Questions received from participants, for the "LoF seminar"

10 March 2020

Responses:

Kevin Clarke, Lloyd's Salvage & Arbitration Branch

Jeremy Russell QC, Lloyd's Appeal Arbitrator

1. I would like to know more about the recent shift away from LOF to other contract forms, including in particular BIMCO forms and various frame agreements between key insurers and salvors.

   This is a question which can only be answered by owners / insurers / P&I Clubs. I would simply comment that I am not keen on the use of commercial contracts (eg the various BIMCO forms) in a salvage situation for two main reasons:

   (a) Commercial contracts can take time to negotiate – time which the casualty may not have. The classic example of this is the "AMOCO CADIZ". Further, I have been informed off the record of a recent case where the casualty had grounded and, whilst damaged, was not in too bad a condition. Insurers spent a number of days negotiating with various potential "salvors", during which time the local weather conditions deteriorated. As a consequence, the casualty's condition deteriorated badly, making the removal much more difficult and expensive and significantly increasing the size of the claim under the hull policy. The party which gave me this information believed that had LOF been promptly agreed, the vessel could have been removed before the bad weather set in and the increased damage to the vessel thereby could have been avoided.

   This type of thing is also of concern to P&I Clubs: if, for example, HFO tanks are breached while the vessel sits on the ground whilst a commercial contract is being negotiated, the Club incurs a liability which may well have been avoided

had the vessel been promptly refloated under a LOF. There is thus a tension between the owners' obligations to his hull insurers and his obligations to his P&I Club, which has yet to be worked out.

(b) LOF is specifically designed for salvage situations; the BIMCO forms are not. Thus if things go wrong, legally it could get very messy (and expensive) because the commercial contract terms are not geared to the salvage situation.

2. I would like to learn about the changes implemented through LOF 2020.
   An article produced by Mr. Tom Walters of HFW is attached, which helpfully explains the various changes.

3. I would like to get a view on the future of LOF. Where does it go from here?

   Any changes/amendments to LOF will be driven by the users, who are represented on the LSG.
   At the present time there does not appear any great appetite for a "LOF Light" contract so let's see what the users bring to the LSG table.

   That is in the hands of the potential users of the form. I would just like to remind people of the findings of the Salvage Working Group in 1993, a key part of which is to be found on slide 6 of my presentation. It should be remembered that that working group was set up because of fears about the decline of true salvage capacity. There has been significant further decline in that capacity since the publication of that report, making its findings all the more relevant today.

4. As to comments on specific topics, I would suggest LOF2020, the use of commercial agreements and the use of side letters.
   Number of cases/Number of side letters/agreements
   2018: 53/3
   2019: 42/2

2020: 14/1

The first two suggested topics have been covered above. As regards the use of side letters, I have no personal experience of them, because no case involving the use of side letters has come before me on appeal. However, I would advise that, if used, considerable care needs to be taken in their drafting, to prevent them being a fraud upon cargo owners / underwriters. (I have heard of at least one formulation which would constitute such a fraud.) It is mainly for this reason that Lloyd's now requires the existence (but not the content) of side letters to be disclosed to it. In that way cargo owners / underwriters can be put on notice of the existence of a side letter and so can, if necessary, make an application to the arbitrator for its disclosure to them.

5. Assuming there a decline in usage of the Lloyds Open Form, could the presenters provide their thoughts as to why?

1) Ships generally safer.
2) Communications better.
3) Reluctance on the part of Underwriters to agree LOF

I agree with Kevin – those are the three main reasons:

Re (1): not only are ships generally safer (ISM, better training of crews etc) but there are now many more traffic separation schemes, VTIS areas etc.

Re (2): When I first started in practice (> 40 years ago), ships did not have Satcom, hence the master was on his own unless he was in radio range, and even then the delays inherent in long distance radio communication were likely to result in the master, as the man on the spot, taking the decision. Thus, in a lot of casualty situations, the decision was necessarily taken by the master. Today, the master calls his owners on Satcom, the owners call their underwriters and the underwriters call the shots.

