

UK P&I CLUB



POST- CASUALTY TOWAGE

The risks and the process required to maintain P&I coverage



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IS MANAGED
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Towage, which is not part of ordinary or customary trading, requires planning. Owners need to consider the risks and understand the process required to maintain their P&I coverage.

Executive summary

This note is designed for shipowners and their brokers to outline the P&I coverage of their ships during towage to a repair yard. Usually, such towage follows a casualty or event giving rise to a Hull & Machinery claim. Owners need to ensure that they have considered their P&I risks and understand the process required to maintain P&I coverage.

The note outlines the need for Club approval of contract terms, as well as the importance of Warranty Surveys.

This publication is not a substitute for communicating with the Club, but should assist in planning for any towage following a casualty.

P&I coverage during towage generally

Towage after a casualty when towage is not part of the ordinary course of trading for a ship, or is not customary.

Where towage is customary within port limits and part of ordinary trading, P&I coverage is generally not affected. Members are advised to contact the Club where there is doubt about whether a particular planned tow requires special insurances.

P&I coverage during post-casualty towage, ie not ordinary course of trading

After a casualty, a ship's normal P&I cover continues under the Rules, but there will be (i) contractual concerns and (ii) safety concerns which the Club and Member must address.

First, costs associated with the preparation for the tow and towage costs to a repair yard or facility will usually be met by Hull and Machinery Underwriters as part of the hull claim. However, owners will generally have the responsibility for fixing the towage contract and may have to cover the initial costs pending submission of the claim to their Hull and Machinery Underwriter.

Second, towage contracts may attempt to impose new contractual liabilities on the entered ship. The Club may be unwilling or unable to absorb such additional, contract based risks, which may include additional liabilities to the tug or provide excessive indemnities to the tug operator. To ensure the Club is willing to cover the contractual liabilities, Members should always seek written confirmation of cover from the Club. The types of contracts acceptable to the Club are discussed below.

Third, the Club also has an obligation to the collective membership to determine whether some tows are too hazardous to be mutual risks. If a tow is too unsafe, or is imprudent, the Managers may indicate any resulting claim is unlikely to be covered. The Club Managers, like other underwriters, will usually rely on third party experts who issue tow approval certificates. The Club may ask or suggest the Member to lay the risk off on the market, ie buy a separate policy for P&I risks during towage. Where the Club approves a contract, the scope of P&I cover follows the normal Rules, such as injury, pollution or cargo aspects. P&I cover for towage does not expand to take on losses not in the regular P&I Club rules, such as commercial losses, loss of profit, physical damage to the ship, costs of towage or other liabilities not normally covered.

It is good practice to seek the Club's advance written agreement to provide coverage for a planned tow, regardless of the form of contract, approvals from various authorities, comments of Class or the report of the approved Warranty Surveyor.

Roles in “usual” casualties – Hull arranging towage

When towing a ship to a yard, an owner and his Hull underwriter will generally focus on the cost of repair and value of the ship. The financial calculus is that the residual value in the ship justifies the cost of towing and repairing it. If not, the ship is abandoned as a Constructive Total Loss CTL, or a wreck. Regular P&I cover includes wreck removal costs if an order of removal is issued. P&I cover will cease upon the approval of the underwriters that the ship is a constructive total loss. It may be necessary for an owner to take out a separate policy for P&I risks to which the owner may be exposed, other than the wreck removal itself.

For ships worth being brought to a repair yard, the Hull underwriter will typically cover the costs relating to the tow. Depending on the tug market at the time, owners may have little choice when it comes to the financial terms of the contract. Towing contractors are likely to push for a lump sum contract, unless they deem the tow or towed voyage to be problematic when they may then offer a daily rate. Contractors will usually offer a certain amount of free time before which payments are due. This time is generally limited and owners should therefore try to ensure that preparations for the towage of their ship meet with all Warranty requirements before the arrival of the tug.

