

ASSIGNMENT 2: SALVAGE

ENVIROMENTAL SALVAGE RE-VISITED?

“The ISU believes salvors are inadequately rewarded for the environmental benefits of a salvage operation and resolves to work to amend the current system of remuneration to ensure that they are”

[Draft Policy Paper 2 of the ISU, February 2006]

During the negotiations preceding the 1989 Salvage Convention, there was much discussion on whether, in addition to ship, cargo and freight, prevention of environmental damage should not in itself constitute a subject of salvage and perhaps even give rise to a fund against which the environmental salvage could be awarded.

Comment on the legality and practicality of introducing environmental salvage as is proposed on the ISU Policy Paper 2.

BARBARA VAUGHAN

INTRODUCTION

With the dawn of environmental awareness and oil pollution concerns in the shipping industry arising from oil spillage incidents such as the *Torrey Canyon* and the *Amoco Cadiz*¹, the role of salvors in protecting the environment from such dangers has become a pivotal one. In recognition of this new dimension to traditional salvage services performed by salvors, the law has evolved to deal with a salvor's rights, duties and remuneration in this respect, and in so doing has ameliorated the pure legal principles of the international law of salvage to a significant extent.

Notwithstanding changes to the law of salvage to accommodate rewarding salvage services aimed at preventing and minimizing damage to the environment, and the lengthy negotiations and consultation process which preceded these changes, the International Salvage Union ("ISU") still believes that "salvors are inadequately rewarded for the environmental benefits of a salvage operation and resolves to work to amend the current system of remuneration to ensure that they are"².

The ISU propose the recognition of a separate head of salvage, known as environmental salvage, for which they should receive a reward separate from and in addition to the traditional salvage award to which they have always been entitled³.

This paper will identify and discuss the reasons why the ISU believes the question of environmental salvage should be revisited⁴, and the legal and practical solutions suggested by them in this regard. This proposed salvage regime will then be contrasted with the principles of both the traditional law of salvage and the current law of salvage, as set out in the International Convention on Salvage, 1989, ("The Salvage Convention") and standard contractual provisions in salvage contracts, in particular LOF 2000.

In juxtaposing the proposed ISU regime with the current position, the extent to which the former departs from the latter will become apparent and will, I believe, ultimately show that the legality and practicality of implementing the ISU's proposal makes it unworkable. It

¹ Followed by further major casualties such as the *Exxon Valdez* in 1989 and the *Nagasaki Spirit* in 1992

² ISU Draft Policy Paper 2, February 2006

³ Ibid, at pg 7

⁴ The concept of environmental salvage as so-called "liability salvage" was initially proposed at the CMI's 1981 Montreal Conference, but was ultimately rejected in favour of another remedy, which will be discussed later.

simply cannot be accommodated under the principles of salvage law – while the current compromise position as set out in the Salvage Convention differs from traditional salvage law to a marked degree, the proposal made by the ISU would make it quite unrecognizable. Apart from pure legal difficulties, I believe that the practical problems of implementing the ISU’s proposal mean that both industry (in particular marine insurers) and governments will reject it out of hand.

PROBLEMS FACING THE SALVAGE INDUSTRY

Increasing importance of environmental protection

“Environmental concern has transformed the role of the salvage industry during the past 20 years. And there is every likelihood that this trend will continue for the next two decades.⁵” Environmental protection is fast becoming the most important concern in salvage operations, with the traditional purpose of salvaging the ship and cargo becoming in some instances only a secondary objective⁶. “OPA 90⁷ and other laws establish that the purpose of salvage has shifted from continuation of the voyage to protection of the environment and the public good”⁸. Pollution prevention has become the top priority⁹. Salvage operators are the best line of defence in combating the environmental dangers presented by oil spills and other marine casualties and operate under increasing public scrutiny brought about by extensive media coverage and a zero tolerance policy adopted by government authorities¹⁰. Salvors must now meet both public and political expectations, which are high and unyielding, in carrying out their salvage operations.

Government intervention

The growing concern of coastal states to protect and preserve the marine environment has led to greater government interference in marine casualties and salvage operations.¹¹ The

⁵ Koffeman, commercial manager of SMIT Salvage BV, “How times change”, Maritime Risk International, Vol 19, Issue 7, July/Aug 2005, pg 8

⁶ Ibid. According to Koffeman, 60% of all SMIT salvage services today have environmental protection as the primary objective, and predicts that this will increase to 80% in the next 10 years. An example of this is the case of the *Jolly Rubino*, which caught fire off Richards Bay. The vessel was beyond saving and SMIT’s primary mission was to remove all pollutants, in order to protect the adjacent World Heritage Site. A turtle breeding area and oyster beds were under threat.

