

A NOT SO PRIVATE ARBITRATION

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Without much fanfare, the 11th edition of the key salvage industry standard contract, Lloyd's Open Form (LOF 2011), was published at the end of last year. It introduced some welcome changes, although several received little publicity.

The changes were designed to bring the form up to date and reduce time and cost in dealing with container ship cases. The key change relates to container ship salvage cases, with the new form seeking to make the process of dealing with these far more manageable.

Previously, in the case of large container ships with hundreds of cargo owners, notice of the arbitration had to be given to each cargo owner for any award to be binding.

Given that today vessels regularly carry more than 15,000 boxes, the problem of notifying and attempting to settle with each cargo owner is both time consuming and often disproportionately expensive to the sums in dispute.

Under LOF 2011, notices in respect of salvaged cargo may be sent to the party or parties that have provided salvage security in respect of that property, namely, the cargo insurers. This will greatly expedite and reduce the costs of progressing and running a salvage arbitration for owners and salvors.

A rather less known change is that LOF 2011, in an attempt to provide better statistics and access, now requires notification to Lloyd's Salvage Arbitration Branch, which will subsequently publish all LOF awards, with certain exceptions.

Under LOF 2011, notification of its use must be provided to Lloyd's - Lloyd's Salvage Arbitration Branch will administer this free of charge - mainly so the level of use of the contract may be gauged and more accurate statistics kept.

Previously, awards were confidential between the parties, replicating the usual system of private arbitration that ensured the parties did not have to air their dirty laundry in public. However, under



LOF 2011, awards, together with reasons, will be publicly accessible via subscription to the Lloyd's website.

The stated aim of this change is to make the market more transparent and inclusive for salvors and property underwriters and to promote early settlement discussions between the parties. All well and good, you may think, but it does bring with it certain dangers regarding the disclosure of evidence concerning the circumstances of the salvage.

Owners are unlikely to want this to be in the public domain because it may fuel further litigation with charterers and/or cargo interests if, for example, evidence of the initial state of the casualty or its cause could potentially give rise to unseaworthiness or gross negligence arguments.

The parties can, however, apply to the arbitrator to prevent publication of an award where there is 'good reason' for withholding it. It is likely that these applications will relate to specific commercially sensitive information a party wishes to keep confidential, rather than any general concern. It seems likely that in most cases a party will wish the award to remain confidential. This is equally true for

salvors where negligence or a failure to exercise best endeavours has been alleged.

Other new provisions under the renewed LOF help reduce the administrative burden, greatly speed up the process and of course reduce costs.

One example is the problem for salvors of a container vessel in trying to reach a settlement with all cargo interests, particularly those that are not represented. Without a settlement being agreed with all cargo interests, the salvors often have little choice but to progress the arbitration.

Under LOF 2011, where an agreement is reached between the salvors and the owners of at least 75% of the value of the salvaged cargo, that agreement will be binding on all owners of salvaged cargo.

Additionally, an arbitrator may now order that cargo below a certain figure is omitted from the salvaged fund and excused liability. This applies where the costs of including the cargo in the fund is disproportionate to its liability for salvage. The award may then be proportionately split between the remaining parties.

Clearly, these new provisions help, but parties should stay alert to the new disclosure rules.

Given these rules, it is important for parties to ensure as far as possible that, first, legal privilege over evidence is preserved following the salvage operation; and, second, that it is carefully considered for relevance, to prevent the unfortunate situation of a party disclosing information it does not want in the public domain and that was not necessary for the purpose of the arbitration.

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