

ENVIRONMENTAL SALVAGE: THE MARINE PROPERTY UNDERWRITERS' VIEW

By

**Nicholas Gooding
Senior Cargo Underwriter
XL London Market Limited**

1. Introduction

I am here today representing London Market Marine Property Underwriters

The terms of the 1989 Salvage Convention were formulated at a Convention in Montreal in 1982. In the 28 years since then, salvage operations have changed substantially. There have been many fewer LOFs and the number of substantial oil spills has greatly reduced. At the same time we have seen an increase in the liabilities of both salvors and shipowners, particularly in relation to third party liabilities relating to pollution and wreck removal, and far greater government interference in the conduct of salvage operations.

Hull and Cargo Underwriters mainly cover damage to property but increasingly they are being asked to pay salvage which includes remuneration covering measures which do nothing to mitigate their potential physical losses but rather those of Governments and P&I liability insurers. Accordingly what the marine property underwriters want agreement that those steps which are taken to mitigate or reduce the liabilities of the shipowners to third parties should be paid for by either governments or shipowners' third party liability insurers since it is for their benefit that such steps are being taken.

2. Why Reform is needed – The Legal Perspective

Hull and Cargo Underwriters insure damage to property, that is loss and or damage to the ship's Hull and Machinery and to cargo carried; save for salvage, general average and (in the case of hull policies) third party collision liability, hull and cargo policies do not cover liabilities. However, the salvage system makes Hull and Cargo Underwriters pay for measures to mitigate pollution and other liabilities insured by others (such as the removal of bunkers and the placement of oil booms etc). This is partly due to the fact that when fixing salvage awards Article 13.1(b) of the 1989 Salvage Convention requires tribunals to take into account "the skill and efforts of the salvors in preventing or minimising damage to the environment".

Additionally, English Courts and Lloyd's Open Form Arbitrators have for many years, taken into consideration potential liabilities to third parties as a distinct element of danger when assessing salvage awards even though the Convention is silent on the point. In the "WHIPPINGHAM" [1934] 48 LLR 49 a ship lost control in a gale while taking action to avoid a collision and fouled some yachts and risked fouling more. Bateson J. in rewarding the salvage tug said:

"The mere saving of a vessel from danger to other ships which might result in claims is a service, to my mind, because although the claim may not be a good one there is considerable damage attached to successfully defending a claim, because there is all the expense which you don't recover even when you are a successful claimant. I think that in itself would be a ground of claim for salvage."

Despite the fact that Article 13 of the 1989 Convention does not provide that the "Whippingham factor" should be taken into account in practice LOF Arbitrators do have regard to the avoidance of potential liabilities to third parties when setting their awards. In some cases this can account for a significant proportion of the award: Imagine for a moment a vessel which is drifting onto a rocky shore with a very real danger that it will go aground and break up with all the environmental damage that a spill of bunkers might cause. A salvage tug manages to get a line on board in difficult weather and tow the casualty to safety. In practice an Arbitrator will have regard to the sum that has been saved in pollution fines, clean up costs and compensation even though there is nothing special which the salvor did to prevent damage to the environment per se – all the salvors' work was done to save the ship and cargo. In this way marine property underwriters are already rewarding salvors (sometimes admittedly in a limited amount) for the work that they do to avoid or minimise the third party environmental liabilities of shipowners.

3. The Change in Salvage Operations

(a) Increase in Governmental control of salvage operations

The last 25 years had seen a massive increase in government control over salvage operations across the world. The invention of the Secretary of State Representative in the UK system which, if the EU get their way, will spread throughout the EU littoral states is just one example. Government intervention and control has altered the priority of salvage

operations. Para 7.8 of the IMO's Guidelines on the Control of Ships in an emergency (19 October 2007) states:

“The Salvors should ensure that the salvage plan and actions represent the best environmental option for the Company and the coastal State(s) concerned.”

As far as the IMO and most Governments are concerned the salvage of hull and cargo are of far less importance than the environment.

(b) An example of how Government can increase the cost of a salvage

To illustrate how this shift of priorities has affected salvage operations I would like to tell you the story of the “Artemis”, a 2,545 grt Combi 3850 design general cargo ship in ballast which went aground on a sandy beach in a resort on the west coast of France on 10 March 2008 at high tide. On grounding the casualty had only 42 cubic meters of gas oil (not marine diesel or fuel oil), 4,500 litres (4.5 tonnes) of lubricating oil in the engine room tanks and a further 500 litres of hydraulic oil in drums. Soundings showed the vessel's shell plating was intact.

An LOF was signed with leading French professional salvors and an Ocean-going tug was on site the same day. A connection was made on 11 March 2008 but it parted during the first re-floating attempt that evening. It was re-connected overnight and on 12 March 2 further re-floating attempts narrowly failed to re-float the casualty. SCOPIC was invoked. The level of high water was now set to fall for some days so time was of the essence. It was decided to dredge away some sand at the next low tide to allow the vessel to re-float more easily.

