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## TOWAGE CONTRACT UNDER POLISH REGULATIONS

### INTRODUCTION

Towage services play an important role in maritime navigation and as such are called ancillary services. From the historical point of view towing of the ships is a relatively new kind of service, which appeared with power-driven vessels. Previously towing of vessels usually took place within the harbours and by means of rowing boats (6-12 oarsmen).<sup>1</sup> S. Matysik points out that after furling sails a sailing ship on the roads was towed to the port with towing lines mounted on the bow of the ship by people forming a separate professional group or by horse-drawn vehicles. This practice continued in Gdansk until the 14<sup>th</sup> century when the first tugboat called '*Xiążę Xawery*' was introduced.<sup>2</sup> The introduction of steam-powered ships, especially powerful and manoeuvrable tugs gave rise to the development of towage services in the modern sense of the term. It also allowed for providing towage services outside seaports. Simultaneously with the development of towage regulations governing towing contracts and services as well as liability for damage caused in the performance of towing were introduced.

Towage service is usually rendered by special units, i.e. tugs. According to a dictionary definition *a tug is a vessel used for towing vessels, barges, oil rigs etc. and to help large vessels to enter or leave the port. The biggest ocean-going tugs are also rescue vessels and can often be used as icebreakers. Port tugs are smaller, have less powerful engines and are used for towing vessels in ports and for other*

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<sup>1</sup> J. Łopuski, *Odpowiedzialność holownika za szkody wyrządzone podczas holowania*, Rocznik prawa morskiego 1954, p. 73.

<sup>2</sup> S. Matysik, *Prawo morskie Gdańska*, Warszawa 1958, p. 335.

*works*.<sup>3</sup> According to the definition in Article 2 § 1 of the Maritime Code a tug is a maritime vessel in the meaning of the regulation of this Code. Admittedly, the Maritime Code does not stipulate that towing must be performed by tugs but port regulations could introduce such a requirement that towage services are to be rendered only by vessels designed for this purpose. The exception is assistance in distress what is required from every vessel regardless of its operation, nationality and status.<sup>4</sup>

It should be noted that towage services have not been regulated comprehensively by international law. International Convention for Preventing Collisions at Sea (COLREG 1972)<sup>5</sup> – so called Rules of the Road contains only the regulations concerning navigation lights and fog signals used on both towing and towed ships (Rules 3, 5 and 15 of that Convention). Similarly, the Convention for the Unification of Certain Rules of Law concerning Assistance and Salvage at Sea<sup>6</sup> contains only regulations on the rights of the tug to be paid remuneration for the assistance rendered to a vessel. In Poland a towage contract is governed by the Maritime Code<sup>7</sup> (Articles 214–219) and port rules, while there are no executive rules in this area.

## 1. TYPES OF TOWAGE SERVICES

According to the definition from Article 214 § 1 of the Maritime Code, towage services are rendered on the basis of a contract. Article 214 § 2 of the Maritime Code defines towage services as towing or pushing a vessel, pulling, holding the ship or other assistance in carrying out a navigational manoeuvre, as well as standing-by of a tug near a vessel in order to serve her with tow (*towage attendance*).

<sup>3</sup> I. Grajewski, J. Wójcicki, *Mały leksykon morski*, Warszawa 1981, pp. 93–94.

<sup>4</sup> *Zarządzenie nr 5 Dyrektora Urzędu Morskiego w Gdyni z dnia 20 lutego 2013 r., Przepisy portowe, (Pomor.2013.1314)*. [Director's of the Maritime Office in Gdynia Standing Order No 5 of 20 February 2013, Port Regulations] (Pomor.2013.1314).

<sup>5</sup> *Konwencja w sprawie międzynarodowych przepisów o zapobieganiu zderzeniom na morzu z 1972 roku, sporządzona w Londynie dnia 20 października 1972 roku, (Dz.U. 1977 Nr 15, poz. 61)* [International Convention for Preventing Collisions at Sea, 1972, done in London on 20 October 1972 (Journal of Laws 1977, No. 15, item 62)].