⁷ U.S. Oil Pollution Act 1990

⁸ Article published at http://www.smany.org/sma/Arbitrat_April 2001.html

⁹ Archie Bishop, Legal advisor ISU, “Thoughts on the future of salvage remuneration”, ISU Bulletin 24, Sept 2005, pg 7

¹⁰ Ibid, supra at fn5

¹¹ ISU draft Second Policy Paper, Feb 2006, pg 1 – 2

Intervention Convention, 1969¹² was enacted in recognition of a coastal state's right to take steps to "prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution of the sea by oil, following upon a maritime casualty, which may reasonably be expected to result in major harmful consequences."¹³ Although there is no specific mention of salvors or salvage in the Intervention Convention, the UK Merchant Shipping Act 1995¹⁴ deals specifically with salvage and salvors and confers wide powers on the Secretary of State.¹⁵ South Africa is also a party to the Intervention Convention and its domestic legislation¹⁶ confers extensive intervention powers on SAMSA¹⁷. These powers include the power to sink or destroy the ship and/or her cargo¹⁸, which could therefore ultimately result in preventing a salvor from earning a salvage award¹⁹. Furthermore, salvors, no longer being in absolute managerial control of a salvage operation, can be less confident of their ultimate success²⁰.

Increased size of environmental casualties and concomitant increase in cost of salvage services

The increased size of environmental casualties often results in greater work and risk together with lower value²¹. This results in an increase in the expense of salvage services, which traditionally was not recoverable in line with the traditional "no cure –no pay" principle of salvage where a salvor was not successful.

Declining workload in the salvage sector

Whilst fewer maritime casualties is good news for the industry in general, it means that the incidence of salvage is decreasing every year with an attendant loss of income to the salvage

¹² Concluded at Brussels on November 29, 1969 and called the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties

¹³ Article I of the Intervention Convention. The ambit of the Intervention Convention has been extended by the 1973 Protocol to pollution by substances other than oil.

¹⁴ Which enacts the Intervention Convention in s137 – 140 of the Act.

¹⁵ Brice, Maritime Law of Salvage, 2003 , para 6-198 These powers are contained in section 137. Inter alia, in terms of s137(2), the Secretary of State may, for the purpose of preventing or reducing oil pollution, give directions as respects the ship or its cargo and these directions may be given to any salvor in possession of the ship, or to any person who is the servant or agent of any salvor in possession of the ship, and who is in charge of the salvage operation.

¹⁶ The Marine Pollution (Control and Civil Liability Act 6 of 1981 and the Marine Pollution (Intervention) Act 64 of 1987

¹⁷ The South African Maritime Safety Authority

¹⁸ The Marine Pollution (Control and Civil Liability Act 6 of 1981, s4(a)

¹⁹ ISU draft Second Policy Paper, February 2006 pg 2

²⁰ Article published at http://www.smany.org/sma/Arbitrat_April_2001.html

²¹ ISU draft Second Policy Paper, February 2006, pg 2. The introduction of the VLCC and the ever-increasing size and capacity of vessels is contributing to this problem.

industry²². The reduced income inhibits investment by salvors in equipment, training, new technologies and research, which is vital for the successful performance of environmental services²³. The 52- strong membership of the ISU earns barely \$100 million a year²⁴. This level of income is believed by the ISU to be insufficient to encourage further and continuing investment by salvors²⁵. Many international salvors, in order to compete commercially and meet the environmental demands placed on them by governments and the public, have invested heavily in maintaining around – the – clock preparedness to attend to salvage operations around the globe. Only a handful of cases offer salvors the opportunity to recoup on this investment.²⁶ The decreased workload has also resulted in there being fewer salvors and large-scale consolidation in the marine salvage industry²⁷.

Besides the problem of reduced income from a lesser workload, salvors also face the problem of there being fewer opportunities to provide practical training to salvage personnel in the crucial areas such as oil tanker emergencies²⁸.

Disproportion between the salvage award and the benefit to the environment

The benefit conferred to the environment is out of sync with the amount which salvors are paid for their services in avoiding damage to the environment, according to the ISU²⁹. As a practical example of this, the ISU quote the example of *The Prestige* – the claims resulting from the damage caused to the environment from this oil spill are estimated to be in the region of \$1.5 billion; in contrast the amount of the award which the salvors could have expected to receive had they salvaged the ship and cargo (and contained the extent of the leakage) would only have been in the region of \$10 – 12 million dollars³⁰. Furthermore, if one considers that, between the *Prestige*, *Erika* and *Exxon Valdez*, a total of 180,000 tons was spilled costing approximately \$5 billion and that, in 2004 alone, the ISU salvaged over four times that amount³¹, the benefit which their services provide in preventing oil pollution and resultant costs is unquestionable.

²² Archie Bishop, “Thoughts on the future of salvage remuneration”, ISU Bulletin 24, Sept 2005, pg 7

²³ Ibid.

