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How the blame game gets resolved

► *Simon Tatham*

Regular columnist Simon Tatham unravels the Gordian Knot of claims and counter claims which often result from the collision of a tugboat, its tow and a third vessel

Collisions between tug and tow and other ships do occur. There are numerous scenarios of course, and it can get complicated, but let's keep it reasonably simple. Let's assume we are dealing with the tow of a vessel or craft that is unmanned or otherwise unable to manoeuvre of its own accord and that a collision occurs with a third vessel. Let's also assume that the tow is in collision without damage to the tug. Claims and cross claims will follow for repair costs and detention. How are these resolved and what bearing does the contract under which the towage is being performed affect the outcome?

As between the towing flotilla and the third vessel, the normal rules of liability apply so that pursuant to international convention and applying the Colregs, blame is to be apportioned according to fault: 50:50, 70:30, and so on. The monetary claims are then offset one against the other in accordance with this division, and the balance is payable. If one side's claim is much bigger than the other, it may well follow that the party less to blame will end up as the net paying party.

The third vessel will probably bring its claim against a negligent tug even though the collision is with the tow. That is because a collision action is for a claim in the tort of negligence and a dumb barge or other unmanned vessel under tow is unlikely to be negligent. If, however, the operators of the tow were responsible for and failed to fit an operative stern light and that was causative, they might hedge their bets and pursue both.

The damaged tow has a right of action and its operators, who may well be the hirers, may also have incurred delay and detention costs which may be claimed, including the costs of maintaining the tug on a delay rate, as that would be a foreseeable loss.

If the incident occurs in international waters, there is no natural jurisdiction for an action. The aggrieved party may decide to arrest the offending vessel in a convenient location to establish jurisdiction.

With many ocean-going tugs and other vessels operating under flags of convenience, it makes little sense to bring the action where the owner is registered or in the vessel's home port. Often the threat of an arrest is enough to secure not only security, but also a collision jurisdiction bringing the claims and counterclaims agreement into a mutually acceptable legal regime, and it is for that reason that parties often end up referring their claims to the High Court in London which has a specialist judge to deal with such cases, although most cases settle before trial.

One recent case that did not settle involved a collision at night with a seismic spread that extended over four miles in length and one mile in width, lit only by stern buoys, giving rise to novel questions, such as the imposition of an exclusions zone around the unit that the Colregs do not address directly (*The West Neptune and The St Louis Express [2010] 1 Lloyd's Rep 158*).

Such rights of action are unaffected by the provisions of the towage contract. How then do these claims unravel under the contract for towage? For this purpose let's assume the tug has been held one third to blame for the collision and the third ship two thirds.

Under TOWCON or TOWHIRE, physical loss to the tow and detention loss is for the account of the hirer (ie the tow) irrespective of the negligence of the tug. Moreover, the hirer has to indemnify the tug in relation to the claims of the third ship. The tow thus recovers two thirds of its loss from the third ship. Once the tug has settled and paid one third of the third vessel's claim, it can recover this expense back from the hirer. But if the tug was itself also damaged, it would have to bear its own loss.

If the UK Standard Conditions of Towage apply, then the tug is in a better position and can recover all of its collision liabilities from the hirer. However the tug would have a duty to reasonably mitigate its loss and claim two thirds of its damages from the third vessel giving credit for the recovery to the hirer.

If the collision occurred during a salvage operation, perhaps while towing a stricken ship that veered heavily, causing damage to the tow as well as to a third vessel, the salvor has no contractual protection and could face not only a collision claim from the third vessel, but also potentially a claim for salvorial negligence such as that under 18 of the Salvage Convention 1989, with the potential to deprive him of all or part of his award. The point would also be taken under Art.13(c) that his 'measure of success' was reduced by the misfortune of a collision. Moreover, the salved fund out of which an award is payable would be reduced, reflecting the damage sustained to the tow. The salvor would no doubt contend in his defence that he used his best endeavours and the difficulty of towing a stricken vessel into collision is a 'risk of liability run by the salvor', which is an award-enhancing factor. The arbitrator would then have to grapple with all that to achieve a fair and balanced outcome.

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