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Commentary on the amendments to Lloyd's Open Form (LOF) 2020

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Introduction

Originating in the late 19th century, Lloyd's Open Form (LOF) embodies the features of salvage under maritime law and provides the regime for determining the amount of remuneration to be awarded to salvors for their services in saving property at sea and minimising or preventing damage to the environment.

The form is subject to periodic review and the latest amendments, which came into effect from 1 January 2020, are the product of discussions between leading salvage companies, the International Salvage Union, insurers, arbitrators and the Admiralty Solicitors group with the aim of addressing concerns raised by regular users of the form.

In order to improve navigation around the form, a common complaint of salved property interests, the Lloyd's Standard Salvage and Arbitration (LSSA) Clauses, Procedural Rules and Fixed Cost Arbitration Procedure have now been combined into the single document titled the Lloyd's Salvage Arbitration Clauses 2020 (LSAC).

We have reviewed the further changes that have been made and consider the impacts these may have on the role of average adjusters when handling claims involving LOF salvage.

1. Clause H – 'Deemed performance'

This clause deals with the conditions where salvors can re-deliver salved property to the owners.

The wording has been amended to make clear when the services have been performed and the vessel can be considered "in a safe condition in the place of safety" where she can be redelivered to owners of property. While the change here is minor, this clause does have a bearing on the determination of salved values, which are important in applying the terms of Rule VI of the York-Antwerp Rules (YAR), depending on which version of the Rules apply.

2. Important Notice No. 4

There is now a requirement to notify Lloyds and provide a copy of "... any agreement that amends or varies the provisions or terms of this Agreement..." to enable the arbitrator to consider the implications of any agreement on the arbitration process.

This is in relation to any other form of agreement that may result in the avoidance of the usual process of determining the award by the Lloyd's arbitration (under Article 13 etc.) and to prevent such agreements from prejudicing the position of P&I clubs or cargo interests.

If the YAR 2016 are to apply, then this notice and its revised requirements may be particularly relevant to adjusters per the provisions of Rule VI(b)(v), which provide that salvage shall be allowed as general average when "a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest".

3. Clause 1 – Introduction

Amended to include reference to the 'old' Procedural Rules and the Fixed Cost Arbitration Procedure, which are now set out in Clause 8 and Clause 15 of the LSAC respectively.

4. Clause 2 – Overriding Objective

The overriding objectives are now located in Clause 2 of the LSAC.

5. Clause 4 – Provisions as to Security, Maritime Lien and Right to Arrest

Some small changes have been made to the language, but the meaning has largely remained unchanged. A more significant amendment is included under Clause 4.5 which requires that security shall be provided to the Council of Lloyd's (via the Lloyd's Salvage Arbitration Branch), that is in a form approved by the Council of Lloyd's and "... by person[s,] firms or corporations acceptable to the Council or acceptable to the Contractors".

There is no longer the requirement for the guarantor to be resident in the United Kingdom.

Contractors can still add their own requirements for guarantors in accordance with Clause 4.5(iii), which permits them to determine whether the identity of a guarantor is "... acceptable to the Contractor...".

The advantage to the salvor of having all guarantors based in the UK, may still be attractive and in practice this may not change. We often see additional requirements being put in place by salvors to maintain the standard of security received. Common practice has been to only accept security from 'A' rated or equivalent insurers, to provide assurance to the salvors that they are obtaining security from a financially strong entity.

6. Clause 5 – Appointment of Arbitrators

This now provides an entitlement for the arbitrators and/or appeal arbitrators to seek security for their "... reasonable fees and expenses ..." which mirrors the position of the Contractors to ensure that they are adequately secured.

7. Clause 6 – Arbitrators' Powers

Clause 6.2. provides a non-exhaustive list and gives arbitrators wide discretion to "... conduct the arbitration in such a manner in all respects as he may think fit subject to the LSAC 2020 Clauses...".

6.2 (vii) is a new clause, which gives the Arbitrator the right to terminate the LOF where he considers it fair and just to do so.

