
Appendix 2
Explanatory Notes

Clause 1 – Definitions

This Clause explains the meaning of the key words and phrases used in the contract, in particular those which govern the liability regime.

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Some rearrangement of the order of the definitions has been made here for ease of reading. Terms have also been capitalised where defined. The word tug has remained uncapitalised as it is not defined and features in this section only as part of a general clarification that use of the singular includes the plural.

By adding some clarity to the definition of towing and considering how towing begins and ends in practice today, this clause has been simplified significantly. There is, for example, with modern communications technology, no material concept of the tug coming within a physical proximity of the tow which permits it to receive orders.

Accordingly, towing now commences merely when the tug is in a position to commence towing – in other words, in both a physical location and in other respects practically ready to begin towing. It ends when the towing has ceased and the tug is safely clear. The same applies where the tug is providing services other than towing, with one additional recognition. Where the tug service includes redelivering property or returning people, the service shall end only after the tug has moved safely clear, following that redelivery or return.

A short definition of hirer has also been included, as this was previously undefined, in contrast to the term tugowner. Further, the Conditions previously used two terms to refer to the vessel being assisted; both vessel and the hirer’s vessel. For simplicity, only the term vessel has been retained in this revision.

A clarification has been added that the term negligence includes gross negligence. As a matter of English Law, this goes without saying. However, it was felt the confirmation may be helpful where the parties choose to

nominate a different governing law, as under some legal systems the concepts of negligence and gross negligence are distinct.

In order to avoid repetition, the meaning of the phrase 'howsoever caused', which is referenced four times in the Conditions, has now been clarified in this section.

Clause 2 – Joint and several application

This Clause explains that both the hirer and owner of the vessel are bound jointly and severally by the Conditions (i.e. they are both responsible for the obligations undertaken by the hirer).

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Additional wording has been added to the end of this Clause. This seeks to ensure that, where a vessel willingly accepts towage services arranged by the hirer, its owners cannot later deny that they are bound by the Conditions.

Clause 3 – Provision that tug is servant of tow

This Clause makes it clear that, during the services, the tug and its employees are servants of the tow.

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An express carve out has been made for, effectively, acts of the tug's employees which amount to wilful misconduct. It is hoped that this addition strengthens the efficacy of the original wording, by demonstrating that the transfer of responsibility is not unlimited or arguably unreasonable.

Clause 4 – Liability

This Clause sets out the liability regime which applies to the parties to the towage Conditions and details the exceptions to this regime.

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Clause 4 (a) has been updated to replace the out-of-date language 'boilers', with the more general term 'systems'. It has also been updated to reflect the removal of Clause 4(e) as set out below. There have also been minor amendments to add clarity and make it clear that the reference to the tug is intended to encompass its crew.

Clause 4 (b) has been modified to account for the absence of Clause 4 (e), which is dealt with further below. The word expense has been added to 'loss or damage' to make it clear this is not intended only to refer to physical loss or damage.

The words 'whether direct or indirect' have also been added to confirm that the heads of loss referenced are encompassed, whether or not they fall under the first or second limb of the test in *Hadley v Baxendale* (1854).

The clarification that the indemnity applies even in circumstances where the negligence of the tugowner (or their servants or agents) was a factor, has been moved from the end of the subclause. It is now present in the centre of the subclause, alongside the other 'whether' stipulations.

The first section of Clause 4 (c) has been redrafted entirely. This provision forms a carve out from the liability regime, and previously required a six-stage test to be considered. Under the previous revision, for the carve out to apply the hirer had to prove that the claim resulted (i) directly and (ii) solely from the (iii) personal failure of the tugowner to (iv) exercise reasonable care to (v) make the tug seaworthy for navigation (vi) at the commencement of the service. There was also an extensive test to discern which parties' decisions could be construed as being within the tugowner's '*personal*' responsibility, relating to those having ultimate control and chief management of the business.

