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1. Introduction

In December 2008, the International Salvage Union (**ISU**) wrote to the Comite Maritime International (**CMI**) pointing out that the Salvage Convention 1989 (**the Convention**) was nearly 20 years old and it was over 30 years since work had first begun on its drafting. It suggested that there was a need for review of certain aspects of the Convention and invited CMI to undertake such a review.

The CMI set up an International Working Group (**IWG**) in 2009 and a Questionnaire was sent to National Marine Law Associations (**NMLA**) in July 2009. Questions were asked concerning various matters identified by the ISU in relation to eight articles in the Convention, they being Articles 1, 5, 11, 13, 14, 16, 20 and 27.There have been 24 responses received, and they have been summarised.

A second Questionnaire was sent to NMLAs in 2010 in order to ascertain whether there was any empirical evidence which could be obtained in support of the ISU's complaints concerning the Convention. A synopsis of the responses has also been prepared.

An International Subcommittee (ISC) meeting took place in London on 12 May 2010. A report of that meeting was prepared. There have also been two IWG meetings, and a Colloquium at Buenos Aires in October 2010, which is referred to below.

2. Background

A little over 30 years ago (September 1979) the CMI established an International Subcommittee under the chairmanship of Professor Erling Selvig to study the subject of salvage and prepare a report for the Montreal Conference to be held in 1981. An IWG was set up which drafted a new Salvage Convention to replace the 1910 Salvage Convention (which CMI had also prepared). At the 1981 Montreal Conference a draft text was approved by the Assembly and forwarded to IMCO (which changed its name in 1982).

2.1 Liability Salvage

As a first step in the work done by CMI, following on a request from IMCO, Professor Selvig prepared a "Report on the Revision of the Law of Salvage" in April 1980, which is to be found in the Travaux Preparatoires of the Convention on Salvage 1989. That report is as relevant today as it was then. In discussing salvage operations Professor Selvig made the following comments:

> "In the overall context of international shipping State - organised machineries established at the national level, cannot be regarded as a viable alternative to an internationally active private salvage industry. National machineries will probably be tailor-made to the needs of the coastal state concerned and primarily for use in the waters adjacent to that State. However, most States will not be in a position to establish or maintain on its own or on a

> regional level a salvage machinery with the overall capacity required. Consequently, the role of national machineries can be expected to be only a supplementary one, mainly limited to the area within their respective jurisdictions.
>
> The overall cost of such a combined system under which the private salvage industry retains a main role will probably be less than the system based only on State organised salvage. The capital intensive character of modern salvage techniques suggest that at a given cost level, the combined system will make available to international shipping and States affected thereby, a higher and permanent overall salvage capacity....
>
> The income of the salvage industry must be sufficient to maintain an internationally adequate salvage capacity. It is probably required that total compensations reach a higher level than at present. Moreover, the risk of incurring expenses without compensation or of incurring liabilities in connection with salvage operations, should not be such that salvors are discouraged from intervening in particular cases".

Professor Selvig then went on to introduce the concept of "liability salvage". He said as follows:

> "Nevertheless, the concept of salvage should be extended so as to take account of the fact that damage to third party interests has been prevented. Since the ship which created the danger, will have a duty to take preventive measures in order to avoid such damage, this will mean that salvage should refer not to ship and cargo, but also to the ship's interest in avoiding third party liabilities (liability - salvage). Thus, the ship's liability insurers should be involved in the salvage settlement and pay for benefits obtained by the salvage operation.
>
> In the long run the law of salvage cannot neglect to recognise that compensation for salvage is nearly always actually paid by insurers. Moreover, insurers of ship and cargo cannot reasonably be required to cover fully the expenses for salvage operations from which another group of insurers - the liability insurers - regularly benefit.
>
> Inclusion of the liability interest within the concept of salvage will undoubtedly provide a more equitable distribution of the overall cost of salvage. It may also provide a beneficial encouragement to salvors to engage in salvage operations when third party interests outside the ship are in danger, particularly in cases where the chance of saving ship and cargo is rather remote. Finally, contributions from new sources may enable the international salvage capacity to remain at an adequate level".

