

# **The Development of Environmental Salvage and Review of the Salvage Convention 1989.**

by

**Archie Bishop  
Consultant – Holman Fenwick Willan**

In the later part of the 20<sup>th</sup> century the world developed an environmental conscience and today there is little that is not affected by our concern for it. Its biggest enemy has undoubtedly been pollution and any form of it has become abhorrent to the public eye. The marine world has not escaped the resultant pressure and environmental concerns have given rise to many international conventions that impose strict civil liability and increase criminal liability. The effect of this growing concern has not escaped the practical salvage world. Today there is hardly a salvage event that is not driven by the environment. You have only to look at recent casualties such as the Napoli, the Chitra, the Rena and very recently the Costa Concordia to see by quite how much.

So how has the environment affected international salvage law? The answer is, 'quite a lot', for it was concern for the environment that gave rise to the Salvage Convention 1989. In many respects the Convention has worked well but the salvage industry says more needs to be done to bring it up to speed. It is in need of a review. To understand why, I must first examine how the law has developed. It is complex and will take time to explain. I begin with a little history.

## **The Development of Environmental salvage**

Salvage is an ancient right and until recent times has been restricted to a reward for the saving of life and property at sea, which historically has always been paid by ship and cargo pro rata to value. The position began to change in the late 1960's with the ever growing concern for the environment. Today efforts to protect the environment are taken into account in the assessment of salvage remuneration but the rewards are restricted by the value of the salvaged property rather than the cost of the damage prevented, and are still paid by ship and cargo pro rata to value. There is a move for change so as to put the environment on an equal footing to the saving of life ship and cargo, but to explain the position fully, I need first to take a little time to review how we got to where we are today.

The increase in the carriage of oil in the sixties and the building of huge tankers to achieve it, brought a new problem. Oil pollution. Casualties such as the Atlantic Empress, The Christos Bitos and the Amoco Cadiz, resulted in governments, fearing pollution, refusing casualties a place of refuge for salvage work to be completed. Without a place of refuge, salvors had no alternative but to tow such ships far into the oceans to be sunk. As they were rewarded on a no cure basis they failed to collect a salvage award or even recover their expenses. They were in effect being discouraged to assist the very ships the world wanted them to salvage.

In an attempt to overcome the problem, The Salvage Convention 1989 made several changes to the law which was relevant to the environment. The first was to add to the nine criteria for assessing a salvage award, an additional factor - "the skill and effort of the salvor in preventing or minimising damage to the environment". (Article 13.1 (b)). And the second was to introduce a new concept - Special Compensation (Article 14), which was designed to ameliorate the harshness of the traditional No Cure No Pay rule by providing a salvor would at least recover his expenses whenever there was a threat of damage to the environment. A safety net. Let's look at each of these two changes in more detail.

### **The first incentive**

Article 13 of the Convention lists the criteria to be weighed in the balance in assessing a salvage award. It provides:-

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- (a) the salvaged value of the vessel and other property;
- (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
- (c) the measure of success obtained by the salvor;
- (d) the nature and degree of the danger;
- (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- (f) the time used and expenses and losses incurred by the salvors;
- (g) the risk of liability and other risks run by the salvors or their equipment;
- (h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

2. 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 defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.

There are three points to particularly note from Article 13

- The second criteria, “the skill and effort of the salvors in preventing or minimising damage to the environment” was specifically introduced by the 1989 Convention to encourage salvors to go to the assistance of ships which threatened damage to the environment. However it should be noted the salvor has to prove that he actually prevented damage to the environment. A 'threat' without proof, but for the services, that damage to the environment would have occurred, is insufficient. Proof of damage to the environment is not easy as is illustrated by the case of the Castor to which I will later refer when we come to deal with Article 14.2
- Any reward received is restricted by the value of the property salvaged. (Article 13.3). In cases where there is a threat of damage to the environment values are often low and the expense of salvage high. In almost 24% of all cases salvors only receive the bare minimum under the safety net of Article 14 or its contractual replacement, SCOPIC to which I will later refer.
- Any award under Article 13 is paid by ship and cargo pro rata to value so they bear any award enhanced by reason of the second criteria – the skill and effort of the salvor in preventing damage to the environment. The underwriters of ship and cargo customarily pay such awards notwithstanding they do not insure an owner's liability for damage to the environment.

## **The Second incentive – Special Compensation**

**Article 14.1** of the Convention provides as follows:-

“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."

There is a lot to be digested from this particular provision.

- Firstly, it will be noted that for this paragraph to bite the salvor does not have to succeed in protecting the environment, he simply has to be involved in a salvage operation in which the casualty threatens damage to the environment.
- Secondly, it will be seen that the salvor has to carry out "salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment". What do we mean by "threatened"? In the UK the LOF arbitrators have found that a reasonably perceived threat, as opposed to an actual threat, is sufficient.
- Thirdly, unlike an Article 13 salvage award (which is paid by the ship and cargo and their property insurers), special compensation is payable by the shipowner alone who is insured for this risk and indemnified by his P&I insurer.

There is a further and important point to take into account. It only applies if there is a threat of damage to the environment. What is "damage to the environment"? This is defined in Article 1(d) as follows:

"Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto caused by pollution contamination, fire explosion or similar major incidents."

A lot of problems arise from this definition.

**Firstly**, while the general meaning of the definition is clear, there is scope for judicial development when interpreting the word "substantial". What is substantial? In the UK the LOF arbitrators have had to consider the meaning of "substantial" on numerous occasions. In the early days they appeared to take a fairly relaxed view of the word, accepting that a comparatively small quantity of oil could cause "substantial" damage if leaked into a particularly sensitive area. But a lot depends on the sensitivity of the area, as is illustrated by a recent case where the "Castor", (which had earlier been refused a place of refuge by 6 countries) laden with 30,000 tons of petroleum and 100 tons of heavy fuel oil, was prevented from grounding near Cabo de Palos on the Spanish coast. In that case the LOF appeal arbitrator (whose decisions influence those of all the other arbitrators), while accepting that the ship gave rise to a (reasonably perceived)

threat of damage to the environment which was sufficient to trigger Article 14.1, found that while a grounding and consequent leakage would have caused some damage, it would actually not have been 'substantial' and therefore insufficient to trigger Article 14.2. In reaching this conclusion, he said:

"I have considered as carefully as I can whether the damage to the birds and fish, which might have ensued from a grounding off Cabo de Palos, can be described as 'substantial physical damage to marine life' within the meaning of the Convention. ....the scope for damage to birds, plankton and benthos and hence fish, in the event of a grounding off Cabo de Palos in winter, appears to me to have been very restricted indeed, notwithstanding the large volume of gasoline that might have escaped. Whilst there might have been some fatalities amongst birds and fish and some tainting of fish flesh, there was no evidence that the fish stocks or bird population would be significantly depleted by the limited damage which might have occurred. I have, therefore, found it difficult to conclude that there was a risk of 'substantial physical damage to marine life' off Cabo de Palos."

**Secondly**, what are "coastal or inland waters or areas adjacent thereto"? They are not defined by the Convention and the phrase has not been construed by the English courts. Most probably it means within 12 miles of the coast as set out in UNCLOS. How adjacent do "areas adjacent thereto" have to be? Again, it is undecided but presumably so close that the pollutant might reasonably be expected to enter or seriously threaten coastal waters. Should the assessment of special compensation start before a casualty enters coastal waters? Probably not, but the point has yet to be decided. Should it continue after the threat of damage has been removed? Yes, said the English Admiralty Court in the case of the *Nagasaki Spirit*. (LLR 1995 v.2 p.44). Once triggered, the assessment of special compensation should continue until the end of the salvage service. To do otherwise would discourage salvors from removing the threat as soon as possible.

