passage which, although it has its own propulsion, requires this support for safety reasons. Normally in this type of tow, the towed party maintains control and direction of the manoeuvre[4].

b) Transport towing: This is the service performed by a tugboat to tow, push or even pull (tied to the side of the vessel) to move the vessel by water from one place to another. In this type of towing, it is normally the tug who maintains control and direction of the manoeuvre[5].

c) Assistance tow: This is a tow performed by a tug to assist a ship in distress and move it to a place of safety. The existence of this category of towage is the

[3] Manual de Derecho de la Navegación del Dr. Rodolfo A. González Lebrero, Edición Depalma 2000, págs. 491-492
[4] Cfe. Rodolfo Mezzera Alvarez, Curso de Derecho Marítimo, Ed. Organización Medina (1954), pág. 386
[5] Cfe. Rodolfo Mezzera Alvarez, Curso de Derecho Marítimo, Ed. Organización Medina (1954), pág. 386

subject of long discussion in the doctrine. Some argue that we are not dealing with a towage contract but with a case of assistance or salvage (regulated in Book III, Title XIII of the Commercial Code). The object of the towage contract is the displacement by water of a vessel or artefact, using the energy of another; whereas, that of assistance consists of the service of a vessel to save another from danger. Although in the field of legal figures, each of these would be clearly delimited, in reality, there are situations in which the distinction is not so clear[6]. In this sense, *"practice and the abundant jurisprudence of the different countries show to what extent cases of doubtful qualification are not at all uncommon. This is an easily explainable reality. In the case of a towage contract, because the difficulties normally involved in carrying out the towage, or the risks that may unexpectedly arise at this stage of the contract, sometimes lead to a situation of danger for the vessel being towed, calling for an extraordinary intervention by the tugboat, which may be classified as assistance"*[7]. This discussion is determined by the different interests involved in both figures, just think of the form of remuneration of the assistance, which normally goes far beyond that of the towage contract; and is distributed among the different interests saved. This situation has led a sector of case law to create "an intermediate category between the two institutions, the extraordinary towage", defining it as "the towage of a ship in distress, or towage in cases where it is difficult to determine whether or not the conditions for salvage are met"[8]. Art. 4 of the International Convention for the Unification of Certain Rules Relating to Assistance and Rescue at Sea (Brussels 1910), states: "The tugboat operator is not entitled to remuneration for the assistance or salvage of the vessel by the towed vessel or its cargo, except in the case where he has rendered exceptional services which cannot be considered as the performance of the contract of towage". This rule emphasises the concept of "exceptional services" and, although it is very difficult to determine the exceptional nature, it has been understood that the rule is applicable provided that during the performance of the towage contract a dangerous situation arises for the towed vessel; and that this danger has been caused by an event not attributable to the tugboat, because if the danger derives

[6] Idem nota 2, pág. 243-244

[7] Idem nota 2, pág. 244-245

[8] Los Contratos de Remolque Marítimo, Dr. Juan Luis Pulido Begines, J.M. Bosch Editor, 1996, págs.. 89-90

from a fault of the tugboat, we enter into the orbit of liability for breach of the towage contract.

IV. LEGAL NATURE

The non-typical nature of the towing contract makes it necessary to qualify it, a task that the doctrine has endeavoured to carry out, making the mistake of trying to find a single legal nature that covers all types of towing. In this way, doctrine and jurisprudence have spoken of a contract of carriage, a contract of affreightment, a contract of hire, a contract of service, etc.

However, the unitary theory has been abandoned, and more recent doctrine has focused more on the cause and content of each of the types of towage to establish their legal nature.

In the case of transport towage, in order to define its legal nature, the vast majority of the doctrine analyses whether or not the towed element has passed into the custody of the tug. When we are dealing with unmanned elements, which do not cooperate with the execution of the towed element, it is a contract of carriage; on the other hand, we are dealing with a contract of autonomous work when there is cooperation on the part of the towed element, there is no delivery of the element, and therefore there is no obligation of custody[9].

