

Report of the IWG on the Salvage Convention meeting held in London on 18th September 2009

1. As previously scheduled, the first meeting of the International Working Group on the Salvage Convention took place in London on Friday 18th September 2009.

The meeting was presided by the Chairman of the IWG, Stuart Hetherington. Mans Jacobsson, Archie Bishop, Jorge Radovich together with her daughter Violeta (specially invited) and Diego Chami attended the meeting. Chris Davis was unable to attend as he was presenting a paper the same day at the International Congress: "Rotterdam Rules" organized by the Universidad Carlos III, in Madrid.

2. We should recall that the aim of the International Working Group (IWG) is to consider whether any changes need to be made to the 1989 Salvage Convention. Therefore, a questionnaire was prepared by the Chairman in order to collect the views of the MLAs on subjects that the International Salvage Union identified as issues that might need to be reformed.

3. Until the day of the meeting the answers of 8 MLAs had been received, namely the ones of Italy, Germany, Australia and New Zealand, Slovenia, Denmark, Mexico, and Argentina. Since then, the answers of Brazil, France, Sweden, and Japan have also been received.

4. As "Rapporteur" in order to make records of the meetings the IWG appointed Diego Chami, who also had the task of presenting a paper with MLAs' answers to each question.

5. Before considering the answers of the MLAs to the questionnaire, some general issues were discussed. It was said that some countries might consider premature amending the 1989 Salvage Convention only 13 years after it had been in force. However, it was also mentioned that the Convention was finalised twenty years ago and work commenced on it 30 years ago. Since then many changes have taken place and it could be many years before any changes CMI recommends become a reality and that the work of the IWG might not be imperative today but could be an urgent need in the near future. By then, the task will have been done. Moreover, nowadays environmental regulations are stricter and there are other threats than merely oil and there is more awareness of what environmental damage means. In addition, it is clear that article 14 of the Convention does not fit the needs to encourage environmental salvage when there is a risk of failure in earning a reward.

As an evidence of that, it was stressed that SCOPIC was invoked more times than article 14¹. It was pointed out that it would be interesting to determine the geographical areas in which those SCOPIC and article 14 cases have occurred. In summary, there was general consensus that the analysis of the amendments which the 1989 Salvage Convention might need should be carried out despite the fact that the work of the IWG may conclude, either with the draft of a Protocol, or just with proposals for the industry to include in private agreements such as LOF, among other possibilities.

6. The impact of the compensation for environmental salvage as well as its relation with general average were discussed during and after the meeting through an exchange of e-mails, discussion that has been summarized herein below.

6.1. Jorge Radovich stated that, in his opinion, a compensation for environmental salvage would increase the owner's exposure, because any case (e.g. a spill from a non-tanker vessel) or substance not covered by the CLC/Fund Conventions would not allow the environmental salvage reward paid by the ship-owner to be recoverable under those conventions.

¹ As stated in Annex 2 of the papers presented by Archie Bishop to the IWG: ".....between the inception of SCOPIC on 1 August 1999 and 5 March 2009 (9½ years), there have been 871 LOF cases notified to Lloyd's. SCOPIC was invoked in 211 of those cases, approximately 24% of the total. Further, the vast majority of SCOPIC cases have been settled amicably for there have only been seven SCOPIC-related arbitrations. In contrast, between 1992 and 1998 (six years), there were 18 Article 14-related arbitrations, eight of which were appealed".

Mr. Jacobsson expanded on the issue of the extent to which rewards for environmental salvage would be recoverable under the CLC/Fund Conventions regime. He stated that the CLC/Fund Conventions regime would not apply to ships other than those constructed or adapted for the carriage of oil as defined (i.e. persistent oil) in bulk as cargo and that those conventions do not therefore apply to non-tankers.