Later on in his report Professor Selvig also made the following comments:

> "The salvor should be entitled to a reward on the ground that liability for damage to third party interests outside the ship has been prevented or minimised. This should be

considered to be "a useful result" within the meaning of the principles of "no cure and no pay" of the 1910 Convention Article 2. ...

Some particular rules may be required to determine how the reward for liability - salvage shall be fixed. The values in danger as well as the salvaged values will as a rule have to be determined with regard to applicable limits of liabilities. In the case of oil pollution, for instance, depending upon the circumstances, both the 1969 and the 1971 limits may be relevant, also with the consequence that the liability insurer and the fund each will have to cover a proportionate part of the reward.

In cases where the salvors have prevented damage for which the ship owner would not have been liable, the salvors may only recover the cost of preventive measures...

In cases of liability - salvage as well as salvage of ship and/or cargo, the reward may be fixed in two stages, first the total amount and subsequently the apportionment determining for which amount each of the respective interests shall be responsible."

2.2 CMI - Montreal Conference

It is also worth quoting from the report of Professor Selvig, which accompanied the text of the IWG draft convention with the papers for the CMI Montreal Conference [CMI Yearbook Montreal 1]. He said as follows:

> "The main differences of view in the sub-committee related to the question of whether salvors should be entitled to payments on the ground that salvage operations have been carried out also in order to prevent damage to the environment or that by the endeavours of the salvors such damage has actually been avoided. One approach to these problems was suggested in the chairman's initial report, another in the LOF 1980 and the draft prepared by the British MLA. The compromise, now contained in the draft convention Articles 3.2 and 3.3, reflects the "safety net" idea of the LOF 1980 as well as certain other notions having emerged during the discussion, and assumes that, in accordance with the draft convention Article 1.5, these articles may be departed from by contract."

In essence what was approved at the Montreal Conference was what had been drafted by the IWG and presented for debate at the conference.

2.3 Salvage Convention 1989

The Salvage Convention came into force internationally on 1 July 1995. The entry into force provisions required 15 States to agree to it (Article 29) and in Article 32 enabled the Secretary General to convene a conference of the State parties for revising or amending the convention at the request of eight parties, or one-fourth of the State parties, whichever is the higher figure. IMO

Resolution A.777(18) provides that the Legal Committee will only entertain proposals for amending existing conventions on the basis of "a clear and well-documented compelling need" to do so, as prescribed by Resolution A.500 (XII).

2.4 "Nagasaki Spirit"

The next development in the story is, perhaps, the decision of "*Nagasaki Spirit*" (1997) 1 Lloyds Rep 323, described by some as the straw that broke the camel's back. The House of Lords held that "fair rate for equipment, personnel actually and reasonably used in the salvage operation" in Article 14.3 meant a fair rate of expenditure and did not include any element of profit. As Lord Mustill said in his judgment at page 332:

> "...the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purposes of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of "salvage operations" which ... are defined by article 1(a) as operations to assist a vessel in distress. Thus although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award."

2.5 SCOPIC

There seems to be broad agreement that the problems of interpreting Article 14 led to uncertainty and dissatisfaction. Among the many problems it is understood that it was found that claims for an uplift over actual cost brought under Article 14.2 necessitated not only proof that the damage to the environment would have resulted but for the salvor's intervention but also the extent of the damage had the operation been unsuccessful. A variety of experts were needed, such as naval architects, drift experts and environmental experts. In addition the accounting exercise referred to by the House of Lords in the "*Nagasaki Spirit*" was found to be a time consuming and expensive one. As a result the SCOPIC clause was negotiated.