<sup>6</sup> *Konwencja o ujednostajnieniu niektórych przepisów dotyczących niesienia pomocy i ratownictwa morskiego, podpisana w Brukseli dnia 23 września 1910 r. (Dz.U. 1938 Nr 101, poz. 672)* [Convention for the unification of certain rules of law respecting assistance and salvage at sea, signed in Brussels on 23 September 1910 (Journal of Laws 1938, No. 101, item 672)].

<sup>7</sup> *Ustawa z dnia 18 września 2001 r. Kodeks morski, (Dz.U. z 2016 r. poz. 66)*, [Act of 18 September 2001, the Maritime Code (Journal of Laws of 2016, item.66)].

Thereby the legislator decided to open a catalogue of services, which could be recognized as towing. The above definition is a *sensu largo* definition. Such a solution is justified because of the dynamics of the development of navigation, among others, construction of new types of vessels and objects such as oil rigs, which also make use of towage services.

By towing J. Łopuski understands “*the provision by one ship to another ship tractive forces to move it across the surface of the water or just to help to it perform that transfer or a particular manoeuvre on its own*”.<sup>8</sup> In this case towed and towing units are usually connected to each other by the so-called towing line. However, the service of towage is not limited only to physical support of a vessel when performing the navigation manoeuvre but its scope should also comprise any kind of assistance or only a tugboat standby to provide such assistance. Therefore, the above definition by J. Łopuski should be classified as towing in a narrow sense.

Undoubtedly, towage services cover: 1) towing of the vessel without propulsion, 2) navigational assistance on entering or leaving the ship or within the port and 3) helping the damaged vessel in distress. The first type of service includes, among others, towing barges or shipwrecks for scrap. Navigational assistance aims to prevent against damage to quays or other vessels in the port. Also, salvage at sea can be found among a variety of towage services provided that the parties have not entered into a towing contract.<sup>9</sup>

The Maritime Code does not impose on the parties of maritime relations the obligation of using towage services. There is no statutory delegation to issue relevant executive regulations concerning obligatory towage. However, this requirement may result from rules regulating the issue of maritime safety, for example Article 59 § 2 of the Maritime Code according to which the master is obliged to use tug services when it is required by law or ship's safety or when the master considers it as necessary.<sup>10</sup>

Towage services are provided among at least two vessels – the towed and towing one. The Maritime Code does not specify the number of vessels used for towing; therefore it is possible that one or a few tugs are employed to tow one vessel. However, to consider a towage service as one contract, the tugs providing towing for a particular vessel should belong to the same shipowner, otherwise there are more than one towage contracts. The above results directly from Article 214 § 1 of the Maritime Code – the shipowner undertakes to provide the towage services using the vessel. If there are more shipowners performing towing by their vessels, each of them provides the service on the basis of a separate towage contract. The

<sup>8</sup> J. Łopuski, *Odpowiedzialność holownika*, p. 72.

<sup>9</sup> S. Matysik, *Prawo morskie*, pp. 230–231.

<sup>10</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Kodeks morski. Komentarz*, Wolters Kluwer 2013, wersja elektr. Komentarz do art. 214 [e-version, commentary on Article 214].

above distinction is especially important when one of the tugs is employed to tow in open-sea towage, while the other begins performing the service just in the port. Such a case was examined by the Maritime Chamber at the District Court in Szczecin, which will be discussed further below.

Towage services are provided under a contract the nature of which is determined by the scope of the services. From a regulatory perspective and the content of the agreements themselves, they can be divided into: 1) a port towage contract and 2) an open-sea towage contract. In fact, the purpose and the scope of towage services vary depending on the sea area on which the service is performed.

### 1.1. HARBOUR/PORT TOWAGE

Port regulations may introduce the obligation of using towage services in order to ensure maritime safety. Port towage is held at the entrance of the port – from the roadstead to berthing inside the port and while leaving the port – from casting off to the roadstead and at every change of berth within the port area with the exception of the ship being moved along the berth. The scope of port towage includes also towing in canals and rivers. This kind of service is used by the vessels whose self-moving could threaten the quayside, port facilities or other vessels in the port because of their size and powerful engines.