**Article 14.2 provides:**

"If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimised 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."

This complex wording and apparent contradictions deserve some explanation. The original draft Convention prepared by the CMI and that later put forward by the IMO Legal Committee to the full Diplomatic Conference, provided that the uplift should be

a maximum of 100% of the expenses recoverable under Article 14.1. During the course of the Diplomatic Conference some countries, after noting that the then Lloyds Open Form contract (LOF 80) restricted the uplift to 15%, said they could not countenance a greater uplift than 30%. The conference quickly became split between those delegates who wanted the maximum to be 30% and those who wanted it to be 100%. There was a serious risk, after 10 years of work, of the Convention falling to the ground because of the lack of an agreement on what was a particularly minor issue. At the end of the day the conference compromised with the wording set out above leaving the courts of each country to interpret it as they will.

LOF arbitrators have taken the 30% to be the point at which one should pause for thought and which one should not exceed except in the most serious of cases. To date the 100% mark has never been reached despite some serious casualties. The highest uplift recorded has been 65% (The Nagasaki Spirit). It is perhaps right to say that an uplift of 100% is highly unlikely. No matter how serious the casualty or threat of damage to the environment, one can always envisage something worse for which the 100% mark should be reserved.

There are other points which should be mentioned in relation to this particular paragraph of Article 14.2. It will be noted that the uplift is only payable if the salvor "has prevented or minimised damage to the environment". A LOF appeal arbitrator has found that to benefit from this provision the salvor must prove he actually prevented or minimised damage to the environment. Unlike Article 14.1 it is insufficient to prove that it was a reasonably perceived threat. The salvor has to show, on the balance of probabilities, that but for the services, damage to the environment would have occurred. The point is well illustrated by the facts of the case which the appeal arbitrator was considering in making this decision. A small ship ran aground on an outcrop of rocks in the northern part of Scotland. As a result of the grounding, her fuel tanks were punctured and she lost about 30 tonnes of gas oil. Forty-five tonnes of gas oil remained on board and this was successfully salvaged, though the vessel was lost. An Article 14 claim was made and the appeal arbitrator awarded the salvors their expenses under Article 14.1 as there was a reasonably "perceived" threat of damage to the environment. However, he did not award them an increment under Article 14.2 because he was not satisfied, that if the salvaged 45 tonnes of gas oil had leaked, it would have caused actual damage to the environment. Events had proved that the original 30 tonnes of gas oil that had leaked when the vessel had first grounded had not caused any damage to the environment whatsoever and he was not satisfied that the remaining 45 tons would have done so either.

Apart from having to show that but for the salvage services, damage would have occurred, it is also necessary to show "substantial damage", as defined in the definition of "damage to the environment", would result. I have already cited the *Castor* as an example of an LOF appeal arbitrator's interpretation of "substantial". In that case, while there was a sufficient threat (reasonably perceived threat rather than

actual) of damage to the environment to trigger Article 14.1 and while some damage would have resulted, the actual (rather than reasonably perceived) damage that would have resulted would not have been “substantial” enough to trigger Article 14.2.

**Article 14.3 provides:**

“Salvors’ expenses for the purposes of paragraphs 1 and 2 mean the out of pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for the equipment and personnel actually and reasonably used in the salvage operation taking into consideration the criteria set out in Article 13 paragraph 1(h), 1(i) and 1(j).”

Out-of-pocket expenses are fairly easily ascertained. They are monies expended by the salvors to enable them to carry out the salvage operation – perhaps hire for salvage equipment or fuel oil consumed. However, the assessment of a “fair rate” for equipment and personnel actually and reasonably used has proved to be a particularly difficult problem. It was considered in the House of Lords in *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep 323, where the salvors contended a fair rate included an element of profit and the owners argued that it merely meant compensation for the overall expense to the salvor of the operation without any element of profit. The House of Lords found in favour of the shipowners. In the words of Lord Lloyd of Berwick:

“...fair rate for equipment and personnel actually and reasonably used in the salvage operation in Article 14.3 means a fair rate of expenditure, and does not include any element of profit. This is clear from the context, and in particular from the reference to expenses in Article 14.1 and 2, and the definition of salvors expenses in Article 14.3. No doubt expenses could have been defined so as to include an element of profit, if very clear language to that effect had been used. But it was not. The profit element is confined to the mark-up under Article 14.2 if damage to the environment is minimised or prevented.”

As a result of the House of Lords’ decision in *The Nagasaki Spirit* and the final wording of Article 14.3 namely “...taking into consideration the criteria set out in Article 13 paragraph 1(h), 1(i) and 1(j)”, it is necessary in every Article 14 case to investigate the cost to the salvor of not only the craft and equipment used during the course of the salvage services, but also the availability and use of other vessels or equipment intended for salvage operations and the value of that equipment. For a large salvage company this is a major accounting exercise and one in which many questions remain unanswered. For instance, for what period should you look at the idle time of the salvage equipment? It is common to use a one-year period but is this the correct? There can be huge differences if you stretch or reduce the period. Further, what about depreciation? Should one adapt the accounting practices of the company – which may differ from one company to another?

#### **Article 14.4 provides:**

“The total special compensation under this Article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under Article 13.”

Special compensation was always intended to be a safety net. A minimum payment to the salvor. One which took away some of the risk endemic in a “no cure – no pay” situation. Consequently, it is only payable to the extent that it exceeds the traditional Article 13 salvage reward. It will be noted that the amount to be paid is that which such assessed compensation is greater than any reward recoverable (not recovered) by a salvage reward under Article 13. The majority of claims for special compensation, or under its successor SCOPIC, involve both an Article 13 award and special compensation assessment. Statistically, on average, only about 50% of the special compensation, or SCOPIC, assessment is actually payable.

It was some six years before the Convention came into force internationally (1 July 1995) but its essential provisions were immediately endorsed by Lloyd’s and incorporated into LOF 90. As a result, experience was gained of special compensation long before the Convention actually came into force. Unfortunately the experience was not good. While the concept of special compensation was felt to be beneficial, the mechanics of assessing it, in accordance with the provisions of Article 14, proved to be time-consuming, cumbersome, expensive and uncertain.

We have discussed above some of the uncertainties and problems in the interpretation of Article 14. However, there were additional practical problems.

- While Article 21 of the Convention provides that at the conclusion of the service the contractor shall be entitled to satisfactory security for his claim for special compensation, in practice salvors found considerable difficulty in enforcing this provision. Special compensation does not attract a maritime or statutory lien (though this will be corrected by Article 1.1(c) of the International Convention on the Arrest of Ships of 1999 if it ever comes into force). So an arrest is not possible to enforce the provision of security. While most owners are insured for their liability for special compensation, their insurers, in the absence of a realistic risk of the security provisions being enforced, were frequently unwilling to provide the security required. As a result, there were many cases where security was not provided for claims for special compensation. While in some cases these claims were ultimately paid, there were others where the liability underwriters were unwilling to meet a properly assessed special compensation claim, even though they had supported the owner in defending the claim. In



several cases, because of the lack of security, and the unwillingness of the liability underwriters to pay, the salvors had to negotiate settlements substantially less than that properly found to be their due by a Lloyd's Form arbitrator.