At this point the authorities intervened and ordered the removal of the vessel's bunkers, pending which no further re-floating attempt would be permitted; this meant no further re-floating attempt could be contemplated until at least 20 March. In the view of both the salvors and the Master the removal of the bunkers was unnecessary but to decline to comply would have risked the authorities assuming the conduct of the operation and incurring unlimited and uncontrollable expenses.

The Master believed there was no danger to the environment; although the casualty had suffered some bottom damage on grounding, her shell plating was at no point breached, the fuel oil was in a tank well away from the ship's bottom, the vessel was securely ballasted

down and could have refloated itself when the high waters returned in the medium term if left alone.

The bunker removal operation took longer to organise than to carry out and was completed by 19 March. Luckily the authorities were persuaded that another refloating attempt could be carried out on 20 March and on that day she refloated. It is hard to say how much time and money the bunker removal operation cost. It probably extended the duration of the salvage by anywhere between 2 and 7 days. The issue here is that the out of pocket expenses of the operation and the cost of keeping 2 tugs and a salvage team mobilized were paid for by the Hull Underwriters even though they contributed nothing at all to the refloating of the casualty. As a very rough estimate the cost of the salvage was increased by one third.

(c) Liability Creep

The increase in the size and scope of environmental liability legislation that has been introduced over the last 25 years in numerous countries has made shipowners liable for damage to things which nobody owns such as wild birds, coral and even the ordinary seabed. The Ballast Water Convention is just one further example of this “liability creep”. This change of attitude to the environment extends to mariners training: In a Seafarers’ Training Manual published in 1967 Masters were encouraged to pour oil on rough seas on the lee side of a ship to assist pilots boarding or launching lifeboats in difficult conditions. This is now a criminal offence in England (s.85 Water Resources Act 1991 as re-enacted in the Environmental Permitting (England and Wales) Regs 2010, Regs 12(1) and 38(1)).

(d) Technological Advances

Further salvage and wreck removal technology has developed apace over the last 25 years enabling wreck removal orders to be made in respect of vessels which, years ago, simply could not be removed. These hi tech wreck removal operations, such as the “KURSK” and the “TRICOLOR”, can be extremely expensive. Similarly bunkers can now be removed in circumstances in which, 25 years ago, it was just impractical to attempt such an operation: This just encourages the Authorities to make bunker removal orders which may be unnecessary.

4. Marine Property Underwriters' Aims

Marine Property Underwriters are content to pay to mitigate the risks that they insure but they want governments and/or P&I Insurers to pay for measures which mitigate the risks that they bear too. We are looking to the reform of the salvage structure by a review of the way that environmental salvage is awarded to help achieve this. Measures which mitigate both kinds of loss (i.e. losses borne by marine property underwriters and losses born by P&I Insurers/governments) should be apportioned under any new system.

5. Types of Award

We therefore propose that in assessing salvage remuneration 3 types of award could be made:

- (a) A Marine Property Salvage Award; this will be assessed by reference to the traditional Article 13 factors except:
 - (i) Article 13(i)(b) Salvage Convention 1989 (“the skill and efforts of the salvors in preventing or minimising damage to the environment”)
 - (ii) The extent of environmental liabilities to third parties avoided by the shipowners; and
- (b) An environmental liability salvage award focusing on work done to avert or minimise environmental liabilities (i.e. pollution by oil, HNS and wreck removal) and the losses to the Shipowner which such liabilities might give rise to. This would include items 5(a)(i)-(ii) above; or
- (c) SCOPIC or Art. 14 (payable only insofar as it exceeds 5(a) and (b) above).

It is envisaged that (b) and (c) are alternatives and it would be for the salvor to choose which secondary award mechanism should be incorporated by notice in writing to the shipowners.

There will usually be cases where work is done by a salvor which benefits both property and liability insurers and in such cases it will be the role of the arbitrator to apportion the extent of the benefit conferred on each type of interest (marine property and marine liability insurers).

It is not proposed that any weight should be given to the avoidance or minimisation of the potential liability of the Shipowner to crew, cargo or in respect of collision or any liabilities of those interested in the cargo. They fall outside Art. 13 at present and are not environmental liabilities and are therefore not suited to inclusion among the factors to be considered when calculating an Environmental Salvage award.

I shall address, in a moment, the relationship between SCOPIC and Art. 14 under the proposed awards.

6. Calculating the environmental liability award

Marine Property underwriters recognise the success of the tariff based SCOPIC system as policed by a Special Casualty Representative (“SCR”) and would like to adapt that in an attempt to minimise disputes over the calculation of the environmental liability award. Accordingly it is proposed that this type of award should be calculated by:

- (a) Costing all steps taken which are aimed in whole or part at minimising environmental liabilities to third parties in the current SCOPIC tariff manner.
- (b) Apportioning (where necessary) the extent to which each step is directly and indirectly aimed at saving the property and minimising environmental liabilities. It is suggested that measures taken which are aimed both directly and indirectly at the reduction of environmental liabilities should be considered for this purpose. Steps adjudged to have been taken (following the apportionment) for the preservation of property should continue to be remunerated under the existing Art 13/SCOPIC system. Steps which are solely designed to avoid or minimize damage to the environment should be the subject of the environmental liability award alone, and steps which are designed both to preserve ship and cargo and preserve the environment should be apportioned between ship and cargo.

