

Fair reward for protecting the environment – the salvor’s perspective

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Introduction

Ladies and gentlemen, thank you for giving the International Salvage Union the opportunity to speak at your meeting. It is a pleasure for me to be able to share with you our members' thoughts on the important issue of ensuring a fair reward for protecting the environment.

Firstly, my credentials. Members of the International Salvage Union are involved in almost every salvage operation that take place in the world today. Last year they conducted well over 240 such operations. They are also involved in wreck removal operations which are fewer in number but provide a similar income.

In 2008, the salvage income world wide of all members was just over \$250 million and that of wreck removal just under \$300 million. Today we are only concerned with the salvage operations. They are carried out on a number of different forms of contract and are subject to different laws though all are subject to the provisions of the Salvage Convention of 1989. Approximately one third of those salvage operations are carried out under the terms of Lloyds Open Form. From these figures it will be seen it is not a huge industry but it is an important one in terms of international emergency response and the protection of the marine environment.

The principal and stated objective of the ISU is to promote the saving of life and

salving of property in danger at sea and while doing so, to prevent or minimize damage to the environment.

Lack of reward for environmental protection

ISU has been concerned for a number of years that its members are not always fairly rewarded for the benefit they confer in protecting the environment. In recent years we have expressed these concerns to the shipowners and their insurers and suggested appropriate modification to the LOF contract to achieve a fairer mechanism to reward salvors for their efforts in protecting the environment. Regrettably, whilst amicable, those discussions have not led to any form of agreement nor even discussion of the proposals we have made. The shipowners and their liability insurers have made it quite clear that they do not see any need to change the current system and are unwilling to talk further about it.

For these reasons we turn to the CMI for help and my purpose here is to give you a sense of why salvors feel there is need for change.

Let me say straight away that we recognise that salvors are in many cases rewarded for protecting the environment by virtue of the Salvage Convention's Article 13.1 (b). However, all too often the tribunal is unable to give full effect to this provision because of the low value of the salvaged property. Cases that give rise to a material threat to the environment are often of low value compared to the cost and effort involved and it is in these cases that we feel inadequately rewarded. In such cases Article 14 (subsequently replaced by SCOPIIC - which has its own problems) ameliorated the problem by providing compensation so salvors were not "out of pocket" but it has always been a "safety net" rather than a method of remuneration.

SCOPIC (which only applies to Lloyd's Open Form cases) is the same – a safety net.

Statistically, SCOPIC is applicable in 25% of all LOF cases so, in 25% of cases, salvors are receiving just the 'bare minimum'. In other cases the effect will diminish as values rise, until the value is high enough to fairly reward the salvor for what he has actually done. The break-even point is uncertain but it could be as much as 50% of all cases. It is the injustice of being inadequately paid for the benefit conferred that we seek to correct.

We recognize that the introduction of the SCOPIC Clause substantially improved the mechanism of assessing 'special compensation', as compared to the 1989 Salvage Convention's Article 14, in LOF cases. But I emphasize, SCOPIC, like Article 14 is a method of compensation when an award to cover cost cannot be made. It is not a method of remuneration which is what we seek. Salvors would not be in the salvage business if their remuneration was restricted to an Article 14 or SCOPIC award.

The three principal reasons for change

There are three principle reasons why salvors feel there should be change. I will first summarise them and deal with each in a little more detail.

Firstly, much has changed since the Salvage Convention was first drafted in 1981. Environmental issues now dominate every salvage case and what may have been a satisfactory "encouragement" then is no longer so today. Further, there is more risk to the salvor from tougher regimes which can criminalize the actions of well-meaning salvors.

Secondly, while salvors always work to protect the environment whilst carrying out salvage operations, they are not fully rewarded for the benefit they confer. They are rewarded for saving the ship and cargo, but not the environment.

Thirdly, salvors and marine property insurers believe it is not fair that the traditional salvage reward that currently, but inadequately, reflects the salvors' efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurers without any contribution from the liability insurers, who cover the shipowners' exposure to claims for pollution and environmental damage.

