

Tug operators have a duty of readiness

Simon Tatham looks at how highly technical charterparties are often ‘bread and butter’ work for English shipping solicitors

Towcon is a mainstay of this industry, as is IT&O, and is an appropriate subject to touch upon to mark the anniversary of this (now) venerable publication.

Charterparties have always been a highly technical area of law, with many cases being heard in arbitration and a few ending up in court. This makes for the majority of the ‘bread and butter’ work for English shipping solicitors, thanks to the frequent choice of English law. Part of the English law package is what is known as the common law, that is the underlying law made by the courts.

This means that where a contract is silent, there may still be rules applying to the conduct of the parties. The parties can vary the common law by agreeing terms, so the common law serves to fill the gaps rather than impose terms different to those agreed.

Therefore, if a charterparty for a cargo vessel had no notice of readiness provision, the law would imply one and typically require that at the time notice is given, the vessel is in all respects ready to load and carry. Most notice of requirement (NOR) terms reflect this.

Towage charters tend to be less contentious because often there is less at stake, while the standard BIMCO Towcon and Towhire contracts are, at least when compared to cargo ship charterparties, fairly protective of the tug’s interests. Arbitrations are less frequent and tug brokers perhaps more proactive than commercial chartering brokers in helping to resolve issues.

However, conflicts do occur, especially when a hirer finds his tow stranded at a distant departure port, suffering port disbursements and delay costs, with the contracted tug late or not ready to perform. The situation is made even worse when exercising the right to cancel could mean a long wait for a new tug – and possibly a higher towage cost, given the law of supply and demand.

One important difference between a towage

and a cargo ship charterparty is the notice of readiness provisions. Under a Towcon there is no complex tug NOR requirement: the tug merely has to tender itself at the place of departure. This can be achieved physically by its mere presence, though of course some form of notification is invariably given.

The duty of the tug owner is to present the tug at the agreed time in a seaworthy condition and in all respects ready to perform the towage – see Clause 19. That is not an absolute duty, the tug owner merely has to exercise due diligence to make his tug fit.

So what happens then if the crew have accidentally damaged the tug, affecting its ability to tow in a way that cannot immediately be repaired, or the expected bunker stem at the departure port has not been possible because of a fire at the refinery, or some other event outside the personal control of the tug owner? Is he excused and able to tender his tug, despite the fact that the tow cannot proceed, and can he start collecting delay payments?

As a starting point, and not surprisingly, the tug owner will still need to demonstrate that he is doing all he can to remedy the situation – the obligation of due diligence continues until the tug is ready to perform the tow. This may do little to reduce the blood pressure of a scrap ship or barge owner desperate to get his vessel out of port and to destination while a critical set of bearings or a new wire needs to be transported and then fitted.

The answer lies in Clause 5, which states very simply that should the tug not be ready to commence the towage on the agreed day, the hirer shall have the option of cancelling. This is not a termination event, so no termination payment is due. Nor can the hirer claim damages for detention unless the delay is caused by ‘the wilful default of the tug owner’ – which would be difficult to prove.

The effect of Clause 19 in this context, therefore, is that it restricts the hirer from



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claiming other damages, say for the higher cost of a replacement tug, to circumstances where the cause of the problem was a failure of the tug owner to exercise due diligence to make his tug seaworthy.

Meanwhile, a sensible tug owner should take full advantage of Clause 5(b) to give early notice of potential delay so as to secure agreement to a revised departure date.

Thus, under Towcon there is no need for parties to add complex NOR provisions and parties should treat any attempt to do so with caution.

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Ferry to be raised

South Korea has said it will raise the ferry *Sewol* that sank a year ago, killing more than 300 people, mostly teenagers, yielding to pressure from mourning families who have called for further investigation into the disaster.

Sewol, which was structurally unsound, overloaded and travelling too fast on a turn, capsized and sank during a routine voyage and lies 44m deep off the southwestern island of Jindo.

The work, which the government hopes can begin in September, could take up to 18 months.

Cuban salvors successfully refloat stricken bulk carrier

Salvors from Cuba-based salvage company Antillana de Salvamento successfully refloated the bulk carrier *Northern Light*, which ran aground on 13 March near Levisa Bank just outside the raw sugar loading terminal of Guayabal.

The vessel became stranded six miles off the southern coast of Cuba while carrying 25,155 tons of raw sugar, bound for Klaipeda, in Lithuania.

Capt Aleop Tur Gutierrez from Havana-headquartered Antillana takes up the story: “The harbour pilot had finished his manoeuvres for the departure of *Northern*

Light and passed command to the captain in the right place at the end of Cuatro Reales Channel, in front of Carapacho Cay Lighthouse. Our salvage masters initially calculated that the vessel needed to lighten around 5,200 tons of its cargo. Fortunately, a team of Antillana divers, who arrived from Havana the next day, found that the vessel was resting on a sea bottom of sand and flat coral and there was no damage to its hull.”

Capt Gutierrez continued: “A 12,000dwt chartered cargo vessel in ballast arrived on 1 April to receive the cargo, an operation achieved with the help of Cuban Damen-built

tug *CDC* with 52 tons BP to help in all the salvage manoeuvres. Two cargo grabs, one of 10 tons capacity and another of 6 tons, along with a group of Cuban stevedores from the harbour of Cienfuegos, were incorporated for the operation, led by Cuban salvage master Maximino Chacon Albisa.

“*Northern Light* was refloated on 7 April after having 4,900 tons of cargo offloaded. It was taken to Cienfuegos for the redelivery of the cargo and completion of the operation according to the terms of the Lloyd’s salvage contract between Antillana and the Hong Kong-based owners.”