The most modern doctrine has held that in the towage transport we are dealing with a contract of carriage if it implies custody (because there is transfer of possession of the towed element); on the other hand, it is a sui generis contract, if there is no transfer of possession of the towed element and the crew remains on board and collaborates in the execution of the contract.

Like the aforementioned authors, I understand that all towing transport implies, as the main object of the contract, the contribution of the tug's motive power to carry out the typical work of the transport. The fact that there is also an obligation of custody or that there is not an effective transfer of the possession of the towed element because its crew remains on board, are elements to be considered in terms of responsibilities and not to define its legal nature.

[9] Idem nota 1, págs.- 574-575

In the manoeuvring towage, the doctrine has been divided between those who maintain that we are dealing with a work lease and those who understand that it is a service lease.

The most classical doctrine has supported the theory of work leasing and tells us that the main obligation is not limited to the contribution of the motive force but reaches the set of operations necessary to obtain the final result.

On the other hand, the supporters of the service lease argue that the tugboat is obliged to carry out an activity considered in itself and not for its result. In a view that I share, the manoeuvring towage "could be more clearly equated to a service lease, where the tugboat operator undertakes to perform the contracted tasks and to carry out the instructions, using the best seafaring practice and the technical elements of his profession"[10].

V. ELEMENTS OF THE TOWAGE CONTRACT

A) Personal elements

a) Owner of the tugboat (tugowner): For a towing contract to exist, it is not necessary for the operation to be carried out by a professional towing company, it can be carried out by a specialised vessel or by a vessel of any other type, even a sport vessel. The one carried out by companies that are specially dedicated to the towing activity is called professional towing; on the other hand, those vessels that carry out towing on an occasional basis are called occasional or fortuitous towing. The difference between the two lies in the formality of the contract. Normally, in the occasional or fortuitous towage, the contract is agreed verbally between the master of the tug and the master of the towed vessel. On the other hand, in professional towing, the operation is carried out by a company that is normally engaged in the maritime trade and uses specialised vessels (either for transport towing or manoeuvring towing) and the contract is formalised by the signing of a written contract (BIMCO or UKSCT forms or any other). In the vocabulary of the forms, the tug is referred to as tugowner, bearing in mind that this expression does not exactly indicate the reality and that the person who

[10] Dres. Cecilia Fresnedo de Aguirre y Fernando Aguirre, Curso de Derecho del Transporte, Transporte Marítimo, volumen III, F.C.U. Primera Edición 2002, pág. 344

appears as tugowner is not necessarily the owner of the tug but the one who has the commercial operation of the tug. The tugowner may be the owner of the tug or it may be a company that obtained possession of the tug in order to exploit it commercially by signing a ship lease contract.

b) Tug owner (hire): In the forms this is referred to as "hire", which arises from the Anglo-Saxon terminology that considers these contracts as service leases. The owner of the towed item is not necessarily a merchant, although in most cases he is.

B) Real elements - (a) Tug: Any seaworthy vessel can tow another vessel.

a) Tug: Any seaworthy vessel can tow another vessel, although in most cases they are vessels specially built for this task. In towing, in principle, any tug with the necessary technical conditions (requirements and power) can manoeuvre, regardless of its identity. In the case of transport towing, on the other hand, the identification of the tug becomes important and its substitution can only be carried out with the approval of the tow. The forms usually indicate the name, flag, class, registration, gross tonnage, classification society, horsepower (hp) and bollard pull, with a clause of substitution by another vessel with the same technical characteristics (e.g.: cl. 18 Towhire 2008 - cl. 20 Towcon 2008)[11].

b) Tow: For part of the doctrine, for a tow contract to exist, the towed element must have the legal status of a ship. In my opinion, it is sufficient that the item to be towed is technically capable of being towed by water. Thus, in addition to a ship (in its broadest conception), any naval appliance, such as buoys, nautical signals, containers or floating cargo, can be towed. In the Towhire and Towcon 2008 forms, they contemplate a vessel and identify them with their technical characteristics (name, gross tonnage, length, beam, flag, registration, classification society, etc.).