According to § 50 Standing Order of the Director of Maritime Office in Gdynia dated 20<sup>th</sup> February 2015<sup>11</sup> – Port Regulations, vessels of 70 meters or more carrying dangerous cargo are obliged to use towage services. Each time the captain of the port determines the number of tugs which should be used for towing. Moreover, he can release the vessel or the port area for a specified time from the obligation of using towage services or agree to use fewer tugs than specified in the Port Regulations. Also when the Harbour Master deems a situation necessary, he may order to use a tug boat or more tug boats. Towage services provided to the vessel in the port are intended to help vessels with manoeuvres while entering and leaving the port and moving the ship within the port.

It should be pointed out that under the Regulation of President of Poland of 1932<sup>12</sup> towing of vessels in Polish ports using special power-driven vessels (tugs) can be carried out by the port authorities, natural or legal persons on the basis of a concession. It was issued at the sole discretion of the Minister of Industry and Trade for the specified period of time or until further notice and subject to the

<sup>11</sup> Pomor.2013.1314.

<sup>12</sup> Rozporządzenie prezydenta RP z dnia 21 października 1932 roku o warunkach uprawnień do holowania statków w polskich portach morskich, (Dz.U. 1932, nr 91, poz. 783), [Regulation of the President of the Republic of Poland of 21 October 1932 on the conditions of permission to tow vessels in the Polish sea ports, (Journal of Laws of 1932, No. 91,item 783)].

conditions set each time by the Minister. Currently the constitutional principle of economic freedom provides serving towage services without any required license or permit.

## 1.2. OCEAN/OPEN-SEA TOWAGE

The nature of open-sea towage, also called ocean towage, is different from port towage. The open-sea towage service provides towing of a specific floating unit (ship without propulsion, barges etc.) by a tug. This service can be provided on high seas, territorial and internal waters.<sup>13</sup> Therefore, not only the nature of the obligation between high sea towage and port towage is different but also subordination between the tug and the towed object.

## 1.3. TOWAGE ATTENDANCE/ASSISTANCE

Towage attendance is a special type of towage service. It takes place when the tug is on standby near the vessel to render assistance. Thus, towed and towing vessels cannot be connected to each other in any physical way by a towing line or the towing vessel may not execute any commands from the vessel to be towed. Nevertheless, towage assistance is included in the concept of towage services as service based on the readiness to provide towage.<sup>14</sup> Thus, this service is subject to charges in accordance with the tariff of the towage company.

## 1.4. TOWAGE AND SALVAGE

In some circumstances towage may turn into maritime salvage. Usually, the towage service provided to the vessel in distress is maritime salvage. It refers to a situation when the towed object was in danger during towage service. It results from Article 235 of the Maritime Code according to which the tug rendering towage services has the right to remuneration for maritime salvage when the vessel was found in distress, if exceptional services beyond the scope of the contract were granted to the vessel. A similar provision could be found in Article 4 of the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea.<sup>15</sup> Thus, there is a slight margin between towage and maritime salvage and it depends on the existence and type of the contract between the parties.

<sup>13</sup> J. Łopuski, *Prawo morskie. Prawo żeglugi morskiej*, tom II, Bydgoszcz–Toruń 2000, p. 45.

<sup>14</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Kodeks morski. Komentarz*, Wolters Kluwer 2013, wersja elektr. Komentarz do art. 214. [*e-version, commentary on Article 214*].

<sup>15</sup> Konwencja o ujednostajnieniu niektórych przepisów dotyczących niesienia pomocy i ratownictwa morskiego, podpisana w Brukseli dnia 23 września 1910 r. (Dz.U. 1938 Nr 101, poz. 672),

## 2. TOWAGE CONTRACT

As it was said above, towage services are provided on the basis of the contract between a tug's shipowner and a shipowner of the towed vessel. The division into port towage and open-sea towage resulted from maritime practice because the Maritime Code does not introduce a distinction between the port towage services and the open-sea towage services. This means that the Maritime Code regulations apply to both types of towage services formulating the most important provisions of the towage contract.<sup>16</sup> This conventional division into port towage and open-sea towage is important when it comes to some duties of the parties and liability for damage occurred in connection with towing. However, regardless of the type of towing, the towage contract is a named contract, bilateral, reciprocal, binding, consensual and paid. Towage services (towing) can be provided both by the shipowner and time charterer. The other party to the towage contract (the towed object) is determined by the property relations of the towed object, i.e. the shipowner or the owner of the towed vessel or the time charterer.<sup>17</sup>

It is worth noting, after J. Łopuski, that until the adoption of the Maritime Code 1961, a towage contract was provided under an unnamed contract while *"definition, towage contract was used to determine the process of towing one vessel by the other but did not mean a separate institution of maritime law."*<sup>18</sup> Adopting the Maritime Code resulted in extracting of towage as a new separate and named contract.

