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### **Environmental Salvage**

In order to evaluate the feasibility, and benefit of an environmental award, it is necessary to recognize the historical evolution of salvage awards from strict reliance on the value of property to the now prevalent and overwhelming public and regulatory pressure to protect the environment, often to the exclusion of property value. In other words, the primary beneficiary as well as the cost of any significant casualty is driven by the issue of environmental protection. The owner and his liability insurer, the P&I Club, spend hundreds of millions of dollars on pollution issues – but the property insurer is also inextricably involved in the cost of environmental protection, although he does not insure the liability. Removal of bunkers so as to avoid a spill prior to beginning salvage is one such example. Article 13, 1(B) also takes into consideration the skill and efforts of the salvor in preventing or minimizing damage to the environment in making a property salvage award. In short, in many instances, property is paying for environmental issues.

The expectation is that the support for environmental emphasis will continue to grow to the exclusion of property considerations. To the degree that salvors can direct their efforts and equipment to minimize or eliminate a clearly defined environmental threat, they should receive a portion of the provable economic benefit. It should be emphasized that any new compensation scheme to salvors must, and I emphasize must, also result in a significant economic benefit to the payer as well, if not in each individual incident, certainly in a reduction of overall market costs.

- Scopic, an LOF evolution, is not adequate to compensate salvors for protecting the environment. It is simply a guaranteed time and material method of payment, not at all related to the actual economic benefit conferred by pollution prevention or minimization. There must be an additional evaluation of an identifiable positive resolution of environmental mishap.
- LOF, celebrating its 100<sup>th</sup> birthday in 2008, is a proven, effective remedy for property saved awards. Might it also serve as the subjective evaluation device for a clear environmental benefit conferred on an owner and/or his underwriter?

#### **Why LOF?**

Lloyd's Open Form, commonly referred to as LOF, is a salvage response contract, accepted worldwide but for the U. S. forum. As we know, the U. S. has often stood outside the sphere of international influence, sometimes for very good reason, on occasion subject to political and social pressures. LOF is unique in its application of the concept of no cure, no pay, passing the total risk of success or failure to the salvor. It is a contract standard in form which can immediately be concluded between shipowner and salvor in a marine emergency.

The issue of final compensation is then negotiated after the conclusion of the event after the dust settles. Failing agreement, it is then referred to London for binding arbitration before a single arbitrator chosen from a panel of experienced and qualified arbitrators. The right of appeal is protected through an appeals arbitrator with a final appeal to the English Court system, if applicable and necessary.

When LOF was first put into play in 1908, the driving force was the distance and lack of communication between ship and owner. It empowered the master as well as the salvor the opportunity to proceed immediately with the salvage of the ship, leaving the value of the service to be determined in the future. Often, the salvor and captain working together completed the work successfully before the owner was aware of the details. Service was prompt and effective with cooperation between salvor and ship's crew. The award, negotiated or adjudicated as a percentage of the value of ship, bunkers and cargo, had as its sole remunerating consideration the value of the property. Over the last one hundred years, percentages of value awarded ranged generally in the area of 5 to 15% of the total property value, leaving the balance to owners. Since the primary focus was saving property, it was sensible and reasonable for property interests to reward the salvor.

Today, our world is smaller and integrally connected. Communication with the ship is instantaneous. Distances have shrunk by speed of ships and the magnitude of international commerce. Most casualties are negotiated by shore-side personnel, assisted and often dominated by lawyers, consultants, surveyors, regulatory authorities, environmental elements and even the media. Everyone comes to the party, the invited and uninvited. The process is often stalled and unnecessarily complicated raising the specter of delay which is the key factor impacting a successful salvage. The Salvage Master and his team are often banished to a back room to await the outcome of the intense discussions ongoing over legal, regulatory, environmental and public related issues, most of which continue to evolve and complicate without resolution long after the salvage or wreck removal is concluded. Days, on occasion, weeks and even months and tens of millions of dollars are often spent on these satellite issues. Weather and the perils of the sea do not await the outcome of protracted and complicated negotiation. The cost of multiple third party interest and intervention is becoming an ever increasing cost.

