

Liability for salvage costs under TOWCON

Earlier this year, BIMCO issued revisions to its widely used standard ocean towage forms, TOWCON and TOWHIRE. The last revisions to these contracts had been made in 2008 and so, there was a real need to update these two contracts to bring them in line with the changing commercial and legal practices that have taken place over the last decade. For the purposes of this article, reference will only be made to TOWCON, but materially the same updates also apply in TOWHIRE. In particular, the changes made to the liability and indemnity regime shall be examined in more detail.

Knock-for-knock indemnity

At its most basic, a knock-for-knock indemnity is a reciprocal agreement concerning the apportionment of liability between the parties to a commercial agreement. Risk is allocated based on ownership of property and personnel rather than fault. Each contracting party will therefore be responsible for any injury, death, loss or damage suffered to their own personnel and property, as well as any liability towards third parties arising in connection with such personnel and property. This is regardless of any negligence, fault or breach of contract by the other party. The purpose of such an indemnity is to strike a balance between the contracting parties' responsibilities and has proven to be popular within offshore contracting agreements as it creates certainty and reduces overall legal costs.

Under TOWCON 2008, the liability and indemnity obligations can be found at clause 25. The Tugowner is to be liable for:

- Death or injury to the Master and crew members of the Tug, its servants and agents, riding crew and any other person whom the Tugowner provides on board the Tow, and any other person on board the Tug who is not a servant or agent of the Hirer (25(a)(i)(1)-(3));
- Loss or damage to the Tug and any property being carried on board of it (25(b)(i)(1));
- Loss or damage to third parties and/or their property by reason of contact with or obstruction caused by the Tug (25(b)(i)(2));
- Any liability in respect of wreck removal of the Tug and/or preventing pollution emanating therefrom (25(b)(i)(4)).

The Hirer's position on liability in turn mirrors that of the Tugowner and we can see that the Hirer is to be liable for:

- Death or injury to Master and crew members of the Tow, its servants and agents, any other person on board the Tow who is not a member of the Tugowner's riding

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- crew (25(a)(ii)(1)-(2));
 - Loss or damage sustained by the Tow (25(b)(ii)(1));
 - Loss or damage to third parties and/or their property by reason of contact with or obstruction caused by the Tow (25(b)(ii)(2));
 - Any liability in respect of wreck removal of the Tow and/or preventing pollution emanating from the Tow (25(b)(ii)(4)).

The indemnity is broad and covers all the usual areas expected to be addressed under a knock-for-knock indemnity: personnel, property and third-party liabilities. However, over the years, it has been argued that there is another group of liabilities which may not be adequately allocated under this wording, namely salvage costs.

Liability for Salvage Costs

Salvage has only been dealt with briefly under TOWCON 2008 in clause 21, to the extent that should the Tow break away from the Tug, the Tugowner is to render all reasonable assistance to re-connect without making any claim for salvage. In the event that professional salvage assistance is required, the Tugowner and/or the Master are deemed to have the required authority to engage salvage services on behalf of the Hirer. However, the question as to who is responsible for the costs of such salvage services is not expressly addressed and has been the cause of much debate.

The liability and indemnity clause only addresses loss and damage, wreck removal and pollution specifically. There is, we think, a good argument that salvage costs are caught up by these provisions, nevertheless. On one hand it may be said that any act of preventing the tow running aground or sinking, is a means by which to prevent pollution from it (the costs of such action being expressly covered).

Another, and perhaps simpler argument proposed over the years is that salvage costs are covered under the wider indemnity of “loss or damage to property”. At its core, salvage is geared towards the preservation of property. With this in mind, it could be said that any salvage costs incurred in preventing or minimising actual or further loss or damage to the property, would fall under this heading. As the parties exclude their liability towards one another for loss or damage caused to the other’s property, liability for salvage costs must be excluded by extension. If the Tugowner is not liable for damage to a tow, or loss of or wreck removal of it, it would seem surprising that they would be liable for the costs of efforts to avoid it becoming damaged, lost or a wreck. For years it has been argued, therefore, that on a ‘purposive approach’, the clause must be interpreted to incorporate salvage style costs, where relevant.

However, to prevent these debates from beginning in the first place, it has been commonly advised for a number of years for Tugowners to amend the TOWCON 2008 clause to expressly refer to salvage.

The Position under TOWCON 2021

TOWCON 2021 has done away with the possible ambiguities concerning salvage costs by addressing them directly in the revised liability and indemnity clause 22. Under the revised contract, each party is to bear their own costs as they relate to “*wreck removal or in respect of the expense of **salving**, moving, or lighting or buoying...or in respect of preventing or abating pollution...*”. The result is clear in that the party whose property has been salvaged will bear the responsibility for such costs. In our view this also makes it clear that, as set out above, that was the intention or purpose of the contract all along.

Concluding Remarks

This is undoubtedly a welcome change to the TOWCON contract as it removes the uncertainties found in previous versions. Moreover, it truly reflects the true spirit of reciprocity intended under a knock-for-knock regime.

Should you have any further questions on the topic please contact the [Offshore team](#).