LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(Approved and Published by the Council of Lloyd's)

NO CURE - NO PAY

1. Name of the salvage Contractors: (referred to in this agreement as "the Contractors")	2. Property to be salved: The vessel: her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew (referred to in this agreement as "the property")
3. Agreed place of safety:	4. Agreed currency of any arbitral award and security (if other than United States dollars)

Is the Lloyd's Open Form salvage contract dying?

There is an industry debate discussing emergency casualty response and the decline in LOF contracts. Gard, as a marine, energy and P&I insurer, is well aware of the pressures which arise from high profile casualties. We thank our guest author, Nick Burgess of BDM Law for his contribution to the ongoing discussion with the aim of finding an acceptable revision to the current LOF formula.

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The Lloyd's Open Form salvage contract (LOF) has been around for well over a century. It is the best known international salvage agreement. In recent years, we have seen the number of reported LOFs decline. In 2016, there were 42 contracts awarded according to Lloyd's and that was only due to a run of losses in November and December. The previous low was 37 contracts in 2014. This compares with an average of over 60 contracts each year during the period from 2000 - 2010. This decline has led some commentators to argue that LOF is a dying concept. Restoring faith and confidence in the form was high on the agenda at the recent ISU annual meeting in London, and there is support for LOF from the Lloyd's Salvage Group, the International Group of P&I Clubs and the Admiralty Solicitors Group.

There are pros and cons associated with the LOF agreement. The perceived wisdom is that signing an LOF is the safest way to protect the crew, property and environment. The contract is designed to be signed immediately without negotiation of terms which, in the context of a maritime casualty, avoids any loss of time and maximises opportunity for salvage. This can be uppermost in the mind of many Masters who think that nobody will criticise them for signing an LOF in circumstances where their vessel is at sea in a situation of potential peril and they have impaired control. At its best, it is a recognised 'no cure no pay' contract with remuneration based on an arbitration process in London administered by the Lloyd's Salvage Arbitration Branch. Elements for environmental protection are incorporated. The underlying principles for assessing the salvors' remuneration are set out in the International Salvage Convention.

In this article, we examine the circumstances behind the decline of the LOF and we consider what, if anything, can or should be done to improve the situation.

Why are LOF contracts are in decline?

The LOF contract has its roots in a time when the Master of the ship was often faced with difficult circumstances and unable to consult others. There was no AIS, email, instant messenger, Skype, nor even the ability to make a call to the shipowner/managers' office. In those days, the P&I club and property underwriters were often among the last to know that there had been a casualty. Now they usually should receive notification within an hour or so of the casualty occurring. Emergency response plans provide for a team of experienced professionals to assemble to provide immediate support and guidance to the Master. As a result, there is scope for assessment of the situation, analysis of risks and discussion of options prior to taking any decisions. A consequence of this is that greater attention is directed to the form of the salvage contract and its terms whereas, in the past, an LOF contract might have been signed without any consultation at all.

Improvements in technology and speed of communication also apply to salvors. They are now able to obtain information more quickly via their agents and sources, and direct their resources in a more intelligent manner. This has resulted in increased competition for the business available, which leads to greater flexibility on the terms that salvors are prepared to offer. Salvors often feel that they are able to offer alternatives, whereas in the past the LOF contract might have been the only option available. In terms of alternatives, we have seen an increased appetite for either a fixed price contract or hybrid contract with a pre-defined uplift in cases where success is achieved.

Aside from these technological advances and competition between salvors over the terms of the contract, there is also a perception that the LOF contract is open to abuse in circumstances where the owners/Master are in a position to bind property interests. In the past there have been unfortunate cases where an LOF has been agreed notwithstanding the fact that the casualty itself is minor and capable of being dealt with via a commercial tow or other fixed price arrangement. The ’hook up and tow’ is the classic case where an LOF is often felt to be inappropriate.

The problems were highlighted in “ *The VOUTAKOS* ” which was an immobilisation/ hook up and tow case where it was argued that there were difficulties involved as a result of the weather conditions. The initial award was made on what is known as the ’disparity principle’, i.e. that in simple rescue towage cases, the sum awarded should not be wholly out of line with commercial towage rates. This award was increased substantially by the appeal arbitrator. The case eventually made its way to the Admiralty Court. The Admiralty judge disagreed with the appeal arbitrator’s decision that commercial tow rates were a wholly irrelevant consideration when it came to assessing the level of the Article 13 award, but the court said that each case would turn on its particular facts. The ’disparity principle’ was said to be flawed because it was impossible to identify what would count as a simple rescue tow and all cases involving immobilisation would involve varying degrees of danger dependent on the circumstances. There was a move post- *VOUTAKOS* to discuss a separate regime for ’hook up and tow’ within the scope of the original LOF, but this may have been replaced by the move towards hybrid LOF and/or bespoke agreements upon BIMCO standard terms where there is a base and bonus element for immobilisation cases. In effect, the parties have addressed some of the problems of ’hook up and tow’ cases by dealing with them outside the LOF regime.

There is concern about the risk of abuse of the LOF system and that LOF contracts are sometimes used in inappropriate cases. Clause L of the LOF contract is designed to prevent inducements being made to facilitate an LOF but it is debatable as to whether this clause goes far enough in terms of providing a remedy for those who are concerned that inducement has taken place. In line with recent tightening of the regulatory regime in the banking and financial services sectors, it seems that it would be appropriate to reduce the standard of proof required to prove an inducement has taken place in the context of an LOF contract. However, even if this can be achieved, proving an inducement has taken place or been promised will remain a difficult obstacle to overcome.