²⁴ ISU Article “Salvors to press the case for environmental awards”, October 2005, published at http://www.marine-salvage.com/media_information/index.asp

²⁵ ISU draft second policy paper, February 2006

²⁶ Koffeman, “How times change”, Maritime Risk International, Vol 19, Issue 7, July/Aug 2005, pg 9

²⁷ Ibid, pg 8

²⁸ Ibid

²⁹ ISU draft second policy paper, February 2006, pg 3 and 4

³⁰ Ibid, pg 4; Archie Bishop, “Thoughts on the future of salvage remuneration”, ISU Bulletin 24, Sept 2005, pg 7;

³¹ ISU draft second policy paper, February 2006, pg 4

Growing criminal and civil liabilities

Salvors have been protected to a large degree from liability from third party claims, due to the so-called “channeling provisions” of the International Liability Conventions³². This has the effect of channeling liability onto the shipowner. However, the Bunker Oil Pollution Convention of 2001 (“BOPC”)³³ contains no such protection for salvors, exposing the salvor to potential third party claims³⁴. The failure to provide for the exclusion of salvors and persons taking preventative measures from liability was objected to during the negotiations of the BOPC by means of a joint submission by the industry³⁵, but the position remained unaltered³⁶. However, a draft resolution was agreed, urging state parties to BOPC to “... introduce legal provision for immunity for persons taking measures to prevent or minimize the effects of bunker oil pollution³⁷” and recommending that national law of state parties should be modelled on the relevant provisions of the HNS Convention which exclude salvors liability³⁸. Tsimplis notes that this position is unsatisfactory, as a state ratifying BOPC may not comply with the Resolution, yet may still be fulfilling its obligations under BOPC³⁹. Salvors and other parties taking preventative measures, such as port authorities, may therefore still be exposed to liability under national instruments providing for strict liability⁴⁰.

A recent EU Directive⁴¹ requires all EU States to impose criminal sanctions for all pollution caused by so-called “serious negligence” within the next 18 months⁴². There has been an application to the London High Court for a judicial review of this directive, requesting the

³² CLC Convention 1992 (in particular Art 4.3 (d)) and the HNS Convention 1996; ISU draft second policy paper, February 2006; Bishop, “Thoughts on the future of salvage remuneration”, ISU Bulletin 24, Sept 2005, pg 7

³³ This convention is not yet in force.

³⁴ ISU draft second policy paper, February 2006, pg 5

³⁵ This included the International Tanker Owners’ Pollution Federation (ITOPF), The Baltic and International Maritime Council (BIMCO), the CMI, INTERTANKO, the International Association of Ports and Harbours (IAPH), the ISU, the International Group of P&I Clubs and Oil Companies International Marine Forum (OCIMF) seeking to reintroduce the responder immunity provisions

³⁶ Tsimplis, “The Bunker Pollution Convention 2001: Completing and Harmonizing the liability regime for oil pollution from ships”, L.M.C.L.Q., Part 1, Feb 2005, pg 90

³⁷ LEG/CONF. 12/11.

³⁸ Supra, fn 33

³⁹ Ibid.

⁴⁰ eg, *The Sea Empress* pollution incident where the Milford Haven Port Authority was fined £4 million (reduced to £750 000 on appeal) under the strict liability regime of the Water Resources Act 1991, s85. cf *Environmental Agency v Milford Haven Port Authority (The Sea Empress)* [1999] 1 *Lloyd’s Rep* 673 The ISU draft Second Policy Paper notes on pg 5 that the Minister of Shipping at the time assured the salvage industry that the Act would be reviewed and appropriate changes made and that in the interim no salvor would be prosecuted under the Act unless there was deliberate pollution by a salvor for pure commercial gain.

⁴¹ EU Directive 2005/35/EC (ship source pollution)

⁴² ISU draft second policy paper, February 2006, pg 6

High Court to refer the matter to the European Court of Justice⁴³. This initiative is backed by the ISU⁴⁴. One of the chief objections to the directive is that the term “serious negligence” is not defined and may aggravate the “trend towards subjective prosecution decisions”⁴⁵. Recent Canadian pollution legislation has also opened the door to potential criminal liability on the part of salvors⁴⁶. Furthermore, there has also been the alarming detention of seafarers, including salvage masters, in the case of the *Tasman Spirit*, and Masters, in the case of both the *Prestige* and the *Karachi Eight*⁴⁷.

The ISU therefore feel that salvors are not given sufficient financial incentives to undertake salvage operations where environmental concerns are at stake, in view of the civil and criminal penalties to which they are being increasingly exposed⁴⁸. Furthermore, this “creeping criminalisation⁴⁹” has the further consequence of “destroying no-blame cultures, discourages openness and erodes seafarer’s morale – it deters salvors in circumstances where we need them most.”⁵⁰

A POSSIBLE SOLUTION?