[11] "The Tugowner shall at all times have the right to substitute any tug for any other tug or tugs of adequate power (including two or more tugs for one, or one tug for two or more) at any time whether before okr after the commencement of the towage or other services and shall be at liberty to employ a tug or tugs belonging to other tugowners for the whole or part of the towage or other service contemplated under this Agreement. Provided however, that the main particulars of the substituted tug or tugs shall be a subject to the Hirer´s prior approval, but such approval shall not be unreasonably withheld".

C) Formal elements: The towage contract is consensual and it is very normal to contract it verbally; and, as I have already stated, there are also forms (standard contracts) for port towage, transport and other modalities.

VI. OBLIGATIONS UNDER THE TOWAGE CONTRACT

A) Obligations of the tugboat.

a) Towage transport

i) To make available the suitable tugboat, at the agreed place and date and in seaworthy conditions: As we said above, in this type of towage it is not the same that any tugboat is made available to the tugboat, but the individualisation of the tugboat is fundamental and it can only be substituted by another, with the same technical characteristics and with the agreement of both parties (cl. 18 Towhire 2008 and cl. 20 Towcon 2008). Although as a general rule in towage contracts the precise place and date are specified, in many of the forms, the date requirement has been relaxed by agreeing on times or days of notice of arrival of the tug and departure as well as of the towage (cl. 27 and 28 Towhire 2008 - cl. 29 Towcon 2008)[12]. As in charter parties, the tug must be delivered in a seaworthy condition. As in towage transport an obligation of result is assumed, I understand that this obligation is absolute, i.e. it must be maintained upon delivery of the tug and throughout the performance of the contract. At common law it has been understood that, unless otherwise agreed, it is an absolute obligation at the time of the commencement of the contract and a relative obligation during the performance of the contract. In towage transport forms, on the other hand, the obligation is deemed to have been fulfilled if due diligence has been exercised to make the vessel seaworthy. In clause 17 of Towhire 2008 and clause 19 of Towcon 2008, it is stated: "Te tugowner 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 give no other warrenties, express or implied." It is also the practice to carry out a pre-inspection of the tug, which may be carried out by a surveyor from the

[12] Idem nota 11

classification society or the insurance company, and a seaworthiness certificate is issued.

(ii) Fitting the necessary towing equipment (tow hook, wire rope, towing foot, etc.): The tug must put all the necessary elements for towing (tow train) in condition and which are suitable for the towing to be carried out. In the BIMCO contracts, this obligation is provided for in clause 14 of Towhire 2008 and 16 of Towcon 2008[13]. According to this clause, the provision of these elements does not mean an additional cost, it is understood that they are included in the freight.

iii) Reception of the items to be towed: As in any contract of carriage, the tugboat is obliged to receive the items to be towed at the place and time agreed for their delivery. As we will see below, the items to be towed must be in conditions to withstand the voyage to be made (seaworthiness conditions) and the tugboat has the right to make any observations it deems necessary and even to reject the receipt of the items in the event that it understands that they do not comply with the necessary conditions to make the voyage safely. There are forms which provide for the right to inspect the towed vessel for seaworthiness[14]. Notwithstanding that some forms (cl. 16 Towhire 2008 and cl. 18 Towcon 2008)[15] provide that the inspection carried out cannot be construed as acceptance of the seaworthiness of the item to be towed.