Salvage and contractual towage distinctions

Salvage can be described as being the work required to save property at risk; the ship and her cargo. Under LOF the salvor is required to use “best endeavours” to save the ship and cargo and re-deliver the ship back to owners “safely afloat” at the agreed place of safety under the LOF. If no place of safety has been agreed, Salvors have an obligation to deliver the ship to a place of safety. Once the salvaged ship is delivered back to the owner, at the agreed place of safety, salvage services legally end. Preparation for onward towage to another destination, does not form part of the salvage services contracted under the LOF. “Safely afloat” can be defined as the ship being in a safe condition, notwithstanding that the ship may be damaged, and the continuation of skilled salvage services from Salvors is no longer necessary to avoid the ship from becoming lost or significantly further damaged. Furthermore, “safely afloat” generally means that there is no requirement of any governmental agency, port authority or similar authority for salvors to remain in attendance. “Safely afloat” does not mean the ship is automatically safe for onward towage to another destination. While salvors may be in a position to give advice on towage requirements to owners, salvors have no authority to approve towage arrangements on behalf of underwriters or owners.

Role of the various interested parties

Warranty Surveyor

Hull & Machinery underwriters will generally include a warranty clause when it comes to towage. In order to fulfil this warranty, owners are required to appoint a Warranty Surveyor, from a survey company which has been approved by the Hull & Machinery underwriter. In cases where the hull value is small, or the ship has sustained relatively minor damage, the underwriter may give approval for a small local survey company to attend. However, where the value of the Hull is relatively high or significant damage has been sustained to the casualty, there may only be some four or five companies globally whom the Underwriter will accept. Owners should be guided by their Hull Insurance Broker as to who should be appointed.

The warranty surveyor, although appointed and paid for by the owner, is actually working on behalf of the underwriter.

In most cases, it is unlikely that the warranty surveyor can complete his survey during a single visit. Generally, the scope of work for the warranty surveyor can be divided into three parts. In some cases, part one and two could be reversed or run at the same time.

Where hull damage has been sustained, the first part of a tow warranty survey would be a visit to the casualty in order that the surveyor can verify for himself the extent of damage and collect what other information he may require to assess the risk. Information required would include the following:

- General Arrangement plan
- Detailed drawings for the damaged areas of the hull
- Any damage reports issued by Salvors or Class
- Underwater photographs/video of damaged areas
- Current stability condition of the casualty
- Proposed stability condition of the casualty if different from above
- Details of any riding crew

On completion of this stage, the surveyor should be in a position to issue some preliminary recommendations for the proposed tow.

The second part of a typical warranty survey process could be described as the 'Desk Top Study'. Subject to the nature and extent of the damage, the condition of the casualty may have to be assessed by a naval architect. Most approved survey companies will have this facility 'in house'. Typical points for the desktop study are:

- Bollard pull requirements
- Proposed towing and emergency towing arrangements
- Towing route, anticipated weather and sea conditions, other navigation hazards
- Places of refuge
- Bunker requirements for the tug
- Structural condition of the casualty
- Review the suitability of the proposed tug
- Issue final list of recommendations for the casualty

The third part of the process will be a final inspection of the casualty by the attending surveyor to ensure that all recommendations have been complied with. At the same time, the surveyor will inspect the tug and towing equipment and ensure that the towing arrangements are the same as were proposed and agreed. Once the attending warranty surveyor is satisfied that all recommendations have been complied with he will issue his Certificate of Approval.

Class Surveyor

The class surveyor will have been in attendance to assess the damage sustained to the casualty with respect to repairs. The class surveyor may also have been in attendance to provide owners with advice on the damage stability. From a class point of view, he may issue recommendations concerning the casualty itself.

Unless Hull and Machinery underwriters have agreed otherwise, class have no say when it comes to the approval of the casualty for the proposed voyage, those responsibilities lie with the warranty surveyor.

Warranty Certificates are important

Should owners fail to comply with the requirements of warranty, and let the casualty depart without a Certificate of Approval, Hull and Machinery underwriters could place them in breach of their cover. Similarly, P&I insurance would likely be prejudiced as towage without warranty could be considered imprudent.