In light of the above difficulties and considerations which have been briefly set out above, the ISU believes that it is inadequately remunerated for the services salvors render in preventing damage to the environment. As a solution they suggest that a new and separate element should be created – environmental salvage: “if [a salvor] protects the environment, he should be similarly encouraged with a generous award paid by those that benefit”⁵¹. The legal novelty of the recognition of such an award is only apparent after a consideration of the basic principles of the law of salvage, discussed below.

LEGAL PRINCIPLES OF SALVAGE

⁴³ ISU, “Salvage Update”, *Salvage World*, March 2006, pg 1

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ The Canadian C-15 Bill as noted in the ISU draft second policy paper, February 2006, pg 6. This bill amends the Migratory Birds and Environmental Protection Acts.

⁴⁷ ISU draft second policy paper, February 2006, pg 6; Bishop, “Thoughts on the future of salvage remuneration”, *ISU Bulletin* 24, Sept 2005, pg 7

⁴⁸ ISU draft second policy paper, February 2006, pg 6

⁴⁹ Peter Swift, managing director of INTERTANKO, ISU conference, 8 March 2005, published at <http://www.mgn.com/news/newsreleasedetails.cfm?id=5391&type=>

⁵⁰ ISU, “Debate on Compensation for Environmental Salvage, 14 March 2006, published at <http://www.mgn.com/news/newsreleasedetails.cfm?id=5391&type=>

⁵¹ ISU draft second policy paper, February 2006, pg 7

Whilst it is beyond the scope of this paper to comprehensively deal with the law of salvage, it is necessary to briefly set out certain of its fundamental principles in order to comprehend the extreme departure from these principles which a recognition of environmental salvage would necessitate.

Public policy

“The right to claim salvage is a fundamental right of international maritime law, depending neither upon any contractual engagement between the salvor and the owner of the salvaged property, not upon a cause of action in delict (tort)”⁵². Salvage is governed to a significant degree by equity⁵³, and involves both private rights and public policy⁵⁴. “The Courts seek not only to do ‘that which is just and right for [the salvor’s] interests’, but also for ‘the interests of the public, which is to encourage them and give that amount of salvage reward which is due to them’. The reward is given ‘not merely to remunerate the effort made to save the ship, cargo and lives of the persons on board, but also to encourage others to make similar attempts’”⁵⁵.

“No cure, no pay”

Traditionally, salvors salvaged maritime property on a “no-cure no-pay” basis, and the law, for reasons of public policy, rewarded them generously with a view to encouraging them, and other potential salvors to do so again⁵⁶. Unless a salvage operator is successful, he could not recover a reward, irrespective of the costs and expense to which he had been put. “The reward for successful salvage was large; for failure it was nil”⁵⁷.

The amount of the salvage award

A salvage award may traditionally only be claimed against the salvaged fund – the upper limit of the award is the salvaged value of the property salvaged – including ship, cargo and freight,

⁵² Hare, Shipping Law and Admiralty Jurisdiction in South Africa, 1999, pg 289

⁵³ *Ibid*, pg 290

⁵⁴ *Ibid*.

⁵⁵ Waddams, “Dr Lushington’s contribution to the law of maritime salvage (1838 – 67)”, L.M.C.L.Q., 1989, pg 70 – 71, quoting Dr Lushington’s comments in *The Magdalen (1861) 31 L.J. Adm 22, 24*, *The William Hannington (1845) Jur. 631, 632*.

⁵⁶ ISU draft second policy paper, February 2006, pg 1

⁵⁷ per Lord Mustill in *Semco Salvage & Marine Pte Ltd v Lancer Navigation (“The Nagasaki Spirit”)*, [1997] HL, published at <http://www.publications.parliament.uk>

and each interest is to contribute to the fund according to its own value⁵⁸. A salvage award, irrespective of any of the considerations and criteria applied in determining the amount of the award, is therefore confined to “the same cap that has prevailed for centuries – the value of the property salvaged.”⁵⁹

CHANGES BROUGHT ABOUT BY ENVIRONMENTAL CONCERNS: THE INTERNATIONAL SALVAGE CONVENTION 1989

Many of the difficulties which have been set out above and the impact of environmental concerns on the traditional law of salvage were considered in the 1980’s, when it was recognized that the law of salvage had to accommodate these matters to some extent⁶⁰. The 1910 Brussels Convention on Salvage (“The Brussels Convention”) contained no express provision regarding the right of a salvor to compensation in the event of steps taken by him to prevent or minimize oil pollution damage or claims against the ship-owner in respect thereof⁶¹.

Accordingly, in Montreal in May 1981, the CMI prepared a draft Convention on Salvage to replace the Brussels Convention, which was sent to the IMO and was discussed in the London meetings of the IMO Legal Committee from 1984 to 1989⁶².