In our opinion, the problems with LOF primarily relate to the perception that LOF is expensive by comparison with other alternatives, and is thus suitable only in certain exceptional circumstances. There exists an element of public policy recognition supporting professional salvors, which results in higher salvage awards, than in fixed price tenders. Significant delay and expense also results from the fact that, absent agreement, the parties have to resort to arbitration, which involves time and legal costs on both sides. An arbitration will involve a subjective assessment of the principles laid down in the International Salvage Convention and the value of the salved property. Whilst experienced salvage practitioners can often give a recommendation as to what might constitute a fair figure, there are often a wide range of opinions so that there is a substantial degree of doubt, delay and uncertainty. Paradoxically, fewer published LOF awards increases the unknown compensatory element, both for salvors and the marine insurers. This all leads to the common perception that LOF is more expensive than a fixed price or a hybrid

contract, where subjective factors are removed from the equation and the scope for dispute is reduced dramatically.

Finally, there is concern that by signing an LOF, the rights of the parties are potentially restricted. In its current form, the LOF can only be terminated in the absence of agreement when there is no longer any reasonable prospect of a useful result leading to a salvage reward. That is a highly subjective assessment based on the prospects of success and likely value of the salved property – matters which are often in dispute at the time. Agreeing to an LOF may obstruct the shipowners and their insurers' rights to move towards an alternative form of contract in the absence of the salvors' agreement. Furthermore, if the LOF incorporates SCOPIC and SCOPIC is invoked with P&I security provided, then termination of SCOPIC may not be possible later in circumstances where the local authority prevents the salvor from demobilizing. This may lock the P&I insurer into a situation where they are on the hook for SCOPIC in circumstances where it may be felt that moving to a caretaking agreement or wreck removal contract may be a better option.

What can be done to make LOF more attractive?

More can be done to address the perception that LOF contracts are more expensive than the alternatives. According to the LOF report 2015 (the 2016 report is yet to be released) the average value of an award over the period from 1 January 2003 to 31 December 2013 was 23% of the value of the salved property and the overall trend is down, not least as asset values are down. Put another way, salvage represents a saving of 77% compared to the alternative total loss to property insurers, which would appear to be good value.

The latest version of LOF under review, LOF 2011, has sought to address the perceived uncertainty of the arbitration process and to make awards more predictable. There is now a system for publication of awards. The aim is to build up a precedent bank that parties can refer to when it comes to assessing the likely level of any salvage reward. However, this is of limited benefit where most salvage awards are settled and settlements are confidential. The time involved in the process of arbitration has reduced, but there is still room for improvement. In 2013, it took an average of 231 days from the appointment of the arbitrator to publication of an award, which is still too long. In practice, it usually takes over a year from the termination of salvage services to reach agreement on the level of the salvage award. Many salvors and insurers regard this as being too long and so there is an ongoing move to try to make the process more streamlined and efficient.

Other parts of the LOF 2011 regime tried to address certain specific issues and weaknesses and make LOF more attractive. This included a new streamlined regime to tackle the problems of handling salvages involving large numbers of laden containers and a large number of cargo interests, some of whom might be uninsured. At the same time, Lloyd's took the opportunity to refresh the panel of LOF arbitrators.

The fixed cost arbitration procedure (FCAP) was brought into effect to try to make LOF attractive in cases where the salved fund is small or where no point of law arises and the facts are uncomplicated. However, this process has not really been popular and there is ongoing debate as to how to re-vamp the service to make it more attractive. Having said this, around 80% of LOF cases are settled prior to arbitration, which is in large part down to the fact that there is a developed body of experienced professionals within the industry who are able to deal with and negotiate settlements

on behalf of their respective clients.

The hybrid options are another way to make LOF more relevant in circumstances where parties seek a degree of certainty. Trade to the US and other jurisdictions already require pre-agreed vessel response plans to be in place with SCOPIC tariff rates and alternative contract forms, including LOF. However, care need be taken that any hybrid does not leave the shipowner uninsured, or the salvor in double jeopardy. The formula for invoking SCOPIC still needs to be notified to P&I to avoid prejudicing P&I cover. This can be prevented by ensuring engagement of all relevant insurers at the time when the hybrid contract is agreed.

Finally, the termination provisions of clause 9(iii) remain an ongoing topic of interest to the ISU and those in the P&I world. The SCOPIC termination provisions are currently under review. Various options have been suggested including a fairer allocation of the financial consequences of a local authority decision to prevent demobilisation and/or better co-operation in terms of transition from LOF to commercial/ wreck removal contracts. It remains to be seen however how these proposals will be received by salvors and property insurers.

Conclusion There is still a great deal of support for the LOF contract but, as times have changed, we have seen alternative options being developed. It seems inevitable that those financially interested in any casualty will always seek to get the best possible deal without compromising the safety of the crew, property and environment. The entire maritime community needs to take care however that by seeking to obtain the best deal in the circumstances, the original aims of LOF are not damaged. LOF was designed to encourage investment in salvage, so as to make it attractive for salvage companies to operate specialist services capable of responding to a maritime crisis. If we lose the emergency response capability, then the entire maritime community may end up paying the price as salvage companies find it increasingly difficult to continue to operate.

While the author's comments are his own, Gard echoes his conclusion - the Lloyd's Open Form has for a long time been the most important contract for salvage, allowing the Master on a ship in peril to contract with a salvor in situations with grave and imminent danger to the vessel, its crew, the cargo and the environment, without having to discuss the details of such contract. Gard strongly supports the continued use of the Lloyd's Open Form in situations for which it is intended.