TRANSACTIONS (TM)

The Institute of Marine Engineers

PAPER No.8

INSURANCE CLAIMS FOR SALVAGE AND DAMAGE, AVERAGE ADJUSTERS, MARINE ARBITRATORS AND LOSS ADJUSTERS

by R Rutherford

ISSN 0309-3948
Trans I Mar E (TM) Vol 91 Part 6
Paper No.8

THE INSTITUTE OF MARINE ENGINEERS
76 Mark Lane, London EC3R 7JN

Telephone: 01-481 8493 *Telex: 886841*

All papers are indexed in the British Technology Index

Paper read at The Institute on 14 November, 1978

INSURANCE CLAIMS FOR SALVAGE AND DAMAGE, AVERAGE ADJUSTERS, MARINE ARBITRATORS AND LOSS ADJUSTERS

R Rutherford *

SYNOPSIS

In this paper the author hopes to review, in general terms, the procedure and practice involved in the adjustment and presentation of Marine insurance claims for salvage and damage, and will also endeavour to illustrate the part played in the process by Marine Arbitrators, Average Adjusters and Loss Adjusters.

Modern day practice of marine claims settlement owes a great deal to the past, deriving much from the development of Marine Insurance over the ages, as well as to the attempts made to codify its customs and usages as they were established in the various commercial centres which dealt in such insurance.

The origin of Marine Insurance is lost in the mists of antiquity, although maritime provisions having the character of the Marine Laws in use today, known as the Rhodian Laws, were certainly supported by Mediterranean countries during the period between 900 and 700 B.C. However, there is no evidence of the existence of Marine Insurance in any commercial sense before 1000 A.D. Nevertheless, the progress of the practice of Marine Insurance into the commercial centres of Europe from the 12th or 13th Century A.D. can be traced, and its gradual development is reflected in the various ordinances produced in Italy, Spain, France, Germany and Belgium in the 15th and 16th Centuries. The "Ordonnance de la Marine", produced in France in 1681 and considered to be one of the most perfect achievements in codification ever accomplished, had great influence on the laws and practice of Marine Insurance in Britain and America and, with very little revision, was largely incorporated in the Napoleonic Code de Commerce of 1807.

In Britain the first form of Marine Insurance probably came from a group of Hanseatic Merchants established in London in the 14th Century, but as time went on more and more Marine Insurance was written, until toward the end of the 17th Century and the beginning of the 18th Century came the beginnings of Lloyd's and the establishment of new Insurance Companies under Royal Charter. Nevertheless, no real attempt had been made to regulate or codify the practice of Marine Insurance in this country and there were few properly reported legal precedents from which assistance could be drawn. However, in the second half of the 18th Century, Lord Mansfield introduced a great many changes in the Court of King's Bench and his decisions and dicta, drawn from close examination and consideration of the continental codes, ordinances and usages, established many of the precedents and principles, which became the foundation of English Insurance Law. In turn, his decisions found favour in the eyes of eminent American Judges and the principles he had laid down were adopted as the basis of subsequent American decisions.

Eventually, in 1894, the Lord Chancellor, Lord Herschell, introduced his Marine Insurance bill to Parliament and it was submitted to the various legal, insurance, shipowning and other commercial bodies who were thought to be concerned. The bill sought to codify, as exactly as possible, the law then existing in England relating to Marine Insurance. The bill was finally adopted as the Marine Insurance Act 1906 and, except for a few sections since repealed for fiscal reasons, remains to this day the fundamental basis for marine underwriting and claims settlement as practised in London; implemented, of course, by subsequent legal decisions and definition. It may also be interesting to note that the form of Marine Policy, known as Lloyd's S.G. Form, is attached to the Act as its First Schedule and is accompanied by a set of Rules for the Construction of a Marine Policy in which many of the words and phrases used in the policy form are defined and given the meanings ascribed to them after what was, at that time, nearly three hundred years of tradition and legal decision.

Thus it will be apparent that the provisions of the Marine Insurance Act and the legally tried and tested wording of the S.G. Form, however archaic they may seem to be, are essential to an understanding of Marine Insurance Settlements as they emanate from London. In addition, however, the procedures followed in London are also derivations from the past.

In the early days of Marine Insurance the Underwriters

* Lloyds Underwriters Claims and Recoveries Office, London

were to be found among Merchants, Bankers and Moneylenders who, undoubtedly, treated their involvement in Marine Insurance as something of a sideline. However, as commerce increased and the demand for insurance grew, more professional underwriters began to emerge. The story of the inception and growth of Lloyd's and of the Insurance Companies specializing in the Marine field has been the subject of many books and has no place in this paper. Suffice it to say that up to the present day, the gradual increase in experience and growth of professionalism among Marine Underwriters gave rise to the many separate forms of insurance cover now available and a multitude of clauses designed to meet varying situations and insurance requirement. This also led to the formation of such organizations as the Association of Average Adjusters and the Salvage Association, both of which owe their 19th Century birth to the then increasing demand made by Marine Underwriters and their clients, for improvement in the methods of settling claims, the provision of better facilities for the investigation of marine casualties, and the protection of property subjected to the perils of the sea. During the course of this century, the demands upon Underwriters brought about by the growth and increasing complexity of Marine Insurance on a World-wide scale gradually led to the appointment of individuals skilled in the work of negotiating and settling claims, and then to the formation of the various claims offices as we know them today.