Re (3): Many insurers seem to be anti-LOF. In the short term, I understand the commercial pressure to keep claims as low as possible, given the tough market re

premium, and hence the temptation to seek to do everything on commercial terms. Long term, I fear another "AMOCO CADIZ", possibly this time involving a large, laden container vessel, and its effects not only on the environment but on the attitude of local and national authorities. (This is perhaps more of a concern for P&I Clubs than property insurers.)

6. Are there any type of urgent assistance services, for example "emergency" ocean tows where the presenters consider usage of commercial terms, for example TOWHIRE, more suitable?

   Any hint of emergency; agree LOF.

   I agree with Kevin. The phrase "Emergency ocean tow" covers a multitude of possible factual circumstances. If the vessel is 400 nm offshore, the weather is benign and likely to stay that way, then there is time to negotiate a tow on commercial terms (eg Towhire or Towcon). If the vessel is 20 miles off a lee shore, with an onshore gale blowing, that is not the time to be trying to negotiate a commercial tow! (Although I know of one case where precisely that happened. In the end the coastal state put an armed marine party on board and "persuaded" the master to sign LOF with the tug standing by off its bows.) There is obviously a wide variety of potential scenarios between the two I have given, but Kevin's advice is sound – any hint of emergency, agree LOF. (For those not familiar with the "AMOCO CADIZ", the facts were essentially those of my second scenario; much time was wasted trying to negotiate a commercial tow. By the time a contract was agreed and the tug connected, it was too late – the connection lasted (from recollection) about 20 minutes before it parted and there wasn't time to re-establish a connection before the fully laden VLCC hit the rocks and broke up.)

7. Example; Vessel with engine break down well clear of any land but will need towage to port and a LOF is signed. It is clear that the towage could just as well have been done on a commercial contract. Will the arbitrators take that into account or will the fact that a LOF is signed automatically lead to a much higher reward for the tugowner?

If the only danger is that of immobilisation until assisted (ie there was absolutely no risk whatsoever of the vessel grounding in any realistic timeframe) then the fact that the tow could have been carried out on commercial terms will be taken into account, provided that evidence is put before the arbitrator showing what tugs were available, willing to contract on commercial terms. See *The "VOUTAKOS"* [2008] 2 Lloyd's Rep 516, which was on this very point. Accordingly, the rate for which the tow could have been carried out (if evidence of that is provided) must be taken into account. **However**, even if there is evidence of tugs being available on commercial terms and of the rates at which such tugs could have been hired, a tow under LOF will be very likely to be more expensive than a tow on a purely commercial basis because:

(i) Article 13 of the Salvage Convention requires an arbitrator to take account of (among other things) the salvors' status and more importantly requires the arbitrator to provide "encouragement", provided that the size of the salved fund is sufficient to make that possible. Neither of those factors is present in a purely commercial tow contract.

(ii) LOF is on a "no cure, no pay" basis. Thus the salvor carries the financial risk of "no cure", which he does not under a pure commercial contract. The fact that the salvor carries that risk will be taken into account (unless the risk of "no cure" can be shown to be non-existent).

8. What thoughts do the presenters have on the usage of so called "side agreements" used to cap the article 13 award under an LOF, for example by applying a tariff rate as per SCOPIC Appendix A from the outset whereby remuneration is calculated on this basis up to the certain amount? If the remuneration exceeds this, the side agreement is voided.

   Number of cases/Number of side letters/agreements:

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I assume that the word "remuneration" in the final sentence really means "cost of the service"; if not, I do not understand the question. In any event, I refer to my answer at question 4 above.

9. Do any of the presenters appreciate why commercial terms or side agreements are being used, for example where awards may give a salvor 20-30 times more than under commercial terms. Typically with soft groundings or ocean tows (without danger).

