

Chapter 17

TOWAGE

A Towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than accelerating her progress.

Section 4 (1) (j) of the Admiralty Act (2017) deals with towage.

The High Court has admiralty jurisdiction to hear and determine any claim in the nature of towage, whether the services were rendered within Indian waters or on the high seas. In order that the owner of the tug may recover the amount of remuneration, if disputed, from the owner of the tow, the claim must, whether specified at the outset or not, be reasonable, and, if the sum was agreed, it must be certain, nothing extra being payable, beyond the fixed amount, for an alleged subsidiary service, such as delay in the transit and the tug must have fulfilled her obligations.

Although the contract between the owner or master of the tug and the owner of the ship requires the tug to obey the directions of the shipowner and act as his servant, and though the tug and tow are, for the purposes of rendering the ship in the tow subject to the rules of navigation applicable to steamers, regarded as one vessel, it has been laid down that, as the employment of the tug is a voluntary act on the part of the shipowner, and not, like the employment of a pilot, forced upon the shipowner by compulsion of law, the contract between tug and tow does not affect third parties. Therefore, if a steam tug towing a vessel under a towage contract comes into collision with a third vessel, it is no defence to an action by the owners of the third vessel against the tug that the tow was in charge of a pilot by compulsion of law whose default solely occasioned the collision.

Ordinary towage is confined to vessels that have received no injury or damage, and mere towage reward only is payable in those cases where the vessel receiving the services is in the same condition she would ordinarily be in without having encountered any damage or accident.

In ordinary towage all that is stipulated for on behalf of the vessel towing is, that she shall receive the ordinary reward which is paid in compensation for that towage services but there are two species of agreement which may be entered into by a vessel, whose usual occupation it is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and where she undertakes, for any sum agreed upon between the parties, to perform the services of bringing the vessel from one port to another, or a place of safety. This may be called extra-ordinary towage, because it is not in the ordinary occupation of the vessel, and not to be considered ordinary towage.

Though an action in *rem* lies, ordinary towage services do not give rise to a maritime lien.

Ships may need towage assistance in various circumstances. However, the most common circumstances are the following:

- i. Deep sea towage: Ships are often towed long distances to repair yards and large structures such as floating docks, power plants and oil rigs are often towed from one part of the world to the other. Such services are provided by large ocean going tugs which are capable of spending long periods at sea, with a significant fuel range and a very large towing power. These vessels are also sometimes used in providing salvage services and are often stationed near important navigational routes. A number of these vessels provide multi-purpose services such as towage, salvage, oil-rig supply and services.

- ii. Coastal and river towage: The tugs that are involved in this activity are generally smaller versions of ocean-going tugs and are primarily used to tow or push barges loaded with cargo and other materials along coastlines, major navigable rivers, and across short ocean passages. Such tugs are occasionally also used in order to provide salvage services.
- iii. Harbour towage: Ships will often require tug assistance in berthing, docking or undocking in confined port areas and, in many instances, such assistance will be mandatory as a condition of port entry. This operation may require the use of more than one tug but may not involve actual attachment to the towed vessel since in many cases, pushing will be sufficient. The tugs that are involved in this form of activity are often highly manoeuvrable, with very sophisticated steering and/or propulsion systems.

Towage is normally provided by specialist towage companies pursuant to a formal towage contract that has been negotiated well in advance between shipowners and towing companies. In some instances (particularly in the case of coastal, river or harbour towage) such contracts are period contracts which relate to the provision of towage as and when needed at particular locations within a specified period.

However, even if no formal agreement is negotiated, completed or signed, a towage contract may be deemed to exist by implication especially where the shipowner or the master has consistently accepted such terms on previous and similar occasions. Furthermore, should the need for towage arise at short notice, the master of a vessel has implied authority to engage towage services that are reasonably necessary for the safe and proper performance of the voyage.

The Distinction between Towage and Salvage

However, an important distinction should be drawn between a towage contract and a salvage contract. A towage contract was described as long ago as 1848 as:

“... the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating of her progress.”

Therefore, a towage contract is normally negotiated at a time when the ship that is to be towed is not facing imminent peril and remuneration is negotiated and agreed in advance, usually on a fixed fee basis. However, a salvage contract (normally a standard form of salvage contract such as the Lloyd's Open Form of Salvage Agreement (LOF)) is agreed when the ship that is to be assisted is facing imminent peril and remuneration is assessed after the completion of the salvage services by a specialist system of arbitration based on a number of factors including the degree of danger to the salvaged property, the value of the property at risk, the degree of skill demonstrated by the salvor and the cost to the salvor of performing the services.

Furthermore, the remuneration that is normally payable under a towage contract is payable regardless of the success of the operation whereas a salvage contract is based on the principle of 'no cure-no pay' which means that the salvor is rewarded only if he succeeds in saving the ship and/or cargo and receives no reward if he fails to do so. Therefore, since the public policy of most countries is to encourage salvage for the common good, a salvage claim normally qualifies as a maritime lien whereas a claim under a towage contract does not do so.

However, the demarcation between towage and salvage may become blurred. For example, a ship which may be proceeding perfectly normally without tug assistance may suffer a problem such as an engine breakdown which does not

place the ship in imminent peril but which nevertheless, requires the attendance of a tug to tow the vessel to a port where she can be repaired. Disputes can then arise as to whether the services provided by the tug should be considered to be salvage and remunerable on the usual 'no cure no pay' basis, or towage services for which remuneration should be in the form of a lump sum. Therefore, it is important whenever time allows that the owners of the ship which requires assistance should involve those other parties who may have to contribute to such remuneration in due course (e.g. his hull and machinery and P&I insurers, and cargo insurers) in such discussions to avoid future disagreements between the interested parties.

Alternatively, if it is known that the ship will need tug assistance to perform a voyage and the shipowners enter into a towage contract in advance for that purpose they will normally envisage that the tow may encounter some difficulties en route and conclude terms that will govern their relationship in circumstances which are reasonably foreseeable and anticipated. In particular, the tug will normally be obliged to use its best endeavours to protect the tow in such circumstances.

Therefore, if an event that was anticipated occurs during the towage and the tug is obliged to take steps to preserve the safety of the tow such services will normally be considered to be an integral part of the towage contract and the tug is not entitled to any additional remuneration. However, if the safety of the tow is imperilled by an event or danger that was not within the reasonable contemplation of the parties, such services may be considered to be salvage services, notwithstanding the existence of the towage contract, and the tug may be entitled to claim additional salvage remuneration if it succeeds in saving the towed ship.

Article 17 of the Salvage Convention states that a salvage reward is payable only where "... the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger

arose.” Therefore, to convert a towage contract into a salvage it has been held that the tug must prove (a) that the services that it performed were of such an extraordinary nature that they could not have been within the reasonable contemplation of the parties to the original towage contract, and that (b) the services that had in fact been performed and the risks in fact run would not have been reasonably remunerated by the contractual remuneration that had been agreed in the towage contract.

Each case will depend on its particular facts. However, it is possible for a towage contract to expressly exclude the right to salvage if a clause to that effect is included in the towage contract.