Furthermore, Mr. Jacobsson pointed out that the Bunkers Convention, which covers damage caused by spills of bunker oil from ships other than tankers, applies to preventive measures, but he highlighted there is no second layer of compensation under that Convention over and above the liability of the ship-owner. As regards the HNS Convention this Convention will, when it enters into force, indeed have a second layer and would apply to preventive measures (i.e. measures to prevent or minimise damage caused by substances covered by that Convention).

He stated that salvage operations would in principle fall under the CLC/Fund Conventions regime only if the damage that the operations prevent or minimise relates to pollution damage as defined in the Conventions and, unless the courts were to decide otherwise, as interpreted by the IOPC Funds' governing bodies. The definition of "pollution damage" laid down in the 1992 Conventions made it clear that damage to the environment per se, i.e. damage to the marine ecosystem, was not admissible for compensation under these Conventions, but only quantifiable economic losses suffered as a result of damage to the ecosystem. Consequently, salvage operations undertaken to prevent or minimise damage to marine environment as such would not be considered as preventive measures for the purpose of the 1992 CLC/Fund Conventions, unless they also prevented or minimised quantifiable economic losses such as economic losses in the fisheries and tourism industries.

Moreover, Mr. Jacobsson stressed the fact that even in cases where the salvage operations were to be considered as reasonable preventive measures in line with the 1992 Conventions, that does not mean that the amount of the salvage reward (whether or not for environmental salvage) will be recoverable under the 1992 CLC/Fund Conventions. He proceeded to state that the Fund's governing bodies have repeatedly stated that the assessment of claims for the costs of preventive measures associated with salvage is not to be made on the basis of the criteria for determining salvage awards, but the compensation is limited to costs, including a reasonable element of profit (see 1992 Fund's Claims Manual, December 2008 edition, paragraph 3.1.15; the Manual is available on the IOPC Funds' website).

This has been said even though admitting that in the end national courts will determine the interpretation of the Conventions, but experience shows -according to Mr. Jacobsson- that it is very unusual that the courts take decisions that are at variance with the interpretation of the Conventions adopted by the Funds' governing bodies.

What's more, even if the 1989 Salvage Convention were to be amended introducing environmental salvage rewards, such an amendment would not, in his view, have any impact on the interpretation of the 1992 Conventions as regards the admissibility of claims related to salvage operations.

For the sake of clarity, Mr. Bishop stated that the ISU's proposal for environmental salvage under a redrafted Article 14 of the 1989 Salvage Convention does not depend on nor is it related to the strict liability pollution conventions. He stated that there will be cases in which an environmental award will be admitted despite there being no claim on the pollution conventions (e.g. salvage in an area where none of those pollution conventions apply). Mr. Bishop continued that the suggested environmental award is for preventing or minimising damage to the environment and not for preventing liability (although this may be relevant to the amount awarded, he wrote).

Mr. Bishop also made some comments regarding the need for a limit or cap to the environmental salvage award. He stated that as the salvaged value is the cap for a salvage reward under Article 13 of 1989 Salvage Convention, a limit needed to be found for a new environmental salvage reward under a redrafted Article 14 of the same Convention. It should be recalled that regarding such cap, one of the suggestions made by ISU was that the cap should be the limits fixed by the

pollution conventions. This was considered as a convenient way of determining the limit according to the size of the vessel and there may be additional benefits to fixing a cap this way.

According to Mr. Bishop, the side benefit to the ship-owner would be that if the ship-owner can limit his liability under the CLC then, he could legitimately state that the environmental salvage award was the result of a reasonable contract entered to prevent and/or minimize damage to the environment. Then the ship-owner should be entitled to participate in his own pollution limitation fund with other claimants (thereby reducing the share due to other claimants) and, if that claim and all other claims exceeded the limit, against the Fund Convention.

Of course, Mr. Bishop highlighted that it would have to be a reasonable contract. He added that, as any environmental award will take into account, and not exceed, the benefit conferred, (and if there is no benefit, there is no award) he believed most would find the contract reasonable.