The London Marine Market (comprising Lloyd's and the Insurance Companies writing marine business) relies upon Lloyd's Marine Brokers for its business. Each Company and Broker has a claims department and, although individual claims men are retained by some Lloyd's Underwriters, the majority of Marine Underwriters at Lloyd's subscribe to the office with which the author is connected.

Lloyd's Underwriters' Claims and Recoveries Office is broadly divided into four sections: Hull, Cargo, Reinsurance and Recoveries, and the sections normally function independently of one another. The claims offices established by the Marine Companies and the Broking Houses are constituted on similar lines and adopt similar practices and procedures. It should be apparent, however, that Brokers' and Underwriters' claims offices must, of necessity, adopt postures in opposite relation to one another if the interests of their principles are to be properly protected. Indeed, recent legal decisions in London, touching upon the law of agency as it affects Brokers, have to some extent confirmed the need for such postures.

However, it should not be assumed that the parties remain at "arm's length" or that the interests of the principal parties to a Marine Insurance Contract would be better served if they did. Co-operation between Lloyd's and the Insurance Companies' claims offices in London and elsewhere, and their relationship with the Broking Houses is of a very high order indeed.

The procedure for the settlement of Marine Hull claims in London follows the procedures established by convention in the underwriting field. When an insurance is first placed by the Broker he takes it for quotation to a Lloyd's or Company Underwriter whom he knows to be generally accepted in the Market as a leader or as an expert in the type of insurance required. Having reached agreement on the conditions of the proposed insurance and a satisfactory rate of premium for the risk, the Broker then goes to other Underwriters in turn, until the risk is fully subscribed. The first Underwriter approached is known as the slip, or overall, leader. If he happened to be a Lloyd's Underwriter, the first Company Underwriter to subscribe thereafter would become the Company leader on that insurance. On the other hand, if the roles had been reversed the Company Underwriter would be the overall leader and the first Lloyd's Underwriter to subscribe thereafter would become the Lloyd's lead.

Any claims which might arise on that particular policy would follow the pattern established at the time the insurance was placed and would be advised first to the overall leader and then to the Lloyd's or Company Market lead, as appropriate. By tradition, subsequent conduct of the case would be the responsibility of the overall leader or his claims office and settlement by him would normally be supported and followed by the claims offices acting for the other Underwriters. That is not to say that other Underwriters subscribing to a policy, or their claims offices, are inevitably bound by the settlements agreed by the leader. On the contrary, each individual Lloyd's or Company Underwriter is fully entitled to take whatever course he may think fit when accepting or rejecting a claim, but disagreement leading to independent action is something of a rarity nowadays. If it were not so, the task of dealing with the enormous volume of Marine Hull claims lodged in London during any one year would be almost impossible to discharge.

The burden of responsibility resting upon the leading Underwriter's claims office is a very heavy one and, as Underwriters willing and able to lead the majority of Hull risks generally shown to the Market, are comparatively few in number, the onus of the bulk of the Hull claims work falls on an equally limited number of claims offices. However, the spirit of trust and co-operation built up among them does a great deal to lighten the load, and in major or complicated cases it is common practice for the leading Underwriter or his claims office to consult with other Underwriters on the policy, or, through the Broker, arrange Market meetings of all Underwriters, or set up working parties and ad hoc steering committees for the purpose of prompt and efficient handling of the many problems inherent in the case and to avoid any unnecessary complications which could be detrimental to the interests of the Assured and his Underwriters alike. As to be expected, this interchange of ideas and experience is not confined to individual cases. Lloyd's and Company Senior Claims Adjusters meet weekly under the auspices of the Institute of London Underwriters for the purpose of discussing claims matters of general and particular interest, and the meeting provides a regular forum for the exchange of ideas and advice.

The Market Technical and Clauses Committee is composed of Lloyd's and Company Underwriters and Senior Claims Adjusters and concerns itself with the task of preparing or amending the various standard clauses issued by the Market. It is not, as might be supposed, an instrument of suppression for the benefit of Underwriters but, more often than not, concerns itself with the task of finding satisfactory and appropriate language to enable Underwriters to provide additional cover where it is required, or to correct anomolies which have been demonstrated by experience, in such a way as to avoid undue violence to the value of the remainder of the policy wordings established by law and precedent. Similarly, other Committees, such as the Market Liaison Committee with the Association of Average Adjusters and the Market Claims Delay Committee, composed of Lloyd's Brokers, Underwriters and Claims Adjusters, are in being to enable major difficulties to be discussed and remedied.