8. Clause 7 – Representation of Parties

Clause 7.4 has been amended so that an owner of salved cargo is judged to have received notice of the hearing and any relevant correspondence if the Contractor has provided this directly to the guarantor (often the insurers – but not in every case) who will have ultimate liability to pay any award.

Given the vast size of container vessels now operating and the number of cargo interests who may be involved in a single case, the idea behind this is to lighten the administrative burden on the salvors, allowing them to identify the guarantors, who would usually be involved for multiple cargo interests, and directly correspond with the guarantor. This will hopefully save considerable costs for the contractor and property as well as streamline the notification process for adjusters.

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9. Clause 8 – Arbitration Procedure

This is where the 'old' Procedural Rules are now located within the LSAC.

10. Clause 14 – Special Cargo Provisions

LSSA Clauses 13, 14 and 15 have now been merged into one new clause. The clauses were inserted to reduce the administrative cost burden on contractors in container vessel cases, and allow them to focus on guarantors of the larger cargo interests, whilst excusing liability for salvage of low value cargo where the cost of recovering would be disproportionate to the cargo interests' liability for salvage. Also, Clause 14 provides that in circumstances where 75% of the salved fund (by value) reached an amicable settlement with the salvors, subject to the Arbitrator's consent these settlements could be visited upon unrepresented interests.

LSAC Clause 14 has been widened to apply to all salved cargo and is no longer limited to container cargo.

It is now down to arbitrators' discretion to evaluate any commercial settlements that may have been reached with other represented interests to be more cost effective.

Unrepresented cargo interests have always presented a challenging balancing act for the average adjuster. It is a difficult process for an inexperienced cargo owner to navigate and to fulfil their obligations under the salvage agreement, without the financial reserves to employ an individual to oversee the matter from beginning to end.

Often when collecting security, and later adjusting the individual claims, it is found that it is the smaller interests who require the most guidance. If these interests can be defined at an early stage and an agreement put in place which clearly encompasses how these interests are to be approached, it would be beneficial to all parties.

11. Clause 15 – Fixed Cost Arbitration Procedure (FCAP)

The Fixed Cost Arbitration Procedure (FCAP) has been fully incorporated into LSAC under Clause 15 with the aim of cutting the costs of arbitral proceedings for smaller claims. In this respect and with regard to the overriding objectives of Clause 2, the Clause specifies that arbitrators may utilise the FCAP where the security demand is less than $2m or, where more than $,2m, the factual issues are likely to be straightforward. By introducing measures to simplify the process, Lloyd's have supported the intentions of FCAP in reducing the cost of salvage arbitrations, particularly in low salved value or straightforward cases. The initiative has existed since 2005 but usage has proved disappointing. In an attempt to improve visibility of the procedure, it is now fully incorporated within LSAC 2020.

12. Clause 19 – Contractors' Special Right to Terminate

Lastly, Clause 19 introduces contractors' special right to terminate salvage services in narrowly defined circumstances. Where ship owners validly terminate the obligation to pay SCOPIC in accordance with SCOPIC clause 9(i), but the contractors are unable to invoke the termination provisions under SCOPIC clause 4(ii), then contractors are no longer bound by the terms and conditions of the agreement and the agreement is deemed to be terminated. The contractor has the right to apply to the arbitrator for an order that the LOF can be terminated and such termination is without prejudice to the contractor's rights to recover SCOPIC up to the date of termination, including demobilisation costs, and their rights to recover under Article 13 of the International Salvage Convention. This clause prevents circumstances where the contractor finds themselves on site but prevented from demobilising and seeking additional security for their SCOPIC claim.

Summary

Average adjusters have always welcomed handling salvage cases, whether large containership casualties or simpler multi bill of lading cases, in which salvage services have been engaged under LOF and it is hoped that the amendments to LOF 2020 enumerated above will simplify the arbitration procedure and result in an increased willingness of parties to enter LOF contracts when salvage services are required. In particular, the provisions regarding security and representation of parties are welcome amendments that will hopefully streamline both the security collection process and the notification of payment procedure to ensure that salvage payments can be collected quicker and claims finalised more swiftly if the administrative burden of adjusters contacting various parties can be mitigated.

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