   Absent evidence, I regard this as a myth, because in over 40 years in practice in the salvage arena, I have never come across a situation where, on the facts postulated by the second sentence of the question, the LOF award was 20-30 times the cost on a commercial basis. I would be grateful if the person asking this question could identify the case(s) concerned. In the unlikely event that an award of that magnitude was made in a towage case performed under LOF, it would be overturned on appeal, because the arbitrator would obviously have failed to give effect to the decision in *The "VOUTAKOS"*: see my answer at question 7 above.

10. Should the "encouragement" of 50-60 percent of values salved take some of the blame for a diminishing usage of LOF?

    Very, very few cases. Cannot recall last time Award was in such percentage figures.
    Average % for last three years:
    2017: 4.7%
    2018: 11.9%
    2019: 4.3%

    Again, I am afraid that I regard this as one of the myths used to attack LOF. There are VERY few cases where the award is 50 – 60% of the salved fund. I have been involved as counsel or arbitrator in > 500 salvage cases under LOF. I can think of less than 10 cases where the award was 50% or more of the salved fund. These were all cases where the salved fund was very low, the dangers very high and the services deserving of considerably more than the arbitrator could reasonably award, given the small size

of the salved fund. (In my presentation, these are what are known as "fund constrained" cases.)

11. How have historically salvage awards developed over the years; and has there been an increase in percentages awarded in Lloyds Arbitrations to salvors from the salved fund?

    Looking at % figures alone are dangerous/mis-leading. Look at the merits of each case.

    High value : low %

    Low value : high %

    1) As explained in my speech, arbitrators do not work on a percentage basis. As Kevin correctly says above, simply looking at percentages is very misleading. The only time that an arbitrator will give serious consideration to a percentage is in the fund constrained case where, as a cross-check, he / she will ask him/herself whether the award that he/she has in mind would represent too high a percentage of the salved fund, leaving the owner of the salved property with little benefit from the salvage service.

    2) The question implies that arbitrators have taken a conscious decision to increase the percentage of the salved fund which an award represents. That is simply not true: there has not been any deliberate increase in percentages awarded by LOF arbitrators. (Not least for the reason given in (1) above.) Each case is assessed on its merits by reference to the criteria which I outlined in my speech. The award is then made. The percentage of the fund which that award represents can then be calculated by others, to use as they wish. But I repeat, **arbitrators do not work on a percentage basis when determining what to award.**

12. Do any of the presenters consider that diminishing usage is actually bringing the LOFs back a suitable level, for the true emergencies, rather than cases where there was relatively low danger?

That may be true to a degree, but I refer back to my answer at 1 (a) above. There are several potential problems. For example:

(i) The danger may appear to the master to be relatively low, but in fact be quite serious. (For example, he is aground on a soft bottom, but is unaware that the area where he is aground is susceptible to significant scouring. Or, in a case in which I appeared, the vessel grounded on a sandy beach, but the effect of the vessel's presence, given local current and tidal flows, was to create a sandbank to seaward of her, which made it very difficult and costly to refloat her.)

(ii) The danger may appear to be low in the prevailing wind and sea conditions, but those conditions are liable to change unexpectedly, rendering the vessel's situation far more dangerous.

13. Presumably 'LOF Light' has now been put to bed for good..?

At present there appears to be little appetite for an LOF alternative, therefore LOF Light is not now being actively discussed by LSG. However, this is not to say that LOF Light or another version may not be revisited at a later date.
From Lloyd's perspective we listen to our stakeholders with the LSG.

I have nothing to add to what Kevin has said above.

14. How the case would be handled at the Arbitration if the casualty (a vessel in distress) is being salvaged by two different companies? E.g. one tug company that has a signed LOF contract and another tug company that has no any contract but was successful in attempts to connect to the casualty. Thereafter, LOF tug company protests and anyway, after unsuccessful attempts still connects also to the casualty. There are two salvors. One LOF and one common law salvor. How this matter would be treated by Arbitrator?

The answer is that it depends on how the parties concerned wish it to be handled.

(i) If the parties are sensible, the common law salvor will agree to a private submission to arbitration and appoint the same arbitrator as appointed under the LOF. The arbitrator can then hear the arbitrations concurrently (if all parties agree) or consecutively (if the parties do not agree to concurrency). In this way the arbitrator will have a good idea of the contribution which each salvor made to the overall success of the salvage and make awards accordingly. The total of both awards must not be at such a level as to be unfair on the property owners.