- There were and are, considerable practical problems in applying the mechanics of assessing expenses as defined in Article 14.3. While the judicial guidance given in *The Nagasaki Spirit*, said this assessment "is largely an accounting exercise", it is undoubtedly a major exercise. One which is both time-consuming and expensive and there are still many uncertainties and unsettled issues on many relevant points. A proper assessment invariably requires an examination of the entire accounts of the contractor, not only in respect of the salvage equipment actually used in the salvage operation, but also of all the other equipment available for use, as well as his administrative costs. To comply with the provisions of the Convention it is necessary to consider the active and inactive periods of each one of the contractor's main salvage units and to apportion the overall direct and indirect expenses of the contractor among each of those units, before making a judgment as to how much should form part of a special compensation assessment. The position is compounded when there is a joint salvage operation between two or more professional companies.
- The assessment of special compensation, even in standard cases, takes a considerable time, will nearly always involve lawyers and frequently accountants. As a result, it is very time-consuming, expensive and leaves the parties in complete uncertainty as to how much is due, until many months, sometimes years, after the services have been completed.
- Finally, the insurers felt they were insufficiently advised of salvage operations until well after the event by which time it was too late for any effective input on their part.

All of the above problems with Articles 13 and 14 of the Salvage Convention are still potential problems when interpreting the law of all the 60 countries that have adopted the Convention. However, about one third of all of today's salvage operations, are undertaken under the standard form of salvage contract Lloyds Open Form (LOF) which has taken steps to ameliorate the position by the introduction of the SCOPIC clause. Whilst this clause is an entirely voluntary and only applicable to an LOF contract, it is worth examining for it has provided a partial solution to the problems

encountered.

### **The LOF Solution - SCOPIC (Special Compensation P&I Club Clause)**

In the light of the problems encountered, a sub-committee formed from representatives of the International P&I Group and the International Salvage Union (ISU) began to meet in the autumn of 1997 with a view to developing in LOF cases a scheme to replace the method of assessing special compensation under Article 14 and resolve other problems then being encountered. The principle behind the SCOPIC clause was born at those preliminary meetings and later developed by the two sub-committees together with two other sub-committees. One appointed by the London property underwriters and another by the International Chamber of Shipping (ICS).

In August 1999, some 18 months after the idea was first suggested, and after lengthy discussion and consultation, the wording of the clause was finalised. Final agreement required give and take on the part of all sides and represented a balance of everyone's interest. While SCOPIC is lengthy, this was necessary for it was designed to resolve just about every problem that then existed, or could be envisaged, and avoid the extensive litigation that had been generated by Article 14.

There proved to be a number of minor errors and omissions in the original SCOPIC clause resulting in a revision (SCOPIC 2000) in August 2000 to coincide with the publication of LOF 2000. The second revision (SCOPIC 2005), which made some fine adjustments, came into effect on 1 August 2005. The third revision (SCOPIC 2007), which inter alia, and for the first time, amended all the rates in Schedule A, came into effect on 1 July 2007. The fourth version (SCOPIC 2011), which again amended the rates, came into force on the first of January 2011.

To call SCOPIC "a clause" is a bit of a misnomer. SCOPIC 2011 has 16 sub-clauses which set out the basic scheme, and three appendices, which are an integral part of it. They set out the contractual position between the salvors and the shipowner, but do not set out the position of the P&I clubs and the ship's underwriters who, while insurers of the shipowners, are not parties, and therefore not bound, to the contract. Their position has been dealt with by two non-legally binding Codes of Practice. One between the ISU and the International Group of P&I Clubs, and another between the International Group of P&I Clubs and the property underwriters.

It had been the original intention to make the Clause binding between all members of the International P&I Group and of the ISU, but it became apparent that, in the absence of legislation, it was not practical to attempt to compel anyone to be bound by its terms. The clause is, therefore, a voluntary addition to the LOF contract which can be used by agreement between the parties at the time they contract. In practice, it is

nearly always used by professional salvors particularly when there is a threat of danger to the environment and low values. It has effectively replaced Article 14 in all LOF cases

In considering the clause, it is important to remember that it was designed to have the same intent as Article 14 – to encourage salvors to go to the assistance of ships that threaten damage to the environment – and to follow it as closely as possible but remove the problems that were giving rise to so much difficulty. In describing SCOPIC it is therefore useful as we go along, to look at the problems that arose from Article 14 and see how the SCOPIC Clause set out to resolve them. This is not just of academic interest, for with knowledge of what the parties were trying to achieve, it is easier to understand the contract and, where there is doubt or ambiguity, interpret it the ways intended.

The SCOPIC Clause is lengthy and complex and not easy to digest. One of the best ways to understand it, is to look at what I call its “Ten Essential Elements” (below) and then, if necessary, look at the Clause itself for the finer detail.

### **The Ten Essential Elements of SCOPIC**

**1. SCOPIC is designed to be an addendum to LOF and will only be included as part of that contract if specifically agreed in writing (see sub-clause 1).**

Box 7 of the LOF 2011 requires the parties to record whether SCOPIC is part of the contract. Clause C of LOF 2011 provides that if this box is not completed SCOPIC will not form part of the contract (see also Rule 3.9 of Lloyd’s Standard Salvage and Arbitration Clauses (LSSA Clauses)). If SCOPIC is not incorporated into the contract then Article 14 (if relevant) will apply.

**2. When incorporated into the contract, SCOPIC replaces Article 14 of the Salvage Convention which thereafter will no longer be applicable (see sub-clause 1).**

Thus, subject to point 4 below, if SCOPIC is incorporated into the contract but not specifically invoked (see 3 below) or is later terminated (see 8 below) the salvor will have neither the protection of Article 14 or of SCOPIC.

**3. Even when SCOPIC is incorporated into the contract, its remuneration provisions will not begin to bite until the Clause is specifically invoked in writing by the salvor (sub-clause 2). Further, the calculation of SCOPIC remuneration will not begin until that point.**

One of the main problems with Article 14 was its trigger mechanism, “a threat of damage to the environment”.

- What was a threat?
- Did it have to be an actual threat or was it sufficient for it to be a reasonably perceived threat?
- What were coastal waters or waters adjacent thereto?
- What was “substantial”?
- How substantial did it have to be?

The designers of SCOPIC wanted to avoid all these problems. So what other trigger mechanism could be used? It was concluded that the simplest and most unchallengeable trigger mechanism was to give the salvor the sole and unfettered power, whatever the circumstances and at any time of his choosing, to specifically invoke the clause in writing. Hence this provision. There is no longer any need to prove there is a threat of damage to the environment.

To balance this trigger mechanism and to discourage salvors from invoking the clause in every case, particularly when no threat of damage to the environment existed, two counter-balancing provisions were made. The first was to provide for a discount if the traditional salvage award should exceed the assessed SCOPIC remuneration (see point 7 below). And the second was to give the shipowner the right to withdraw from SCOPIC at any time (which he might well do if there was no threat of damage to the environment), subject to five days’ notice and the local authorities permitting it (see point 8 below).

It is important to remember, unlike Special Compensation under Article 14 which incorporates all the work of the salvor from the very beginning of the case, that the assessment of SCOPIC remuneration does not begin until it is invoked in writing. Any work done before that point is not taken into account in its assessment. Thus, while the salvor has the option to invoke the clause at any time, it is in his interests to make the decision sooner rather than later.

#### **4. Once SCOPIC has been invoked the shipowner must provide security in the sum of \$3 million (sub-clause 3).**

This provision was made for the salvors protection and on their insistence, for without it there is no effective means of enforcing payment. While Article 21 of the Salvage Convention provides that security should be provided for a salvor’s claim, it is not due until the end of the salvage operations and, in the case of security for Special Compensation or SCOPIC remuneration, there is no maritime or statutory lien and, therefore, no way of enforcing its provision. Further, as mentioned earlier, before the

days of SCOPIC, there was a marked reluctance to provide it. In a number of cases shipowners, guided by their P&I club, refused to provide security, fought a claim for Special Compensation to appeal and then “negotiated” on the final appeal award.