A towage contract is entered into as a result of a consistent statement of the parties involved. The exception is the necessity of providing salvage which means the situation when one of the vessels is in distress and is being towed by the vessel serving salvage. In this case there is no unanimous declaration of will of the parties to the contract, which means the contract has not been concluded.

An important element of the towage contract is payment resulting directly from Article 214 § 1 of the Maritime Code. Lack of payment causes that the service provided cannot be considered as towage and hence – the service is not subject to the provisions of the Maritime Code.

Towing a yacht or a fishing boat as an unpaid, friendly favour may be indicated here as an example. Article 217 of the Maritime Code states that remuneration for towage services is specified by the contract and in the absence of such provisions

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[Convention for the unification of certain rules of law respecting assistance and salvage at sea, signed in Brussels on 23 September 1910 (Journal of Laws 1938, No. 101, item 672)].

<sup>16</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Kodeks morski. Komentarz*, Wolters Kluwer 2013, wersja elektr. komentarz do art. 214. [e-version, commentary on Article 214].

<sup>17</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Leksykon morski*, C.H. Beck 2013, p. 190.

<sup>18</sup> J. Łopuski, *Odpowiedzialność holownika*, p. 75.

an honest wage should be paid. The payment depends on the rates adopted in a specific category of services provided in the place where the contract was concluded. It should be noted that when considering the amount of remuneration, the time to reach the vessel and the time to return to the tug base is also taken into account. The passage of the tug to the vessel is not the towage service yet, however, this period is included in payment.<sup>19</sup> Maritime practice indicates that remuneration is determined according to the tariff. Towage fees are collected according to the vessel's tonnage and the power of tug's engines.<sup>20</sup>

The Maritime Code does not specify any special form for validity of a towage contract. Usually the towage contract is concluded by ordering the towage service (in case of port towage) and after the execution thereof a towage receipt is issued which confirms evidence of the contract and specifies the conditions of the contract.

The towage contract imposes certain obligations on the parties. The shipowner is obligated under Article 216 § 1 of the Maritime Code to deliver at the agreed time and place a tug fit for performing the agreed services, properly equipped, supplied and manned. Both the tug and equipment used by her should be in good technical condition and suitably adapted to provide towage services, while the crew of the tug should have appropriate professional qualifications. Another obligation of the tug is to provide the services with efficiency required by the circumstances without interruptions and delay and in accordance with the principles of good seamanship. The doctrine of maritime law states that the provisions of Article 216 § 1 and 2 of the Maritime Code are not mandatory and are applicable only where the parties have not agreed otherwise.<sup>21</sup> This point of view should be questioned as seaworthiness of the ship is concerned. Indeed, seaworthiness of a ship is one of the conditions of maritime safety arising from Article 57 of the Maritime Code according to which the master is obligated to exercise due diligence to assure seaworthiness of the ship before and during the voyage. Thus, the duty to place seaworthy vessel in every way fitted, as defined in Article 216 § 1 of the Maritime Code, cannot be regulated by the parties differently as it would contravene the generally applicable maritime safety rules and port regulations.

If the master of the vessel in tow is in charge of the navigational command, a tug is subordinated to the towed vessel and is required to perform his orders accurately and immediately. The tug's duty is to avoid situations which may lead to damage either to the towing unit or to the towed vessel, as well as to warn the vessel in tow of potential hazards. The tug may not, without justified reasons,

<sup>19</sup> S. Matysik, *Podręcznik prawa morskiego*, Warszawa 1975, p. 211.

