Towing the line on defining salvage

► *Simon Tatham*

When can an unexpected problem that happens part-way through an operation under a towage contract legally be said to have turned it into a salvage operation? Regular columnist Simon Tatham looks at some borderline cases

At the Salvage and Wreck Conference in London in December, one subject that caught the attention of participants was the question of when towage becomes salvage. Perhaps one reason is that when margins are tight, the occasional 'encouraging' salvage award can boost both the bank balance and staff morale.

As one tug operator commented recently after a small salvage claim was settled, they did not make a lot of money as the ship and cargo values were low, but it took them out of the daily routine, tested their resources and was actually quite a lot of fun. There will however be few tug owners who have not asked themselves whether a particularly stressful situation during an assistance or tow was borderline salvage.

So, what are the guiding principles to have in mind in those cases? There is in fact plenty of law on the point: numerous cases mainly stemming from the late 19th century when steam tugs and ship owners were confronted with this novel situation.

The modern law of salvage, reflecting the old court decisions, is encapsulated in the Salvage Convention of 1989, adopted by most maritime nations. The principles set down by the courts in those early days are thus still good today, and these are relatively simple; it is the facts that are less clear. As one judge put it in 1857, there is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to define.

Let's therefore apply the principles to three typical situations. The first is where a tug, engaged to tow a vessel on standard terms, is required to do more than was bargained for. The second is where a tug has been engaged for a towage with a 'no salvage claim' clause bolted on to the bottom and, thirdly, where a tug is engaged by LOF contractors on commercial terms to carry out part of a salvage operation.

As to the first, every incident or mishap that may take place in a towage service does not necessarily turn that towage service into something else. As Article 17 of the convention puts it: "No payment is due … unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose."

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To constitute salvage by a tug under contract to tow two elements are thus necessary, and the bar is set quite high: first that the tow is in danger which could not reasonably have been contemplated and, second, that risks are incurred or duties performed that could not reasonably be held to be within the scope of the contract – see the ***Holmwood*** case decided back in 1928.

The courts will therefore look to the provisions of the contract to decide the scope of what was contemplated. Thus a rescue tow implies just that, but if the tug engaged to hook up unexpectedly finds the vessel abandoned with the result that his crew must additionally board to stem a leakage that left unchecked would make towage impossible and start auxiliaries before heaving the tug's wire on board, the line has been crossed.

The situation and danger are unforeseen. Usually in these situations the law regards the towage contract as suspended while salvage services take place and then, once the tow is proceeding normally, the contract resumes.

The next situation is where typically TOWCON or TOWHIRE additionally contains a 'no salvage claim' clause. Here, although the tug is bound by its agreement not to make a claim, equally it cannot be compelled to perform services in the nature of salvage outside the contemplated scope.

This leads to a potential stand-off, as the contract cannot adapt to a change in circumstances. Alternatively, if the tug does not wish to go beyond its contractual duty, having no right to claim salvage, it may fall back on clause 21(b) entitling it to engage external salvage services (assuming that clause is not deleted and that other tugs are in the vicinity). But that rather defeats the purpose of the 'no salvage claim' provision.

Nonetheless, they are widely imposed nowadays and will constrain the tug operator other than in exceptional cases. Hopefully, in return, the agreed remuneration will reflect the anticipated additional risks or dangers.

Finally in this connection, it would have to be a very extreme case that would result in the terms being examined by a tribunal pursuant to Article 7 of the convention, which allows a court to modify or annul a contract if the payment is in an excessive degree too small for the services actually rendered.

These instances are rare, although in a recently reported case ship interests contended that they had agreed a harbour rate equivalent to around US$550/hr for what turned out to be salvage services. The Article 7 point did not arise as the court decided that no hourly rate had been agreed.

Thirdly, salvors who have obtained an LOF will understandably wish to sub-contract tugs in the locality on commercial terms. The first point to make is that such a tug is not contracted to the casualty itself and very arguably falls at the first hurdle in salvage law not being a 'volunteer', that is to say it is under a pre-existing duty to assist, reflecting Article 17 mentioned earlier.

Likewise, as above, they cannot be compelled to perform beyond the scope of their contract. Most professional salvors would moreover ensure that the contract prohibits a parallel claim: if the services are difficult, the salvage contractors will wish to claim that benefit for themselves. In return they need to pay well. If they have an appetite for risk and are in a good bargaining position, the sub-contractor might go for the ISU Award Sharing Sub-Contract, but not if values are small. There will be lots to think about and always very little time in which to do so. This discussion, however, leaves one question unanswered: what if the salvage situation arises as a result of the tug's fault? That, however, is for another day.

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Grounded tugboat in pollution alert

A pollution control operation took place in Alaska after the tug *Samson Mariner* ran aground and spilled fuel while towing a barge in the vicinity of Rosa Reef in Tongass Narrows.

The US Coast Guard, the Alaska Department of Environmental Conservation, Southeast Alaska Petroleum Response Organization, National Oceanic and Atmospheric Administration, and specialist firm Alaska Commercial Divers took part.

Approximately 5,000ltr of diesel spilled from the tug prior to it being patched by Alaska Commercial Divers. The spillage was later dealt with.