To avoid this happening, sub-clause 3 of the SCOPIC Clause specifically provides that security in the sum of \$3 million is to be provided within two days of the Clause being invoked. It goes on to make provision for the amount to be adjusted, up or down, at the termination of the services, but substantial security is required “up front”. To assist further, the clubs agree not to refuse to give security because it could not be obtained in any other way (clause 4 of the Code of Practice between the ISU and The International Group of P&I Clubs) and to save unnecessary costs, the ISU agree to accept security by way of a letter of undertaking in an agreed wording, from the club concerned (clause 6). Generally, these provisions have worked well with clubs that are members of the International Group.

As further protection to the salvor, it will be seen (sub-clause 4) that if security is not provided the contractor has the option to withdraw from SCOPIC. This would result in the reinstatement and limited protection afforded by Article 14 which, in most cases, would not be a lot of help. However, if security is not provided then at least the salvor would know where he was and could pull out of the whole LOF contract on the grounds of the owner’s breach.

**5. Once SCOPIC has been invoked, SCOPIC remuneration will be assessed in accordance with a tariff (sub-clause 5(iv) and Appendix A) for men, tugs and equipment reasonably engaged or used in the operation, plus a bonus of 25%.**

It will be recalled that under Article 14.3, when assessing Special Compensation, a “fair rate” for all the men and equipment has to be used. The English courts decided in *The Nagasaki Spirit* that the term “fair rate” was to be interpreted as a rate of expense which did not include any element of profit but did take into consideration the criteria set out in Article 13(h), (i), and (j) – which are provisions to encourage a professional salvor to invest in equipment and keep it on standby ready for use in case of need. This meant, whenever an assessment had to be made as to a “fair rate”, that consideration had to be given to all of the salvor’s equipment, even that not used in the particular service. This factor resulted in Special Compensation often being assessed at a figure that was just as much, or perhaps more, than it would have been, if assessed on profitable rate basis. But the main complaint was that it gave rise to unacceptable complications. In each case, the salvor’s accounts had to be examined and consideration given to a host of new factors, in order to establish what was a “fair rate” in the particular circumstances of a case. This caused untold delay, expense and much uncertainty. When drafting SCOPIC, this problem had to be avoided.

The answer was to establish a tariff rate and Appendix A of the SCOPIC Clause was the result. In arriving at the tariff rates for personnel, tugs and equipment,

a very broad brush approach was needed. It was intended that the rates should, to a degree, be profitable and encouraging to salvors but clearly they were going to be more profitable in some parts of the world than others. Consideration was given to applying different rates to different areas but dismissed as being a further complication to what was already a very complicated clause. SCOPIC was intended as a safety net, a minimum payment, and a broad brush approach was sufficient. By applying a standard tariff rate it became fairly simple to calculate SCOPIC remuneration on a daily basis.

The next question was “How do we replace the bonus element of Article 14.2?”. This had also given much trouble in its assessment. A salvor had to prove, but for his services, that there would have been damage to the environment, and satisfy the tribunal as to the extent of that damage, which clearly would affect the percentage of uplift. In almost every case, expert evidence was needed. It was a time-consuming and expensive operation and there was much uncertainty long after the services were complete. It was not a commercially acceptable way to assess the remuneration due.

The solution was to again take a very broad brush approach. At that time, the average uplift under Article 14.2 in arbitrated cases, was 26%. It was decided that a general and fixed uplift of 25% in all cases would compensate. Again, it was recognised this would be more generous in some cases than in others, but it was important to have simplicity and certainty.

If the contractor hires in equipment in excess of the tariff rate – which can often be necessary – it can still be allowed as an out-of-pocket expense if the Special Casualty Representative (SCR) thinks it was reasonable in the particular circumstances of the case. So the contractor is protected in those cases where he is held to ransom by the owner of a piece of equipment which is essential to the salvage operation. However, note that the bonus which accrues to that part which is in excess of the tariff rate, is restricted to 10%.

**6. The assessed SCOPIC remuneration is due from the shipowner, in so far as it exceeds the traditional salvage award made against salvaged property under Article 13 of the Salvage Convention (sub-clause 6).**

This mirrors Article 14.4 of the Salvage Convention which provides that Special Compensation shall only be paid to the extent that its assessment exceeds the traditional Article 13 salvage award. The position is the same under SCOPIC. So, if the traditional salvage award is say \$1 million and the assessed SCOPIC remuneration is \$1.5 million, the salvor will receive \$1 million from the ship and cargo, pro rata to value, and \$0.5 million from the shipowner in respect of SCOPIC remuneration.

It is important to note, like Special Compensation under Article 14, that SCOPIC remuneration is to be paid by the shipowner, not ship and cargo pro rata to value as is

the case for the traditional Article 13 salvage award. This means different insurers are involved. Property underwriters for traditional Article 13 salvage awards and liability underwriters (P&I Clubs) for SCOPIC remuneration.

**7. If the traditional Article 13 salvage award exceeds the assessed SCOPIC remuneration, the discount provision begins to bite (sub-clause 7) and the Article 13 award will be reduced by the 25% of the difference between it and the assessed SCOPIC remuneration.**

As mentioned in point 3 above, some check was needed to prevent the salvors invoking SCOPIC in every case or when there was not a threat of damage to the environment. Without a check, the salvor would have nothing to lose and might as well invoke SCOPIC on day one in every case. That would take away one of the main elements of traditional salvage law – the element of “no cure – no pay”. So how do we get him to invoke it only when he felt it really necessary and what penalty should he pay for the protection and security afforded when SCOPIC was invoked? The answer was twofold. To give the owner power to terminate (see point 8 later) and to build in a discount clause.

Sub-clause 7 provides that if the SCOPIC clause has been invoked and the Article 13 award is higher than the assessed SCOPIC remuneration, then the Article 13 award shall be discounted by 25% of the difference between it and the SCOPIC assessment. So, if the salvage award was say \$1.5 million and the assessed SCOPIC remuneration \$1 million, no SCOPIC remuneration would be due and the salvage award to be paid would be reduced by \$125,000 ( $1.5 - 1 \times 25\%$ ).

The ploy seems to be successful for statistics show that SCOPIC is only invoked in just over 20% of cases.

Note – the discount benefits the property underwriters who are liable to pay the reduced Article 13 award, not the P&I clubs who are liable to pay the Article 14 or SCOPIC remuneration. This was a conscious decision and intended as some recompense to the property underwriters for the provision in Article 13.1(b) (the skill and effort of the salvor in preventing damage to the environment) which enhances the traditional salvage award payable by the property underwriters.

**8. The owner is entitled to terminate SCOPIC (note – not the LOF contract) at any time, after giving five days’ written notice, PROVIDED the appropriate authorities do not object (sub-clause 9(ii) and 9(iii)), and the salvor can withdraw from the whole LOF contract, if it is no longer financially viable (sub-clause 9(i)).**

The termination provisions of SCOPIC (sub-clause 9), together with the discount provision (see point 7 above), counter-balance the salvor’s right to invoke the Clause whatever the circumstances (see point 3 above) and are intended to ensure the salvor

will only invoke the Clause when there is a threat of damage to the environment and he is in need of the protection of the Clause. There are three termination provisions. Each designed to have an effect on the other with a view to ensuring that, overall, the principal aim of the Clause is achieved. Namely, to be only used by the salvor when there is a threat of damage to the environment.

Under sub-clause 9(ii), the owner can withdraw from SCOPIC (not the LOF) on giving five days' written notice. There are no restrictions to the right to withdraw save that under sub clause 9(iii) he is prevented from doing so if the appropriate authorities object. When designing the clause it was thought they would object if there was a threat of damage to the environment. To back up this intention, the International Group of P&I Clubs in clause 8 of the "Code of Practice between ISU and The International Group", agree to recommend the owners not to withdraw without reasonable cause.