(ii) At the other extreme, the common law salvor may decide to bring his claim in a local court. (Eg a court where he has arrested the vessel to obtain security for his claim.) In these circumstances the LOF arbitrator can obviously only decide the claim by the LOF salvor BUT he / she must keep in mind that:

(a) There was plainly alternative assistance available. (For the relevance / impact of that on the level of award, see my speech.)
(b) There is another claim for salvage against the salved fund. As a consequence, the award under LOF must be at a level such that the (likely) total of both awards of salvage is not unfair to the property owners.

15. Is there equivalent LOF in Scandinavia?

I am not a Scandinavian lawyer, but my understanding is that there was a Scandinavian "no cure, no pay" contract, which bore a number of similarities to LOF. I do not know (i) whether that form still exists and if so, (ii) to what extent it is used. Any Scandinavian court or tribunal assessing a salvage award under such a contract would be required (by local law) to apply Article 13 when assessing the amount of the award, as all Scandinavian countries have given effect to the salvage convention.

16. Salvage under Scandinavian Law (i.e. where no contract at all exists). How this is handled?

I am not qualified in Scandinavian law, so am unable to answer this. But a Scandinavian court would have to apply article 13 of the salvage convention: see answer 15 above.

17. Salvage Convention Article 1 (a) says " *"Salvage operation" means any act or activity undertaken to assist a vessel or any other property in* ***danger*** *in navigable waters or in any other waters whatsoever.*" How does the arbitrators interpret the term "*danger*" and how is it assessed if and to what extent the vessel and property actually was exposed to danger?

Please see my speech, where this is covered in reasonable detail. But I repeat that a Scandinavian court would have to apply Article 13 of the salvage convention: see answer 15 above.

18. Owners have seen cases where it can be argued that there was absolutely no danger or urgency and that it was only a case of assisting the vessel to get underway again from a light grounding or towing to port or anchorage after engine breakdown. Tugs will however only render assistance under LOF and since they have no competitors in the area, then there are no alternatives for owners but to accept LOF. How will the arbitrators assess such cases?

(a) The starting point is: the question appears to assume that "danger" for the purposes of salvage is the same as "physical danger". This is not correct: not all dangers which qualify as dangers for the purposes of salvage are physical. So, for example:

(i) Immobilisation is a danger. (EG1 a vessel afloat in the middle of the Atlantic, in summer, with a main engine breakdown which is not repairable at sea, is in "danger" for the purposes of the law of salvage, although a person not familiar with salvage law might say "the vessel is not in danger". EG2: similarly, a vessel may be aground on a sandy beach, evenly held, but unable to refloat herself.

But the point is, in both examples a valuable asset – the ship and her cargo – is no longer available to the respective owners, and the capital tied up in ship and cargo is "infructuous". That is sufficient to give rise to a danger in salvage law. The weight to be given to that danger will vary from case to case – a laden container vessel on a liner service with a main engine breakdown not repairable at sea will "suffer" more than a bulk carrier on ballast voyage to her next loading port, and so the award against the container vessel will be higher, all other things being equal.

(ii) The risk of third-party claims can also be a "danger". (Eg a vessel at anchor begins to drag in bad weather towards a yacht marina. If the vessel hits the moored yachts, it will suffer no measurable physical damage, but the fact that, if it hits the yachts and sinks them, the vessel's owners will face significant financial claims brought by the owners of the damaged / sunk yachts is sufficient to be a "danger" for the purposes of the law of salvage.)

(b) Shipowners and salvors are subject to the "law" of supply and demand, just like any other commercial organisation. If there is only one tug available to assist and its owner insists on LOF, so be it: that's how "supply and demand" works. The arbitrator will assess it on the basis that it is a salvage case and will consider the factors which I have set out in my speech. If he / she finds the dangers to be as low as the question suggests, then the award will be lower than if the dangers are higher. But for the reasons already given in answer to question 7 above, an award under LOF is very likely going to be higher than the cost under a pure commercial contract.