The ISU stress that SCOPIC is in essence, a safety net, not a method of remuneration. It is also not an international solution but only one for LOF. There would be problems if it were sought to apply it as a matter of law rather than contract, eg. who would negotiate rates, and how would they be determined. The present rates have only been changed twice in 10 years. There is no currency fluctuation cause, which has caused concerns to the salvage industry.

3. Previous Meetings/Colloquiums

3.1 Buenos Aires Colloquium - October 2010

Papers were presented at this Colloquium by key stakeholders in this debate. Todd Busch[1], the President of the ISU, commenced his paper by saying:

> "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."

He identified the significant problem which salvors face when he said:

> "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 salved property."

He then referred to the fact that both Article 14 and SCOPIC are at best only a safety net for salvors, it is applicable in 25% of LOF cases and therefore in 25% of cases salvors are receiving what he described as the "bare minimum".

In his paper Todd Busch identified three principal reasons why the Salvage Convention needed to be amended. Firstly, he argued that much has changed since the Salvage Convention was first drafted in 1981. He pointed in particular to environmental issues which he said are now dominating every salvage case. Secondly, whilst salvors are rewarded for saving the ship and the cargo, they are not fully rewarded for the benefit they confer in protecting the environment. Thirdly, he argued that it is not fair that the traditional salvage reward which currently, but inadequately, reflects the salvor's efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurance without any contribution from the liability insurers who cover the shipowner's exposure to claims for pollution and environmental damage. The remainder of his paper elaborated on those principles.

Kiran Khosla, Director, [2]Legal Affairs at the International Chamber of Shipping and the International Shipping Federation, spoke on behalf of the shipping industry. In her presentation she outlined the history leading up to the 1989 Salvage Convention and stressed the significance of the "common understanding" of the diplomatic conference which is attached to the Convention to the effect that courts are not required to fix an Article 13 award up to the maximum salved value of the property before assessing special compensation under Article 14. Courts are therefore entitled to calculate an award of special compensation in all cases where the Article 13 reward is lower than the appropriate Article 14 compensation. The second compromise that she

[1] CMI Yearbook 2010 P.493

[2] CMI Yearbook 2010 P.478

stressed was the fact that the enhancement in the Article 13 award would be allowable in general average whereas the special compensation in Article 14 would not. This led to the amendment of the York Antwerp Rules in 1990 so that shipowners only would be liable for the Article 14 compensation.

Ms Khosla asserted that the SCOPIC tariff rates are both profitable and purposely generous for personnel, equipment and tugs and that the rates had been increased significantly in 2007. Further discussions were taking place at the time of the Colloquium which resulted in further changes to SCOPIC in 2010. She went on to say in relation to the SCOPIC clause that it has "effectively disposed of all the difficulties associated with Article 14 and when incorporated and called into use, it has resulted in an efficient and orderly provision of salvage services for the prevention of pollution to the environment and generally on an amicable basis".

Concerning the ISU's proposal for an environmental salvage award, Ms Khosla considered that it would:

> *"alter the basis of salvage operations. The prime objection would be no longer to save property. The basis of the award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented. It hardly needs saying that this would entail a difficult and speculative enquiry into what damage might have occurred had pollution resulted from the casualty. There is moreover no guidance on what an appropriate award amount would be in any given incident. ...This would raise the bar significantly and the increased sums at stake would inevitably result in contentious expert evidence and speculative theorising. This would no doubt result in more litigation and serve no-one's interests".*

In relation to the ISU's suggestions that the P&I Clubs, as the ultimate beneficiary of the pollution prevention services provided by the salvors, should be responsible for paying the environmental award Ms Khosla emphasised that:

> *"governments have recognised that there is a shared responsibility, by governments, by shipowners, by cargo and by the general public. They have done this through the mechanisms created in the CLC Liability Conventions (including the Fund Convention) and the HNS Fund Convention. The Funds provide for additional compensation which is contributed to by cargo interests, once the shipowner's liability has reached the agreed limits. By attributing the liability on to cargo interests, the governments explicitly recognise cargo's responsibility for the environment."*

Ms Khosla also emphasised that:

> *"governments are not asking the salvage industry to build up capacities for preventing damage to the environment. Rather, they are accepting 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 regional levels."