P&I coverage during post-casualty towage – no contractual risk cover absent agreement

Under the International Group Agreement there is no automatic P&I cover for any and all contractual liabilities involved in towing. P&I Clubs have some discretion to cover customary towage, which usually only applies where tugs are customary for vessels entering and leaving a port as part of ordinary trading. Damaged ships are unlikely to be engaged in 'ordinary trading'.

Ocean towage contracts typically end when a vessel reaches the dry dock and is formally handed over to the yard. In some circumstances, separate harbour tugs must help a dead ship manoeuvre into a yard or dry dock. This is not customary towage as part of "ordinary trading" and care should be taken to identify any additional tow contracts required for what may be a very short period of additional towage within a port. If in doubt, a Member should contact the Club. For post-casualty, non-customary towage, the owners must have the Club's written agreement to the contact terms. If a tow commences without Club approval, the owner risks having no cover for liabilities under the tow contract.

Which specific P&I risks concern a P&I Club during towage of a casualty?

First and foremost, the Club will be concerned about the safety of the lives of crew involved in the tow. As seen, the warranty process focuses on safety of life. Thereafter, a P&I Club has three particular concerns, as large claims can in theory arise as a consequence of:

- Wreck removal – eg the sinking of the tow in a channel or navigation lane;
- Pollution and environmental damage – eg bunker loss, grounding in a sensitive area such as on a coral reef;
- Cargo loss or damage – if not already removed, loss of cargo still on board.

This is not an academic, theoretical exercise. Tows have failed and ships been lost, despite best efforts to ensure attention to safety and contractual elements, and litigation has followed.

Therefore, where a tow must pass shallows, sensitive environmental areas, contains oil, or is at risk of sinking, the Club will have concerns which must be addressed. Remember, whilst a hull underwriter may be arranging the tow and the contracts, the P&I Club may be exposed to greater financial liabilities than the hull underwriter.

Basis on which the Club may approve P&I coverage of casualty tows

A Club may elect not to cover high risk tows under any conditions because the tow may be so unsafe despite best efforts that it would be unfair to expose the mutual membership. Statistically, however, the Club approves most tows for P&I cover. The approval follows from two main assessments:

1. Contractual assessment – e.g. TOWCON, TOWHIRE, etc.
2. Safety Assessment – e.g. a tow-worthiness certificate or tow warranty, class comments, permission from authorities, etc.

Where these assessments cannot be met, the Club will not provide its written approval under Rule 2, Section 13(b) and the owner should purchase an SOL Policy [see the section below on SOL].

P&I assessment category One: contractual aspects

Towage should never commence without any contract at all but if that happens the Member should immediately contact the Club. Assuming efforts to conclude a tow contract have started, Members should seek the Club's input.

Towage laws around the world are complicated, local legal advice often is required. During towage damage can arise to the tow, the tug, to both or to third parties (cargo, other ships, public authorities, etc). Different contracts and the laws of some countries apportion these losses differently.

Frequently, the ship being towed can be held liable for any possible loss on the basis the tug is the tow's servant, ie the tug never has any liability. Some laws and contracts recognise the tug boat is often in full control of both vessels and places the legal burden on the tug.

In agreeing to provide P&I cover for a vessel being towed, the Club looks for balanced contracts and those which do not place excessive risk on the tow. In particular, the Club looks out for risks of the tug being transferred to the towed ship by way of onerous indemnity provisions. Examples of attempts to transfer unacceptable risk to the ship are phrases such as "hold harmless" "assurance against loss" "refund" "compensate for loss sustained" and so on.

Contracts generally in use globally and which Members may be asked to sign fall into two general categories:

1. Tug-friendly contracts which place liability on the tow regardless of tug negligence or fault. These contracts are not acceptable to P&I Clubs, and
2. Tug contracts which apportion liability using a "knock for knock" principle. These contracts are normally acceptable to P&I Clubs.

Under a “knock for knock” towage contract, the owners of the entered ship and the owners of the tow are each responsible for any loss or damage to their own property without any recourse whatsoever against the other.

However, “knock for knock” type contracts can be quite complicated and the Club therefore recommends that tows are fixed on the TOWCON or TOWHIRE forms which are published by BIMCO (www.bimco.dk) and are similar contracts providing for lump sum or daily hire payment. As these contracts are often heavily amended, the Club must see the specific terms prior to approval.

