



COMITE MARITIME INTERNATIONAL, AISBL

PRESIDENT

Singapore, 9th July 2009

Presidents of All National Associations

Dear President,

Salvage Convention 1989

I enclose a Questionnaire which has been prepared by the newly constituted International Working Group to consider the Salvage Convention 1989.

Stuart Hetherington has kindly agreed to act as Chairman of the CMI IWG on this subject and the IWG consists of Executive Councillors: Chris Davis and Mans Jacobbson, as well as Archie Bishop, Jorge Radovich and Diego Chami.

Please submit your responses to the Questionnaire as soon as possible to enable the work of the IWG to progress. It is hoped that this topic will be on the agenda for the Colloquium to be held in Argentina in 2010.

Yours sincerely,

Karl-Johan Gombrii

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**COMITE MARITIME INTERNATIONAL
SALVAGE CONVENTION
QUESTIONNAIRE TO MEMBER ASSOCIATIONS**

The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

"For the purpose of this Convention:

- (d) *Damage to the environment being substantial physical damage to human health or to marine life or resources **in coastal or inland waters or areas adjacent thereto**, caused by pollution, contamination, fire, explosion or similar major incidents."* (Emphasis added)

Comments

1.1 **The International Convention on Civil Liability for Oil Pollution Damage, 1992**, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

- (a) *loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, **wherever such escape or discharge may occur**, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken."* (Emphasis added)

Article II of that Convention also provides:

"This Convention shall apply exclusively:

- (a) *to pollution damage caused:*
- (i) *in the territory, including the territorial sea, of a Contracting State, and*
- (ii) *in the **exclusive economic zone** of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;*
- (b) *to preventive measures, **wherever taken**, to prevent or minimise such damage."* (emphasis added)

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

- "(b) loss of or damage to property **outside the ship** carrying the hazardous and noxious substances caused by those substances;*
- (c) **loss or damage by contamination of the environment** caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)*

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

- (a) to any damage caused **in the territory, including the territorial sea** of a State Party;*
- (b) to damage by contamination of the environment caused in the **exclusive economic zone** of a State Party, established in accordance with international law, or, if a State Party has not established such a zone **in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;***
- (c) to damage, other than damage by contamination of the environment, **caused outside the territory, including the territorial sea**, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and*
- (d) to preventive measures, **wherever taken**" (Emphasis added)*

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

- "(a) loss or damage **caused outside the ship** by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)*

Article II provides as follows:

"This Convention shall apply exclusively:

- (a) to pollution damage caused:*
 - (i) **in the territory, including the territorial sea**, of a State Party, and*

(ii) ***in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured***

(b) *to preventive measures, wherever taken, to prevent or minimise such damage.*" (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. *This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.*

2. *Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.*
3. *The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."*

Question:

- 2.1 Can public authorities pursue claims for salvage in your jurisdiction?
 - 2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?
3. **Article 11 in the Salvage Convention 1989 provides as follows:**

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Comment

- 3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

- 3.2 Has your country ratified the Salvage Convention 1989?
 - 3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?
 - 3.2.2 If so, please supply a copy, if possible with a translation into English or French.
 - 3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.
4. **Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:**

"Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence."

Comment

- 4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of

interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

- 4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?
- 4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

5. Article 14 in the Salvage Convention 1989 provides as follows:

"Special Compensation

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 this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.*
2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 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 relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.*
3. *Salvor's expenses for the purpose of paragraphs 1 and 2 means 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 consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).*
4. *The total special compensation under this article shall be paid only if and to the extent that such compensation is granted than any reward recoverable by the salvor under article 13.*
5. *If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.*
6. *Nothing in this article shall affect any right of recourse on the part of the owner of the vessel."*

Comment

- 5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has

substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

- 5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. *No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."*
2. *A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment."*

Comment

- 6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

- 6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. *Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.*
2. *The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."*

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

8. **Article 27 of the Salvage Convention 1989 provides as follows:**

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

June 2009