Having set the stage, so to speak, it would now be as well to consider the function of some of the players.

The basis of Marine Insurance is indemnity and it is the responsibility of the Assured, at all times, to take every appropriate and necessary step to ensure the safety and well-being of his own property. Should an accident occur, the onus is primarily upon the Assured to show that the resulting loss is one which comes within the cover provided

by his insurers. In the event of a casualty, it is the responsibility of the Broker, acting for his client, to advise the leading Underwriter of the fact and of the steps taken by the Assured, and to seek such instructions as the Underwriter may wish to give. It is the continuing responsibility of the Broker to keep the leading Underwriter advised of further developments as they occur and seek his approval or confirmation of actions taken by the Assured in connection with the potential loss. In most cases, and especially in the event of damage to the insured property, it would be normal practice for the leading Underwriter to nominate a surveyor to act on his behalf.

In London, it is the usual practice of Hull Underwriters to instruct the Salvage Association and, in many cases, cargo Underwriters would follow suit, but it is common practice for cargo Underwriters to instruct one of the many independent firms of specialist cargo surveyors. When the matter has reached a point at which the claim can be demonstrated and quantified it is the responsibility of the Broker to present it to the leading Underwriter, or his claims representative, supported by such information and documents as may be required to enable a complete assessment to be made in terms of the policy of insurance.

Obviously, claims come in many forms and those which involve nothing more than damage to the insured property are comparatively straightforward and simple to deal with. However, claims arising from collisions or salvage, or which involve more than one interest, can become complicated in the extreme. In such cases it would be usual for the Assured to enlist the service of an Average Adjuster whose function would be to examine all aspects of the loss and prepare a statement or adjustment of the claim, which would then be submitted to the Underwriters. In this country most firms of Average Adjusters are members of the Association of Average Adjusters which, as has already been indicated, had its origins during the last century, having been founded in 1869. The members seek to present an impartial approach to the matters they are required to consider and are bound by the Rules of the Association, entry to which is determined by way of examination. Adjustments are governed by the Association's Rules of Practice which reflect the York/Antwerp Rules dealing with General Average, the effect of relevant legal decisions and some of the old customs of Lloyd's.

Lloyd's, the Marine Insurance Companies and the P & I Associations appoint Representative Members to the Association and its Annual Subscribers include Shipowners, Insurance Brokers, Maritime Lawyers, Insurers and others, throughout the World.

However, it should not be assumed that adjustments prepared by members of the Association are necessarily incontrovertible. Although Marine insurance matters have attracted a great deal of legal decision, questions continue to arise for which there are no ready made legal solutions and an Adjuster's conclusions of law on any such point can be disputed. However, major disputes between Adjusters and Underwriters leading to litigation are, fortunately, uncommon.

To come now to salvage claims. Clearly, salvage can take many forms. The Marine Insurance Act 1906, Section 65, sets out a definition of salvage charges and draws a distinction between "voluntary" salvage and salvage under contract. The distinction is not an easy one to determine in practice and it would not be appropriate in this paper to endeavour to explain the legal and practical differences between the two. Suffice it to say that although it has been argued that salvage rendered under "no cure no pay" contracts, such as Lloyd's Open Form, could fall into either definition, it has been the practice to treat such salvage as "charges recoverable under maritime law by a salvor independently of contract" and, therefore, as a loss by the perils insured against which the salvage services sought to prevent.

Major salvage claims are usually difficult to resolve and often attract a great deal of uniformed criticism directed toward those who are required to deal with them. The circumstances which give rise to the need for salvage are usually such that time is of the essence and rapid decisions are called for. The owner of the stricken vessel is in no position to make the best bargain and the salvor is not keen to hazard his reputation and expensive equipment without some assurance that his efforts will reap a reasonable reward. "No cure no pay" contracts would appear to offer the best solution since they would seem to provide the basis for urgent action and yet make provision for the financial and other aspects of the salvage contract to be determined thereafter. However, no one form can be expected to deal with all eventualities and a great deal must be taken on trust.

Salvage awards may eventually be assessed by the Courts or by Maritime Arbitrators. Under Lloyd's Open Form, which is approved and published by the Committee of Lloyd's, the Committee undertake to appoint an arbitrator if so requested by one of the parties to the contract. Such arbitrators assess salvage awards on the same principles as the Court would apply and must not only take into consideration such matters as the values of the salved property, the value of the salvor's property used in the operation, the degree of danger to which the salved property and salvors equipment was exposed, the nature of the services rendered and the time spent in rendering the services and all other relevant factors, but must also, as a matter of public policy, ensure that any award will be such as to encourage others to render similar services in the future. Many of the problems which arise in connection with salvage claims frequently rest with the principle parties themselves. It will be obvious that considerable time may be taken up in the first instance assessing the values at risk, providing security, and thereafter in providing the necessary information and argument for the purpose of the Arbitration.