If the owners were to withdraw from SCOPIC, the salvor would no longer have the financial protection of either SCOPIC or Article 14, and could be stuck with an unprofitable LOF contract which he is still obliged, under that contract, to complete. This would be unfair if he had been induced by the prospect of SCOPIC remuneration to enter the LOF contract and later find that the owner withdrew from SCOPIC. So, to protect his position, he is given the right to withdraw from the entire LOF contract if it is no longer financially viable (sub-clause 9(i)). This provision acts as an additional brake on an owner terminating SCOPIC unreasonably.

**9. As soon as SCOPIC is invoked, the owner may appoint a Special Casualty Representative (SCR) (see sub-clause 12) to represent all salvaged property (ship and cargo).**

In the past, one of the most unsatisfactory aspects of many salvage cases, particularly those that involved Special Compensation, was the lack of information that came back to the insurers during the course of the services. This was particularly so from a P&I club point of view. Indeed, because of the way it was devised, there were many Special Compensation cases of which they knew nothing until months after the services were complete. This was unsatisfactory and, to ensure they were kept advised on a daily basis, SCOPIC provides that in every SCOPIC case they can appoint a Special Casualty Representative (SCR) whose principal duty is to keep them, and all other interests, informed on a daily basis. Once appointed, the SCR represents and reports to all salvaged interests, ship cargo underwriters and P&I clubs, with copies to the salvors.

The SCR's duties are set out in Appendix B and are augmented by "The Guidelines to SCRs" which is published on the Lloyd's website, and SCR Digests which are published from time to time by the SCR Committee. The salvage master must keep the SCR informed of his plans and listen to any comments the SCR may have, but the



final decision on any aspect of the salvage service is always that of the salvage master. The SCR has no authority or power to bind the salvaged property, but clearly his voice is influential. He must either endorse the salvage master's daily report or issue a dissenting report. All reports and communications are to be sent to all salvaged property through Lloyd's, with copies to the salvor.

The duties of the SCR are set out in Appendix B and are further explained in "The Guidelines for SCRs", and SCR Digests 1, 2, 3 and 4, all of which can be found on the Lloyd's website at [www.lloydsagency.com](http://www.lloydsagency.com). To protect, encourage, and instil trust in the independence of the SCR, it is agreed that the SCR shall not give evidence in any other litigation other than salvage (see final sentence of sub-clause 11 and Appendix B).

SCRs have played an important role in SCOPIC situations and, with the benefit of the tariff rates, it is now possible for an owner and his insurers to be aware and keep an eye on the minimum cost of any operation on a daily basis. An enormous improvement on the Article 14 Special Compensation regime.

**10. In addition to an SCR, the hull underwriters and the cargo underwriters are each allowed to send a Special Representative to observe and report (sub-clause 13 and Appendix C).**

The SCR represents all salvaged interests. When SCOPIC was devised, it was thought property underwriters would like to be separately represented and so a provision was made for the hull underwriters and the cargo underwriters to each appoint a Special Representative, one for hull and one for cargo, as additional watchdogs. In practice, the independence of the SCR and the unbiased manner in which they have fulfilled their duties, has ensured that Special Representatives are seldom appointed. When they are appointed, their duties are governed by Appendix C of SCOPIC which largely restricts them to watching and reporting on events as they occur.

So there we have it. SCOPIC in a nutshell. How has it worked? Lloyd's statistics on the 1<sup>st</sup> April 2011, showed there have been 1,085 LOF cases since the inception of SCOPIC in August 1999, and that it had been invoked on 255 occasions (24%). There have only been seven SCOPIC related arbitrations.

It should be noted that the SCOPIC Clause is a living contract. In accordance with the Clause the rates and the SCR panel are to be reviewed each year by the SCR Committee set up under Appendix B, which has overall responsibility for its provisions. After its first year, some amendments were made, largely to correct errors, which resulted in SCOPIC 2000. A further version, SCOPIC 2005, came into effect on 1 January of that year. The changes were not large and were mainly to take into account currency fluctuations between the time of the termination of the services and the date of any set off, or date of final assessment of SCOPIC remuneration. In

2007, the tariff rates were increased for the first time since 1999 (15% for personnel, 15% for equipment and 25% for tugs) resulting in SCOPIC 2007 which came into effect on 1 July 2007. The Tariff rates were reviewed again in 2010 (when there was a further increase of 10% across the board, on condition there was no further change until 2014) and resulted in SCOPIC 2011 which came into force on the 1<sup>st</sup> January that year. It will be noted that the rates have not kept pace with inflation which between 1999 and 2011 was 35%. Further, those salvors that trade in the Euro have experienced a further 20% reduction by reason of devaluation of the dollar.

SCOPIC is a negotiated contract which represents a balance of interests between the negotiating parties. It is not a perfect instrument. There are parts which are not completely fair and logical which can result in anomalies. As an example, the discount clause (sub-clause 7) provides that when calculating the discount one should assess the SCOPIC remuneration on the assumption that the Clause had been invoked on day one, thereby not penalising the salvor for a late invocation of the Clause. This safeguard is not given in the termination provisions (sub-clause 9). So, if the shipowner terminates the SCOPIC Clause under sub-clause 9(ii) and the salvor has to continue with the services (because sub-clause 9(i) does not bite), the discount increases with each day that the services continue (because the calculation of SCOPIC remuneration has stopped), notwithstanding that the salvor is no longer protected by either SCOPIC or Article 14. To be even-handed, there should be a notional assessment of SCOPIC remuneration until the end of the actual salvage service, before assessing the amount of the discount. Attempts have been made to correct this and other problems, but they have been rebuffed on the ground that it is a negotiated contract with pluses and minuses on all sides and this is a minus that salvors have to live with. Despite such anomalies, the Clause represents what all sides of the shipping industry can currently live with. It should be read in that light.

### **Code of Conduct between the ISU and the International P&I Group**

The P&I clubs, like any insurer, are normally not parties to a salvage contract and, therefore, are not bound by any clause to a LOF contract. However, the International P&I Group agreed to a Code of Conduct which will apply whenever a ship entered with a member of the International P&I Group is salvaged by a member of the International Salvage Union. It may be that in individual cases, the Code can be extended to other salvors or clubs, but that is a matter which needs to be dealt with by agreement at the time of contracting.

It will be seen from the Code that the clubs will cover their members for any liability under the SCOPIC Clause and will generally provide security on behalf of a member for a SCOPIC claim. It is not a firm undertaking to do so for the clubs must reserve any defence they may have against the member.

They also agree to generally provide security when required by port authorities to

permit the entry of the ship to a place of safety, subject to the reasonableness of the demand. They further agree that any payment of SCOPIC remuneration shall not be subject to general average.

While the Code is not legally binding it has overcome many of the earlier problems under Article 14 and resulted in much greater co-operation between parties.

### **Breach of the principle of “No Cure – No Pay”**

It has been said that SCOPIC in effect does away with the “no cure – no pay” element of a salvage contract and that it operates even when there isn't a threat of damage to the environment. I would not agree. It does neither, at least no more than is currently the case under Article 14. There are two provisions that prevent this:

1. Firstly, as we have seen, under sub-clause 7, there is a potential price to pay for invoking the SCOPIC remuneration provisions – a 25% discount of the difference between any Article 13 award and the amount of SCOPIC remuneration. This is the potential price to pay for the security of SCOPIC and has proved to be sufficient to dissuade salvors from invoking the SCOPIC provisions except in very low value cases (which would not generally attract a “no cure – no pay” salvage contract) and when there is a genuine threat of damage to the environment. Statistics show the Clause is only invoked in 24% of cases
2. Secondly, under sub-clause 9(ii), the shipowner may at any time terminate (with five days' notice) the obligation to pay SCOPIC remuneration once the SCOPIC Clause has been invoked. So far as the owner is concerned this option is unlikely to be exercised if there is an actual threat of damage to the environment but if he tried the authorities could prevent it under s.cl 9(iii). So far as the salvor is concerned, the possibility of the shipowner withdrawing under sub-clause 9(ii), is likely to restrain him from invoking the SCOPIC provision, except where there is an actual threat of damage to the environment, for if he does the owner is likely to withdraw from SCOPIC under sub clause (9(ii) which may result in a discount from his Article 13 award under sub clause 7, which would not otherwise occur,.

