

PROPOSAL FOR REVIEW OF THE SALVAGE CONVENTION

A POSITION PAPER BY THE INTERNATIONAL CHAMBER OF SHIPPING

- A. ISU Proposal for Environmental Salvage Awards and Property Underwriters' Proposal to Reapportion Liability for Salvage Services to minimise Environmental Damage
 - B. Proposal 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?
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- A. ISU Proposal for Environmental Salvage Awards and Property Underwriters' Proposal to Reapportion Liability for Salvage Services to minimise Environmental Damage

The International Salvage Union has proposed that salvors should be entitled to a separate environmental salvage award, distinct from that which they earn for salvaging property, when they have carried out salvage operations in respect of a ship or cargo which has threatened damage to the environment.

The ISU has proposed this as a means of, they say, of retaining a "vibrant and viable salvage industry" and one which would improve salvage response to the benefit of all, including shipowners, their liability insurers and the general public. (**footnote 1:** ISU paper of 5 June 2007 to the Lloyd's Salvage Group Sub-Committee on Environmental Salvage titled "Environmental Awards – Investing in Spill Prevention"). ISU contends that environmental salvage awards would encourage salvors to invest in research, training, men and equipment to the future benefit of the environment.

At the same time, Marine Property Underwriters (MPU) have expressed an interest in revising LOF and/or the Salvage Convention, seeking to re-apportion their liability for an enhanced award under Article 13 of the Salvage Convention compensating salvors for services undertaken to minimise damage to the environment. MPU consider that this is a benefit for liability insurers and should be borne therefore by them.

Summary of ICS' Position

Shipowners and their insurers (both liability and property) are interested in maintaining a vibrant and viable salvage industry. The salvors initially presented the concept of Environmental salvage on the grounds that the industry was in financial difficulty and needed more funding if it is to survive. ICS and the IG were prepared to examine this initial claim and requested detailed information but the ISU was unable to verify the claim of financial difficulty.

Salvors' second rationale for introducing the concept is that in recent times, there has been increasing attention on protection of the environment when there is a casualty and often this takes priority in any salvage over and above any operations to save property. The ISU claim that the operations they perform to protect the environment benefit the liability insurers enormously by way of reduced/minimised pollution liability and yet the salvors are not entitled to a salvage award that would reflect the benefit to the P&I interests. In other words, salvors claim they are inadequately rewarded under the present LOF and indeed, the Salvage Convention, 1989.

Having considered the concept generally and the specific proposal to amend LOF, ICS is not persuaded that there is a need for environmental salvage awards. The proposal is similar to the concept of "liability salvage" which was discussed in 1989 when the Salvage Convention was being negotiated. Ultimately, that concept was rejected in favour of Articles 13 and 14 of the 1989 Salvage Convention and, subsequently, SCOPIC (the Special Compensation P&I Clause) in LOF. SCOPIC is an alternative mechanism to Article 14 for remunerating salvors for preventing or minimising damage to the environment. It is designed to be used in conjunction with LOF and can be invoked by the salvor at any time during the salvage operation. It contains agreed tariff rates, which are both profitable and generous, for personnel, equipment and tugs. The rates were increased significantly as recently as July 2007. NB: SCOPIC provides salvors with the certainty of a reasonable and profitable reward for preventing or minimising damage to the environment in cases which might otherwise not be financially attractive i.e. where prospects for success (and therefore the earning of a traditional Article 13 award) are slight.

ICS also does not agree that there is a need to re-apportion MPU's liability under Article 13 for an enhanced award for services in respect of protecting the environment. The present arrangements reflect the principle that all parties to the venture are responsible for the environment and should all participate in any risk to the environment.

Background to development of Article 13, 14 and SCOPIC in LOF

Salvage of property at sea has historically been rendered on a "no cure – no pay" basis with the award being assessed by reference to the property at risk and saved, usually, the ship, cargo and any freight at risk. Different jurisdictions may also allow salvage for other items but the generally accepted principle is that salvage is claimable on saving property.

The present Salvage Convention of 1989 was agreed to address concerns over the environment. and in recognition of the fact that more and more cargoes were being carried by sea which are capable of causing pollution and that salvors were expected to take action to both protect property and to take steps to protect the environment and that their actions on the latter might not be reflected adequately, if at all, in any salvage award. In fact, the commercial parties to the salvage contract had addressed this difficult issue already in LOF 80 which introduced some new concepts such as an enhanced award, and a "safety net". These provisions were agreed by the various parties and their insurers.

The initial drafting work within the CMI international sub-committee drew heavily upon the contractual compromise in LOF 80 and incorporated also the "Montreal Compromise" agreed at the CMI meeting in 1981. This was a package of carefully balanced and delicately negotiated measures, whereby shipowner and cargo interests agreed to increase their present liabilities. While there is very little documentation as to the detail of the package, it is understood that the parties agreed that there would be a balance between them in the responsibility for paying for pollution prevention.

The Montreal Compromise was incorporated into the final Convention. Under the final Salvage Convention: Article 13 provides for a reward which is modelled on the traditional salvage award: it is not available unless the salvor has produced a useful result; it cannot exceed the salvaged value of the vessel or other property; its quantum is fixed with reference to the traditional list of factors. To these traditional factors, Article 13(1)(b) adds "the skill and efforts of the salvors in preventing or minimizing damage to the environment", which courts must take into account as a criterion for enhancing, or decreasing the reward.

Article 14 on the other hand, provides special compensation outside of the traditional "no cure –no pay" principle for providing services to prevent environmental damage but where the salvage award under Article 13 is inadequate to properly compensate. This compensation is based on salvors' expenses. The Article 13 award is paid by the property interests (hull and cargo) while the Special Compensation in Article 14 is paid by the liability insurers. All parties to the venture have an express duty to protect the environment.