I shall now examine each reason in a little more detail.

1. There has been an enormous change in practical salvage since 1979 when consideration was first given to ways of encouraging the salvage industry to go to the assistance of ships which threatened damage to the environment. The remedies provided in the Salvage Convention may have been sufficient when they were first proposed nearly 30 years ago but environmental issues have increased in importance year by year making further change necessary. The environment is now relevant in every case and enormous regulatory control has been imposed often giving inexperienced local officials the power to determine precisely what work is done.

Thirty years ago the main concern was oil cargoes. But it is now recognised that other pollutants can be equally, if not more, damaging. Regulation and legislation have expanded to deal with other pollutants. There are no ships which do not carry

pollutants in one form or another and there is therefore hardly a casualty in which environmental considerations are not relevant. Further, potential liabilities do not stop at pollutants.

It is now quite common for claims to be brought in respect of grounding damage to coral reefs. Changing public environmental concerns now, effectively, dictate how a salvage operation is to be carried out and have to be the very first consideration of any salvor.

The ever increasing concern of the wider public and government agencies about the environment and the fear of it being damaged has also made a material difference to the risks and liabilities of the salvor. These increase as each year goes by. In their anxiety to curb pollution of the sea, governments are legislating to not only increase potential civil liabilities but create potential criminal liability.

Salvors have always accepted that they have liability for their negligence during any salvage operations, but they have also had the protection of 'responder immunity'. However the Bunker Convention of 2001 deliberately removed that protection opening up the salvor to potential third party claims. Although there may be a good defence it is highly likely that the salvor and his personnel will be drawn into expensive, time consuming litigation subject to the vagaries of a variety of jurisdictions.

As an example of this scatter gun approach to litigation, my company has recently been dragged into a third party claim for damage to a coral reef upon which a ship

had grounded. The ship owner was sued and as part of his defence he alleged we had been negligent and caused damage to the reef whilst refloating the ship. We are now tied up in expensive time consuming litigation subject to a jurisdiction on which we had no choice.

Aside from civil liability the salvor is increasingly exposed to potential criminal liability. For example, in the United Kingdom, the Water Resources Act imposes strict criminal liability on any one whose act or omission was the cause of the pollution. It does not have to be the sole cause or even the main cause. Any contributing cause is sufficient. For example, if adverse weather during a salvage operation were to cause a hose in a ship to ship fuel transfer operation to break, with resultant pollution, the salvor could be criminally liable under the Act. Representations by salvors gained an undertaking that this regime would be reviewed and appropriate corrective legislation drafted. The review has taken place but revised legislation has not been introduced.

The recent EU Ship Source Pollution Directive requires all EU States to impose criminal sanctions for all pollution caused by 'serious negligence'. The Canadian C-15 Bill has a similar effect. Salvors will therefore be open to prosecution whenever they save a ship within 200 miles of the coastline if there is a leakage of a pollutant and it is suspected they were responsible. No doubt other nations will follow suit.

Aside from new legislation, there also seems to be an increasing tendency towards unjustified political detentions of seafarers. In the case of the "Tasman Spirit", the

salvage master, who did not arrive until after the leakage, was detained for 9 months and the vessel chartered by the salvors to offload the oil from the ship arrested.

The potential civil and criminal liabilities of a salvor are certainly very different from what they were in the 1980s when the Salvage Convention was being developed and are a definite disincentive to the salvor to become involved in other people's problems. If salvors are to put their heads in a potential noose the rewards should take into account these risks.

2. In many shipping casualties where a coastal state is involved it is frequently a requirement that the bunker fuel is removed from the casualty by the salvor before they are allowed to commence property salvage operations. Even when salvors feel it is an unnecessary precaution. There are few cases today where there is not a 'threat of damage to the environment'.

