LOF SALVAGE, WAR RISKS AND TERRORISM:

LESSONS FROM THE TANKER WAR

Last weekend saw the much-publicised attack on the MARLIN LUANDA. The tanker was en route from Egypt to Singapore in a laden condition when she was struck by a missile fired by Houthis from the Yemeni mainland on 26 January. Trafigura, the vessel's operator, reported that the strike had caused a fire in one of the vessel's cargo tanks. The crew were able to use the vessel's firefighting equipment to extinguish the fire on board, together with support from United States and French Navy vessels.

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This recent attack on a laden oil tanker echoes a previous conflict in the region, the Tanker War, which took place between 1984 and 1988. The conflict was part of the larger Iran-Iraq war and saw an estimated 546 merchant vessels damaged and 430 civilian seafarers killed. In response, several salvage companies sent tugs to the area and a number of tankers and other vessels were salved under the terms of Lloyd’s Open Form contracts. The awards published at the time provide helpful guidance regarding how LOF arbitrators are likely to approach salvage in war zones.

Given the parallels between this most recent incident and the Tanker War, we thought it be helpful to look back at our salvage database[1] to consider how the market has historically dealt with similar cases. Looking back at these older awards, it is interesting to note certain issues and dangers which may be relevant if the present conflict escalates further resulting in more attacks on vessels in the region and the need for salvage services.

It is easy to fall into the trap of assuming that, simply because a laden tanker had been struck by a missile and was on fire, an arbitrator would find that there was a risk of fire spread and/or subsequent explosion. This was, however, not the case and in several awards the arbitrators held that, despite the vessels in question being heavily damaged, there was only a low order risk of fire spread or explosion. When considering whether there was a risk of fire spread, the arbitrators would give careful consideration as to the presence of unburnt fuel which would have allowed the fire to keep burning and whether there was a mechanism by which the fire could have spread.

If the peak of a fire had passed by the time that the salvors arrived, then an arbitrator would be much more likely to find that the risk of fire spread was low. Similarly, the arbitrators often found that the risk of (further) explosion was minimal. This was because in order for an explosion to occur, it is necessary to have an atmosphere within the explosive range and a source of ignition. The explosive range is the concentration range of gas or vapour that will burn or explode if an ignition source is introduced. If the ratio of fuel to air is too low, then the mixture will be too lean to burn. On the other hand, if the mixture is too rich (i.e. there is insufficient oxygen) then there is also no risk of explosion. Even if you have a mixture of fuel and air which is “just right”, a salvor will also have to prove that there would have been a source of ignition.

This was often difficult to determine given the circumstances of the salvage operation and a number of awards went into great detail about whether ignition could have occurred. There was often detailed examination of whether certain doors were open or closed, the risk of drifting embers and so on. Finally in the 1980s, tankers were fitted with extensive fire protection measures, including inert gas systems, cofferdams and firefighting equipment. In this modern age of health and safety and increased technology, vessels have become safer thereby reducing the likelihood of an arbitrator finding that there was a risk of fire spread and/or explosion.

Another danger which was repeatedly contended for by salvors was the risk of second strikes by Iranian or Iraqi forces. This was far from a given and required careful consideration of the broader pattern of attacks in the region. In one particular award, the arbitrator held that, despite an unidentified helicopter loaded with rockets approaching the casualty whilst the salvors were on site, the arbitrator only found that there was a very low order risk of a second strike. At the start of the conflict, the arbitrators found that the risk of second strikes was low, however this changed towards the end of the war when there were several second strikes, including cases where salvage tugs were alongside.

As with all LOF arbitrations, the level of encouragement was hotly debated. On several occasions, the arbitrators held that exceptional encouragement should be given to reflect the salvors’ willingness to maintain tugs and salvage equipment in a war zone. In part this was to reflect the fact that war risk insurance became so high that it became uneconomic to fully insure some tugs and the fact that crews had to be paid bonuses to work in such dangerous circumstances. It is clear from the awards at the time that the arbitrators believed that, without this encouragement, there would be a real danger that salvors would refuse to operate in the region.

1 HFW maintains a searchable database containing over 755 awards from 1975 to present day that are index linked to inflation and can be used as a tool to compare other comparable salvage services.

It is worth noting that the standard of proof required to establish that a casualty was exposed to a given danger is such that the Contractors do not have to prove on the balance of probability that a danger would have materialised, only that the danger was one that was sufficiently likely to materialise to be worthy of being taken into account.

Helpfully, the Appeal arbitrator considered the appropriate level of encouragement that must be given to salvors who are willing to work in areas classified as a war zone, even if the risk of attack is remote and apprehended. He based his assessment on a previous award which set out the principles to be applied which stated that:

> *"Public policy is an important factor in fixing the level of awards. This simply means that awards have to be sufficiently generous, where possible, to encourage salvors to do what is in the best interests of property owners and underwriters generally... It is clearly in the interests of owners and underwriters that high class professional salvors like the Contractors should dare to provide salvage services in the Persian Gulf despite the conflict between Iraq and Iran. In order to do so, they have to bear exceptional costs of operation and they have to accept unusual risk to their tugs and the men who man them. It is equally clear that they will only be encouraged to do so if the level of award is unusually high".*

So how might an LOF tribunal approach the issue now? It is clear from our review that, despite the apparent risks posed by missile, drone and UAV attacks on shipping in the Red Sea region, the LOF arbitrators will still have to carefully weigh up all the available evidence before finding that there is a substantial high level risk from the sort of dangers that one might expect to be advanced following the successful salvage from a vessel in a high risk area. Even if the number of attacks escalate, salvors will still have to make good their case on dangers and so the need for supporting evidence will be just as relevant as it was during the Tanker War in the 1980's. That said, even where there is no risk to salvors being harmed by terrorist or war-like activities, where there is an apprehended risk, the tribunal have indicated that they must still be given real effect in fixing a just award with the requisite degree of encouragement to salvors to operate in a war zone[2].

2 LOF Digest – Issue 12 dated July 2006

For further information, please contact:

TOM WALTERS
Partner, London
T +44 (0)20 7264 8285
E tom.walters@hfw.com

HENRY CLACK
Associate, London
T +44 (0)20 7264 8494
E henry.clack@hfw.com

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