When the delegates met in Montreal, included as a main topic in their discussions was the concept of so-called “liability salvage”, and its relevance to the protection of the marine environment⁶³. Professor Selvig pioneered the inclusion of this concept in the draft convention⁶⁴ – however the delegates were divided into two groups over the issue. One group favoured an unlimited liability salvage regime, while the other preferred the limited concept of special compensation similar to that already provided for in the LOF 80⁶⁵. From a commercial and insurance point of view, it is also relevant to note that the former faction

⁵⁸ Hare, Shipping Law and Admiralty Jurisdiction in South Africa, 1999, pg 302 - 303

⁵⁹ ISU draft second policy paper, February 2006.

⁶⁰ The CMI Draft Convention on Salvage 1981

⁶¹ Brice, Maritime Law of Salvage, 2003, para 6-72

⁶² *Ibid*, para 6-73

⁶³ *Ibid*, para 6-79; The National Academy of Sciences, “Purposeful Jettison of Petroleum Cargo (1994)”, published at <http://www.nap.edu/openbook/0309050812/html/120.html>, pg 120

⁶⁴ ISU draft second policy paper, February 2006, pg 2

⁶⁵ The National Academy of Sciences, “Purposeful Jettison of Petroleum Cargo (1994)”, published at <http://www.nap.edu/openbook/0309050812/html/120.html>, pg 120. As noted by Brice in his article “The New Salvage Convention: Green Seas and Grey Areas”, L.M.C.L.Q 1990, pg 40, The LOF 1980 created a safety net for incidents involving laden tankers where the salvor is not able to earn an adequate award to cover his expenses, the tanker owner could be ordered to pay those expenses with a potential uplift of 15% . Importantly, this safety net award was borne by the tanker owner’s P & I Club.

proposed that “liability salvage” would give the salvor a right to a reward against the shipowner , to be limited with reference to the ship’s tonnage.

Ultimately, the broader liability regime was rejected in favour of a compromise position of the so –called “safety net” and special compensation reflected in the Salvage Convention of 1989, discussed in more detail below. What remains relevant to the consideration of the current ISU’s proposal to recognize an environmental salvage award (which is, in effect, a form of “liability salvage”) is that, had the delegates chosen to adopt the broad concept of liability salvage, they would have “substantially altered two basic principles upon which both voluntary and contract salvage have been based”⁶⁶. These principles are the “no cure- no pay” principle and the rule that a salvage award is limited to the amount of the salvaged property⁶⁷.

“The solution devised in the 1980’s was not to create a new institution: a kind of free-standing “environmental salvage”. The services performed remain, as they have always been, services to the ship and cargo, and the reward is borne by those standing behind ship and cargo.”⁶⁸

As far as the commercial practicalities are concerned, the compromise position also reflects the interests of marine insurance in salvage operations. “Without some realistic limits to the potential award of special compensation, it is doubtful the marine underwriting industry would have been willing to accept the principle of recovery under liability salvage”⁶⁹. Marine insurers are however willing, and have in fact, provided cover for awards to be paid under Article 14 (special compensation) of the International Salvage Convention of 1989.⁷⁰

THE SALVAGE CONVENTION 1989: ART 13 AND 14

The Salvage Convention⁷¹ recognizes in its preamble the contextual background to the adoption of the Convention and the importance of salvage services undertaken for the protection of the environment: “Conscious of major contribution which efficient and timely

⁶⁶ The National Academy of Sciences, “Purposeful Jettison of Petroleum Cargo (1994)”, published at <http://www.nap.edu/openbook/0309050812/html/120.html> , pg 121

⁶⁷ Ibid

⁶⁸ *Semco Salvage & Marine Pte Ltd v Lancer Navigation (“The Nagasaki Spirit”)*, [1997] HL, published at <http://www.publications.parliament.uk>

⁶⁹ Ibid

⁷⁰ Ibid; Hume, Chief Executive of the Shipowners’ P & I Club, “A P & I perspective on relationships between Clubs and Salvors”, *ISU Bulletin* 24, Sept 2005, pg 8 . The introduction of Scopic as it pertains to the P& I insurance will be dealt with later.

⁷¹ Enacted in South African legislation as a Schedule to the Wreck and Salvage Act, 94 of 1996 on 1 February 1997.

salvage can make to the safety of vessels and other property in danger and to the protection of the environment”⁷². In direct recognition of this contribution, Article 13(b) lists as one of the criteria for fixing the reward “the skill and efforts of the salvors in preventing or minimizing damage to the environment”. This factor is therefore taken together with the other nine criteria listed in Article 13 by the arbitrator in fixing the reward. However, in line with the traditional principles of salvage law, the amount of the reward may still not exceed the salvaged values of the salvaged property⁷³. Furthermore, only salvage operations which have had a useful result give right to an award⁷⁴.