Warranties and approvals in towage contracts

Most towage contracts including, for example, the TOWCON will have contractual provisions relating to safety of the towage. Underwriters and others rely on these provisions. For example, clause 12 of the TOWCON provides in part:

“...the Hirer shall supply to the Tugowner or the Tugmaster, on the arrival of the Tug at the place of departure an unconditional certificate of tow worthiness for the Tow issued by a recognized firm of Marine Surveyors or Survey Organisation...”

In summary, towage contracts should always be presented to the Club prior to signature where possible, and certainly prior to commencement of towage.

P&I assessment category Two: Safety aspects

Whilst the Club can approve or disapprove a towage contract, the Club does not actually approve or disapprove towage based only on safety.

In a technical insurance sense, the Club's Rule only actually applies after a claim occurs and the Club's Managers then decide whether or not to pay a claim.

In order to provide some certainty to Members however, the Managers will work closely with them to form an opinion in advance about how a claim would be treated under Rule 5J (imprudent or hazardous operations). The final decision as to whether to commence a tow or not will however rest with the Member and the Club.

The standard against which the Club's Managers or Board consider claims arising during towage, and in fact from all other causes, is found in Rule 5,

“5J. Contraband, blockade running, unlawful trade, imprudent or hazardous operations”

*No claim shall be recoverable from the Association if it arises out of or is consequent upon an entered ship carrying contraband, blockade running or being employed in an unlawful trade or if the Directors, having regard to all the circumstances, shall be of the opinion that the carriage, trade or voyage **was imprudent, unsafe, unduly hazardous or improper.**”*

This particular Rule has at times sounded draconian to Members because of reference to such crimes as blockade running. However, where a planned tow is unsafe, reference to this Rule is in no way meant to suggest wrongdoing or moral culpability on the part of the Member, but the simple reality that some ships are so badly damaged or weather conditions are so severe that towage will be unduly hazardous.

What exactly does it mean for P&I coverage if the Club has contract or safety reservations?

If the Club does not approve the contract or does not deem a tow safe, it does not mean the Member is automatically without any P&I cover. Claims which would arise under the standard Rules will still be covered by the Club – what is not covered are purely contractual risks or losses directly linked to safety, depending on the Club's concerns.

An owner can, however, buy market cover for the risk not covered by the Club – SOL insurance.

What is SOL cover?

In some situations where the Club will not be able to approve P&I coverage for a tow an owner or his broker will go to the insurance market to obtain what is known as “Ship Owner’s Liability” or SOL cover as it is known. An SOL policy essentially replaces or buys back standard P&I cover with a fixed premium cover, typically with a limit of between USD 10-50 million.

The SOL market is well developed and a number of underwriters are able to provide quotations for covering non-standard contract risks or covering tows with particular technical or safety concerns. The Managers most frequently see SOL covers placed in the London market. Premium, limits and deductibles are negotiated on a case-by-case basis and the underwriters may have a number of questions about the tow as planned.

The Managers of the UK Club are able to help Members and their brokers obtain SOL quotations from the market, if requested by Members. The Managers will typically ask that the Member or broker sends the details of the tow to the SOL underwriters, as full disclosure of the risks is important at the time of placing SOL cover. Because SOL is a policy of the ship-owner, it is important that the owner disclose as much relevant information as possible, eg details of the tow, recommendations of class or the warranty surveyor, including adverse surveys, condition of the vessel, etc. However, the Managers are often able to assist in accelerating the process and frequently obtain quotations the same day.

Towage to breakers or other movements of dead ships

The principles of seeking P&I Club approval for towage to repair yards also apply to towage to breakers. In either scenario P&I coverage may be affected because towage will not be in the ordinary course of trading or customary. Usually where towage is to a broker P&I cover has ceased. The owner may need to arrange P&I cover for pollution and crew or obtain SOL.