In addition, Mr. Bishop pointed out that in the great majority of cases an environmental award wouldn't be expected to be as the limit set. The extent of the award would be dependant on the precise circumstances of the case, but in the same way as a salvage award never exceeds, or even equals, the salvaged value one would not expect an environmental award to equal the cap set.

Mr. Bishop also stated that he accepted that environmental salvage could increase the owners' exposure, bearing in mind that at present and according to Article 13.1.(b), the award granted taking into account measures in preventing or minimizing damage to the environment, is paid by ship and cargo pro rata to value. On the contrary, under the ISU proposal the environmental salvage award would be paid by the ship alone and this would have an effect on the insurers. Property i.e. the cargo, would cease to pay what they currently do under Article 13.1 (b) (measures for preventing or minimizing damage to the environment), and P&I clubs would bear the risk of the environmental salvage award. But then, Mr. Bishop insisted, both -the cargo insurer and the P & I clubs- would be paying for what they actually insure -and for the benefit they have received.

Mr. Bishop took Mr. Jacobsson's point that the pollution funds do not cover damage to ecosystems but only actual damage to the environment as accepted by the conventions. However, he stated that if there was no damage to the environment as defined by those conventions there would be no claims against the funds of those conventions.

He continued saying that if an incident gives rise to a valid claim under the pollution conventions, salvage resulting in an environmental award would have reduced the damage and claims that would otherwise have occurred.

The governing bodies of the funds cannot, to date, have considered the possibility of environmental salvage being a preventive measure, for no such claim has so far arisen, but he believes that any award specifically geared minimising or preventing damage to the environment, which would otherwise form a claim under the conventions, would be difficult to resist.

Regarding the contract mentioned by Mr. Bishop, Mr. Jacobsson answered that he still maintains that for the purpose of deciding whether an environmental salvage claim falls within the 1992 Conventions, the contract (whether reasonable or not) is irrelevant. He added that the States Parties to those conventions have very clearly and repeatedly taken the position that only the costs incurred by the salvor and a reasonable element of profit are admissible for compensation under the 1992 Conventions. As regards Mr. Bishop's statement that any award specifically geared minimising or preventing damage to the environment, which would otherwise form a claim under the conventions, would be difficult to resist, he repeated that the definition of "pollution damage" made it clear that damage to the marine environment as such was not admissible for compensation under the CLF/Fund Conventions, but only quantifiable economic losses resulting from damage to the environment.

6.2. Regarding general average, Mr. Bishop wondered if a ship could still claim general average for salvage bearing in mind Rule VI of York Antwerp rules 2004. He answered affirmatively and stated that whilst the amendments in 2004 prevented a readjustment of a salvage award made

against ship and cargo they specifically provide that if one party pays another's contribution, he can have it taken into account in GA.

The purpose of the York Antwerp Rules 2004 was to ensure that a properly apportioned salvage award was not readjusted in general average. However, the York Antwerp Rules 2004 leave open the possibility of an adjustment if for instance the ship-owner pays the cargoes' proportion of salvage. He added that one of the proposals to solve the containership problem is to provide that the ship-owner issues security to the salvor for the cargo.

Mr. Radovich answered that according to the new Rule VI salvage is no longer allowed in general average which, in his opinion, was not convenient and partially explains the lack of adoption of the 2004 York Antwerp Rules. He added that he had already taken into account Mr. Bishop's comments on the new Rule VI of the 2004 York Antwerp Rules and that it was correct to say that by exception when one party pays others' salvage charges, these amounts should be allowable in general average, but he pointed out that the principle was still exactly as he had stated in the meeting. Furthermore, the only case that he knew in which a ship-owner could accept to respond for other parties' salvage award is in a scenario of immediate peril of loss of the vessel. He could not see how the ship-owner could be voluntarily interested in paying for the cargo's proportion of the salvage award, for instance, when he does not know the value of the goods and has no instructions of the cargo owners/underwriters to proceed in that way. He added that both aspects could lead to litigation. In his opinion, it should also be taken into account that the 2004 York Antwerp Rules are very rarely applied in practice.

