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Representative Claims in Arbitration: Lessons From Lloyd’s

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Although maritime arbitration is now considered to be distinct from both international commercial arbitration and investment arbitration, the procedures have common legal roots as well as many common procedures. As a result, specialists in commercial and investment proceedings may be interested in certain recent amendments to Lloyd’s Standard Salvage and Arbitration Clauses, particularly with respect to representative claims, since some of these mechanisms issues could eventually migrate from maritime proceedings to commercial and investment practice.

For those who do not work in the maritime field, “Lloyd’s” refers to two related entities: the Lloyd’s market, which conducts the business of insurance and reinsurance by creating syndicates to spread the risk of loss across countries and insurers, and the Corporation of Lloyd’s, which can generally be understood to oversee that market. Lloyd’s operates in a variety of fields, including maritime and salvage operations. The Salvage Operation Branch provides a mechanism – the Standard Form of Salvage Agreement (Lloyd’s Open Form or LOF) – by which parties can determine the amounts payable to salvors for efforts to save property damaged at sea and to minimize or prevent injury to the environment. The LOF is perhaps the most widely used international salvage agreement in the world.

The LOF operates in conjunction with Lloyd’s Standard Salvage and Arbitration Clauses (LSSA) and procedural rules. A recent change to the LSSA has opened the door to the use of representative mechanisms in maritime arbitration, thereby adding to the debate about large-scale arbitration (i.e., class, mass, and collective arbitration) in commercial and investment settings.

The relevant provision is found in Clause 14 of the LSSA, which states:

> Subject to the express approval of the Arbitrator, where an agreement is reached between the Contractors and the owners of salved cargo comprising at least 75% by value of salved cargo represented in accordance with Clause 7 of these Rules, the same agreement shall be binding on the owners of all salved cargo who were not represented at the time of the said approval.

This provision was considered necessary in light of the potentially large numbers of cargo owners that can be involved in salvage disputes. While the number of cargo owners will differ from case to case, the ever-increasing size of cargo vessels suggests that the number of owners may be substantial. For example, industry reports suggest that by the end of 2015, the typical cargo ship was capable of carrying approximately 10,000 20-foot equivalent units (TEU). Shipping companies often combine shipments from multiple owners in order to fill a ship of this size, thereby resulting in a multiparty dispute if the ship undergoes salvage operations.

Revised Clause 14 allows the owners with a 75% interest in the salved cargo to negotiate a settlement agreement that binds absent owners, so long as the arbitrator agrees with the terms. This mechanism is similar to the type of collective action clauses (CACs) that are now routinely used in certain commercial and investment settings, such bond restructurings. However, Clause 14 of the LSSA may be the first time that a collective action provision has been seen in the arbitral setting.

On first glance, such a mechanism may seem problematic, since it allows an arbitrator to adjudicate or approve settlements of the rights of parties who are not present in the proceedings. However, arbitrators have always been able to determine the rights of parties who are properly in arbitration but who refuse to participate. Clause 14 arises out of the LOF and Lloyd's standard arbitral rules, which means that absent cargo owners can be said to have agreed to this type of proceeding when they entered into their shipping agreements (assuming, of course, that the default provisions applied in the relevant contracts). Any owners who object to Clause 14 could attempt to negotiate around the language, although it might be difficult for individual shippers to derogate from this provision if shipping companies believe they need 100% compliance with this particular term.

Some observers might suggest that the Lloyd's regime resembles the use of arbitration in contracts of adhesion, where the weaker party has no realistic opportunity to avoid arbitration or other problematic dispute resolution procedures. However, contracts of adhesion are usually found in the consumer context and involve parties who are both unsophisticated and vulnerable, two characteristics that are seldom used to refer to cargo owners involved in international shipping. In fact, cargo owners could be characterized as akin to bondholders who accept CACs as a necessary feature of contemporary commercial practice. This perspective is particularly appropriate given that both bondholders and cargo owners will not know in advance whether they will be a majority group member enjoying the advantage of the CAC or a minority group member suffering the supposed disadvantage. CACs make sense when viewed from the Rawlsian "veil of ignorance," which suggests that Lloyd's new Clause 14 will, too.

The preceding is of course a very preliminary analysis of Clause 14, and the arbitral community will have to watch to see how the clause is used in practice. However, Lloyd's adoption of a type of CAC in arbitration is intriguing, even if it occurs in the realm of maritime and salvage law, since it may herald the adoption of similar contexts, including commercial and investment arbitration, where large-scale disputes are arising with increasing frequency.

Lloyd's Standard Salvage and Arbitration Clauses can be found here.

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