<sup>20</sup> Taryfa WUŻ Port and Maritime Services Ltd. Sp. z o.o., <http://www.portgdansk.pl/port/charges/services/taryfa-wuz.pdf>

<sup>21</sup> S. Matysik, *Prawo morskie*, pp. 235–236.

interrupt towing which is in progress unless there are situations which make towage services impossible. The change of circumstances under which the towed ship unexpectedly is found in a dangerous situation does not constitute grounds to stop towing. Interruption of towing due to extraordinary reasons is connected with the obligation to return to towing and resume towage, once the cause for the interruption of services has ceased. In contrast, when the towage operation is under command of a tug master, his duty is to maintain constant communication and observation of the unit in tow, as well as to check the position of the lights of the towed units.<sup>22</sup>

Then the primary obligation of the towed vessel is payment for the service. Moreover, the towed object which is in command of tow is obliged to assure the safety of navigation and tow pursuant to Article 216 § 3 of the Maritime Code. This means it is the vessel's duty to signal danger that the tug cannot see and to prevent situations where the tug might perform risky manoeuvres.

## 2.1. PORT TOWAGE CONTRACT

It has already been mentioned, that there is no obligation in the Maritime Code to use the services of a tug. However, the directors of maritime offices can introduce regulations in this area. Currently, this requirement arises from the orders of directors of the Maritime Offices in Gdynia, Szczecin and Słupsk – *Port Regulations*.

Maritime practice indicates that a port towage contract is concluded usually verbally by an agent. The nature of this contract is adhesive, and its conditions are unilaterally imposed by a tugowner. The content of the towing receipt indicates that the towage services are provided on the contractual terms specified on the back of the receipt and both parties accept these conditions as binding. However, in cases not covered by the terms of towing, the provisions of the Maritime Code are applicable.

The provisions of the contract impose on the master of the towed vessel the obligation of navigational command. They also state that the tug and its crew are at the disposal of the towed vessel from the moment of receiving the first command of the towed vessel until the end of towing (execution of the last command). It should be noted that the regulations provide that the tug operator shall not be liable for any damage caused by the tow to the towed vessel, its cargo and persons on board occurring during towage services provided under the contract

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<sup>22</sup> J. Łopuski, *Prawo morskie dla oficerów marynarki handlowej i rybołówstwa*, Gdańsk 1974, p. 308.

and resulting from any cause, including negligence of the master of the tug, his subordinates and agents.

While the owner of the towed vessel is responsible for all damage occurred during towage services or in connection with these services caused by the tug or its crew, other vessels, port facilities or third parties; it also refers to the situations caused by negligence of the tug master, his subordinates and agents. In addition, in case of bringing the claim against the shipowner resulting from the performance of towage services under the contract, the shipowner of the towed vessel covers all damage incurred by her relating to these claims.

The conditions of a sample towage contract also contain the provision stating that the towed vessel is responsible for proper condition and strength of the towing lines as well. The master is also responsible for the proper berthing of the vessel. If the manoeuvres performed by the towed ship pose a threat to the tug, the tug has the right to get rid of the towing line and the towed vessel is responsible for the consequences resulting therefrom.

A towage receipt includes information specifying an agent acting on behalf of the towed object, the characteristics of the towed object (measurements, flag), and the name of the tug, its work time, route and nature of service. Moreover, this document contains a column specifying whether the tug's towing line was used at the request of the towed vessel.

The text of the agreement is contained in the towage receipt, signed by the masters of both vessels or the towed vessel and the tugboat skipper. This document confirms the execution of the towage service. As a rule, the validity of provisions of the general conditions of the port towage cannot be questioned if the parties to the agreement are commercial entities on the basis of Article 385 § 2 of the Civil Code.

There is a belief in legal writings that the contract for port towing “*eludes attempts to be assigned unambiguously to a particular category of contract*”.<sup>23</sup> This statement should be accepted because towage services provided under a port towage contract are varied and relate to pushing or pulling the towed vessel, as well as assistance in navigational manoeuvres or towage assistance. The tugowner commits himself to provide certain services. Therefore, a port towage contract is a contract of due diligence in its design similar to the agreement of an order specified in the Civil Code.