Ms Khosla was supported in her comments by Hugh Hurst[3] who represented the International Group of P&I Clubs. He stressed the element of risk sharing between property interests (and thus their insurers) and liability insurers. He argued that "Any environmental award would inevitably be subjective, speculative and hypothetical which would lead to a lack of consistency between awards. It would also severely delay any payment to salvors unlike the position under SCOPIC".

A paper was also presented by Nic Gooding[4] representing the London Market Marine Property Underwriters. He emphasised that the world of salvage has changed significantly since the Convention was formulated in Montreal in 1982. He referred to the fewer salvage operations performed, the reduction in the number of oil spills, the increase in the liabilities of salvors and shipowners, particularly concerning third party liabilities relating to pollution and wreck removal and far greater government interference in the conduct of salvage operations. He then said that:

"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."

Mr Gooding therefore proposed that there be three types of award -

(i) a marine property salvage award based on the present Article 13 criteria (excluding Article 13(1)(b))

(ii) an environmental liability salvage award - focusing on work done to avert or minimise environmental liabilities

(iii) SCOPIC or Article 14 only if it exceeded (i) and (ii).

The proposal made was that (ii) and (iii) were alternatives.

3.2 International Subcommittee Meeting: May 2010

This meeting was well attended by the members of the International Working Group, representatives from the International Salvage Union, the International Chamber of Shipping, the International Group of P&I Clubs, arbitrators, the insurance market, barristers and representatives from MLA's. There was a vigorous debate, in which many of the arguments already canvassed in

[3] CMI Yearbook 2010 P.499

[4] CMI Yearbook 2010 P.470

this Report were discussed. Of significance were the comments made by a barrister, who has appeared in salvage cases and has sat as an arbitrator, Michael Howard QC.

"There is relatively little evidence in most cases of specific work done to prevent damage to the environment." He said further that: "awards do not reflect work done in relation to environment protection by and large; Arbitrators tend to think in terms of physical benefits. Where a shipowner is saved from liabilities to third parties, that tends to be taken into account in the overall assessment of an award."

Such an approach is consistent with that adopted by Tamberlin J in the Australian case of *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [5]. In that case his Honour concluded that:

> *"consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors and, in appropriate circumstances, this may inform the fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability."*

Another barrister Vesanti Salvaratnam QC identified from the discussion that salvors wanted greater transparency from awards and she did not see any reason why arbitrators could not address that. She queried why Article 14 could not be amended to overcome the House of Lords' decision in the "Nagasarki Spirit" in order to make it clear that such awards should include a profit element.

4. First Questionnaire to National Maritime Law Associations (NMLAs)

4.1 Article 1 Salvage Convention

– **Geographical Scope**

One of the questions posed in relation to Article 1 was whether the definition in Article 1(d) which limited "damage to the environment" to "**substantial** physical damage to human health or to marine life or resources **in coastal or inland waters or areas adjacent thereto** …" should be amended (emphasis added).

The First Questionnaire sought to ascertain the views of NMLAs as to whether that wording which has been highlighted should be deleted or whether words such as those found in other conventions (CLC, HNS and Bunker Conventions) such as "wherever such may occur" or "the exclusive economic zone" or the "territorial sea" should replace those words. It is suggested by the ISU that the present wording is outdated and too imprecise.

Of the 24 NMLAs who responded to the First Questionnaire 16 have favoured replacement of those words with words which refer to the exclusive economic zone (or an area adjacent to the territorial sea equivalent to an exclusive economic zone). Two did not express an opinion, and of six who did not want to amend the present wording, four recognised that the wording could be improved. South Africa has, by its domestic legislation, extended the scope of "damage to the environment" to any place where such damage may occur.