19. Salvage Convention, Article 13, 1. states that "*The reward shall be fixed with a view to encouraging salvage operations;..*". This is interpreted to mean that salvors who have actually made investments in salvage equipment, competence etc. shall be given an encouragement and be rewarded for this in the salvage reward. Assuming this interpretation is correct, to which degree will the arbitrators assess if a salvor

actually qualifies to such 'extra' remuneration, i.e. that they have actually made such investments?

If the salvor wishes to claim professional status and seek encouragement for investment in salvage personnel, equipment and craft, he must produce evidence of the sorts of things he has invested in. So, for example, he may put in evidence that he has:

(i) purchased a warehouse for $A, and spent $B on salvage equipment to be stored in that warehouse, on call for salvage purposes. Evidence of annual maintenance costs etc is also relevant.

(ii) Spent $C on training his personnel in salvage techniques.

(iii) Spent $D on purchasing and equipping craft (tugs, sheerlegs, etc) for use in salvage.

Absent such evidence, the level of encouragement will be much lower. (So, far example, on identical facts a leading international salvor will be awarded more than, eg, a small, local harbour tug company which rarely performs any salvage and has not invested in any way in salvage capability.)

20. Is it the perceived risk and danger there and then at the time of the incident, or is it the facts as they appear after thorough investigation and fact finding after the incident that is decisive for the setting of the award?

As I hope my speech made clear:

(i) For the purposes of assessing dangers, it is the facts as they are proved to be after the event which are relevant ("actual danger"), not the dangers which were thought to exist at the time the service was performed ("apprehended danger").

(ii) For the purposes of assessing the merits of the service, some effect may be given to the apprehended danger.

For example, assume a ship on fire. When the salvors arrive, it is reasonably believed that the ship may be about to explode. Nevertheless, the salvors board and commence firefighting. Investigations after the event show that there was in fact no risk of the vessel exploding. The "dangers" part of the assessment will take account of the actual facts ("no risk of explosion"); the "services" part of the assessment will give some (likely to be small) weight to the fact that the salvors boarded and commenced firefighting, even though they reasonably feared that the vessel might explode. (Why? To encourage salvors to get on with it, rather than standing by and waiting to see what happens. Some credit for their courage in boarding should be given.)

21. One of the reasons why LOF is viewed with scepticism by some may be the perception that Article 13 is applied somewhat arbitrary and with little transparency on how the criteria are applied and considered. Is there any conceivable way of making a system for quantifying and or ranging the criteria set in Article 13 so as to make it a more transparent and predictable tool for setting the award?

As I hope my speech made clear, the article 13 criteria are applied by the arbitrators in a **systematic** (certainly not arbitrary!) manner. The purpose of my speech was to provide transparency as to the manner in which LOF arbitrators approach / apply those criteria. I hope that I have succeeded in that task.

Yellow page salvors:

I have also been asked to comment on the approach taken to "yellow page salvors" – ie those with good contacts and a mobile phone, and not much more. The short answer is this:

On the same facts, a salvor who has invested in salvage capability (craft / personnel / equipment etc) will (or at least certainly should) receive more than the "salvor" who has made no investment in salvage capability. But two points to bear in mind:

1) Even the salvor who has made significant investment in salvage capability will receive a lower award where, on the facts of the particular case, his own craft etc were not

used, because (eg) it made more sense to hire in craft which were geographically much closer to the casualty than his own.

2) Even a service on LOF by a “yellow page salvor” is likely to cost more than a service on purely commercial terms because:

   (a) He has to fund the service himself and possibly wait many months for reimbursement. This is not the case under a commercial contract.

   (b) As a salvor under LOF he has to use his best endeavours to salve ship and cargo and bears a legal responsibility for their safety. A tug owner under a commercial contract is under no such obligation.

   (c) As a salvor under LOF, he bears the risk of “no cure”. A tug owner under a commercial contract bears no such risk.