7. It was also said that the Environmental Salvage, the answers received from the MLAs and the work of the IWG, can be included as a subject in the Buenos Aires Colloquium, which will take place in October 2010.

Before that, in the second quarter of 2010, a meeting of the Sub-Committee will take place in London, in order to summarize all the answers received from the MLAs and to listen to the position of the industry that will be specially invited to attend.

Then, the discussion of the MLAs answers to the questionnaire began.

Question:

1.2.1. 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?

The majority of the answers received, namely the ones of the MALs of Italy, Germany, Argentina, Australia & New Zealand, Slovenia, Mexico, and Denmark were in favour of amending Article 1 (d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto"). The MLA of Slovenia and Denmark stated that the expression "in coastal or inland waters or areas adjacent thereto" was not accurate or precise enough, or simply not defined.

However, from these countries, Germany and specially Italy stressed that there should be a limit in the geographical scope of application and that it should not be extended to operations anywhere, considering that salvages in the high seas should not be covered.

Question:

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

The majority of answers received were in favour of amending article 1 (d) in order to include the damage occurred not only in territorial waters but also in the Economic Exclusive Zone in accordance with the international law, or if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of the 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. The MLA of Argentina was in favour of extending the scope of application to "where ever such may occur".

Question:

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?

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

Only Australia had reported cases which were attached to their answers.

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?

As regards retaining or removing the word "substantial" the positions were divided.

The MLAs of Italy, Germany and Slovenia were of the opinion that the word "substantial" might cause interpretation problems. The Italian MLA stated that there is a difficulty in distinguishing between damage that is substantial and damage that is not substantial or the incident that is major and the one that it is not. Germany's MLA stated that the word "substantial" might well be difficult to apply and give rise to dispute as well as to determine what a major incident was. Slovenia stated that the case of the Castor illustrates the difficulty of such definition. Mexico also considered that the word may cause problems of interpretation. On the other hand, New Zealand considered that it could cause no interpretation problems, Australia gave no answer and Argentina went directly to the answer whether the word "substantial" would be maintained or replaced.

The MLAs of Germany, Argentina, and Mexico were of the opinion of retaining the word "substantial". Germany stated that despite the difficulties in interpreting what is substantial or not, major or not, the decision should be left to the courts and that the wording of article 1 (d) should remain as it is. Argentina stated that the word "substantial" should be maintained or replaced by another word to put clear that the damage to the environment should be considerable or of importance to trigger the Special Compensation and that a minimum damage would not be enough. Mexico stated that despite the interpretation problems, the word "substantial" should remain.

On the other hand, Italy and Slovenia were in favour of removing the word "substantial". Italy stated that in addition to the difficulty of interpretation between substantial and non substantial and major and minor, the very basis of any of such distinctions was disputable and that the same damage might be considered substantial in one country and not in another in view of the different economies and that such distinction is not made by the CLC, HNS or the Bunker Conventions.

Slovenia was of the position of deleting the word "substantial" and also "major" and that, even if the meaning of the two words was defined, the ambiguities in their interpretation will not be solved.

Australia and New Zealand answered "Not applicable" to question 1.4.3.

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) (i.e. do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

The MLAs of Australia & New Zealand answered with a straight yes. Slovenia considered that the provision could only apply to cases that therefore would fall under the definition of "...similar major incidents..." in which containers were afloat and salvors attempting to remove them to prevent damage to the environment, but as specific cases should not be included in the definition.