Moreover, the legal nature of the port towage agreement is also indicated by the fact that, most frequently, the tug remains under the full navigational command performed by the towed vessel. This arises from the clauses concluded in the port towage contracts. The main reason for the introduction of such clauses

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<sup>23</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Kodeks morski. Komentarz*, Wolters Kluwer 2013, wersja elektr. komentarz do art. 214. [*e-version, commentary on Article 214*],

in forms is the desire of companies providing towage services in ports for exemption from liability for any damage which might be caused during the provision of towage services.

## 2.2. OPEN-SEA TOWAGE CONTRACT

The character of services provided under an open-sea towage contract is different because it relates to the movement of the object being towed from one place to another. In this respect, it is similar to a work contract, as its result assumes moving the towed vessel on a particular route and delivering it to the place of destination specified in the contract.

Most frequently, it is the tug master who is in charge of the navigational command of the tow. The towed vessel under the management led by the tug master uses her own propulsion only to a limited extent or does not use it at all. Meanwhile, the tug is the source of the driving force for both itself and for the towed object and thus has the ability to influence the movements of the towed vessel.<sup>24</sup>

The open-sea towage contract is often international. Therefore, the parties commonly use the forms made by BIMCO-TOWCON 2008 and TOWHIRE 2008. The Towcon 2008 form consists of two parts. The first one contains a form in the form of a table. The second part contains the general terms and conditions. The first part contains data referring to the shipowner of the tug, hirer, the towed vessel, P&I liability insurers (both of vessel being towed and the tugboat), the name and type of the tug, tug's gross tonnage. Moreover, it determines the nature of the services provided, the places of departure and destination, planned route, remuneration and the method of payment.

The tugowner and the shipowner of the towed object, called the hirer or the lessor, are the parties to the contract. According to the general provisions, the towed object should be made available for a tugowner in the place of commencement of the service, while the tug is ready to sail from the place of departure. The towed unit should be immediately accepted and received by the hirer or its authorized representative at the place of destination.

If the tugowner provides a crew for towing, the make-up of the crew and their fitness will be determined at the sole discretion of the tugowner. The provisions of the contract provide also the right to mutual use of equipment of the tug and the towed vessel.

The duty of the hirer is to take appropriate efforts to ensure that the towed unit at the beginning of towing will in every respect be capable to be towed from the

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<sup>24</sup> M. Okręgliński, *Pojęcie i sprawowanie kierownictwa nawigacyjnego zespołu holowniczego*, Zeszyty Naukowe Prawa i Administracji Uniwersytetu Gdańskiego, Prawo nr 3, 1976, p. 114 ff.

place of departure and destination. This involves the obligation of the tugowner to take adequate efforts and ensure that the tug at the beginning of towing will be seaworthy in every respect and prepared to perform towing. All fees associated with towage i.e. port charges, pilot's fees, insurance of the towed object rest with the hirer.

It should be emphasized that when concluding a towage contract (including open-sea towage), the hirer does not order a particular tug. The tugowner can, in any time, substitute each tug for another one with adequate power but following the rules of good maritime practice.

Towcon 2008 Form also provides rules of remuneration in case of interruption of towing operations. According to the Supreme Court judgment of 25<sup>th</sup> March 2011 in case No. IV CSK 387/10<sup>25</sup> it is clear that if the parties concluded a towage contract on the Towcon 2008 Form, the shipowner of the tug is entitled to receive payment even if the towing operation is interrupted after departure from the starting point but before the arrival of the towed vessel at its destination without the fault of the tugowner.

The open-sea towage contract based on the conditions of the Towcon 2008 Form also defines the issue of salvage of the towed vessel and other vessel in distress. In case of breaking the towing lines between the tug and the towed unit during the towage services, the tug shall take all reasonable steps to reconnect the towing line and following the towage contract without making any claims for salvage. Moreover, the tug has discretion on assisting any other vessel which is in distress in order to save life, property or in a state of other necessity. If such a situation occurs during the towing operation, the tug is obliged to leave the vessel in-tow in a safe place.

Noteworthy is the decision resulting from the open-sea towage contract, so called the Himalayan Clause, the most-favoured-nation-clause. It provides that all the exemptions, limitations of liability, indemnities, privileges resulting from the contract or the law in favour of the tugowner or hirer shall also apply in favor of the charterers, contractors, operators, masters, officers and crew of the tug or the towed vessel.