(iv) Perform the agreed voyage: The tug has the obligation to comply with the voyage and to perform the voyage in accordance with the agreed itinerary and timescales, without deviation and with due diligence. It has been understood that it is the master of the tugboat who is in charge of the manoeuvre and who assumes the obligation to take the vessel to the agreed destination. To deploy the nautical diligence for the execution of the contract, watching over the

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[13] "(a) the Tugowner agrees to provide free of cost to the Hirer the use of all tow wires, bridles and other towing gear carried on board the Tug for the purpose of the towage or other services to be provided under this Agreement. The Tow shall be connected up in a manner within the discretion of the Tugowner. (b) The Tugowner may make reasonable use at this discretion of the Tow´s gear, power, anchors, anchor cables, radio, communication and navigational equipment and all other appurtenances free of cost during and for the purposes of the towage or other services to be provided under this Agreement. (c) The Hirer shall pay for the replacement of any towing gear and accessories should such equipment become lost, damaged or unserviceable during the service 8s), other than as a result of the Tugowners negligence.

[14] Cfe. Juan Luis Pulido, Los Contratos de Remolque Marítimos, págs.. 299 a 301

[15] "(d) No inspection of the Tow by the Tugowner shall constitute approval of the Tow´s condition or be deemed a waiver of the foregoing aundertakings given by the Hirer.

necessary elements for the towing as well as the elements to be towed. Although there is no stipulation in the forms that the master of the tugboat is in charge of the manoeuvre, this obligation can be inferred from clauses 13 and 15 of Towhire 2008 and Towcon 2008[16].

v) Deliver the item to be towed at the agreed place and time: The tug has the same obligations as any carrier, to deliver the towed item at the agreed time and place of destination, in the same conditions as it received it. Upon arrival at the destination, the tugboat must notify the owner of the towed item or the person indicated and wait to receive the order to release the tow line, an operation that is carried out under the direction and responsibility of the tugboat captain.

b) Manoeuvring towage

i) Seaworthy tug: The towing company must make available to the towed party a tug which is seaworthy and suitable for the agreed manoeuvre (e.g. sufficient power). Normally, towage manoeuvre forms do not specify what the requirements for seaworthiness are, but they are regulated by maritime regulations approved by the relevant maritime authority. The same requirements apply to the manoeuvring equipment (cables, ropes, etc.) and crew.

ii) Commencement of the manoeuvre at the agreed place and time: Normally this does not pose a major problem because this type of operation is carried out in port areas.

iii) Obligation to obey the towed party's orders: Unlike in transport towing, in manoeuvring towing, the towed party maintains the direction of the operation. This obligation is not absolute, as the tug master remains in command of his vessel and may refuse to carry out a manoeuvre that endangers his vessel, the towed vessels or third party vessels and/or goods.

B) Obligations of the towed person

a) Towing transport

[16] "…and such personnel shall be at all times under the orders of the Tugmaster".

i) To make available the items to be towed: The owner of the items to be towed must make them available to the towed party at the agreed place and date. For example, Clause 13 of the Towcon 2008 form states: "The place of connection and departure shall always be safe and accessible for the Tug to enter, to operate in and for the Tug and Tow to leave and shall be a place where such Tug is permitted to commence the towage in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner which shall not be unreasonably withheld". The purpose of this clause is to ensure that the place where the tug has to report to receive the towed item is suitable for the operation and that it does not endanger the tug or cause delay. As in charterparties, the concept of "safe harbour" is used in a relative way, i.e. it will depend on the type of vessel, the item to be towed and all other local circumstances that may hinder the operation. There are also clauses establishing the deadlines for making the connection between the tug and the towed vessel and, as in charterparties, there are concepts such as "laytime" or "freetime", as in the Towcon 2008 form (box 26 and clause 6a)[17].