Italy's MLA stated that they had some difficulties in understanding the question. They asked, for example, in cases of loss of containers at sea, which would the services rendered be: i) the action to prevent the loss? ii) the action of collecting the containers? They also asked what effect such action on the right to a reward would have. And if those services would justify an enhancement of the reward under the criterion set out in paragraph 1 (b) of article 13 or justify the application of article 14. They also wondered if, in case of affirmative answers, the Montreal compromise would survive. Besides, they mentioned that widening the definition of damage to the environment to events that have nothing to do with the environment would trespass into very dangerous grounds. After stating that, they added that the notion of salvage would become uncertain if dangers external to the vessel or property are taken into account. In summary, the events that could constitute a danger to navigation would not come into the meaning of "similar major incidents" because the expression is only related to incidents in which there is a prejudice to the environment and not to the navigation.

Germany's MLA answered no to the question if navigation hazards as floating containers are akin to water pollution or contamination because contamination suggests that the condition of the water itself must be affected.

Argentina stated that an event that causes dangers to navigation would not fall within the definition of article 1 (d) unless in cases in which a serious and real risk to the environment exists because the loss of containers by itself does not imply environmental damage. However, there could be such a risk if the nature of the cargo in the container or the sensitivity of the area or the dense navigation in narrow channels could lead to a threat of physical damage to human health or to marine life or resources.

Mexico did not consider that the loss of containers could fall under "similar major incidents" and Denmark did not understand the question because dangers to navigation do not fall under article 1 (d).

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?

Italy considered that to widen the definition would endanger the Montreal Compromise and give rise to unpredictable consequences and to a great increase in litigation. Slovenia considered that the definition should not be widened together with Argentina. Mexico did not oppose to widening the definition.

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?

The answers to this question were divided. At first only Italy and Argentina answered NO, whereas Germany, Australia & New Zealand, Slovenia, Mexico, and Denmark answered YES. However, Italy and Slovenia added that there was no provision under their domestic law, but Italy informed about a precedent in which an Admiral's claim was rejected and in the opposite position Slovenia mentioned that nothing *de iure* prevented public authorities from pursuing salvage claims.

From the answers of Italy and Germany, we can conclude that, if the public authorities are under a duty to provide salvage services free of charge, salvage claims are excluded.

The same construction inspires the answer of Argentina.

Germany clarified that public authorities may in principle claim a salvage reward but that it was less clear in relation to the special compensation.

Question:

2.2. If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Italy considered that the provision was appropriate and that it should be left unaltered. Slovenia was of the same position and added that any further modifications towards unification will not hurt maybe by model rules. Argentina was also of the position of an appropriate amendment. Germany was against modifying article 5.3. and together with Slovenia stressed that it was a matter of domestic law.

No applicable answers: Australia & New Zealand, and Denmark.

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.

3.1. Comment

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:

Question:

3.2. Has your country ratified the Salvage Convention 1989?

Italy, Germany, Australia, New Zealand, Slovenia, Denmark, and Mexico have ratified the 1989 Salvage Convention, but Argentina has not, even though it has been recommended to the authorities several times by their MLA.

Question:

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.

Italy, Germany, Australia, New Zealand, Slovenia, and Denmark answered no. Only Mexico enacted article 11 in their Maritime Navigation and Commerce Act.

Question:

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.

Italy, Australia & New Zealand, Slovenia, and Mexico were of the prevalent opinion that article 11 should not be amended. Italy mentioned that if a reference to IMO Guidelines was included, it would then be superseded if a different instrument were adopted, for example a convention.

On the other hand, a minority of countries, namely Germany and Argentina were of the position that Contracting States should observe the provisions of Resolution A.949(23). Denmark was of the idea of replacing "take into account" for more binding words from article 11.

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 defense.

4.1. Comment

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?

In Germany, Argentina, and Slovenia the salvage reward shall fall on the salvaged interest. Australia, New Zealand, and Denmark informed that there was no such provision stating that a reward should be paid by one of the property interests. Italy informed that even though there was no such provision, their jurisprudence was generally of the view, under the 1910 Salvage Convention, that the owner of the salvaged vessel is bound to pay the whole of the salvage reward, and has a recourse action against the owners of the cargo.

The IWG will find out which were the solutions in Dutch and Belgian law.

Question:

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?

