

Precedents provide legal certainty

Regular columnist Simon Tatham on why English law and jurisdiction are used to settle disputes about incidents many thousands of miles away from the White Cliffs of Dover



► Simon Tatham

Most of our clients are from outside of the UK, not untypical for those practising maritime law in England. When people ask why that is I scratch my head, as I am never entirely sure. At least one explanation may be the common law precedent system. When English law and jurisdiction are selected, courts apply previous decisions which are binding, for better or worse, until overturned by a higher court. Arbitrators must follow this course because otherwise their awards will be open to challenge as being wrong in law.

The result is that, by applying case law to a given set of facts, very often there is an applicable case decided in recent years or perhaps 200 years ago. When two parties are lining up over a potential dispute and go to their solicitors for advice then, assuming they both do their research properly, they ought to be giving the same advice. In that way the issue is often settled because there is a clear, or reasonably clear, right and wrong answer. This introduces a degree of certainty, and businesses like certainty.

Lloyd's of London publishes to subscribers the LOF salvage arbitration awards. This operates in a slightly different way. Not being court decisions, they are not binding, and anyway it is rare that one salvage case is factually identical to another. However, past awards can give a useful indication of the appropriate level of reward. Before the awards were published, which is a recent development, the arbitrators alone had access to past decisions and were entitled to trawl through these for guidance. This has meant that awards should have a degree of uniformity and, where an arbitrator might have stepped out of line, one of the functions of the appeal arbitrator has been to knock the case back into line.

I have trawled through recent rewards

and discuss a few of those here. Whether our readers are involved in salvage or not, these cases always make for interesting reading. We are all involved in the maritime adventure, or perhaps the occasional boating holiday (see below), and we realise that perils of the seas can visit even the best prepared.

In one case, a 2007-built 20,000grt laden handysize bulker en route from South America to China broke down. LOF was agreed with a leading salvage company and a powerful Japanese salvage tug was engaged by them, mobilised quickly, ran out some 1,000 miles and connected up.

The initial plan had been to proceed to destination but this changed and the stricken vessel was taken to Busan, a tow of more than 1,300 miles, for the most part straightforward, though at one stage threatened by a tropical storm. Once there the vessel was handed over to harbour tugs and then repaired before completing her voyage.

The operation took about 12 days and salvor's expenses (for the most part the cost of the sub-contracted tug engaged under TOWHIRE) were around US\$5m. The salvaged property fund was very high, at US\$34m. The arbitrator took into account the fact that a sub-contracted tug was used (the award would otherwise no doubt have been higher) and heard arguments about whether if the job had been done on purely commercial towage terms what the outcome might have been. He also gave recognition to the fact that the contractors kept tugs on station, some in lay-up on account of lack of work, and had a sizeable investment in the business. They merited an encouraging award, but nonetheless one that was not disproportionate to the services performed. The arbitrator considered that a fair award was US\$2.25m.

In another case an American yacht was drifting without power in gale force winds

and 4m swells towards the rocky shore of a Greek island. A very small local tug was on scene less than 20 minutes after call-up, hooking up some three cables from shore in about 20m of water. The tow was tricky, but the operation was over in two hours, after which the tug stood by in port for a few days.

The yacht's value was US\$225,000 and the arbitrator awarded US\$90,000 to the salvors together with costs (which were limited because the arbitration fell into the inexpensive fixed costs procedure applicable to smaller cases).

Finally, I mention an unusual salvage in the Middle East of a 1991 German built container ship where ship and legally represented cargo settled, leaving the salvors to seek an award against unrepresented cargo.

The vessel, carrying around 1,300teu, had run hard aground on rocky shingle and sand on a militarised and politically sensitive island off Iran in late 2014.

No tanks were ruptured, but the vessel was nearly 2m out of draft. LOF was awarded to a Dubai-based operator which mobilised its salvage team supplemented by a container ship consultant, two naval architects and survey and diving teams.

Once inspections and calculations were done, a salvage plan was submitted to the authorities and the necessary permits and permissions obtained – a process that was not straightforward. Food and medical supplies were provided to the crew.

Eventually, deballasting took place and after being aground for about a month the container ship was refloated by numerous tugs without the need to lighten cargo.

The value of the property was assessed at US\$26m, while the salvors' expenses were US\$2m, mainly in tug hire costs.

One of the risks faced by the vessel in the absence of assistance was the threat of intervention by the authorities to refloat her and detain her. Sanctions inevitably added a further complication while the salvors negotiated both the local seabed and expense claims and her exit from Iranian waters. The arbitrator made a global award of US\$9m. In addition to that was interest, and, of course I am happy to report, legal fees.

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Salvors given first-hand insight

Salvors at the ISU annual meeting held in Italy heard first-hand about the refugee crisis in the Mediterranean Sea from Admiral Nicola Carlone of the Italian coastguard.

His service is on the front line of dealing with desperate people attempting to cross the Mediterranean Sea to reach Europe, mainly from North Africa. The perilous crossings – often arranged by unscrupulous operators – take place in all

sorts of craft, most of which are unsuited to open water and are overcrowded. Countless migrants have died at sea including many women and children.

Admiral Carlone said that in the whole Mediterranean Sea 127,000 migrants have been rescued this year, 26,000 of them by Italy. His teams rescued 6,952 people on 29 August 2016 alone. Italy has rescued more survivors in the past two years than in the previous 23 years combined.