The SCOPIC Clause substantially improved the mechanism for assessing special compensation while retaining the principle behind it. It does away with the difficulties which bedevilled the smooth operation of the special compensation provisions of the Convention and provides a new method of calculating its equivalent

while, by a system of counter-checks, ensuring it can only be used when there is an actual risk of damage to the environment. Like any compromise, there are problems with it but as a safety net it functions well. However, like Article 14, it is still in essence a safety net - not a method of rewarding salvors for the protection of the environment.

### **The ISU proposal for change**

In recent years the International Salvage Union (ISU) on behalf of professional salvors has been pressing for a radical review of how salvors are rewarded. They would like to see the law changed so they are not only rewarded on a salvage basis for saving ship and cargo, but were also properly rewarded for their efforts and success in preventing damage to the environment.

In an attempt to persuade industry of their case and the need for change, the ISU first raised the issue with the Lloyds Form Salvage Group which has responsibility for keeping that contract up to date and in tune with the marine industries needs. The Group set up a subcommittee with representatives from the London Property Underwriters, the International Group of P&I Clubs, the International Chamber of Shipping (ICS) and The International Salvage Union (ISU), and the issue was discussed extensively at several meetings between 2007 and 2008. Unfortunately unanimity could not be reached. Whilst the London Property Underwriters agreed with the ISU that change was necessary, the shipowners through the International Group and the ICS were implacably against. They were content with the present system.

The ISU then approached the Comité Maritime International (CMI), which drafted both the Salvage Conventions of 1910 and 1989, and ask for it to include in its work schedule a review the 1989 Convention. The request was accepted and the Council of the CMI set up an international working group (IWG) to examine the issue. The IWG then consulted on the various issues by way of questionnaire, with some 56 national maritime law associations and brought the subject for discussion at two venues. An exploratory meeting held in London in May 2010 to which all sides of industry were invited, and a CMI Colloquium which was held in Buenos Aires in October 2010 at which all sides of industry presented their position and the issues were debated. Since that time a further questionnaire has been to the 56 national maritime law associations. The IWG is currently preparing a full report for a Conference of the CMI which is to be held in Beijing in October of this year.

The CMI's review of the Convention encompasses the whole Convention, not just the environmental issues so far discussed in this paper but it is true to say the environment element is dominant. As I have so far only dealt with environmental issues, I will continue to focus on this element and revert later to the other issues under discussion.

At the CMI Colloquium in Buenos Aires, the President of the ISU, when explaining why the salvage industry felt it was not being properly rewarded for what it did to prevent damage to the environment, said in relation to the first incentive given to salvors by the salvage convention 1989

"Let me say straight away we recognise 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 SCOPIC - 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."

When dealing with the second incentive given by the 1989 Convention, namely Special Compensation, he said

"We recognize 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 President of the ISU then went on to give three reasons for change to the present system which he summarised as follows:

**"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."

He went on to develop each of these reasons in his speech. I will not repeat them here for the full text may be found on the CMI website ([www.comitemaritime.org](http://www.comitemaritime.org)) together with all the papers given on the subject at the Colloquium including the supporting view of the London Property Underwriters and contrary views expressed by representatives of the International P&I Clubs and the International Chamber of Shipping (ICS),

### **The ISU's proposed amendments to the Convention**

The ISU has suggested the following changes be made to give effect to their proposal for environmental salvage awards. They affect three articles.

#### **Article 1 (d)**

The provisions in the convention that concern the environment only apply when there is 'damage to the environment' or in the case of Article 14.1 a threat of it. Damage to the environment is defined as follows:

d) "Damage to the environment" means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

The ISU maintain that the environment is not limited to coastal waters and there should be no restriction. The words "in coastal or inland waters or areas adjacent thereto" should be struck out. It expresses the view that no geographical limit is needed. Under the definition, the damage has to be 'substantial'. What may be substantial in one area may not be in another. If for instance a ton of oil were to escape in the River Plate it would undoubtedly be considered substantial. But if the same quantity were to escape in the middle of the South Atlantic, its doubtful if anyone would consider it was. The ISU feels any informed tribunal would be quite capable of making up its mind in the light of all the circumstances and in the interest of simplicity, sees no purpose in imposing any geographical limit. That said, it could accept a limit of the Economic Zone which is used in later conventions such as the 1992 Protocol, the HNS Convention and the Bunker Convention, which all refer to the economic zone.

### **Article 13.**

The ISU proposal involves very little change to the current Article 13. The main change is the removal of 13.1 (b) which, as we will later see, will be incorporated into the new Article 14. The following is the current Article 13 with the proposed amendments and additions in red.

13.1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- (a) the salvaged value of the vessel and other property;
- ~~(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;~~
- (b) the measure of success obtained by the salvor;
- (c) the nature and degree of the danger;
- (d) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- (e) the time used and expenses and losses incurred by the salvors;
- (f) the risk of liability and other risks run by the salvors or their equipment;
- (g) the promptness of the services rendered;
- (h) the availability and use of vessels or other equipment intended for salvage operations;
- (i) the state of readiness and efficiency of the salvor's equipment and the value thereof.
- (j) Any award under the revised Article 14.

13.2. 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 the right of recourse of this interest against other interests for their respective shares. Nothing in this article shall prevent any right of defence.

13.3. The rewards, exclusive of interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.

13.4 For the avoidance of doubt no account shall be taken under this article of the skill and effort of the salvor in preventing or minimising damage to the environment.

### **Revised Article 14**

As discussed earlier in this paper Article 14 was extensively examined in numerous LOF arbitrations between 1990 and 1999 and closely examined by the House of Lords in the "Nagasaki Spirit". Following numerous decisions industry concluded that Article 14 was uncertain in outcome, cumbersome to operate and expensive to implement. It was replaced in LOF cases by SCOPIC in 1999 but is still the law in 60 countries. The ISU proposal strikes it out entirely and replaces it with the following :

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its bunkers or its cargo threatened damage to the environment he shall in addition to the reward to which he may be entitled under Article 13, be entitled to an environmental award. The environmental award shall be fixed with a view to encouraging the prevention and minimisation of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

- (a) any reward made under the revised Article 13
- (b) the criteria set out in the revised Article 13.1(b) (c) (d) (e) (f) (g) (h) and (i)
- (c) the extent to which the salvor has prevented or minimised damage to the environment and the resultant benefit conferred.

It will be noted that that under the proposal a tribunal could make an environmental award whenever there is a 'threat of damage to the environment'. The salvor does not have to actually prevent damage to the environment. An environmental award is not limited to expenses as in the current Article 14.1, nor dependant on proof of actually preventing damage to the environment as is required by the current Article 14.2. The amount of the award is left entirely to the discretion of the tribunal in taking such factors into account in reaching its assessment.

The suggested criteria emulate Article 13 save for (c) which gives the tribunal the power to take into account the degree of success in preventing damage and the benefit thereby conferred. So, if there was a threat of pollution in waters that would impose a liability on the owner, the award would be more than if it had been in waters which did not impose such a liability, for the benefit conferred would be that much greater.