(ii) Paying the price: Unlike in the case of a manoeuvring tow, in the case of a transport tow, the price is freely negotiated. Notwithstanding this, there are two main systems: "lumpsum" or "forfaitaire" and "daily hire". The "lump sum" or "forfaitare" system consists of fixing a fixed sum to be paid before the start of the towage, which cannot be changed except in special circumstances (weather conditions, unseaworthiness of the towed vehicle). On the other hand, the "daily hire" system or daily rate for each day spent on the towage. The first of these is preferred by towage owners as it allows for the charging of a sum proportional to the use made of the tugboat, while the second is preferred by towage users. Both systems are provided for in the BIMCO forms. The Towhire provides for a daily hire (box 33) and payment in advance; and the Towcon for a lump sum or

[17] (a) The Free Time specified in Boxes 26 and 27 shall be allowed for the connecting and disconnecting of the Tow, transiting canals and Restricted Waters and all other purposes relating thereto. Free Time shall commence when the Tug arrives at the pilot station at the place of departure or the Tug and Tow arrives at the pilot station at the place of destination or anchors or arrives at the usual waiting area off such places or, in the case of canals and Restricted Waters, as from arrival at the pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea. Free Time for transiting canals and Restricted Waters shall be as stated in Box 28. Should the Free Time be exceeded, Delay Payments at the rate specified in Box 30 shall be payable until the Tug and Tow sail from the place of departure or the Tug is free to leave the place of destination. (b) Any Delay Payment due under this Agreement shall be paid to the Tugowner as and when earned on presentation of the invoice.

"lumpsum" or "forfaitaire" (box 33). In both forms, there is extensive regulation of the price and form of payment (clause 3 of both forms)[18].

iii) Reception of the towed elements: The owner of the towed elements must receive it at the agreed time and place. Once the voyage has ended, free time (laytime - free time) is normally agreed to carry out the manoeuvre of disconnecting the tug with the towed item, an operation that is under the direction of the tug's captain. As in the transport of goods, the problem that can arise is that the owner of the towed item does not show up to receive it. Some of the towage forms provide a time limit for the holder to come forward to receive the towed item, failing which the tug has the right to abandon the tow (cls. 21 Towhire and 23 Towcon)[19].

b) Towing manoeuvre

i) Paying the price: Unlike transport towing, the price is fixed by a tariff which is normally set or approved by the administrative authority. In practice, the price is paid by the ship's agency and under conditions fixed unilaterally or by mutual agreement.

ii) Direction of the manoeuvre: As we have already stated, in this type of towage, the towed party does not lose the direction of the manoeuvre, the tug being limited to collaborating in the docking or undocking manoeuvres.

iii) Necessary elements for the towing: In the manoeuvring towage forms it is established that the towing cables are provided by the towed party and, if it is the tug who places them, he is entitled to a supplementary price[20].

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[18] "(a) The Hirer shall pay the Tugowner the sum set out in Box 33 (hererinafter called "the Lump Sum"). (b) The Lump Sum shall be payable as set out in Boxes 33 and 34. (c) The Lump Sum an all other sums payable to the Tugowner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 33, Tug and/or Tow or part of Tow lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis as per Box 30. (d) All payments by the Hirer shall be made in the currency and to the bank account specified in Box 34.

[19] (a) The Tugowner may, without prejudice to any other remedies he may have, withdraw from and terminate this Agreement and leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of the Lump Sum less expenses saved by the Tugowner and all other payments due under this Agreement …".

[20] Cfe. Nota anterior, págs.. 188-189

iv) The towed vessel must be in seaworthy condition: Although this would not be a major problem since the vessels requesting the service come from the high seas and should be in seaworthy condition, it is the towed vessel's obligation to maintain this condition during the manoeuvre.

VII. LIABILITY OF THE PARTIES

In the case of both transport trailers and manoeuvring trailers, liability for damages is of great importance. This liability can be between the contracting parties or against third parties. In the first case, we would be facing a contractual liability and, in the second case, we would be facing a non-contractual or joint and several liability.