Where the Salvage Convention departs from traditional salvage principles is in Article 14, which reflects the compromise position discussed above in the form of the so-called “safety net” provisions. In summary, Article 14 (special compensation) provides for the following scenarios:

Art 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 and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with Article 14, he is entitled to special compensation from the owner of that vessel equivalent to his expenses, which are defined in Art14(3);

Art14(2): If, in the circumstances set out in paragraph 1 above, the salvor has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the criteria set out in Art 13(1), may increase such special compensation further, but in no event shall the total increase be more than 100% of expenses incurred by the salvor.

The total special compensation under article 14 is only payable in the event and to the extent that such compensation is greater than any reward recoverable under article 13⁷⁵. It is payable by the shipowner alone, and the cargo owners do not have to contribute to the special compensation at all⁷⁶.

⁷² Preamble, International Salvage Convention 1989.

⁷³ International Salvage Convention 1989, Article 13(3).

⁷⁴ Ibid, Article 12

⁷⁵ Ibid, Article 13(4)

⁷⁶ Ibid, Article 14.

It will immediately be apparent from a reading of the above provisions of article 14 that it provides for a fundamental change to traditional salvage law principles – no longer is a salvor unable to recoup his expenses in the event that he is not successful where the vessel or its cargo threatened damage to the environment, or where he prevented or minimized damage to the environment, as would be the case in an application of the “no cure -no pay” principle. It will also be apparent that it is now possible that the total amount recoverable by a salvor may now exceed the total value of the salvaged property in light of the special compensation provisions, in contrast to the traditional cap set by the salvaged value of the salvaged property.

The concept of expenses and the application of Article 14 in practice has proved to be ambiguous, difficult to implement and uncertain in outcome⁷⁷, as was demonstrated in the case of *The Nagasaki Spirit*⁷⁸. Expenses are defined in the Salvage Convention as “the out of pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into account the criteria set out in Art 13, paragraph 1(h), (i) and (j)⁷⁹. In the case of *The Nagasaki Spirit*, the House of Lords had to determine the meaning of “a fair rate” in this definition. In brief, the ship and cargo owners averred that this did not include a profit element, while salvors averred that it did.

In finding that “fair rate” did not include a profit element⁸⁰, Lord Mustill had the following to say about the salvors contention that they required further encouragement to perform salvage services in the form of profit: “In the first place I do not accept that salvors need a profit element as a further incentive. Under the former regime the undertaking of a salvage service was a stark gamble. No cure – no pay. This is no longer so, even if traditional salvage yields little or nothing under article 13 the salvor will, in the event of success in protecting the environment be awarded a multiple not only of his direct costs but also the indirect stand-by costs, yielding a profit. Moreover, even if there is no environmental benefit he is assured of an indemnity against his outlays and receives at least some contribution to his standing costs. Lack of success no longer means “no pay”, and the provisions of this safety net does suffice, in my opinion, to fulfill the purposes of the new scheme.”

⁷⁷ Waltons and Morse, “Salvage: The Scopic Clause”, Aug 1999, published at <http://www.waltonsandmorse.com/resources/bulletins/scopic/>; ISU draft second policy paper, February 2005, pg 2

⁷⁸ *Semco Salvage & Marine Pte Ltd v Lancer Navigation (“The Nagasaki Spirit”)*, [1997] HL, published at <http://www.publications.parliament.uk>

⁷⁹ *Ibid*, Article 13(3)

⁸⁰ The Wreck and Salvage Act 1996 makes it clear in s2(8) that “fair rate” includes a profit element, to address the finding made to the contrary in this case.

SCOPIC, THE SPECIAL COMPENSATION P & I CLUB CLAUSE

In light of the difficulties with assessment and application of the special compensation Article 14⁸¹ award highlighted by *The Nagasaki Spirit*, the industry and in particular LOF users agreed to an alternative tariff based Special Compensation system, the SCOPIC Clause⁸², originally published in 1999⁸³. At the time when SCOPIC was agreed, the tariff rates were “intended to be generous and profitable”⁸⁴ And are subject to annual review by the SCR⁸⁵ Committee⁸⁶. Negotiations between the Clubs and Salvors over increases in the rates have not always been successful, with salvors being of the view that the rates are often inadequate, and they have been pushing for an increase since 2004⁸⁷.

The SCOPIC clause can be invoked only at the option of the salvor⁸⁸, and is supplementary to LOF agreements and overrides the Article 14 provisions of the Salvage Convention when invoked⁸⁹. This clause can apply in any circumstances, regardless of whether or not there is a threat of damage to the environment⁹⁰. The salvor is also entitled to a standard bonus of 25% of the tariff rates in certain circumstances⁹¹.