This section has been replaced with a simpler, more familiar carve out provision similar to that found in other maritime conventions and standard form charterparties. The new wording disapplies the indemnity regime under Clause 4 (a) and (b) in relation to claims where the hirer can prove that '*the loss has resulted from the personal act or omission of the Tugowner committed with the intent to cause such harm or recklessly with the knowledge that such harm would probably result*'.

The second section of Clause 4 (c) has been amended to provide greater clarity on when the liability regime in Clauses 4 (a) and (b) will be suspended. It now specifies that towing, as defined, must have commenced, and that the tug must be detached from the hirer's vessel and be in all respects safely clear of any associated position of proximity or risk.

Clause 4 (d) has benefitted from some minor edits to make the wording more explicit. In particular, it has been specified, for the avoidance of doubt, that the phrase '*... under no circumstances whatsoever ...*' includes circumstances where the tugowner or their servants or agents have been negligent.

The word '*costs*' has also been included, to ensure the exclusion of loss or damage is not construed as referencing only physical loss or damage, but also any costs incurred as a result of the delays or detentions outlined. Finally, the words '*whether direct or indirect*' have been added to confirm that the Clause is intended to capture both direct and consequential losses; in other words, costs which would fall under both the limb one and two of the judgment in *Hadley v Baxendale* [1854] EWHC J70.

Clause 4 (e) was inserted into the Conditions in 1986, being considered necessary against the legislative backdrop in the UK at the time. This provision caused a degree of uncertainty when read in the context of the Conditions as a whole. It also led to some tug owners outside the UK continuing to use the 1974 Conditions. As a result of greater clarity in the relevant areas of law following the 1986 Conditions, this clause is no longer required and it will not feature in the 2024 Conditions.

The UKSCT has traditionally made it clear that tugowners have no liability for claims involving injury and death arising out of the services. The 1974 revision stated *“The Tugowner shall not be responsible or liable for any personal injury or loss of life howsoever and wheresoever caused ...”*.

When the Conditions were revised in 1986, the Unfair Contracts Terms Act 1977 had come into force in the UK. The Act prohibited terms in contracts which sought to exclude a party’s liability for negligently causing injury or death. There was a fear that an exclusion clause which contained elements that did not comply with the Act may be struck out entirely. In order to avoid this risk, the drafters of the 1986 Conditions added Clause 4 (e), to demonstrate that the Conditions were not seeking to make exclusions for injury or death which were not permissible at law.

Accordingly, the new 1986 review Clause 4 (e) made it clear that the Conditions did not act as an *exclusion of liability* of the shipowner for death or personal injury arising from negligence. The Clause did not, however, remove the general indemnity principle at Clause 4 (b) that *“The Hirer shall ... indemnify the Tugowner against ... any claims of whatsoever nature or howsoever arising or caused ...”*. Nor did it remove the general principle at Clause 3 that, whilst towing, the crew of the tug would be considered the servants of the hirer, and the hirer should be vicariously liable for their acts or omissions. This complex combination of provisions was partly due to the limited case law on how the Act would operate at the time.

What the 1977 Act precludes is now well understood. It does make it unlawful for a contract to seek to exclude the rights of injured parties (or their next of kin) to claim against a responsible party in relation to their negligently causing injury or death. It does not preclude commercial parties allocating liability for such claims as between themselves. Further, it is now clear that even where part of an exclusion clause is considered to breach the Act and be unenforceable, any other lawful provisions of such an exclusion clause may survive and be applied. The supposed concerns which Clause 4 (e) was inserted to address are, therefore, no longer extant.

Clause 5 – Substitution and agency

This Clause permits the tugowner to use a substitute tug, or to instruct another tugowner, to perform the services.

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This clause has been amended only to emphasise its intended operation.

Where another tugowner is contracted to perform the services, it is now made clear that the original tugowner does not retain any liability for the work. In this scenario, they take on a role only as agent for the hirer in instructing the other tugowner.

Clause 6 – Salvage and limitation

This Clause makes it clear that the Conditions do not impinge on the tugowner's rights to make claims for salvage, where applicable, or to apply rights of limitation.

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This Clause has not been amended other than with respect to the introduction of gender-neutral language.

