

Knock-for-knock clauses and towage agreements: A Greek law perspective

Introduction

The Club's Members come from, and trade across, all four corners of the world, and often use standard contracts under which parties' liabilities may be allocated on a knock-for-knock basis. This concept and related indemnity provisions are widely used in contracts related to towage, offshore work and salvage (e.g. Supplytime, Towcon, Towhire, Wreckhire, Wreckfixed). Such indemnities are popular for the certainty they provide to the contracting parties by creating a straightforward system of allocating liabilities that are independent of each party's own negligence.

The legal effect of knock-for-knock clauses in such contracts under common law jurisdictions is well-established. However there is not extensive information available in relation to their application and effect under certain civil law legal systems, which usually follow different legal principles from the ones found in English law.

Therefore, the purpose of this article is to provide a brief description of the function of knock-for-knock clauses and towage agreements generally under Greek law (which is a civil law jurisdiction) and discuss the effect these clauses could have when interpreted in the context of such agreements.

The 'knock-for-knock' regime under Greek law

In Greece, parties' legal relationships are usually governed by one of the standard international contracts used often in shipping. These generally remain unamended and are often subject to English law. To our knowledge, under Greek law there is no legal precedent suggesting that such agreements will not be respected and upheld by the Greek courts, even when they are subject to English law or a foreign jurisdiction. However, if there is no standard contract used, or the contract is silent about the applicable law, and Greek jurisdiction becomes relevant (e.g. due to the incident location), or if the contract expressly provides for the application of Greek law, parties' liabilities will be primarily governed by the general principles of the Greek Civil Code.

It is interesting to note that under the Greek Civil Code, there is no similar concept to the knock-for-knock regime. Therefore, there is no established guidance regarding its limits and the effect of its application to date, except only the general principles applying to all contractual relationships provided under the Greek Civil Code.

Similarly to the English law, the Greek Civil Code under art. 361 recognises the principle of

freedom of contract. According to this, all parties are free to negotiate and agree on whatever terms they wish under their contracts unless Greek law provides otherwise. It is also provided that for such terms to be enforceable, they should simply be agreed in good faith (art. 200) and in line with fair trade practices (art. 288). Therefore, it does seem to be permitted under the Greek Civil Code for parties to increase, limit, or even exempt themselves from a liability so long as this occurs in line with the minimum conditions described above.

In addition to these general principles, there are certain provisions under the Greek Civil Code which regulate specific types of contractual relationships and provide for extra requirements for the enforceability of parties' contractual clauses. Although these named contractual relationships under the Greek Civil Code are not in their majority relevant to the shipping contracts, there are some, such as an agreement for the provision of services, which might be applicable in a maritime context (as will be discussed below). So, a careful consideration of their requirements is also deemed necessary when the enforceability of a knock-for-knock regime is examined within their context.

Overall, considering the above, it is safe to presume that it would be generally acceptable under Greek law for parties to agree on a knock-for-knock regime to regulate their liabilities if they wished, as there is no provision within the Greek Civil Code which expressly restricts such right. However, given that the contractual use of such clauses has never been tested before the Greek courts to date, there is uncertainty as to the exact extent of such clauses.

The towage agreements under Greek law

Under Greek law, the meaning of a towage agreement does not differ from the English law definition, however in England, there are specific common law principles and a jurisdiction specific standard contract (e.g the UK Standard Conditions for Towage and Other Services as amended in 1986). Under Greek law there is no similar contractual arrangement, as parties often prefer to use one of the standardised offshore contracts developed in practice which apply English law and jurisdiction (e.g. UKSTC terms, Towcon, Towhire, Supplytime). Under such arrangements, parties' rights and obligations are well established and are unlikely to be interpreted otherwise before the Greek courts, although as far as we are aware there is no relevant legal precedent to confirm this to date. Yet it should be noted that under Greek law, general principles of contract law such as good faith are taken more into account by Greek courts compared to English courts, where the certainty of contract plays a more significant role.

However, when there is no contract in place and the applicable law to the towage arrangement is Greek law, this would most likely be regulated by the general principles of Greek contract law described in the Greek Civil Code, as the Greek (Public or Private) Maritime Law Codes do not regulate commercial towage contracts per se. For example, the Greek Code of Private Maritime Law (art. 250) refers to towage but only in the context of salvage. Whereas the Greek Code of Public Maritime Law (art. 188), although it is titled "towage and salvage", merely refers to the license conditions required for vessels performing towage and salvage operations, and to the Port Authorities' power to create and impose regulations referring to such operations. Therefore, usually customary towage within Greek ports and harbours is governed by the Greek

Port Authorities' specific regulations. Reference to towage can also be found in the Presidential Decree No. 45/1983, however this regulates only the types of vessels allowed to perform towage services, without defining their rights and obligations when exercising these services.