A shipowner’s liability under SCOPIC is underwritten by their P & I insurer, similarly to the way that Article 14 cover is also included in marine insurance cover. SCOPIC therefore enables the salvor to recover his expenses and make a profit. However, the ISU still feels that the profit incentive offered by SCOPIC is inadequate⁹², and notes that in any event SCOPIC only applies in approximately 20% of salvage cases⁹³. It is generally only invoked where “the

⁸¹ ISU Article, “Developing a 21st century solution for environmental salvage”, Shipping world and Shipbuilder, February 2006, published at http://www.marine-salvage.com/media_information/articles/environmental%20salvage

⁸² ISU Articles, “Salvors seek due rewards for global spill defence services”, Lloyd’s Ship Manager: December 2005, published at http://www.marine-salvage.com/media_information/articles/spill%20defence.htm

⁸³ Article, “SCOPIC”, published at http://www.smany.org/sma/Arbitrat_April_2001.html

⁸⁴ ISU, “SCOPIC personnel rates increased”, Salvage World, March 2006

⁸⁵ Shipowners’ casualty representative

⁸⁶ Hume, Chief Executive of the Shipowners’ P & I Club, “A P & I perspective on relationships between Clubs and Salvors”, ISU Bulletin 24, Sept 2005, pg 8 .

⁸⁷ ISU, “SCOPIC personnel rates increased”, Salvage World, March 2006;

⁸⁸ SCOPIC2005, para 2

⁸⁹ SCOPIC 2005, para 1

⁹⁰ SCOPIC 2005, para 2.

⁹¹ SCOPIC 2005, para 5(iv)

⁹² ISU second draft policy paper, February 2006, pg 3

⁹³ Ibid

casualty has a low value or the risks are too great to assume under Article 13 no cure – no pay.⁹⁴,

ISU PROPOSAL: ENVIRONMENTAL SALVAGE

It is clear that the ISU are dissatisfied with their overall remuneration, and thus seek the recognition of environmental salvage as a new source of income through payment of an environmental salvage award by those that benefit. They propose that the same criteria as those set in Article 13 could apply to the assessment of an environmental award, save that Article 13(1) (a) would be substituted by two new elements: “the salvage award to be paid by ship and cargo under the traditional salvage award”, and “the amount of the limit of liability of the appropriate pollution liability convention or conventions”⁹⁵. Article 13(1) (b) would have to be removed from the list of criteria in assessing the traditional salvage award to avoid “double-dipping”.

PRACTICALITIES OF THE RECOGNITION OF ENVIRONMENTAL SALVAGE

Assessment of the environmental award

Although the ISU insists that arbitrators can assess the amount of the award in a similar manner to the way in which they currently assess salvage awards⁹⁶, it is clear that this involves a far more difficult and speculative inquiry into what damage might have occurred had pollution resulted from the casualty. These difficulties were also noted by Clubs when the issue was raised in 1980: “The Arbitrator in assessing liability salvage would in effect have to have a trial within a trial of all potential liability claims – consequential or otherwise, at an absurd level of speculation”.⁹⁷ Furthermore, there is absolutely no guidance on what an appropriate amount of an environmental award would be and an appropriate scale would have to be set⁹⁸.

⁹⁴ ISU Article, “Developing a 21st century solution for environmental salvage”, Shipping world and Shipbuilder, February 2006, published at http://www.marine-salvage.com/media_information/articles/environmental%20salvage

⁹⁵ ISU draft second policy paper, February 2006

⁹⁶ Ibid pg 11 and ISU Article, “Developing a 21st century solution for environmental salvage”, Shipping world and Shipbuilder, February 2006, published at http://www.marine-salvage.com/media_information/articles/environmental%20salvage

⁹⁷ Coghlin, UK Mutual P & I, Lloyd’s conference on LOF80, September 1980 as quoted in Hare, Shipping Law and Admiralty Jurisdiction in South Africa, 1999, pg 316

⁹⁸ ISU draft second policy paper, February 2006, pg 8

Who pays?

The ISU will remember that the failure of the acceptance of liability salvage in the 1980's discussions was largely due to the opposition by liability insurers who refused to foot the bill for such an unlimited liability, since any award for such salvage would lie against the shipowner⁹⁹. In recognition of this, the ISU have suggested that the cost of an environmental award should be borne by those "the ultimate beneficiaries of the pollution prevention services provided"¹⁰⁰ and that they do not believe that the entire burden of funding should rest on the shipping industry and its insurers¹⁰¹. They identify the ultimate beneficiaries as being governments of coastal states¹⁰², but concede that beneficiaries will also include cargo owners, shipowners, and their third party liability insurers, to the extent that they might otherwise be liable under the liability conventions¹⁰³.

They propose various sources of funding dependant upon three different scenarios¹⁰⁴:

- (1) Pollution from a laden tanker – an environmental award should be shared by the CLC and Fund Convention pro-rata to their maximum liability. On average this would result in the Fund having to bear 75% of any award, quite a considerable amount if one bears in mind that it is not the primary fund liable.
- (2) Pollution caused by hazardous cargo – this will be governed by the HNS Convention 1996¹⁰⁵ which establishes two funds modelled on the structure of the CLC and Fund Conventions. An environmental award could be shared by these two funds pro-rata to their maximum liability.
- (3) Pollution from bunkers – this will be governed by the Bunker Convention of 2001 which imposes strict liability on the shipowner, who can limit his liability in accordance with the 1976 Limitation Convention. An environmental award could lie against this fund where pollution arises from bunker spills not covered elsewhere¹⁰⁶.