Additional reading and resources

Websites

UK P&I Club – www.ukpandi.com

Salvage Association – www.wreckage.org

Noble Denton – <https://www.dnvgl.com/>

International Salvage Union – www.marine-salvage.com

BIMCO – issuers of TOWCON – www.bimco.dk

Checklist for P&I cover of tows

- Notify the P&I Club of planned tows which are not customary for a port, and all tows of dead ships.
- Clear re-delivery to the owner by Salvors?
- Has the P&I Club been kept advised of towage dates?
- Warranty Surveyor instructed by owners as early as possible?
- Draft towage contract sent to the UK Club prior to signing?
- Warranty Surveyor’s Certificate of Approval obtained.

2015 TOWAGE RULE – RULE 2 SECTION 13
Liability arising out of towage of or by an entered ship

A. Customary towage of an entered ship

Liability, other than for the cost of the contracted services, under the terms of a contract for the customary towage of an entered ship, that is to say:

- i. towage for the purpose of entering or leaving port or manoeuvring within the port during the ordinary course of trading, or
- ii. towage of such entered ships as are habitually towed in the ordinary course of trading from port to port or from place to place, to the extent that the owner is not insured against such liability under the Hull Policies of the entered ship.

B. Towage of an entered ship other than customary towage

Liability under the terms of a contract for towage of an entered ship other than the customary towage covered under paragraph (A) of this Section but only if and to the extent that cover for such liability has been agreed with the Managers upon such terms as the Managers may require.

C. Towage by an entered ship

Liability arising out of the towage of another ship or object by an entered ship PROVIDED ALWAYS that

There shall be no recovery by an owner for loss of or damage to or wreck removal of a ship or other object towed by the entered ship or the cargo or other property on such tow (together with costs and expenses associated therewith) save in so far as

- a) the towage or attempt thereat is made for the purpose of saving or attempting to save life or property at sea, or
- b) the entered ship is towing under a contract approved in writing by the Managers or on such terms as the Managers may require;

Note: The Managers will ordinarily only approve contracts for towage by an entered ship in terms not less favourable to the towing ship than:

- a) United Kingdom, Netherlands and Scandinavian standard towage conditions;
- b) Towcon and Towhire;
- c) The Lloyds standard form of salvage agreement (1980, 1990, 1995 or 2000, whether or not incorporating SCOPIC) – no-cure no pay;
- d) a contract that contains a term that the parties to the towage contract, and any parties on whose behalf they contract, shall be responsible for any loss or damage to or wreck removal of their own ship, cargo or property and for loss of life or personal injury thereon, without recourse against the other and will indemnify the other against any such liability (a “knock for knock” clause);
- e) other contracts where
 - (i) A term or terms of the contract complying with d) above is or is likely to be unlawful or unenforceable in whole or in part; and
 - (ii) The contract does not impose on the owner any liability to any person arising out of any act, neglect or default of the owner of the tow or any other person; and
 - (iii) The contract limits the liability of the owner under the contract or otherwise to the maximum extent possible by law.

f) Supply Boat Charters

If the entered ship is working under a time charter and there is no contract between the owner and the owner of the tow, then liability for loss of or damage to or wreck removal of a towed object and/or property on board shall only be covered where the Managers have approved the charter in writing and the charter contains:

- (i) a clause in terms set out in (d) above covering the property of sub-contractors of the charterers as well as the property of the charterers themselves, or

(ii) a separate clause requiring that all towage be carried out on terms no worse than as provided in (d) above; or

(iii) it otherwise complies with the requirements of (e) above.

g) In addition, when cargo is carried on board the towed vessel the Managers will expect that:

(i) a Himalaya clause or similar provision is incorporated in the towage or other contract under which the entered ship is hired to perform towage services, to protect the tug owner's own employees, servants and sub-contractors from being sued in tort by the hirer or charterer of the tug; and

(ii) the towage or other contract under which the entered ship is hired to perform towage services should include a requirement that any other contract entered into by the hirer or charterer of the tug with any third party should contain a Himalaya clause, under which the tug is afforded the same defences as the hirer or charterer.

Note: "Supplying or Towing Extension Cover" is set out in "Addendum Relating to Offshore and Specialist Operations" attached to the Rules.

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