

CMI REVIEW OF THE SALVAGE CONVENTION 1989 - ENVIRONMENTAL SALVAGE

MLA MEETING IN HAWAII – DECEMBER 2011

History

It is natural that any review should consider the historical context which led to what is being reviewed having been decided in the first place. Stuart Hetherington's paper has reminded us of some of that history, but not all. Perhaps I can add a little.

It is easy to paint the P&I Clubs as the bad guys because they don't like 'environmental salvage'. Surely, people say, it must be 'a good thing' – a bit like 'corporate social responsibility'; how could anyone possibly gainsay the importance of preventing or minimising damage to the environment or the taking of practical steps to do so? Well the answer is that we don't.

Three times in the last 30 years, the P&I Clubs have taken a lead in responding to concerns expressed by various parties that there should be encouragement to salvors to respond to casualties, specifically to avoid environmental damage, when the prospects of a low or nil property salvage award would otherwise discourage them from doing so:

- The discussions which led to the introduction of LOF 80, and the original exception to 'no cure no pay' by means of the safety net for laden tankers;
- The discussions which led to the Salvage Convention 1989 and the extension of the exception to 'no cure no pay' to encompass the 'special compensation' provisions of Article 14 of the Convention – providing a greater incentive to salvors to prevent or minimise damage to the environment, or so it was thought at the time.
- The discussions with the ISU and property underwriters between 1997 and 1999 which were triggered by the case of the 'Nagasaki Spirit' and led to the introduction of SCOPIC on 1st August 1999. Apart from the many other benefits for salvors, property underwriters and Clubs which SCOPIC provides, it should be remembered that one of the drivers so far as the Clubs were concerned was enabling them to take an increasingly participative role in casualty management to ensure that their exposure to environmental damage claims was minimised. SCOPIC has delivered on that objective as well.

So we need to get one thing completely clear – the Clubs are not opposed to salvors being fairly remunerated for their efforts in preventing or minimising damage to the environment. The Clubs think they should be; and they already are.

What then is this concept of an 'environmental salvage' award which the ISU, and others who believe it to be a 'good thing', get so excited about? Well, we wish we knew – its outlines are so vague and imprecise, its suggested mechanisms so potentially uncertain and unwieldy that we have yet to comprehend it.

A bit more history to add:

Notwithstanding our scepticism that 'environmental salvage' had anything to offer the environment which was not already provided by SCOPIC, we agreed to participate in the Environmental Salvage Working Group of the Lloyd's Salvage Group to hear the ISU's articulation of it. The Working Group was established during 2007 and met on three occasions.

The ISU told the Working Group initially that 'environmental salvage' was necessary on the grounds that the salvage industry was in financial difficulty and needed additional funding. This interested us as the Clubs have always supported the belief that a financially viable salvage industry is important. In fact the ISU could not support their assertion that the industry was in trouble, and the then President of the ISU eventually acknowledged publicly that the salvage industry was well funded.

So a change of tack – 'the world had changed' - we were told. The environment was much more important now; people take more notice of it; governments and authorities get more excited and more demanding.

Well perhaps.... The scale and volume of public response to environmental casualties has changed, but it is difficult to see that anything really substantial or practical has changed in terms of the required casualty response.

Be that as it may, we agreed to consider what the ISU would present on the subject of 'environmental salvage' and it is worth quoting the minutes of the meeting of the Environmental Salvage Working Group on 4th April 2008 which incorporated the text of an e-mail which we sent after the meeting:

"To summarise the extensive notes that we took, we understood that the ISU and property underwriters would get together to formulate a proposal to the ICS and Clubs

- *which would, by way of worked examples, be sufficiently clear, substantial and tangible for us to understand, and*
- *which would demonstrably improve casualty response and confer benefit on those currently paying for casualty response, and*
- *which would identify what, if any, elements of the current casualty response regime, specifically the notable practical benefits and certainties of SCOPIC, would be either retained or adjusted, and*
- *which would address the ISU's concern that they are not adequately remunerated for what they do to 'salve' the environment, and*
- *which would address the property underwriters' concern that there is unfairness in the allocation between property and P&I of the current cost of environment protection.*

For our part, we undertook to consider seriously any proposal which fulfilled these criteria with an open and constructive mind. You accepted that if the proposal did not at least satisfy the second bullet point above, the ISU saw no purpose in pursuing ES as an idea in any event."

We eventually heard back from the ISU a year later, in April 2009. It should be said that their proposal purported at least to address these points but it fell a long way short of answering them in terms of greater clarity of the mechanisms, improved casualty response or demonstrable financial benefit. At a meeting with the ISU in July 2009 we explained why, if adopted, the proposal would represent a retrograde step but undertook to consider a revised proposal.

We expected a response. In fact we have never heard anything more from them direct. It was only later that we heard that the ISU had already approached the CMI in December 2008. We wondered why.

The current position

So much for history; what of the present?

To the extent that the Salvage Convention is flawed by the unworkable provisions of Article 14, industry has found a solution in SCOPIC which is clear, simple and workable, is accepted by all parties, is generous to salvors and has developed a successful 12 year track record.

To the extent that the Salvage Convention is flawed by the provisions of Article 14, it does not impact on states. It is not their concern who pays. From their perspective the Convention operates very effectively and there is a satisfactory mechanism in place to prevent or minimise damage to the environment. It seems very unlikely that anyone will be able to demonstrate “a clear and well-documented compelling need” to amend the Convention.

Article 13 1 (b) requires that “the reward shall be fixed with a view to encouraging salvage operations” and for arbitrators to take into account “the skill and efforts of the salvors in preventing or minimising damage to the environment”. It is telling that Stuart Hetherington’s paper should draw attention to the observations of Michael Howard QC that there is relatively little evidence in most cases of specific work done to prevent damage to the environment. The mechanism exists, why don’t salvors use it?

Let’s not get distracted by the supposed environmental altruism of the ISU. The reality is that salvors want an additional revenue stream. They have yet to disclose what more they intend to do to justify this.

Numerous commentators have pointed to the inherent practical difficulties of introducing an award for ‘environmental salvage’. I do not propose to go into them now. Suffice to say that if Article 14 proved to be commercially impractical, ‘environmental salvage’ would be so much worse. There is an inherent and intellectually fatal flaw in trying to align environmental salvage with property salvage: if it is to be done it must logically be proportional to quantifiable savings in liability for environmental damage. This is impossible to demonstrate.

It is important to recognise the distinction between the salvage dimension to preventing and minimising damage to the environment and, on the other hand, pollution response. Many salvage companies have arrangements with pollution responders – all well and good, but the interface is important because there is a wholly different legal regime applying to salvage as opposed to pollution liabilities. Whereas states may disclaim responsibility for salvage in their waters they certainly wish to retain it for pollution response.

That the ISU has beguiled the CMI into spending so much time on the remote possibility of revision of the Salvage Convention is a mystery to me. It is disappointing that the ISU should have broken off the dialogue with us about ‘environmental salvage’. Notwithstanding our scepticism about that particular topic, we remain ready to resume discussions with them, and indeed property underwriters, about any concerns they have about the operation of the current regime. We have demonstrated our commitment to the salvage industry by the agreement to increase SCOPIC rates from the beginning of this year and we have every hope that we will be able to work together in the future as we have in the past.

Charles Hume

Chairman – The Salvage Sub-Committee of the International Group of P&I Clubs

This paper also represents the views of the International Chamber of Shipping who have asked that their name should be added to it.