The Greek Civil Code provisions regulating towage may vary depending on whether the towage agreement constitutes an agreement for the provision of a certain service, or an agreement for carriage by sea.

It is understood that there is an agreement for the provision of a certain service, when the tow has its own propulsion, controls its movement, and has sufficient crew on board. On the contrary, when the towed vessel is without crew and does not have control of its own power or propulsion, the towage agreement is considered an agreement for carriage by sea. In the latter case, the Hague Visby Rules will be applicable by virtue of Law 2107/1992, which implemented the Hague Visby Rules, and supplementarily the Greek Code of Private Maritime Law. Similarly, it also applies in the event of towage in broad sense: In other words, when the tug follows the towed vessel, remaining on stand-by, and the tug Master provides orders in relation to the movement of the tow.

The enforceability of a knock-for clause in the context of Greek towage agreements

As explained, if there is a contract in place for the towage operation which has the form of an unamended standard towage contract, the allocation of parties' liabilities as provided therein are likely to be respected by the Greek courts when applying English law. Therefore, considering that the majority of such contracts provide for a knock-for-knock clause to divide parties' rights and obligations, it is believed that this will be enforceable in the context of towage as well.

However, the position might differ if the towage operation is not governed by a standard contract or is subject to Greek law. Thus, when the towage agreement is considered one for provision of a service, it will be governed by articles 332 and 334 of the Greek Civil Code. According to art. 332 para. 1, any agreement that excludes or limits parties' liability in case of wilful misconduct and gross negligence is void. Under art. 332 para. 2 section A, it is further provided that when one of the contracting parties is under the service of the other, an agreement excluding liability is void, even in case of mere negligence. It is believed that the rationale behind this provision is to protect the contracting party in the least powerful position to negotiate the contractual terms, as it is dependent on the services of its counterparty. Also, art. 334 of the Greek Civil Code provides that parties' liabilities for their own agents/employees is similar to theirs and that such liability can be either limited or excluded subject to the provisions of art. 332 described above. Considering the above, a usual knock-for-knock clause found in the standard offshore contracts which does not distinguish between parties' mere or gross negligence and wilful misconduct might not be enforceable under Greek law as it would contravene articles 332 and 334 of the Greek Civil Code above.

Moreover, when the towage agreement is considered one for carriage by sea, it will be

governed by the provisions of the Code of Private Maritime Law and specifically article 142 of the same. According to the latter, shipowners remain responsible for any fault of their own or their crew, whilst any agreement limiting or releasing them from liability in relation to their obligations described under the Private Maritime Law Code is void. Similarly, it also applies in relation to the agreements which shift the rules on burden of proof as provided under Greek law. However, it is very difficult to apply the provisions of the Private Maritime Law Code in the context of a towage agreement in order to determine parties' liabilities, as it contains only provisions which deal with parties' usual obligations arising under a charter party or a carriage of goods contract (e.g., shipowners' duty to provide a seaworthy and cargo worthy vessel, charterers' duty to provide and accurately describe the cargo carried on board, etc.). Consequently, due to the lack of specific provisions linked to towage within the Private Maritime Law Code, it follows that parties' liabilities will be once again governed by the general contract law principles found in the Greek Civil Code. Therefore, as provided under art. 355 of the latter, someone who offers a service under a contract, is responsible only in the event of gross negligence or wilful misconduct, and such liability cannot be excluded or limited as per art. 332. As a result of the above, the effect of a standard knock-for-knock clause in agreements involving carriage by sea will remain the same as the one described above, notwithstanding that the type of towage agreement is different.

Although there is no Greek case law testing parties' liabilities under a towage agreement, it is worth mentioning that Greek courts have found that the Master of a tow is jointly liable with a tug Master for damage caused to third party property during towage operations on the grounds that both vessels were aware of this risk but insisted on continuing the operations which resulted in the above damage.

Conclusion

Contrary to English law where the use of knock-for-knock clauses is common practice in offshore contracts and parties' liabilities are established, in Greece the position regarding the application of such clauses remains somewhat unclear. In fact, it is noteworthy that there are some scholars who criticise this regime with the argument that such clauses often result in unusual and unfair outcomes. Also, the legal framework governing offshore contracts, such as towage agreements, is believed to be strict and outdated on the basis that the provisions of the Greek Civil Code cannot address adequately the issues that arise in a maritime context, as they refer to other contractual arrangements and apply here merely by analogy.

It is expected that the above issues will be reviewed during the reformation of the Commercial Maritime Law Code which commenced in March 2021. However, until then, we would recommend that Members are cautious about agreeing on the application of Greek law under their offshore contracts and make sure they are aware of the extent of their liability exposure under the Greek Civil Code when undertaking a towage operation in Greece without having agreed beforehand on a standard towage contract.