Lloyd's Form is, of course, designed for general use worldwide. The current public concern over oil pollution and its consequences has increased the problems facing the owners and salvors of stricken vessels and their cargoes, exposing both parties to much greater potential liability than before. These developments have increased the demand for modification of the Lloyd's Form and the matter will be given full consideration now that the Form is under review. However, the need to avert or minimize oil pollution raised many other salvage problems. Coastal states have the right to order destruction of vessels polluting their waters and vessels in distress may be denied entry into repair ports if there is any danger of pollution. Recent well publicized casualties have done nothing to alleviate the problem and it remains to be seen what action governments will take to meet public concern over the matter. However, it can be assumed, with some certainty, that salvage claims will not become any easier as a result.

Finally, reference should, perhaps, be made to that other recent phenomenon, North Sea Oil. The structures created to find it and pipe it ashore come within the portfolio of the Marine Underwriters and, therefore, any claims which arise are dealt with by those Underwriters and their claims offices. The structures are, strictly speaking, a type of land construction in a marine environment and have brought about an association of civil and marine engineering expertise. Although the insurances are broadly based on marine law and practice, elements of non-marine practice have crept in. Loss Adjusters and Assessors who might, perhaps, be said to play a role in non-marine affairs similar to that of the Average Adjusters in marine matters, have

been involved in the oil industry in USA for many years and are, naturally, used by Underwriters in London. However, whilst Average Adjusters normally confine themselves to a statement of the claim based upon law and practice, Loss Assessors are free to recommend to Underwriters courses of action in light of the facts and the terms of the insurance and, on instructions from Underwriters, may even take claims to negotiated settlement. However, in a recent claim which concerned one of the North Sea constructions Average Adjusters and Loss Adjusters were involved and it is to be expected that as time goes the distinction may become less apparent.

Discussion

MR G G HOWARD (Salvage Association) Opened the discussion by pointing out that Mr Rutherford had referred to a recent case in which, because of the oil pollution problem, no attempt had been made to deliver the vessel to a place of safety and she had been deliberately sunk in deep water. He enquired whether the author could comment on underwriters' liability for a total loss in such circumstances.

MR C A SINCLAIR, CEng, FIMarE (Salvage Association), noted Mr Rutherford's remarks, where he stressed that rapid decisions were called for in relation to agreement of salvage contracts, and wondered whether the author would be free to comment upon any other standard types of contract, especially as to their acceptability or areas of application. He had particularly in mind a recent offer of assistance where a Russian contract was submitted. It would be interesting to know what other contracts were available and wherein the major differences lay.

A further question related to Mr Rutherford's mention of Lloyd's Open Form in the paper. Would he please clarify that a little further, particularly the Open part, as it would seem that a Standard Form was being offered.

MR H J MILLER, BSc (Hons,) CEng, FIMarE, FRINA, FCMS, AIArb, was grateful to Mr Rutherford for such an excellent paper, and to the Institute for its vision in including in its transactions a subject of such great interest and importance to all in the Maritime field.

As an aspiring candidate in the field of Maritime Arbitrations it was with particular interest that he had noted the author's remarks in respect of an arbitrator's award following a dispute arising under Lloyd's Open Form. He had stated that "such arbitrators . . . not only take into consideration such matters as the values of the salved property . . . but must also, as a matter of public policy, ensure that any award will be such as to encourage others to render similar services in the future". Mr Miller suggested that the latter part of that statement was such that his paper should be "remitted" for further consideration as being "bad on the face of it" for, unless the arbitrator's award was in the form of a "case stated" it could never "encourage others to render similar services in the future" because, in the UK, unlike the United States where arbitration awards were made public, others would not be aware of the contents of the award since one of the main arguments in favour of arbitration in the UK was that the hearings and the award were confidential to the parties concerned.

Perhaps the author had been literally correct when he said that ". . . vessels in distress may be denied entry into repair ports if there is any danger of pollution. . .", as he probably had in mind the cases where it was the vessel itself in distress and not the crew (i.e. the lives of the crew were not at risk). However, the term "vessel in distress" more generally had the connotation that the crew also was in distress. Mr Miller wished to be assured that no port had the right to deny access to such cases and he asked if there were not an international law prohibiting denial of entry to vessels in distress. In the same sentence the author had stated ". . . Coastal states have the right to order destruction of vessels polluting their waters. . ." (though perhaps for the peace of mind of irresponsible Masters and Chief Engineers he should rephrase that statement!); would the author be kind enough in that connection to advise

1) whether or not such coastal states had the unilateral right to order such destruction;
2) what the rights of the Underwriters and the assured were in such cases.