The agreements on articles 13 and 14 were supplemented by two more compromises. The first is contained in the "Common Understanding" of the Diplomatic Conference, attached to the Convention. This clarifies the relationship between the two articles, stating that courts are not required to fix an Article 13 award up to the maximum salvaged value of the vessel and other property before assessing special compensation under Article 14. In other words, Article 14 is not only triggered in cases where an Article 13 award exhausts the salvaged fund; courts are entitled to calculate and award special compensation in all cases where the Article 13 reward is lower than the appropriate Article 14 compensation. The other, somewhat less well-known, compromise was that the enhancement in the Article 13 award would be allowable in general average whereas the special compensation in Article 14 would not. The York Antwerp Rules were amended accordingly in 1990.

ICS' Position

The above background to the Salvage Convention explains the very carefully negotiated compromises between the various interests in a salvage operation. It is apparent from this that to unravel one part would entail unravelling all aspects.

The principles also reflect the current concepts in the public law Conventions of the CLC, HNSC, etc where it is recognised that all parties share a responsibility for the environment and its protection while at the same time, seeking to ensure that salvors are given an incentive to assist ships which threaten the environment. An examination of the Convention reveals that environmental concerns were very much in the governments' minds. The final

agreement reflects also an acceptance that the payment of compensation had to be adjusted and a departure made from the traditional no cure-no pay system in order to encourage salvors to take on services which are distinct from property salvage.

As noted in the ISU paper to the LSG WG, the proposal for environmental salvage awards would alter the basis of salvage operations. The prime objective would no longer be to save property. As stated above, a similar proposal was made in 1989, by Professor Selvig (CMI) following the Amoco Cadiz casualty and was rejected. As Lord Mustill explained succinctly in *Nagasaki Spirit* (1997), it was agreed that the Salvage Convention should not create a new and distinct category of environmental salvage, which would finance professional salvors to keep their vessels and equipment in readiness for the purpose of preventing damage to the environment. The primary purpose of "salvage operations" continues to be to assist a vessel in distress, for which the primary incentive is, as ever, a traditional salvage reward. The prevention of damage to the environment is an incidental benefit of some salvage operations. While the international community agreed the incidental benefit conferred by the salvor deserved financial recognition by way of special compensation, it was not agreed that it justified a freestanding reward.

The approach taken in the Salvage Convention is reinforced in subsequent international conventions (OPRC and OPRC-HNS) and national laws. Governments are not asking the salvage industry to build up capacities for preventing damage to the environment. Rather, they accept that this is a task for governments as such. In Europe for example, EMSA has been entrusted with the task of pollution response, supplementing the resources and arrangements that have already been set up at national or regional levels. These structures are recognised as making a significant contribution to the continual improvement of preparing for and responding to marine pollution. EMSA is currently completing the network of stand-by availability contracts for at-sea oil recovery services and having the arrangements fully operational.

Moreover, the basis initially proposed by the ISU for assessment of environmental salvage awards - "threatened damage to the environment" - is very broad, and could be established in all salvage operations given the presence of bunkers on all ships. It would be difficult to quantify an environmental salvage award, and any method of assessment based on the extent to which a salvor had prevented or minimised damage to the environment and the "resultant benefit conferred" would inevitably be hypothetical. Reference to the shipowners' liability under the various limitation and pollution liability conventions is not appropriate. Taken to its logical conclusion, the proposal would mean that shipowners and cargo with the highest environmental liability risk would have to pay a higher environmental salvage award than those with a lower risk even though the actual salvage operations in preventing damage to the environment had been the same.

Conclusion

Reviving the concept of environmental salvage would necessitate unravelling the complex compromises agreed in the Salvage Convention. It might also impact on other international conventions. MPU's proposal on the other hand would ignore the important principle of

shared responsibility for environmental protection. If, however, a sound case for change to the salvage industry is now made by ISU/MPU which would result in an improved salvage response at lower cost to all, shipowners and insurers are willing to consider it. Indeed, shipowners and insurers have responded constructively to salvors' concerns on previous occasions. SCOPIC for example was agreed by the industry in 1999 in response to salvors' concerns about the interpretation of Article 14 of the Salvage Convention. Salvors have confirmed their continuing satisfaction with this scheme.

B. Proposal 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?

The ISU and average adjusters have stated that the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests as thousands of interests are often involved and it can take months to collect security. ICS has also been advised that 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 but that they would then have the right to claim a right of recourse against the other interests for their respective shares.

ICS Position

The Salvage Convention provides that all property interests to a venture are responsible for salvage and, by extension, they are all responsible for providing security for their respective portion. To alter this such that shipowners take on the burden of providing security and requiring them to later exercise a right of recourse against the other interests would be unnecessarily burdensome upon shipowners and would also leave them exposed in the event that security was not obtained for any reason. There is moreover insufficient evidence available to conclude that the practical problems referred to are real and systemic and justify the significant adjustment to the Salvage Convention that this would entail. This proposal is therefore not supported.

Shipowners nevertheless recognise there is a problem and a practical, commercial solution has developed whereby shipowners agree in the contract with charterers/merchants to "absorb" cargo's portion of salvage security up to a certain limit. It is unknown however how widely such clauses are used and also the financial limit. A thorough investigation of such clauses might be appropriate to see if the contractual parties can use these clauses more widely. The advantage of such clauses is that they preserve the basic principles of the Salvage convention but provide a commercially agreed mechanism for dealing with the effects of this in cases where the risk can be balanced against the freight earned and the commercial relationship between the parties.