The ISU has accepted that there should be some form of cap on any environmental award and initially proposed the following

14.2 "An environmental award shall not exceed the amount of the ship owner's limitation fund under the CLC 1992, the HNS Convention 1996, the Bunker Convention 2001, or the 1996 LLMC Protocol or their respective successors, whichever may be appropriate to the circumstances of the case."

The cap proposed under 14.2 only looks to the respective conventions for the purpose of establishing the amount of the applicable cap. Aside from establishing the amount of the appropriate cap these conventions have no relevance to an environmental award. Some are unhappy with the involvement of other conventions and an alternative proposal has been made which reads:

- 14.2. An environmental award shall not exceed
- a) In relation to a ship not exceeding 5000 tons gross "x" special drawing rights



b) in relation to a ship exceeding 5000 tons "y" special drawings rights per gross ton subject to a maximum of "z" special drawing rights.

No proposals have yet been made for the actual SDR figures. The proposal continues with

14.3. For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties,

This is an important provision to the salvors for they do not want to be put in the position of competing with third party claimants and the inevitable delays that result. In the vast majority of cases its not likely to be relevant to the owner for if a limitation fund is relevant, the salvor is not likely to have been very successful in preventing damage and entitled to an environmental award.

14.4 Any environmental award shall be paid by the shipowners.

Like the current Article 14, the proposal places the liability for an environmental award on the ship owner, rather than the cargo, as it is he who is liable for any pollution under modern Conventions and Laws. The proposal amendment to Article 14 concludes with two Articles that are in the current convention.

14,5 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 environmental award due under this article

14.6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

It will be noted that under the proposed new Article 14, an environmental award is left entirely to the discretion of the tribunal. Experience over the last 100 years has shown that an informed tribunal is quite capable of weighing up the relevant factors set out in Article 13 and making a fair and just award which satisfies industry. Lloyds Open Form has nearly a hundred cases to deal with every year - many of enormous proportions. For nearly 100 years courts all over the world have had to do so. It is a tried and tested system. There is absolutely no reason why a tribunal cannot do the same when assessing an environmental award. The only difference is, instead of examining the danger of damage or loss to ship and cargo, it will have to examine the danger of damage to the environment. The P&I Clubs say such a system is too complicated and uncertain. But it's no more complicated or uncertain than the present system which they say they are happy with. Today the assessment of a salvage award under Article 13 is very similar to what is proposed for the assessment of environmental salvage and has to be done in almost every case even when SCOPIC is involved for you can't ascertain how much is due under SCOPIC until you have assessed the Article 13 award

London Arbitrators say they already take into account the potential liability from which ship and cargo are saved. Such potential liability does not have to be proven to the last dollar. It is sufficient to know of the risk and to weigh in the balance the degree of that risk. It will be the same for an environmental award. A threat will be sufficient for an award to be made but clearly the degree of that threat and the likely consequences will have a bearing on the amount that is awarded. That is for the tribunal. The President of the ISU said in Buenos Aires, "salvors do not expect to be paid unless there is a benefit conferred and they fully expect an environmental award to be commensurate with that benefit. They do not expect anything unless it has been earned and are happy for an appropriate tribunal to make the judgement of what is fair and reasonable."

The ISU's proposals for change to Articles 13 and 14 are the only proposals put forward to date but alternative solutions may well be proposed in the future. In this respect discussions are currently taking place between the ISU and the Property underwriters, who whilst supporting change in principle are not currently satisfied that the ISU proposal is the correct route. It is possible these discussions might result in an alternative solution to the problem.

### **The current position of the IWG of the CMI**

As will be seen from the papers given in Buenos Aires the shipping industry is split as to whether any change should be made. The P&I Clubs and the ICS, who both represent ship owners interest, are fiercely against whilst the ISU and the London Property Underwriters are in favour. What do the member associations of the CMI think? An excellent factual report summarising the present position was given by the Chairman of the IWG, Stuart Hethrington, at a meeting of the United States Maritime Law Association in Hawaii in December of last year. The full text may be found on the CMI website ([www.comitemaritime.org](http://www.comitemaritime.org)) and I would urge all interested to read it together with another paper given at that meeting by the Chairman of the International P&I Club salvage committee, Charles Hume, explaining why the group are so adamantly against change.

It will be seen from Stuart Hethrington's paper, that of the 24 responses so far been received to the questionnaires from National Maritime Associations (NMLA's), on the environmental issue, that

- The vast majority are in favour of amending in some way the definition of damage to the environment. There seems to be support for extending the geographical scope to at least the exclusive economic zone. The NMLA's seem fairly relaxed as to whether there should be any change in the word 'substantial' and the ISU has recently suggested it be replaced by the word 'significant' which might be more appealing.
- Whilst there is a more even split, the majority feel some change is needed to Articles 13 and 14 to reflect the environmental issue (though not necessarily

in the way suggested by ISU – a proposal which had not been put to them). Ten NMLA's expressed support for considering the issue and seven were opposed. Of the remainder two expressed no opinion, four recognised some change was necessary and one was open to persuasion.

The views expressed show there is a majority for change but there are still many NMLA's that have not responded and the overall view may change as debate heats up in the coming months.

Before we leave the environmental issue I would like to add a few thoughts of my own which are relevant to the issue.

The current system is undoubtedly very beneficial to owners and P&I

- The environment is the first consideration of any salvor - and local government ensures that remains so.
- The current cost of preventing damage to the environment is in most cases covered, in whole or in part, by Article 13.1(b) and paid by the owners of ship and cargo and their property underwriters
- P&I are only liable if Article 14 or SCOPIC is involved (about 25% of cases) and both are assessed on basic cost basis.
- They only have to pay when, and to the extent that, the assessment exceeds what is paid by the property underwriters under Article 13. (SCOPIC statistics show that on average the amount to be paid is about 50% of the actual SCOPIC assessment).

One can well understand their reluctance to change such a system but the change proposed will ultimately be as much to their benefit as everyone else. There will be a fairer distribution of what is awarded between shipowners, cargo interest, property insurers and P&I. Insurers will only pay for what they insure. More importantly, the shipping industry and the public will be more secure because their emergency service will be properly awarded for what they actually do and thereby encouraged, both to remain in business and to invest for the future.

It is not envisaged that the proposed change will result in huge sums. Whilst of high profile the overall salvage income of the industry is quite small compared to that of the shipping industry as a whole. The total gross salvage income of the world wide, industry as represented by the ISU, was \$250 million in 2010, earned from 250 salvage operations (1/3rd of them on LOF). The revenue for wreck removal, the other source of income to the industry, was \$300 million. These are gross figures - before expenses and running costs. For the reasons mentioned in this paper, the industry estimate awards are adequate in about 50% of salvage cases, but too low in the others. They are certainly too low in 25% of cases (where SCOPIC is involved and the bare

minimum paid). It is not suggested an environmental award be unlimited and there is scope to arrange for a reasonable cap.

Statistics show the salvage industry salvages and protects the environment from a huge amount of pollutant every year. In 2010 its members salvaged and thereby protected the environment from 1,022,730 tons of pollutant. In the last 15 years they salvaged nearly 16 million tons. Imagine if it, or even a part of it, had not been salvaged. To put it in perspective, the Exxon Valdez spilt 37,000 tons and Deepwater Horizon is said to have leaked about 500,000 tons. As we all know the cost of clearing up spilt oil is enormous and can run into the billions. The more that can be salvaged the better. The proposed change would allow salvors to be rewarded for what they actually achieve, encourage them to remain in the business and invest in better equipment to help them to protect the environment.