– **"Substantial"**

Also, in relation to Article 1, the First Questionnaire enquired as to whether the word "substantial" had been interpreted in any cases in the jurisdiction of the NMLAs or alternatively sought an expression of opinion as to whether that word is likely to create difficulties of interpretation. Apart from one Australian case *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [6], to which reference has already been made there were no cases which explicitly discuss that word. The US MLA referred to *International Towing and Salvage Inc v F/V Lindsey Jeanette*[7] which found there to be a threat of damage to the environment, where a discharge of oil and other pollutants was threatened into the EEZ, (although there was no explicit discussion of the word "substantial").

Two NMLAs did not express an opinion as to whether the word "substantial" should be deleted; seven supported deletion and the remaining 15, for the most part, considered that the courts or tribunals were well able to interpret the word satisfactorily. China, for example, favoured deletion on the basis that its use is contrary to the trend of strengthening environment protection, fails to reward the ordinary, non-substantial physical damage, and finally because of the lack of clarity as to what was intended by use of the word "substantial". Italy, Sweden and Slovenia suggested that both the words "substantial" and "major" be deleted. The Netherlands however thought the inclusion of "substantial" serves to filter out bagatelle cases. South Africa which suggested deletion, was uncertain whether it should be replaced and queried, if it was, whether words such as "not trifling nor insignificant" should qualify damage to the environment.

The British MLA pointed out the word "substantial" has had to be considered in a large number of salvage arbitrations, (and in the case of *R v Monopolies and Mergers Commission (1993) 1 WLR 23*) and attached extracts from some of them, which were attached as a schedule to its response.

– **Loss of Containers**

The First Questionnaire also sought to ascertain whether the definition in Article 1(d) which refers to specific means by which such damage can be occasioned (ie pollution, contamination, fire, explosion or similar major incidents) would be likely to encompass an incident which gives rise to

[5] (2006) FCA 1141

[6] (2006) 163 FCR 151; (2006) FCA 1141; and (2007) FCAFC 115.

[7] 1999 AMC 2465

dangers to navigation, for example a loss of containers at sea. Once again, some NMLAs considered that it would be covered but others that it would not be covered.

The question arises therefore as to whether or not the definition should be widened to cover casualties which can give rise to a danger to navigation, particularly in the case of containers carrying dangerous or hazardous cargo. In short, is a danger to navigation also a threat to the environment? It is not difficult to envisage a submerged container puncturing the side of a ship and giving rise to the potential of damage to the environment. This was the scenario that took place off the Eastern Australian coast when the "Pacific Adventurer" lost containers overboard which holed two of its fuel tanks in March 2009, causing substantial oil pollution damage to Queensland beaches. As the Finnish MLA pointed out, a container's contents could constitute an environmental risk.

Nine NMLAs opposed any change to this provision; four suggested that it should be widened to refer to this type of situation; four did not express an opinion as to whether amendment was necessary; five expressed the opinion that it would not be covered without saying whether it should be amended, and two suggested that it would be covered without expressing a view that amendment was (or was not) necessary. A number of MLAs considered that if no present arrangements were altered they should be changed for all types of vessels.

– **Brice Protocol**

Another topic for debate at the Salvage Convention, raised by France, concerned the definition contained in Article 1(d) and whether it should make specific reference to "cultural heritage" (page 115 Travaux Preparatoires). Since then of course the UNESCO Convention on the Protection of the Underwater Cultural Heritage has been negotiated in 2001, which largely ignores the existence of salvage. It provides in Article 4 that:

> *"Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:*
>
> *(a) is authorised by the competent authorities, and*
>
> *(b) is in full conformity with this Convention, and*
>
> *(c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection."*

Some 37 countries have adopted the UNESCO convention, but many of the major Maritime countries have not adopted the convention and show no signs of having any inclination to do so.

