



LA Marine Towage

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This article focuses on the remedies available to the tug owner under the widely used BIMCO Towcon and Towhire terms when a hirer fails to pay the balance of the towage fee and the problems that may arise if the hirer is not the owner of the tow.

The recent downturn in the economy has inevitably seen a number of casualties in the market, in particular where the hirer has paid a deposit to secure the contract but is unable to settle the balance as a result of insufficient cash flow. Tug owners fortunate to be in possession of the tow will be able to exercise a lien over the towed vessel to encourage payment pursuant to Clause 21 of the TOWCON terms:

"Without prejudice to any other rights which he may have, whether in rem or in personam, the Tugowner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory lien upon the Tow in respect of any sum howsoever or whatsoever due to the Tugowner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow..."

However, those who have released the tow on the promise of payment may find that they are left with little or no security, particularly when the hirer becomes insolvent.

In most transactions it is difficult to withhold the release of a tow when such action is likely to upset the business relationship. More often than not, the hirer is expected to pay the balance once the tow reaches its final destination. Where there is no dispute that the hirer is the owner of the tow, steps can be taken to issue a claim form against the tow owner to take possession of the tow by way of an arrest warrant through the Admiralty Courts. Such procedure can be carried out within a matter of hours and in particular where there is a risk that the tug owner may be unable to recover payment, such as the imminent insolvency of the hirer.

Particular reference will need to be made to the precise location of the tow in order to establish the relevant jurisdiction. In England and Wales, the Admiralty Marshal has the power to arrest and detain a ship within these waters and will take steps to have the vessel appraised and sold in the event that judgment is awarded in favour of the creditor tug owner and the hirer fails to settle the debt within the court stipulated timeframe. However, an arrest is only effective if the hirer is the owner of the towed vessel. If the hirer is not the tow owner then the tug

owner may face a potential claim for wrongful arrest from the tow owner.

Where the tug owner is led to believe that the hirer is the owner of the tow, difficulties may arise when the hirer has no actual authority from the owner of the tow to enter into the towage agreement. Clause 22 of the TOWCON terms attempts to rectify this problem by providing that the hirer gives a warrant of authority. In other words, the hirer is representing to the tug owner that it is authorised by the tow owner to enter into the agreement on behalf of the tow owner:

"If at the time of making this Agreement or providing any service under this Agreement other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the Tow..., the Hirer expressly represents that he is authorised to make and does make this Agreement for and on behalf of the Owner of the said Tow subject to each and all of these conditions and agrees that both the Hirer and the Owner of the Tow are bound jointly and severally by these conditions."

On the face of the above clause, it seems that the tug owner will be sufficiently protected in the event that the hirer is not the owner, since the tug owner can pursue the tow owner as well as the hirer. This is true when there is an agency situation and the tow owner has given actual or apparent authority to the hirer. In the case of Lukoil-Kaliningradmorneft Plc v Tata Ltd [1999] 2 LLR 129, the hirer, Global Marine Transport, entered into an agreement with the claimant towage company pursuant to the TOWCON terms. The hirer became insolvent and the tug owner relied on Clause 22 to recover the sums owed to it by alleging that Tata was jointly and severally liable under the agreement as the owner of the tow. It was held that Tata was liable on the basis that it had given actual authority. Tata was acquiring vessels in order to scrap them and to reclaim the materials from which they were built. It was obvious that they needed to be towed from Canada to Tata's yard in India as the vessels had no motive power. There was evidence to suggest that Tata and Global had set up an agency agreement, albeit in respect of other matters, and it was therefore no surprise to find that it was held that there was actual authority in light of the facts.

Difficulties however arise if the tow owner neither gives direct authorisation for the hirer to enter into an agreement with the tug owner nor benefits from the arrangement. A clear example is a leasehold or hire purchase owner. In this respect, the actual owner does not concern itself with the activities of the tow and whether or not it will generate income. Its primary objective is to be paid pursuant to the terms of the leasehold or hire purchase agreement. In this respect it is unlikely that the actual owner (usually the bank) will be liable for any non-payment of hire under the tow agreement and the only remedy for the tug owner is against the hirer.

Another problem with the warranty clause is that, even if the principal owner might be liable under the warranty clause, the tug owner cannot simply elect to pursue it alone if it transpires that the hirer has no assets. Unfortunately, it would be contrary to the basic principles of privity of contract for the actual owner to have liability imposed upon it by a contract to which it is not a party, and of which it may have no knowledge. The tug owner cannot simply choose to sue the owner of the tow in place of the hirer alone. Both parties must be subject to proceedings, subject to evidence of an agency arrangement.

In summary, the warranty of authority clause can only be relied upon if the owner of the tow actually granted authority to the hirer to enter into the towage agreement on its behalf. In the absence of such authority, the tug owner will struggle to justify pursuing the tow owner and its only remedy is for breach of warranty and to obtain damages from the hirer which represented that it did have authority. This is of no use if the hirer is insolvent. Careful procedures should therefore be put in place to ensure that the tug owner is satisfied that it is dealing with the tow owner or that the hirer has authority. This might include obtaining copies of title documents from the hirer or from the relevant Registry of Shipping as a condition precedent to entering the towage agreement. Remedies against a hirer which owns the tow will be significantly easier to enforce than those against a non-owner hirer.



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