There are very few international professional salvage companies operating worldwide that have the ability to tackle those cases which substantially threaten the environment. Arguably - about five. The majority are divisions of larger corporate entities. What will happen if their shareholders or corporate heads decide the risk does not justify the rewards and move the men and equipment to another side of their business. The UK is withdrawing support for the four ETV's that protect its coast line. Current income does not justify holding those craft on station and it is likely the tugs will be redirected to other work. In these hard economic times, will other countries follow suit? The argument runs that if salvors were rewarded for what they did, they would be less likely to withdraw. Indeed, if paid for what they actually did, they are more likely to be encouraged to remain the shipping industries emergency service. Four recent cases illustrate the need for that emergency service

- The salvage of the MSC Napoli prevented some 3000 tons of oil polluting the English coastline. Much cargo, including HNS cargo, was salvaged but the ship broke in two and its wreckage (in effect another pollutant) removed.
- More recently in August 2010 off Mumbai, the MSC Chitra was badly damaged in a collision. Between 500 and 800 tons of fuel oil and 200 containers (many with HNS cargo) were lost. The majority of the fuel was salvaged together with a large number of containers with HNS cargo but the ship was so damaged she had to be towed to deep water to be sunk 350 miles off the coast.
- In October last year the Rena grounded in an environmentally sensitive area on New Zealand coast. After three weeks of hard and testing work 1400 tons of fuel was salvaged. Again, some containers were salvaged but the ship broke in two. Wreck removal continues.
- Even more recently the Costa Concordia whilst sightseeing off the coast of Italy struck a rock and was so badly damaged that she was beached off the Italian coast. She reputedly carries 2200 tons of fuel oil and 185 tons of diesel

in 17 tanks. Work has begun to remove the oil and tenders have been invited for either the salvage or removal of the wreck.

In the first three cases much damage and resultant claims have been prevented, and in the fourth case, hopefully will be prevented, but in salvage terms the first three have in essence been unsuccessful and the prospects for the fourth do not look good.. Should we not encourage those that take on these difficult and testing cases? Should they not be rewarded in salvage terms for the extent to which they have protected the environment?

So, what can we expect from the CMI's forthcoming conference in Beijing? It is possible that it might only result in a report to IMO identifying the issues and the conclusions reached but the ISU hopes for a draft amending Protocol to the 1989 Salvage Convention. It does not have to be long and complicated and would take nowhere near the time that is needed for a new convention. Some have drawn attention to the IMO Legal Committee Resolution A777(18) which provides that the committee will only entertain proposals for amending existing conventions on the basis of "a clear well documented and compelling need". That is a resolution that binds IMO not the CMI, but in any event I would suggest there is "a compelling need" and that steps need to be taken to rectify it before the environment is damaged by a casualty for which no salvor is available to assist.

### **Other Elements of the Convention under Review.**

As mentioned earlier whilst the review of the convention is largely focused on the environment, there are a number of other issues being examined, all of which are dealt with in Stuart Hetherington's Hawaii paper. This paper is already long and is intended to focus on the environmental issues, so I do not want to take up too much time on discussion of the other issues but they may be summarised as follows

- Article 1. Whether the definition of 'damage to the environment' should include or be extended to danger to navigation. There seems little support for this.
- Whether the Convention should deal with 'cultural heritage' in view of the lack of support by most major maritime countries for the Underwater Cultural Heritage Convention 2001. An alternative, called 'the Brice Protocol' is favoured by some as an option and a decision as to its inclusion will need to be taken in Beijing.
- Article 5 – should public authorities be able to claim for salvage carried out in their jurisdiction. In the majority of countries, the issue is resolved by establishing whether or not the authority has a duty to perform the work done. If it does, it has no claim for salvage. There seems to be no appetite to change this.

- Article 11. Should any reference to Places of Refuge should be made. Whilst many thought a few improvements could be made it was generally felt such matters were best left to stand alone instruments.
- Article 16. The current wording provides that the claim of a life salvor is to be made against the property salvor notwithstanding they may be a separate and unconnected body. This could give rise to an injustice as is illustrated by the following example which is based on an actual case

A passenger liner catches fire off the coast off East Africa. She is abandoned and over 800 people are in lifeboats.. They are picked up by three ships which deviate to save them. One is a VLCC with large deck space. It takes some 600 to an island in the Seychelles. The VLCC is engaged for 5 days and incurs an off hire loss of over \$100.000. She plays no part in the property salvage. If the casualty is salvaged the property salvor may not recover anything in respect of life salvage because he played no part in it, yet under this article he would be liable to pay the life salvor say \$100,000 plus. Equally if there was a claim for special compensation under Article 14.1 alone, which basically gave the salvor his expenses and nothing else, those expenses would not include the expenses of the life salvor for they were not incurred by him. However, under Article 16, he would have to share the recovery with the life salvor. In either case, it would be unjust for the property salvor to have to pay the life salvor. It needs to be made clear that any award to a life salvor is to be paid by the property interests.

A majority of the responses agreed a correction should be made. An amendment would be relatively simple and I suggest the following (current wording in black. New words in red italics. Existing redundant wording struck out)

#### **Article 16 - Salvage of persons**

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.
2. A salvor of human life, who has *saved life from a ship or property that was subsequently salvaged by another* shall be entitled to a fair reward, based on the criteria set out in Article 13 from the property salvaged ~~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 salvaging the vessel or other property or preventing or minimizing damage to the environment

- Article 27. Publication of awards. Whilst supporting publication the majority did not think any change to this Article needs to be made

- Article 21. 'The Duty to provide security'. There is currently a difficulty in both obtaining security from, and in the representation of, individual cargo interests in container ship cases.

The provision of cargo security in container ship cases is a problem which has increased year by year as ships get ever larger. In modern cases well over 10,000 cargo interests can be involved. And ships are getting bigger. Under current law whilst the master or Shipowner can make a contract on behalf of all, each property interest is responsible for itself, no party is liable for the other. Each has a duty to provide security and each is entitled to be represented in subsequent legal proceedings. In large container ship cases where thousands of cargo interests are commonly involved, it is impossible for a salvor to identify and obtain security from each interest within any reasonable period of time and his only remedy, detainment of the property concerned, is very often impracticable or impossible. Further, even when security is received the cost of giving to each property interest appropriate notice of legal action, arbitration, or awards is not only time consuming, but expensive – a cost that is ultimately born by the salvaged property. Currently under Article 21.2 the ship owner has an obligation to assist the salvor in obtaining security but there is no obligation to provide it if he fails to do so.

In the interest of all, ship, cargo and salvor, the law needed to be tightened to overcome this problem.

Some countries already have a system in place to overcome it (Netherlands and Belgium) but the vast majority do not. Italy, in its response to the first CMI questionnaire, suggested the law be tightened by providing that if cargo is released before it has provided salvage security, the shipowner will be liable, subject to indemnification, for that cargo's contribution to the overall salvage award. If a change on these lines were to be made it would be very helpful. It would maintain the current position of each party being principally liable for his own proportion of the award, yet protect the salvor.

The following amendment is suggested (current wording in black - amending words in red)

#### **Article 21 - 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 salvaged 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. *If any such cargo is released without the*

*cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salvaged vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s). "*

3. The salvaged 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.

There will no doubt be much further debate by many national delegations on the whole review in the coming months and the outcome in Beijing later this year is awaited with considerable interest. Should a new protocol be drafted and be approved by the Conference it does not necessarily mean the Legal Committee of IMO will either consider or undertake the work necessary to translate it into an actual international conference approved protocol but it will stand a much better chance of doing so than if nothing is done. Further if industry is satisfied that change is what the international community want, there is a far better chance of it getting together and agreeing to an acceptable solution.

Archie Bishop  
09.02 .12