A) Contractual liability - There is no legal regulation of contractual liability for breach of the towing contract, so we must refer to the general rules of contractual liability and, if there is a written contract, to the provisions on liability agreed therein. In the case of towing transport, as we have already said above, we are dealing with a contract of carriage and, as such, in addition to the general rules on contractual liability, the rules of the contract of carriage in general and especially those provided in Title VII of the Commercial Code apply; and, in the event that there is a written towing contract, as agreed in the same (art.209 of the Commercial Code). In this way, the tugboat will be liable for all damages caused to the item to be towed unless he proves that there was a defect in the thing itself, force majeure or the fault of the shipper (art. 1078 of the Commercial Code). The BIMCO forms already referred to (Towcon and Towhire 2008) extensively regulate the contractual liability regime between the tug and the towed party (cl. 25 Towhire/Towcon). In these cases, "the tugboat is liable for all claims for personal injury brought by persons on board its vessel or by their dependants (even if the latter suffered the damage while on board the towed vessel). He is also liable for material damage to his own vessel or damage caused by his own vessel to third parties. The same regime also applies to the towed party, in respect of its own personnel and vessel ("knock for knock system"). No attention is paid to whether the damage in question is caused by the faulty conduct of one or the

other (whereby the regime is partly reminiscent of the regime for damage in the case of collision, both of which are culpable under Art. 827 of the Civil Code)"[21][22]. These clauses have been considered null and void on the grounds that they are a contract of adhesion and that they are liability exemption clauses. Although this is a subject that may give rise to discussion, I understand that this type of clause is valid[23] and establishes a simple and equitable system of distribution of risks[24]. The BIMCO forms (Towhire - Towcon) are not contracts of adhesion, but rather standard or pre-drafted forms which, like charterparties, are freely negotiated and can be modified by the parties; and their clauses are not exoneration of liability, but rather a distribution of responsibilities.

However, even if we were dealing with a contract of adhesion and an exoneration of liability clause is not sufficient to consider them null and void, if the contract was freely accepted and signed by the parties. In this sense, our doctrine has held "that one must first of all begin with a conscientious study of consent, examining whether or not the clause was in fact accepted. A unilateral act of the debtor, by which he exempts himself in advance from his liability, is invalid. The clause is often painted on the walls of garages used for storage, or on posters placed by the hotelier in the rooms used for accommodation, or even on the tickets or passage in the contract of carriage (sometimes in smaller type, so as not to attract too much attention). We are then faced with a question of fact: the creditor's acceptance must be proved. And here, as Mazeaud states, his silence can rarely be interpreted in that sense"[25]; and, he concludes: "In my opinion, contracts of carriage are governed by the bill of lading, and in such a hypothesis consent cannot be discussed, contrary to what Uruguayan jurisprudence considers (supra, note 7)"[26]. In short, whether the towage contract (whether forms or not) is considered a contract of adhesion or not, if the parties have given their consent, the clauses of exoneration or distribution of liability are valid. In the case of a

[21] Idem nota 1, pág. 585
[22] El art. 1434 de nuestro Código de Comercio prevé lo mismo y dice: “Si ha habido culpa por parte de los dos capitanes, o de los individuos de las tripulaciones, cada buque soportará su daño”.
[23] Cfe. Lord Chorley y O.C. Giles, Derecho Marítimo, Bosch, Casa Editorial, 1961, págs.. 326 a 329
[24] Cfe. Nota 1, pág. 371
[25] Prof. Dr. Jorge Gamarra, Tratado de Derecho Civil Uruguayo, Tomo XVII, Responsabilidad contractual, Vol. 1, Segunda Edición 1999, F.C.U. pág. 257
[26] Idem nota anterior

manoeuvring trailer contract, as in the case of a transport trailer, there is no special legal regulation, so that liability is regulated first by the contract and, if there is no contract, by the general liability provisions in the contract and, in particular, by the provisions of the contract for the hiring of services. In principle, the person who has caused the damage is liable for the damage and in order to be released he must prove that he acted with due diligence. In the towage manoeuvre forms, liability rules are incorporated whereby the tugboat is exempted from liability both for damage caused or suffered by its vessel and for damage suffered by the towed vessel (UKSCT form). The validity of these clauses has been defended by a large part of the doctrine, mainly on three grounds: a) contractual freedom; b) reduction of litigation; and, c) that it is an instrument for sharing the risks of the operation[27]. Although I recognise the debatability of this point, as I have argued in the transport trailer, what is important here is not whether we are dealing with a contract of adhesion but whether the parties have given their consent and accepted the exoneration clauses.