The author had noted that "in London it is the usual practice of Hull Underwriters to instruct the Salvage Association and, in many cases, cargo Underwriters would follow suit, but it is common practice for cargo Underwriters to instruct one of the many independent firms of specialist cargo surveyors". Mr Miller was somewhat confused when it came to the collection of General Average contributions as he could not understand how it had come to be the practice that the Broker collected from H and M Underwriters for the vessel's proportion, whereas it was the Average Adjuster who collected cargo's proportion. Neither could he understand how cargo interests could, as they often did, reject the request for payment of cargo proportion to GA on the basis of "unseaworthiness" when H and M had already declared their assessment of the case by payment of their proportion.

One thorny point which the author had not touched upon, and which was becoming all too prevalent, was some Brokers' delays in effecting payment to the assured. He was dealing with the case where the Leading Underwriter and second Underwriter (and sometimes the third Underwriter) had accepted the Average Adjustment of a valid claim. It was commonly appreciated that London Underwriters paid up promptly, and that often foreign Underwriters took longer, but was that any reason why Shipowners should have to wait often for many months from the acceptance of the average adjustment before they were reimbursed for monies spent on damage repairs, which monies they had been hard put to find in the present depressed market? It was appreciated that Underwriters, to their credit, did often make payments on account before the finalisation of the average adjustment; it was also appreciated that some Brokers went out of their way to assist a client even to the extent of advancing monies against a valid claim. However, more often than not if an Owner allowed collection and final reimbursement to follow its own natural course, he would wait an inordinately long time for his money. Perhaps such cases could be dealt with by the "Market Claims Delay Committee" but if that were the case, he suggested they could have a full programme. In his view Brokers should be obligated to present the assured, in respect of each and every claim, with a record sheet of collection dates and amounts involved, and should be obligated to effect payment of the sums so collected with interest – that would have the effect either, of speeding up payments or at least of ensuring that the assured was not unreasonably out of pocket at the end of the day.

He asked the author if he would advise on two final points:

i) the reasons for an "Increased Value" insurance;
ii) the reasons why some Underwriters chose to be Leaders; it would seem that they were put to a lot of trouble and expense, which other Underwriters did not have to undergo

Author's Reply

Mr Rutherford said that Mr Howard's question touched upon the second question by Mr H J Miller which was concerned with the right of coastal states to take extreme measures in the event of the threat of oil pollution to their shores. When that particular convention came into being Underwriters were, naturally, faced with the question now posed by Mr Howard.

The author did not believe that it would be right for him to endeavour to set down the details of the lengthy Market debate which followed but it was eventually tacitly accepted that if the disposal or destruction of a vessel, by, or on the orders of, a coastal state could be shown to have been directly brought about as a consequence of oil pollution, or the threat of oil pollution, arising from the casualty to which the vessel had fallen victim, then her total loss at the hands of the coastal state could be accepted as a loss by the peril to which she was initially exposed. However, the matter could not be said to be completely free from doubt and, for the benefit of Owners requiring a more positive form of assurance that their Marine Policies would respond, the Institute Pollution Hazard Clause was produced. It read as follows:

> "Subject to the terms and conditions of this Policy, this insurance covers loss of or damage to the Vessel directly caused by any governmental authority acting under the powers vested in them to prevent or mitigate a pollution hazard, or threat thereof, resulting directly from damage to the Vessel for which the Underwriters are liable under this Policy, provided such act of governmental authority has not resulted from the want of due diligence by the Assured, the Owners or Managers of the Vessel or any of them to prevent or mitigate such hazard or threat. Masters, Officers, Crew or Pilots not to be considered Owners within the meaning of this Clause should they hold shares in the Vessel.
>
> All other terms and conditions remain unchanged."

He believed it was true that, in all cases to date which had resulted in the destruction or disposal of the vessels concerned in order to avoid or minimize pollution or the risk of it, it had previously been demonstrated, to the satisfaction of the Underwriters concerned, that the vessels were already demonstrably Constructive Total Losses.

Mr Rutherford regretted that he was unable to provide any positive answers to Mr Sinclair's first question because if any truly standard forms of salvage agreement existed, other than the Lloyd's form and those used by the Russians and the Chinese, he had not come across them. He was prepared to believe that other forms existed, and might emerge from time to time because, some years ago, a form issued by one of the maritime states of Central Africa was imposed upon an unfortunate shipowner. Under its terms he was required to accept salvage services from the Director of Marine of that State and to accept any award for those services which would eventually be determined by the Government of that State. He was also required to make payment whether or not the services proved to be successful.

The Russian and Chinese Forms, in their effect, produed similar results to those which flowed from the use of Lloyd's Standard Form but, as might be expected, they provided for arbitration in their own countries.