The form also regulates the lien resulting from the provision of towage services. The tugowner (his employees, agents or other persons) is, without prejudice to any other rights it is entitled to (whether in relation to things – *in rem* or people – *in personam*), entitled to exercise the lien on the towed unit in respect to any amount in any way due to the tugowner according to the agreement, and to exercise lien on the unit, it shall be entitled to take over and/or keep possession of the towed vessel. The contract provides that the hirer pays to the tugowner all

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<sup>25</sup> <http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/IV%20CSK%20387-10-1.pdf>,

reasonable costs and expenses incurred by or on behalf of the tugowner in the exercise or attempt to exercise or preparing to exercise lien.

The terms of the contract do not determine the issue of exercising the navigational command of the tow. However, they regulate the extent of liability for damage caused in connection with towing, which is similar to the tug and the hirer. As a rule, both the tug and the towed object are liable for injury or death of members of its crew or persons on board for the reasons attributable to their side. What is more, each of the parties shall be liable for the acts and events that took place on board the vessel or were made from the vessel.

In summary, S. Matysik points out that open-sea towage is one of the forms of export of services.<sup>26</sup> The service is provided under the result agreement but even though there is no doubt that while executing its provision the tugowner should act in a careful way and in accordance with good sea practice.

Taking the above into consideration, it is worth pointing out a situation where both open-sea towage and port towage were served to one unit. A tow – the tug A with a barge D13 sailed from Sweden to the port in Świnoujście. The sea agent was responsible for organization of the towing service. He addressed the Harbour Master in Świnoujście to specify the conditions for entering the port and assign a tug B to help tug A with towing the barge and to appoint a pilot. The barge D13 was to be moored to the Top quay and such information was reported by the pilot to the VTS. At the entrance of the port part of the crew of the tug A was transferred to the barge D13 by the tug B. The master of the tug A had contact with the barge D13 and the pilot with the tug B. Because of bad weather conditions the pilot asked the agent by the agency of the pilot dispatcher about the possibility of mooring the barge at another berth. The agent received permission for the barge berthing at the Discharge Wharf but the pilot understood that it had been a Renovation Wharf.

The master of the tug A was responsible for the navigational command in the present case as in the towing service referred to the barge was without an engine. The communication between the tug A, the tug B tugs and the barge D13 was maintained by the pilot. Information about the change in the berthing place did not reach the tug B. As a result, there was an accident – the barge D13 had struck a yacht C moored at the Renovation Wharf which resulted in destroying the yacht. Both instances of the Maritime Chamber indicated that the master of the tug A and the pilot were held responsible for the accident.<sup>27</sup>

<sup>26</sup> S. Matysik, *Prawo morskie...*, p. 247.

<sup>27</sup> Orzeczenie Izby Morskiej przy Sądzie Okręgowym w Szczecinie z dnia 21 marca 2008 roku w sprawie WMS 1/08 oraz orzeczenie Odwoławczej Izby Morskiej przy Sądzie Okręgowym w Gdańsku z siedzibą w Gdyni z dnia 26 lutego 2010 roku w sprawie OIM 6/08 (niepublikowane), [The decision of the Maritime Chamber at the Regional Court in Szczecin of 21 March 2008, on the

The above-presented facts show that the first open-sea towage was performed from Sweden to Poland. Although the judgment does not mention that it should be indicated that the contract was concluded on the terms of Towcon 2008 or Towhire 2008. What is more, the service of port towage was performed on the basis of an agreement concluded by the agent for the towed barge. This example shows that the port towage contract is concluded orally and without doubt has an adhesive nature and the person acting on behalf of the owner of the towed object should be familiar with the towing conditions in the port area. An important issue in this case is to determine the head of the tow as he/she is responsible for damage to the yacht C.

## 2.2. CONTRACTUAL LIABILITY FOR DAMAGE CAUSED DURING TOWING OPERATIONS

Due to the limited scope of this article, the issue of contractual liability for damage caused during towing will be discussed briefly. The consequence of the adoption by the Polish maritime law the concepts of tow and the navigational command of the towage team is to assign the liability to the master who shall lead that team. This principle is based on Article 218 of the Maritime Code and it is not generally applicable. Thus, the parties to towage contract (open-sea towage and port towage) may regulate the above issue otherwise. Nevertheless, the legislator rightly adopted the principle of liability of this party that manages the tow and decides on the manoeuvres.