B) Liability towards third parties (tort or tortfeasor) - Any type of towing involves risks and damages may be suffered, not only by the parties bound by the transport contract, but also by third parties outside the contractual relationship. If damages are caused to third parties outside the towing contract, their liability and repair are regulated by the rules on tort liability (arts. 1319 C. Civil) and, if applicable, the rules on "Collision or Boarding" of our Commercial Code (arts. 1433 to 1442). If in a towage operation, the towed vessel collides with a third party's vessel causing damage to it, the latter will have the right to claim compensation against any of the participants of the operation (tug - towed). Not being a party to the towage contract, he should claim against the party at fault, but proof of this is sometimes difficult to establish. For this, it is necessary to establish criteria for the attribution of liability for damages caused to third parties who are not part of the towing contract. Essentially, we can summarise in two criteria supported by the doctrine and they would be the following:

[27] Cfe. nota 8, págs. 215-227

a) Presumed liability of the person in charge of the operation: One of the criteria upheld by the doctrine is that the person responsible for the damage caused to third parties is the person in charge of the operation[28]. On this criterion, it has been held that it cannot be accepted that in cases in which the damage is caused by the fault of the person who does not have the management of the operation, it is the person who assumes the liability and not the one who caused the damage. On the other hand, it has been held that the liability of the person who directs the towing operation is presumed, unless there is proof to the contrary. In this sense, the doctrine has said "that the criterion of the direction of the manoeuvre seems to us to be the most appropriate for resolving the question we are dealing with because the party who controls the execution of the operation is the one who is usually in the best position to offer an explanation of the causes of the accident. Furthermore, although negligent behaviour of the other party may always be involved in the occurrence of the accident, it seems logical to require that the party who assumed the obligation to control all the nautical aspects of the towage should demonstrate the use of its best diligence"[29] . In my opinion, this criterion is the correct one and in line with the general principle for non-contractual liability. Indeed, in our system of non-contractual liability "every act which causes damage to another person imposes on the person through whose wilful misconduct, fault or negligence it has occurred, the obligation to repair it" (art. 1319 C. Civil). Therefore, although there is a presumption against the person who directs the operation, it admits proof to the contrary and the person who is directly responsible for the damage must respond.

b) Unity of the towed train: Those who sustain this criterion say that the tug and the towed elements form an indivisible and independent unit and, the third party who suffered the damage will be able to go against any of them in a joint and several and invisible way. This is without prejudice to the corresponding actions between the parties

[28] Spasiano, In tema di urto de navi et di rimorchio, en Rivista del diritto della navigazione, 1938, pág. 181

[29] Idem nota 8, pág. 384

involved in the towing contract[30]. Part of the doctrine has rejected this criterion "because, with the laudable intention of protecting the interests of the latter, excessively harmful results are produced for the component of the convoy that has not acted culpably. Towing, in any of its modalities, is a shared adventure in which each of the parties assumes a sphere of responsibility, so that it is not justifiable to attribute to the innocent party the consequences of the harmful event caused by the negligent behaviour of another of the components of the convoy"[31]. This is the criterion foreseen in the Argentine Navigation Law[32]. In our legal system there is no legal basis to sustain the joint and several liability of all the components of a tow train unit.

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[30] Cfe. G. Ripert, Derecho Marítimo, tomo II, pág. 927
[31] Idem nota 8, págs.. 387-388
[32] Artículo 363: "En caso de abordaje con otro buque, el convoy constituido por el remolcador y el remolcado se considera como un solo buque, a los efectos de la responsabilidad hacia terceros, cuando la dirección la tenga el remolcador, sin perjuicio del derecho de repetición entre sí, de acuerdo con la culpa de cada uno".