A majority of MLAs answered no, namely Germany, Argentina, and Denmark. Australia & New Zealand answered yes. Italy, Slovenia, and Denmark were of the opinion that if the rule were to

be amended, it should include all cargo ships, not only container vessels. The majority were of the opinion that the salvor had the remedies to enforce his claim, namely a lien on the property.

1. 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).

A majority of the opinions received were in favour of an amendment of article 14. Of this view were Australia & New Zealand, Germany, Argentina, and Slovenia. Australia & New Zealand

considered that views needed to be widely canvassed and carefully balanced. Germany pointed out that the SCOPIC clause demonstrates that article 14 is not accepted by the industry and therefore they supported a reconsideration of the issue by the IWG, but the issue should be previously negotiated by the industry. Argentina stressed that the defining question was to determine who should pay the bill.

On the other hand, Italy was concerned about a possible radical change of article 14 that might give rise to a great many problems and conspire against uniformity and was in favour of a simplified wording of article 14 rather than a radical change that would disrupt the Montreal compromise on articles 13 and 14 of the Salvage Convention by which the ship-owner and its P&I Club would have to pay a much greater compensation. Denmark strongly opposed to including an environmental salvage that would create a high degree of uncertainty which would be a strong breach of the Montreal compromise.

6. 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?

The opinions were divided. Argentina, Australia & New Zealand, Germany, and Mexico favoured the amendment. Germany pointed out that anyway the claim would still be only for a share of the award or special compensation the property salvor is entitled to. The other position was shared by Italy, Slovenia, and Denmark. Italy stressed that the provision was sound and has an important moral justification.

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?

The affirmative position was shared by Argentina, Australia & New Zealand (where there is such a lien). Germany stated that both the environmental award as the regular award should have a lien on the property.

The other position was expressed by Italy, Slovenia, and Mexico, countries which opposed to the environmental award.

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.”

8.1. Comment

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?

Argentina, Germany, Australia & New Zealand, Mexico, and Denmark were in favour of publishing the awards. Italy opposed and considered the change unnecessary. Slovenia shared that position.

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?

Italy considered it too early for a possible review of the 1989 Salvage Convention and that the Convention should be tested for a longer time before deciding whether any changes might be convenient. However, they focused on articles 14 and 21 as candidates for amendments.

Another provision that ought to be the subject of consideration by the CMI is article 21. Pursuant to paragraph (1) the owner of each property salvaged is bound to provide security for the share of the reward due by it. As regards article 21.2., Italy's MLA stated that one way of protecting the salvor would be to provide that the owner of the vessel has the obligation not to deliver the cargo or that the cargo be delivered only if satisfactory security is provided, otherwise he would be bound to pay the entire salvage reward.

Germany suggested the following points to be included:

- To reconsider the definitions of "Ship" and "Property" in Article 1 (b) and (c) of the Salvage Convention in view of the definition of "Wreck" in Article 1 No. 4 of the Wreck Removal Convention, taking into account that whether there is still a ship or already a wreck may have effects on the applicability of either Convention and thus on the "salvor's" position.
- To include a definition of the vessel owner who may be liable for a salvage reward or special compensation, taking into account that in many jurisdictions as well as the registered owner in many respects is replaced by the owner *pro hac vice* ("Ausrüster"), i.e. the operator of the vessel, often a bareboat charterer.
- To state that the salvor's misconduct (Article 18 of the Salvage Convention) should not affect the claim of the third party salvor of human life for a share of the salvage award as per Article 16 (2).

Australia and New Zealand suggested that the potential liability to third parties should be specifically excluded as a factor to be taken into account within the context of Article 13.

Question:

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

Italy mentioned that the success of the 1989 Convention is also proved by a significant reduction in litigation and that since July 1996 only four cases have been reported. Mexico reported six cases decided under the Convention. Germany informed that there were no reported German cases, Australia only very few (fewer than 10), New Zealand and Slovenia none.