Clause 7 – Force majeure and delay

This Clause excludes the tugowner's liability for a series of force majeure events and for delays.

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This Clause has been rearranged to make it clear that it has two elements in respect of which the tugowners' liability is excluded. First, there is a list of effectively 'force majeure' events, and second there is the concept of delays to the tug or tender or their operations.

The language used to describe the force majeure events has been updated to bring it into line with such clauses in other modern commercial maritime contracts. Today the component elements in such lists are typically outlined in a more detailed form than the more generic references which previously featured in the Conditions.

The list of events has also been more clearly delineated to identify and narrow the list of events the 'whether they be a party thereto or not' language applies to. For example, the Clause does still exclude the tugowner's liability for the consequences of industrial action, even where their own crew may be involved. It is now clear, however, that it does not exclude their liability in the case of, for example, their being involved in acts of terrorism.

Clause 8 – Himalaya Clause

This Clause seeks to protect the tugowner's servants and agents by extending the benefits of defences in the Conditions to them, and ensuring proceedings are not brought against them directly.

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This Clause has been split into two sections to identify the two elements it is dealing with more clearly.

First, at part (a) there is an undertaking that the hirer shall not take any legal proceedings against the tugowner's servants or agents. This is intended to avoid direct action being taken against parties other than the original contracting tugowner; or any other tugowner, where the towage has been contracted to them under Clause 5 (b). The word 'whatsoever' has been added to make it clear that this restriction on legal proceedings against such parties is intended to cover any legal proceedings. Non-substantive proceedings against such parties in order to obtain security, or seek a declaration on liability for example, are also intended to be prevented by the undertaking.

A portion of the previous wording from the end of this Clause has been removed, as it was considered superfluous given the broad scope of the restriction. The relevant words specified that the restriction would apply in instances where there would have been a direct right of claim against such a party, notwithstanding the provision itself, as a result of negligence, breach of duty or due to some other wrongful act on their part. The wording in relation to subletting was similarly considered unnecessary and has been removed.

Second, a more standard, modern form of 'Himalaya' clause wording has been inserted at part (b) to most effectively ensure that the servants, agents, contractors and sub-contractors of the tugowner (and their personnel) have the benefit of the protections afforded to the tugowner under the Conditions. The words 'of any tier' here are intended to extend those protections to those working for any of the listed parties, even where they are part of a chain of contracts and regardless of their place in that chain.

Clause 9 – Governing law and jurisdiction

This Clause sets out the governing law of the Conditions, the jurisdiction forum for disputes, and provides an exception in relation to arrest of assets outwith that jurisdiction.

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Four amendments have been made to this Clause. These are to add clarity and to bring the form into line with modern commercial practices.

An express provision now recognises the right of the parties to agree a governing law other than English Law, or to choose a dispute resolution forum other than the English Courts. For example, they may wish to refer disputes to arbitration.

The automatic application of Scottish Law and jurisdiction where tugowners are based in Scotland has been removed. The general preference for tugowners across all areas of the United Kingdom is for the Conditions to be subject to English law and jurisdiction by default, as the terms have been drafted in accordance with English law. However, as noted in the preceding paragraph, the parties may now agree to apply any law and dispute resolution forum they wish under Clause 9 (a), if the default option is not their preference.

Additional words have been added to make it clear that the governing law is also the law which controls how the terms of the agreement are to be interpreted. This could arguably arise where the operation was undertaken outside of England and Wales and the English courts were hearing the dispute. The words adopted to address this are now commonly used in similar commercial agreements.

Clause 9 (b) now makes it explicit that the right of the parties to arrest assets of the other party in situ, even where outside the agreed jurisdiction for dispute resolution, is a right which arises in order to obtain security for claims under the agreement. The requirement that arrest proceedings may only be brought in rem has been removed, as it is considered unnecessarily restrictive language.

N.B. The UKSCT is generally used in a business-to-business context. If the Conditions are to be used with a Hirer who is a private individual, it would be prudent to consider whether any amendments to the Conditions are required to take account of local consumer laws in the applicable jurisdiction.