⁹⁹ ISU Articles, "Salvors seek due rewards for global spill defence services", Lloyd's Ship Manager: December 2005, published at http://www.marine-salvage.com/media_information/articles/spill%20defence.htm

¹⁰⁰ ISU Article "Salvors to press the case for environmental awards", October 2005, published at http://www.marine-salvage.com/media_information/index.asp

¹⁰¹ ISU Articles, "Salvors seek due rewards for global spill defence services", Lloyd's Ship Manager: December 2005, published at http://www.marinesalvage.com/media_information/articles/spill%20defence.htm

¹⁰² Ibid

¹⁰³ ISU draft second policy paper, February 2006, pg 8. These are the 1992 CLC, the 1992 Fund Convention, the HNS Convention 1996 (not yet in force) and the Bunker Oil Pollution Convention 2001 (not yet in force)

¹⁰⁴ ISU draft second policy paper, February 2006, pg 9 - 10

¹⁰⁵ Hazardous and Noxious Substances Convention.

¹⁰⁶ Bunker spills are included in the South African Marine Pollution (Control and Civil Liability) Act 1981

Where a combination of the above scenarios is present, the ISU suggests that all the above funds should contribute to the ultimate environmental salvage award pro-rata to the maximum liability of each fund¹⁰⁷.

Another option identified is to create a new fund for the specific purpose of environmental awards¹⁰⁸.

How can these changes be implemented?

The ISU acknowledge that, to change the law permitting salvors to claim an environmental award would be both difficult and extremely time consuming¹⁰⁹. “There is no prospect of a revision of the 1992 Civil Liability Convention and the Fund Convention in the near future”¹¹⁰. The ISU believe that governments should foot the bill for this award and then could recoup this cost against the relevant convention if they could show that it was a reasonable expense incurred to prevent damage to the environment¹¹¹. It is extremely doubtful that governments would agree to this, let alone the consideration whether they could, legally or practically, recover this as a “reasonable expense” incurred to prevent damage to the environment.

Alternatively, the ISU suggest that the necessary changes could be implemented by making amendments to the world’s principal salvage contract, LOF. However, in my view this misses the important point that this would only bind shipowners and their insurers by virtue of general contractual privity of contract principles, and could never hope to bind any government authority or third party outside of the contract itself. It also does not shift the burden of liability salvage from the shoulders of shipowners and their liability insurers, which was the initial difficulty when liability salvage was proposed in the 1980’s.

¹⁰⁷ ISU draft second policy paper, February 2006, pg 10

¹⁰⁸ ISU Article “Salvors to press the case for environmental awards”, October 2005, published at http://www.marine-salvage.com/media_information/index.asp

¹⁰⁹ Ibid, pg 11

¹¹⁰ Mans Jacobsson, International Oil Pollution Compensation Funds Director, quoted in ISU article, “Debate on Compensation for Environmental Salvage”, 14 March 2006, published at <http://www.mgn.com/news/>

¹¹¹ ISU draft second policy paper, February 2006, pg 12

CONCLUSION

I believe that in the final analysis, not that much has changed since the initial debate in 1981 and the adoption of the Salvage Convention 1989 to justify a revisit of this issue. The compromise position as reflected in the Salvage Convention 1989 should remain. Legally, the recognition of environmental salvage would manifest a total departure from the basic principles of the law of salvage. To the extent that contractual terms or conventions may ameliorate the adverse effects of a strictly traditional application of salvage law, I believe that these have been accommodated for adequately in LOF 2000, SCOPIC and the Salvage Convention. The recognition of any further award would fundamentally rest on a different principle to that of salvage.

On a purely practical level of implementation of environmental salvage, the proposal is bound to be unsuccessful. Governments will simply not accept the responsibility of paying these awards, irrespective of the benefits they gain. Neither, I believe, will the industry be persuaded to recognize such an award by including a contractual provision in LOF to provide for it.

If the ultimate complaint by the ISU is that they are not remunerated adequately to make their business profitable, is the question not rather, as identified by Hume¹¹², “are salvors remunerated fairly? ” He notes that SCOPIC is available where the property value cannot produce an adequate reward, and this should reflect a fair rate of remuneration, including profit¹¹³. Further more, he very sensibly suggests that salvor should address their concern about levels of income by making provision for contractual retainer agreements with governments, which reflect the benefits of having salvage vessels on standby to protect the coastline and marine environment¹¹⁴. This would provide a contractual basis for the salvors right to remuneration, and there has already been a growth in retained salvage services internationally¹¹⁵.

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