It is time all concerned marine interests together examine the shift in emphasis from property to environment, review the economic consequences and then adjust the casualty response of the salvor both practically and economically for the mutual benefit of all.

We must evolve a fair and equitable economic solution which first identifies, in some manner, the benefit conferred, i.e. the amount saved in environmental costs; then, reward the salvor a reasonable portion thereof. Although this will require some thoughtful consideration and an exploration of all available alternatives, perhaps similar criteria to that currently being utilized to formulate the LOF article 13 award would be a starter.

Perhaps the salvor should have an option to elect:

- a) LOF without Scopic or environmental salvage.
- b) LOF with Scopic.
- c) LOF with environmental salvage, excluding Scopic.

The current Article 13 fixing the property award should have Article 13 1(b) the skill of the salvor removed from consideration. Should the salvor elect an environmental award consideration, perhaps a re-defined Article 14 should be appropriate. The Article 14 award would include:

14.1 If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment he shall in addition to the reward to which he may be entitled under Article 13, be entitled to an environmental award taking into account the following criteria without regard to the order in which they are presented below.

- a) Any reward made under Article 13.
- b) The criteria set out in Article 13.1 (c) (d) (f) (g) (h) (i) and (j)
- c) The skill, efforts and extent to which the salvor has prevented or minimized damage to the environment and the resultant benefit conferred.

14.2 The fund out of which an environmental award shall be made shall be calculated on the basis of US\$250 per gross ton of the vessel, the subject of the salvage services, with a minimum fund of US\$5,000,000 (the limit of a vessel of 20,000 gt) and a maximum fund of US\$25,000,000.

14.3 For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

14.4 Any environmental award shall be paid by the shipowners.

14.5 If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any environmental award due under this Article.

The salvor must not have his cake and eat it too. Any new LOF regime should allow the salvor to elect either Scopic or an environmental award. When he elects one, he must abandon the other. This serves two purposes. It identifies, clarifies, and separates the environmental considerations from the property salvage. It also removes the time and material aspect from the environmental effort and places the salvor in the risk-reward precedent set by LOF.

The salvor, as part of the assessment for the benefit conferred, should also be compensated for mitigating the owner's civil and criminal liability for the recent emphasis on civil and criminal liability is related and evolved chiefly from environmental consequences. I don't believe anyone would disagree. The only issue is, again, to be able to quantify the liability in economic terms.

The salvor must therefore be an environmental responder in the first instance. He should not and cannot replace the spill responder for the long term event when beaches, wildlife and other more time consuming events must be dealt with. A long-term spill response is not a salvage effort. I do submit, however, that when a vessel is in extremis, whether it is a tanker, hazardous material carrier or even a vessel carrying substantial bunkers, one cannot separate and should not separate the salvage from the environmental event. The salvor should be equipped professionally by experience, training and assets to first realize the overriding presence of the potential environmental liability and then, when necessary, prevent environmental damage even if it minimizes his property recovery. This can only be accomplished if he is rewarded for the benefit conferred. Yes, the salvor must, in the future, be capable of preventing or minimizing the environmental risk in the first instance in any casualty. He therefore must be prepared with trained personnel and equipment to face the risk promptly and effectively. If he confers a measurable benefit, he should be fairly rewarded. The salvor can walk and chew gum at the same time. His efforts must always respect both environmental and property considerations. Depending on the event, the respective priorities can and should be evaluated by the salvor in conjunction with all of the respective interests.

The professional salvor is the most experienced, qualified attendee at any marine casualty. If he is expected to address the environmental success of a casualty, and he is required to do so, should he not be compensated from a portion of the demonstrated financial savings resulting from his efforts? We must somehow extract our industry from the time and material, astronomical, and often fruitless response efforts from which our industry is currently suffering. The road is a long one. It will involve the combined efforts of owners, the underwriting community, government interests, as well as the salvage community, environmental responders and the education of the public. The salvage community believes the utilization of the time proven risk reward system of LOF, as a partial solution to the enormous ever increasing and often wasteful current response to environmental issues attendant to marine casualties, is a very positive step in the right direction. The proof is in the pudding. If a reconstructed LOF, rewarding the salvor for a portion of the financial benefit he has conferred upon an owner and his underwriter does not come to pass, the form will fall into disuse and disappear.