It was really impossible to comment on other forms of salvage agreement with regard to acceptability or areas of application, because so much depended upon the circumstances in which they might be offered. Obviously, London Underwriters would have a preference for a form which they knew and understood and under which determination of the issues would be made in London. However, it had to be accepted that vessels which came to grief in territorial waters of other countries were likely to attract the salvors and forms of salvage agreement produced by those countries.

Furthermore, it must obviously be the prime concern of the Owners and Master of a vessel imperilled on the high seas, or in territorial waters and in need of urgent assistance, to obtain such assistance from those nearest at hand who might be properly equipped and able to render it. He could not believe that, in those circumstances, the nature of the agreement for the services would, or should, be anything other than a matter of secondary importance, especially as the right of a salvor to be rewarded for his services existed independently of contract. Nevertheless, it was possible to visualize situations of that kind in which an unfortunate owner could be held to ransom and, for that reason, the use of Lloyd's Standard Form or other forms based upon it, should, in his opinion, be encouraged.

Mr Sinclair's second question was more easily answered. There was only one form of Salvage Agreement approved and published by the Committee of Lloyd's and it was known as Lloyd's Standard Form of Salvage Agreement. The form left "open" the question of remuneration for the services to be rendered and, in the event of success, such remuneration might be determined by agreement between the parties or by Arbitration in London.

Until the beginning of this century it was usual for such forms to provide for a stated amount of remuneration in the event of success but subsequently, at the request of salvors, reference to a stated amount was omitted. At that time it was probably necessary to distinguish between the two types of agreement and the term "Lloyd's Open Form", as an apt description for the one in current use, had persisted to this day.

The author was grateful to Mr Miller for his comments and questions but, as some of his questions touched on matters which might easily provide the basis of several separate papers, he trusted that he would forgive him if the answers were not as fully developed as, perhaps, he would like.

In his first comments Mr Miller took Mr Rutherford to task for his statement that arbitrators must, "as a matter of public policy, ensure that any award will be such as to encourage others to render similar services in the future." He argued that as salvage awards in this country were not made public "others" would not be aware of the contents of the awards and, therefore, would not be able to derive encouragement from such awards.

Firstly he should make it clear that his statement was part of a paragraph in which he had listed, in general terms, some of the principles which govern the assessment of salvage awards by Lloyd's Panel of Arbitrators. Secondly, it was apparent that, even in those salvage cases which came before the Courts, the encouragement to "others" did not lie in any readily identifiable element of the award itself, but simply in the belief that such awards would, and did, contain a generous measure of additional recompense.

By way of illustration he referred to the judgment of Mr Justice Willmer, in the "Queen Elizabeth" case, Lloyd's List Law Reports, Vol 82, page 821 where, in the course of that judgment, he had said:

> "I have tried to give effect to the well-known principle whereby a salvage award should be a fair remuneration for the services rendered, bearing in mind that salvage services are the services of volunteers who voluntarily incur the risks thereby involved. I have tried to give effect to the principle that awards must be such as will encourage these salvors, *and others*, to be ready to go

out and render like services in similar emergencies to other vessels.

In the case of the "Bustler" and the "Metinda III" I have tried to give effect to the fact that they are primarily and in the first instance, professional salvors. As Sir William McNair put it, salvage awards to such plaintiffs are bread and butter, whereas to the other plaintiffs claiming in this case they may more properly be described as jam. I need not refer to authority for the proposition, which is well established, that salvors of this character are entitled to a special measure of generosity."

The Judge then proceeded to make his awards in the form of a total sum to each of the plaintiffs except the Admiralty, where, by special request, he made an individual award to each of the Admiralty vessels involved. However, none of the awards, then or subsequently, was broken down into its components and it was not possible to determine what part of each award represented the element of "encouragement to others." Therefore, such "others" would only have been able to derive positive assurance and encouragement from the Judge's words as opposed to his awards.

The author knew of nothing to suggest that the principles mentioned by the Judge were any less valid today or that they were disregarded by practising salvage arbitrators and, with respect to Mr Miller, he did not believe that publication of arbitration awards would do anything to provide greater encouragement to "others" than they might already derive from the certainty that the principle of generous awards was still observed.

Mr Miller was correct in his assumption that when he used the expression "vessels in distress" he had in mind the vessels themselves and for that reason he also used the term "repair port" as distinct from, say, "port of refuge", in the same sentence. However, he was unable to give Mr Miller the assurance he required because he was not aware of any international convention under which a Maritime State could be compelled to take in a distressed vessel, with or without crew, if the condition of that vessel were such as to present a hazard to the lives or property or environment of the inhabitants of the State. In such circumstances the governing authorities of that State would be faced with the awful dilemma posed by the difficult choice between the need to afford shelter to the stricken vessel and their responsibilities to the people they govern. International conventions, by their very nature, came into being and continued in force with the willing concurrence of those countries which participated in them and he could not believe that any such country would be prepared to accept and adhere to any measure likely to bring adverse effects to its people.