The Second Questionnaire which the Salvage Review IWG sent to NMLA's asked whether the Brice Protocol should be considered for inclusion in the Salvage Convention. Four NMLAs

answered positively (and one agreed that it was worthy of consideration) and three answered negatively. Canada expressed concern that the reservation which Canada made to the Salvage Convention (which has no geographical limitation) may conflict with the Brice Protocol which suggests a more restricted right of reservation in Article 30 - that is where the property involved is historic wreck in the territorial sea, or inland waters. The UK MLA was unclear as to why the protection of wrecks should form part of a Salvage Convention.

The question for delegates in Beijing will be whether specific provisions dealing with underwater cultural heritage should be included in the Salvage Convention, at least for the benefit of those nations who do not wish to become party to the Underwater Cultural Heritage Convention but consider that it would be appropriate to make some provision in the Salvage Convention to deal with this topic.

4.2 Article 5 Salvage Convention

The First Questionnaire sought to ascertain whether public authorities can pursue claims for salvage in their jurisdiction. This was not an issue raised by the ISU but was raised in the debate within CMI on Places of Refuge. 18 countries answered to the effect that public authorities can pursue claims for salvage; China considered that the provision should be deleted, although it recognised that other States might oppose the deletions, in which case it would support the creation of a right to a reservation over the deleted provision. Seven did not support any change. A number of MLAs considered that this is a matter which should be left to national law.

The British MLA identified the general rule of English law as being that a person or body that performs a pre-existing duty to a casualty is not entitled to claim a salvage reward and where, however, it performs services beyond its pre-existing duties it may be able to claim a salvage award. The South African MLA referred to *Transnet Limited t/as National Ports Authority* and the "*Cleopatra Dream*"[8] where a public authority failed in its attempt to claim a salvage reward. This appears to be the position in a large number of countries.

There is therefore minimal desire to effect change to this provision, at least in so far as the answers in the First Questionnaire are concerned. Slovenia suggested that each country should be left to determine the rights and duties of public authorities, but perhaps model rules could be prepared to assist in delivering uniformity.

4.3 Article 11 Salvage Convention

This question sought to ascertain which countries had ratified the Salvage Convention, whether any specific legislation or regulation had been made to give effect to Article 11 and whether NMLAs thought it would be appropriate to make express reference to the IMO Guidelines on

[8] (Unreported Supreme Court of Appeal of South Africa, 11 March 2011)

Places of Refuge in Article 11. Of the 24 countries who have responded to the First Questionnaire 20 countries, had either accepted or ratified the Convention; only two countries had made any express provision in relation to Article 11, some suggest that their legislation has dealt with this issue indirectly and only a couple of respondents thought that an express reference should be made to the IMO Guidelines on Places of Refuge or the new CMI Draft Convention on Places of Refuge. (It was suggested by some that the EU had taken steps to integrate the IMO Guidelines into domestic legislation by amendments to Directive 2002/59 which refers to the IMO Resolution.) The US MLA referred to the US Coast Guard Commandant Instruction entitled US Coast Guard Places of Refuge Policy of July 17, 2007 and the multi agency National Response Team Guidelines for Places of Refuge Decision Making dated July 26, 2007.

Whilst a few NMLAs think that the Salvage Convention could be improved by amendment the overriding sentiment appears to be that such matters are best left to stand alone instruments.

4.4 Articles 13 Salvage Convention

Article 13 paragraph 2 provides that:

> *"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 salved 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 defence."*

The ISU has identified problems in recent years in the salvage of container ships, which are becoming larger and larger, and which has given rise to problems in collecting security from cargo interests. Sometimes it is not obtained at all or, when it is provided, the cargo often remains unrepresented and has to be given notice of pending arbitration, an award and an appeal award, all causing considerable expense and delay. In one case 6,000 TEU containers were involved comprising 4,486 individual interests. Only 3,066 were involved in the arbitration and of those 1,055 were unrepresented.