Steps (a) and (b) above would initially be at the SCR’s discretion (but with a right of appeal to the Court or arbitrator).

- (c) Arriving at a “cost” for the environmental liability award and then uplifting the environmental liability award by a factor calculated by reference to the degree of risk that the liability would crystallize and the extent of potential environmental liabilities

averted or minimised. Clearly this factor is not one which an SCR can reasonably be asked to determine. It would have to be determined by an arbitrator in the absence of agreement. The upper and lower limit of the uplift will have to be the subject of negotiations, but a minimum could be 25% (as for SCOPIC) and a maximum might be 100% (as in Art. 14 exceptional circumstances) subject to the cap or overall limit that I shall come to.

7. Limit for environmental liability award

Just as the Article 13 property award is limited by the value of the salvaged fund it is proposed that the environmental/third party liability award would also be limited to a figure calculated in accordance with the ship's tonnage. Precisely what this figure should be will obviously be a subject for negotiation and it may be appropriate to have a higher limit in the case of oil tankers than would apply to other vessels. As a starting point for these discussions we propose that liability underwriters fix a limit of US\$180 per gt with a minimum limit of US\$3,600,000 (the limit of a vessel of 20,000 gt) and a maximum limit of US\$25,000,000 (the limit of a vessel of 138,889 gt); the tonnages relate closely to the CLC 1992 limit tonnages as amended by STOPIA.

8. Security

- (a) **Ship** : When demanding salvage security from ship the salvor will need to quantify his security demand in respect of his Art. 13 (as amended) and environmental salvage/SCOPIC awards separately. In the first instance the person responsible for lodging security shall be the owner (as at present). Security may be given in one, two or any number of guarantees so long as the total of all such guarantees match the sums demanded in respect of each of the awards claimed.
- (b) **Cargo and Time Charterers** : Cargo and Time Charterer's bunkers will remain liable only for Art. 13 awards so the current system of collecting security will be unaltered.

9. Evidence

Shipowners and their insurers may, if separately represented, adduce evidence separately.

Access to the shipowner's witnesses should be available to both those representing the owner's hull and machinery underwriters and liability underwriters jointly where both sets of insurers are involved. Efforts should be made to adduce only one statement from each witness.

10. Representation

Owners, property and the ship's liability insurers should be entitled to be separately represented before the appropriate tribunal (including LOF arbitrations) under this system. Insurers would not be a party to the LOF contract so there will be no direct right of action against marine property or liability insurers – the right of action to enforce an award will lie against the shipowner and cargo owner alone or under any guarantee(s) given to secure their liabilities.

11. Article 14 / SCOPIC

Assuming the above system is introduced there will be less need for an Article 14 or SCOPIC award in the future save where there is little or no danger of environmental liabilities.

12. Payment

The owners of the ship shall be liable to pay both his proportion of the Art. 13 award (as amended) and all of the environmental liability award in full; the environmental liability award will be payable in full in addition to the property award – it will not be a top up award, as the Article 14/SCOPIC award is. If the salvor elects not to claim an Environmental Salvage award Art. 14/SCOPIC will continue to be payable only to the extent that it exceeds the amount of the amended Art. 13 award. This will require an amendment both to the Convention and to LOF.

It is envisaged that the liability to pay the environmental salvage award should be covered by the P and I insurers of the ship just as Art. 14/SCOPIC is now.

Cargo and Time Charterers' bunkers interests will only be liable for their proportions of the Art. 13 award; no environmental liability or SCOPIC award will be payable by them.

13. Training and Investment

Marine property underwriters would like to see a mechanism for ensuring that all, or a substantial portion, of the environmental liability salvage award is used to improve training and investment in the salvage industry perhaps by forming a Trust to train salvage crews and lend to the industry to allow investment in salvage craft and equipment; this will go a significant way towards justifying the introduction of the environmental liability salvage award and avoid the impression that it is merely there to enrich the ISU members' shareholders.

14. Implementation

Marine property underwriters propose that the 1989 Salvage Convention should be replaced by another convention entirely along the above lines. However they would be content to support these measures in a Protocol if this became a preferred option.

15. Conclusion

The way in which casualties are dealt with has changed completely in the last 25 years. Far greater emphasis is now placed upon environmental protection than was the case when the 1989 Convention's terms were sketched out in Montreal in 1982. This has led to far greater expenses under Article 13 much of which has been caused by pollution avoidance on the orders of public authorities. It is only fair that this increased element in the cost of salvage should be paid for either by those who insure it or those who order it and it is this which hull underwriters will be arguing for during the debate on environmental salvage.