That environmental concerns are uppermost is well illustrated by the case of the "Prestige". The refusal to offer a place of refuge to the "Prestige" may have been understandable to the authorities at that time, but within the industry it is commonly accepted that had it been given, this ship and much of her cargo could have been salvaged, as well as reducing the environmental disaster that occurred.

It is also accepted that the resultant salvage award under the existing regime would probably have been in the region of \$10 to \$12 million; that such an award would probably have been paid out of the salvaged property fund without the need to dig into the safety net of the SCOPIC clause; that such cargo oil remaining onboard would

have been contained; and that the cost of the cleaning up of the spill arising from the initial casualty would have been in the region of \$40 to \$50 million.

In the event, the salvors were unable to salvage the ship and cargo because a place of refuge was denied with the result that the ship finally sank giving rise to claims estimated to be in the region of \$1 billion.

Had the ship and cargo been salvaged, claims of up to \$1 billion would have been avoided but how much would the salvor have received for protecting the environment under the present regime? An enhanced award, but one capped by the salvaged value of the ship and cargo. Very little in comparison to the benefit conferred.

Despite the lack of a proper reward for the benefits conferred by protecting the environment, the salvage industry currently does much to benefit it. The Prestige lost some 70,000 tons of oil, the Erika a similar amount, and the Exxon Valdez lost some 37,000 tons. A total of 180,000 tons which resulted in claims of about \$5 billion. I understand that the US Government estimates that 700,000 tons of oil were lost in the Gulf of Mexico earlier this year. BP has already had to pledge \$20 billion – and the meter is still ticking.

In contrast, during 2009 alone, ISU members salvaged 1,022,730 tons of pollutants and in the last 15 years have salvaged nearly 16 million tons of pollutants, some of which might otherwise have polluted the sea. Of course not all that tonnage of pollutants would have been at the same degree of risk but what would have happened had only a small proportion not been salvaged?

The salvage industry has done well to cope with the changing situation as is illustrated by the results of the ISU annual pollutants salvaged survey, just mentioned. But I suggest that is despite a lack of financial incentive rather than because of it.

If the ship and cargo are of little financial value, or even valueless, the salvor (if a LOF is signed), will hopefully have the benefit of the SCOPIC Clause. This operates very well, but it is tariff based, and does not have an adequate reward mechanism for the salvor's work to prevent damage to the environment. As salvors are usually the first on the scene of any casualty, this state of affairs does not seem sensible. A change in the law to provide the possibility of a reward for protecting the environment would provide additional encouragement for the salvor.

3. As mentioned earlier, it is fair to note that when discussing the incentives given by the Salvage Convention, salvors' efforts in protecting the environment are currently remunerated, to a degree, as it is an element taken into account in assessing an award under Article 13. However, the reward under Article 13 is paid by ship and cargo owners and their respective underwriters pro rata to value rather than by the ship owner and his liability underwriters who normally bear the brunt of pollution claims and therefore benefit from the work done. This is plainly unjust.

How can change be effected?

The International Salvage Union has suggested that environmental awards which recognise the environmental benefit conferred by salvors could be achieved by amending Articles 1, 13 and 14 of the Salvage Convention. ISU has worked with others to produce drafts of the amendments. And the resultant proposals will be the

subject of Archie Bishop's talk in a few minutes time, so I will say no more other than to endorse the proposal which we feel will result in a more just and fair regime. I would ask you particularly to note that we do not ask for any award unless a benefit has been conferred and we entirely accept that it should be in proportion to that benefit. Further, we are content for the assessment as to a fair award, to be made by the appropriate tribunal, guided by principles that have worked well for many centuries in many countries.

Conclusion

Here I have given the salvors' "case for change". We believe it has the merit of being both persuasive and fair given the way concern about the environment has properly increased since the original work on the Salvage Convention began some thirty years ago. We also believe there is a sensible way to amend the existing framework to enable the change. We know that not all parties agree with our position and we stand ready to work cooperatively with the Comité and other stakeholders to continue to discuss and to work on this important matter. Being proactive on further protection of the environment will benefit everyone.

THANK YOU