Of course, Mr Miller's anxiety was largely based upon hypothetical consideration since there were many ways in which life salvage could be carried out without the need to enter port, but the fact must be faced that past disasters, such as those which had occurred some time ago in Bombay and Houston, and, more recently, following the *AlvaCape/Texaco Massachusetts* collision at New York, as well as the current crop of oil pollution incidents, had induced a greater reluctance among maritime communities to take any steps likely to be prejudicial to those for whom they had prime responsibility.

He was sure that Mr Miller would not expect him to worry too much about the peace of mind of irresponsible Masters and Chief Engineers nor, he suspected, did he believe that a coastal state would order destruction of an offending vessel if the discharge of oil could be simply terminated by closing the appropriate valves. However, coastal states had jurisdiction over their own territorial waters and, therefore, might take such measures as may be authorized by their laws, or which they might consider appropriate in an emergency, to deal with the problem of oil pollution affecting those waters. In addition, the provisions of the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution casualties, done at Brussels, November 29, 1969, allowed coastal states which were parties to the Convention, to take draconian measures on the High Seas.

Article I (1) read:

"Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequencies."

The Convention required that, in the normal course of events, consultation should first take place with other States and, particularly, with the flag State, and that notice should be given to "persons physical or corporate" known to the coastal state to have interests which would be affected by the proposed measures. However, Article III (d) stated:

"in cases of extreme urgency requiring measures to be taken immediately, the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing consultations already begun."

Certain safeguards and guidelines were written into the Convention with the aim of ensuring that the measures to be taken by the coastal State should be in proportion to the threat to that State and should be as reasonable as the circumstances would allow. In addition, the coastal State was required to avoid risk to human life, to assist persons in distress and to facilitate repatriation of crews in appropriate cases.

To complete the answer to Mr Miller, the rights of the Assured and Underwriters to be consulted were protected by Article III, except in cases of extreme urgency, and the coastal State was required to take into account any views they might submit. In addition Article VI provided that:

"Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article 1."

Thus it would seem that the Assured and his Underwriters would have some sort of remedy in the event of excessive measures being adopted by the coastal State, but only to the extent of the damage brought about by those excessive measures. Provision was also made in the Convention for the method of determining any controversies which might arise. The text of that Convention and the texts of other Conventions which might be relevant to Mr Miller's questions could be found in Najendra Singh's book of "International Conventions of Merchant Shipping", Volume No. 8 in the British Shipping Laws series published by Messrs. Stevens & Sons Ltd.

Mr Miller's next question, in two parts, was concerned with the subject of General Average. The answer to the first part lay in the fact that general average formed part of the ancient maritime law and the obligation to contribute to it depended upon a general rule of that law. Thus, general

average existed quite independently of any contract entered into between a Shipowner and the owner of the cargo which he had contracted to carry, although special terms in the contract of carriage might limit or vary the rights and liabilities of the parties to that contract in respect of general average. Furthermore, the obligation to contribute in general average existed between the parties to the adventure whether they were insured or not.

With that in mind, and in the event of a general average being declared, the onus was upon the Shipowner to take the necessary steps to ensure contribution from the various interests concerned and also to achieve a fair and reasonable apportionment of the general average sacrifice and expenditures over all the contributing parties in accordance with law and practice. Normally that task would be entrusted to an Average Adjuster of the Shipowner's choice. After the adjustment had been completed and accepted by the Shipowner, collection of the ship's proportion of general average from his own Hull Underwriters would follow similar procedures as for any other claim and would be left to his Broker.

However, collection of the appropriate contributions from the other parties to the adventure was a different matter entirely, simply because the contributions became due under the general rules of maritime law, as he had tried to explain, and, therefore, must be recovered by the Shipowner from the other principal parties involved in the adventure exposed to risk at first instance. It was for those parties, in turn, to make whatever recovery might be appropriate from their own Underwriters.

The answer to the second part of Mr Miller's question lay in the fact that under the Marine Insurance Act 1906, which governed a Hull policy, the test for unseaworthiness was not the same as it was under a normal contract of affreightment governed by the Hague Rules or the various Carriage Acts.

Broadly speaking, to defeat a claim under a Hull Time policy on the grounds of unseaworthiness it would be necessary for Underwriters to demonstrate, in law, that:

a) the vessel was unseaworthy;
b) the unseaworthiness was the cause of the loss;
c) the Shipowner was aware of the unseaworthiness giving rise to the loss.

On the other hand, the test under the Hague Rules and the various Carriage Acts was to determine whether or not the Shipowner had exercised due diligence to make his vessel seaworthy. Various legal decisions, most notably in the case of the "Muncaster Castle", Riverstone Meat Company Pty, Ltd, *v* Lancashire Shipping Co, Ltd, reported in Lloyd's List Law Reports 1961, Vol. 1, page 57, made it clear that following an allegation by cargo of unseaworthiness of the vessel, the burden of proving the exercise of due diligence, which lay upon the carrier, was a very heavy one and was often extremely difficult to discharge.