Three NMLAs reported that in their countries there is a provision in their legislation which has channelled liability to the shipowners. Four NMLAs thought it would be of benefit for the Convention to identify the ship owner as being the party who should primarily be responsible for the payment of claims and the provision of security in container cases. The remainder did not consider it necessary to make special provision for container ships. China, however, suggested that "Further work needs to be done to explore solutions in relation to the provision of security and handling of unrepresented cargo, both in relation to container and general cargo ships". Finland pointed out that whether the ship or the salvor had the liability for administration or the ship had the liability for payment/security the burden could be unreasonable on both. Germany

considered that the availability of its lien put the salvor in a better position than the shipowner. Italy, Slovenia and Netherlands favoured identifying all ships and not just containerships if change was to be made.

4.5 Article 14 Salvage Convention

This is clearly the most contentious area of potential reform in relation to the Salvage Convention 1989 and relates to what is now being termed "environmental salvage". A broad question was posed to NMLAs as to whether they would be in favour of an investigation by CMI as to whether Article 14 should be amended to create entitlement to an environmental award.

Their suggested solution to this is to amend Article 13 by deleting Article 13.1 (b) (the skill and effort of the salvor in preventing or minimising damage to the environment) and reintroducing it in an amended Article 14. The arguments in favour and against were rehearsed in Buenos Aires and the speakers at this conference will give you another taste.

Ten NMLAs expressed support for considering the issue of environmental salvage and seven were opposed. Of the remainder two expressed no opinion and four recognised that some change may be necessary and one was open to persuasion. Germany, whilst recognising and supporting the need for a reconsideration of Article 14 hoped that the competing interested parties would first negotiate a resolution. Norway recognised that the increased focus on the environmental side of casualties suggested that Article 14 needed to be drafted to encourage professional salvors to maintain vessels and equipment dedicated to prevent environmental damage. A number of NMLAs pointed to the fact that SCOPIC has been introduced as indicative that Article 14 had not worked. As has been seen in Section D opposing views were expressed by the shipowners and their liability insurers (the P&I Clubs) on the one hand and the ISU and London market property underwriters on the other hand. The arguments in favour of change are based on the changing face of salvage, and the inability for salvors to be appropriately remunerated in cases where there are low salved values. The arguments against change focus on the unpredictability of an environmental award and the need to share with the property owners and their insurers the liability for any such award.

4.6 Article 16 Salvage Convention

This question asked whether NMLAs considered that Article 16 should be amended to ensure that life salvage claims should be made against the owners of property salved rather than the salvor. Article 16 currently provides that "A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimising damage to the environment".

The ISU has pointed out that prior to the 1989 Convention, claims for life salvage would have been made directly against the owners of the property but as a result of the language used in the Convention, such claims now can be made against the salvor. It points out that this could create a problem for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim under Article 13 and 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 the effort of a third party over which it had no control. So whilst liable to the life salvor, the property salvor will have received nothing for the work done in saving life. This, it is suggested, would be an injustice to the property salvor. The ISU therefore suggests a correction to the wording to ensure that any life salvage claims are made directly against property rather than the salvor.

In New Zealand and the Netherlands, domestic legislation places the liability for the payment of life salvage on the shipowner. South Africa has also dealt with this by providing in its domestic legislation that the owner of a ship or wreck is liable for life salvage. The Canadian MLA suggested that consideration should be given to revising the wording to ensure that life salvage claims are made directly against the vessel or other property owner, rather than the salvor, and that they would be a separate reward, not a part of the property salvage award. Germany, on the other hand, whilst supporting a change so that claims are directed to the respective property owners, but, noted that the award would reduce the salvor's property salvage award. Greece supported change but also said that if no change is made a time limit should be imposed on claims by life salvors of more than two years (because property salvors, in practice, do not inform life salvors of the award which it has obtained).

Ten NMLAs answered in the affirmative, including China which expressed the view that life salvage should be kept entirely separate from property and does not consider that the present provision is conducive to the encouragement of property and environmental salvage (China considered that a separate lifesaving fund should be established) and eleven NMLAs considered that no change was necessary. (Two NMLAs did not express an opinion and South African legislation makes the shipowner liable to pay salvage in respect of life salvage to the salvor.