The issue of liability for damage occurred as a result of and when the towage operations are subject to extensive regulation in the contractual forms. During port towage liability of the towed vessel is usually widely recognized while an open-sea towage contract does not differentiate liability of the tug and the towed object.

Principles of liability in the provision of port towage resulting from the practice of international maritime traffic provide greater protection for damage caused during towing operations. Therefore, we have to deal with the situation where the burden of liability of the tugowner is put onto the shipowner of the towed vessel.<sup>28</sup> Entities providing towage services significantly limit their liability through contractual provisions contained in the contractual forms.

Thus, the tugowner holds no liability for any damage done to the towed vessel, its cargo and persons on board when the port services are rendered by him. This principle also applies to the damage resulting from the negligence of the master of

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case WMS 1/08, and the decision of the Appeal Maritime Chamber at the Regional Court in Gdańsk with its seat in Gdynia of 26 February 2010 on the case OIM 6/08 (not published)].

<sup>28</sup> J. Łopuski, *Odpowiedzialność za szkodę w żegludze morskiej*, Gdańsk 1969, pp. 189–190.

the tug, his servants and agents. These regulations correspond to those commonly used in the UK standard conditions of port towage (*United Kingdom Standard Conditions for Towage and Other Services*). It should be emphasized that no contractual provisions exempt the parties from compliance with the generally applicable standards for safety of navigation. Some doubts may arise according to the exclusion of liability for damage caused by negligence of the crew of a tug when the crew did not comply with orders given by the master of the towed vessel.

When it comes to the contractual provisions covering liability for the provision of the open-sea towage services the forms Towcon 2008 and Towhire 2008 should be referred to. The tugowner is liable for injury or death during towage or performing any other service in the period from arrival at the pilot station or customarily waiting or departing place related to the members of his crew or persons on board. Similar liability is held by the towed vessel. Also liability for damage incurred by third parties has been proportionally divided between the tug and the towed vessel. An important regulation is the provision of a waiver of all claims arising from loss or damage suffered by their vessels as a result of loss or damage caused or suffered by the other ship.

J. Nawrot notes that the differences in liability specified in the scope of a port towage contract and an open-sea towage contract correspond to the market opportunities. This is the consequence of the fact that the competition in the provision of towage services provided at port is limited. Moreover, disparities in the generally accepted port towage principles dealing with liability of the tugs are the result of a desire to protect the interests of local towing companies, whereas the open-sea towage services are more global. Therefore, the towing companies operating in conditions of greater competition cannot afford to shift the responsibility to the towed vessel.<sup>29</sup>

## CONCLUSIONS

The main objective of auxiliary agreements, including the towage contract, classified as contracts of service, is to enable, improve or facilitate the proper performance of transport. Some of them have a universal nature, which means they occur in a larger number of branches of transport, others result from specific service of one of them, which excludes the possibility of other types. Usually, except for the contracts regulated by the Maritime Code, the auxiliary contracts are unnamed contracts, developed by years of business practice to provide certain

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<sup>29</sup> J. Nawrot [in:] D. Pyć, I. Zużewicz-Wiewiórowska, *Kodeks morski. Komentarz*, Wolters Kluwer 2013, wersja elektr. komentarz do art. 218, [e-version, commentary on Article 218].

categories of services.<sup>30</sup> Although the Maritime Code governs the towage contract without distinguishing the scope of services provided on its basis, maritime practice plays an important role in creating the principles of towing. Maritime practice has led to distinguish the port towage contract which has the nature of an adhesive and open-sea towage contract, based on the conditions of Towcon 2008 or Towhire 2008. In summary, it should be noted, that the towage services play an important role in shipping for two reasons, i.e. first of all, towage can serve the movement, or transport an object from one place to another and, secondly, it can ensure the safety of navigation in the port.

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<sup>30</sup> W. Katner (ed.), *Prawo zobowiązań – umowy nienazwane. System Prawa Prywatnego* 9, C.H. Beck 2015, p. 588.