Mr Miller's penultimate question, which was concerned with the late payment, by some Brokers, of claims money due to the Assured, was not one which he could fairly expect the author to answer. The relationship between Brokers and their clients was a matter between themselves and, on the face of it, it might be thought that any problems which might arise in the course of that relationship should be resolved by the parties themselves. Generalization on the subject were, to his mind, dangerous because it had often been demonstrated that instructions given by the client to his Broker with regard to the placing of insurance had contributed, in large measure, to the problems of collection of claims when a casualty had arisen. The suggestion that the payment of interest might, in some way, act as a remedy, had a superficial attraction and had been made many times before. However, unless the parties chose to air their disputes in Court, where interest might be awarded, or entered into a contractual agreement of some kind, in which provision was made for such compensation in the event of delay, there would appear to be no legal or valid basis for the payment of interest. It might be thought that payment of interest in such circumstances should be imposed by Statute, but it was difficult to see why any such legislation would, or should, be confined to delayed payment of sums due from Brokers to their clients. If legislation of that kind were to be brought into being it could be expected to reach into all other areas of commercial dealing and, unless so worded as to provide absolute certainty with regard to the method and extent of its application in all circumstances and eventualities, could be expected to increase litigation and, consequently, add to the delays. Surely the real answer lay in the freedom of an Assured to choose, or change, his Broker.

The Market Claims Delay Committee, to which Mr Miller referred, was set up to discover ways and means of expediting the processes of handling claims in order to ensure the minimum of delay between the date of formal presentation of the claim and its settlement by the various claims offices acting for Underwriters. Therefore, although the Committee could, and in fact did, encourage all those involved in claims matters within the Market to do everything that could reasonably be done to eliminate or minimize the causes of delay at the level of claims presentation and examination, it had no brief to examine such matters as the accounting processes between Brokers and their clients.

To give complete answers to the two parts of Mr Miller's final question would take more time than could reasonably be afforded, simply because the two subjects he had raised were difficult to explain satisfactorily without reference to their historical development. However, in brief, the answers were:

1) Increased Value and Disbursements insurances, which usually also provided cover against Excess Liabilities, were normally written on Total Loss only terms. They were usually "honour" or "ppi" (policy proof of interest) policies, which meant that the Underwriter was prepared to accept the extent and nature of the Assured's interest in the thing insured without further proof. There were three main reasons for such insurances, which were commonly affected by Shipowners:

   a) they provided the insured Shipowners with cover against the risk that the benefit of any disbursements he might have made, or expenditure he might have incurred, in respect of his vessel, and which, broadly speaking, could not be said to embrace expenditures ordinarily covered by insurances on hull, machinery and freight, would be lost to him, or frustrated by, the Total Loss of his vessel.

   b) they enabled the Shipowner to increase the amount of insurance on his vessel without increasing the valuation in the Hull policy, but subject to the limitation imposed by that policy in respect of additional insurances.

   c) they provided the Shipowner with additional cover on the excess liabilities he might incur in respect of collision, salvage, general average and sue and labour in the event that the value of the vessel adopted for contribution in respect of those matters should prove to be in excess of the insured value stated in the policies on Hull and Machinery. The additional cover so provided was, of course,

also subject to the limitations imposed by the excess liabilities clauses themselves.

2) That part of Mr Miller's final question fell into the "chicken and egg" category. It might be part of an ambitious Underwriter's philosophy that to become a Market leader would be the ultimate accolade, but he suspected that most leaders found themselves in that position as a result of the operation of Market forces rather than a result of their own choice.

Obviously much must depend upon the Underwriter's personality, ability, professional approach and flair as well as upon the financial resources at his disposal, and any limitations which might be placed upon his freedom of action in the use of those resources by those to whom he was responsible. At the same time, the Brokers, who had a duty to their clients to obtain the requisite insurances on the best terms possible, could be expected to seek quotations from those Underwriters prepared to offer them and whose judgment was most likely to be respected and followed by other Underwriters in the Market. Of course, there were also those Underwriters who had made a close study of particular types of risk and who then emerged as accepted leaders on those risks as a result.

Finally, to keep the record straight, it should be remembered that it was, perhaps, fundamental to any Market that those who operated within it should be in competition with one another and, therefore, although leaders were undoubtedly put to a great deal of trouble and expense in order to discharge their responsibilities, they could also expect to be shown a generous share of the business coming into the Market which was, after all, their *raison d'être.*

Published for THE INSTITUTE OF MARINE ENGINEERS by Marine Management (Holdings) Ltd., (England Reg. No. 1100685)
both of 76 Mark Lane, London EC3R 7JN. Printed by Crown Printers (Bedford) Ltd., Bedford (England Reg. No. 910307).