4.7 Article 20 Salvage Convention

This question sought to ascertain whether Article 20 (which provides that "Nothing in this Convention shall affect the salvor's maritime lien") would need to be amended if a new and separate award was to be created under Article 14.

Seven NMLAs thought this was appropriate; twelve considered that it was not necessary, for example, as it would be a maritime lien within its jurisdiction in any event, and five NMLAs did not express a final position. The Netherlands and Norway suggested that such matters should be

dealt with in the Mortgages and Liens Conventions or National law. (The Netherlands is considering amending its national law so as to extend it to Article 14 awards).

4.8 Article 27 Salvage Convention

Article 27 provides: "State parties shall encourage, as far as possible, and with the consent of the parties, the publication of arbitral awards made in salvage cases."

This question to NMLAs enquired as to whether NMLAs considered that Article 27 should be amended to reflect the position achieved by the Lloyd Salvage Group, namely the publication of awards unless any party objects. Both LOF an LSSA clauses have been amended since the Questionnaire was sent out so that Awards are now more likely to be published.

Seven NMLAs agreed that Article 27 should be amended, 13 did not agree. Denmark supported the publication of awards provided parties agreed but considered that it should be left to national law and the parties to determine this issue and not the Convention. Two NMLAs did not express an opinion. France also supported the publication of a summary of an award without names of the parties, as happens in France already. The Greek MLA believed tribunals should have the power to publish awards where they may be of interest to others. A number of MLAs referred to the basic right of parties to retain the confidentiality of their chosen mode of dispute resolution should they wish, ie the sanctity of the arbitration process.

4.9 General

(1) Enquiries were also made of NMLAs as to the number of cases which had been decided in their jurisdiction under the 1989 Salvage Convention. No more than 30 were identified, although that does not include arbitrations. The British MLA identified 675 awards since 1990, of which 282 resulted in awards following appeals. The US MLA speculated that there may have been "dozens, perhaps even hundreds of arbitrations".

(2) In response to the general question as to whether there were any other issues which needed to be considered:

- Italy referred to Article 21 which provides that:

  "Duty to provide security

  1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

2. Without prejudice to paragraph 1, the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

3. The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property."

Italy pointed out that paragraph 1 places an obligation on the shipowners. If however the shipowner is not the carrier who can exercise control over the cargo and suggests that an appropriate amendment would be to require the owner to prevent the cargo from being delivered unless satisfactory security is provided, failing which the shipowner would have the liability to pay that cargo's contribution to any salvage award.

- The German MLA suggested that the definitions of "ship" and "property" might need to be reconsidered in light of the definition of "wreck" in the Wreck Removal Convention.

- The German MLA also queried whether there needs to be a definition of "shipowner" so as to ensure that an owner "pro hac vice" (such as bareboat charterer) would be liable to meet any salvage award, as well as any owner.

5. Section G - Second Questionnaire to NMLAs

Information was sought in the Second Questionnaire with a view to seeking to ascertain how much empirical data was available to support the concerns raised by salvors. In particular data was sought as to the number of salvage claims that had resulted in a modest reward by reason of the low value of the salved fund. None of the eleven responses thus far received from NMLA's has identified an example of an instance where this has occurred. No examples have been cited of circumstances in which a salvor declined to be involved because of the low value of the property to be salved. Similarly there were no recent examples of cases in which authorities had prevented the completion of a salvage operation and thus deprived the salvor of a possible award. Responses also suggested that it is only in the UK (and possibly China) where tribunals adopt a rule of thumb principle so that a salvor is unlikely to recover more than half the salved value by way of a reward. Responses to date also suggest that Article 14 awards do not permit a profit element to be incorporated and there are no examples of any uplift being applied to an Article 14 award.

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