INTERNATIONAL
SALVAGE UNION

Position Paper on the 1989 Salvage Convention

ISU PROPOSAL

The ISU is of the opinion that the 1989 Salvage Convention should be brought up to date by providing for the assessment of both an award for salvage services to maritime property, AND an award for the degree of success obtained by a salvor in avoiding or minimising damage to the environment during such salvage services.

REASONS

The ISU considers that the present system under the 1989 Salvage Convention, and the commercial arrangements under Lloyd's Form 2011, and where applicable, the Special Compensation P&I Club Clause (SCOPIC 2011), do not provide proper recognition of the salvor's efforts in carrying out his obligations under the 1989 Salvage Convention in avoiding or minimising damage to the environment

BACKGROUND

Under Article 8.1 (b) of the 1989 Salvage Convention a Salvor is required, whilst carrying out salvage operations, to exercise due care to prevent or minimize damage to the environment.

The Award criteria in the 1989 Salvage Convention requires an Arbitrator or Tribunal, under Article 13 (i) (b) to take into consideration 'the skill and efforts of the salvors in preventing or minimizing damage to the environment' whilst rendering salvage services to the casualty.

Article 14 of the Convention provides for the Salvor to be paid Special Compensation under specific circumstances where he has rendered services to a vessel which by itself or its cargo threatened damaged to the environment, and the salved property fund is insufficient to provide the salvor with a normal salvage reward.

This 'special compensation', if applicable, is assessed on the basis of a 'fair rate' for personnel and equipment utilised in the services, plus the reasonable out of pocket expenses incurred in the services, plus a bonus of up to 30% of the total expenses, or if fair and just to do so, up to 100% of such expenses.

This system arose out of what is known as the 'Montreal Compromise' negotiated between the parties to the CMI Conference in 1981 to take the place of a proposal to include 'Liability Salvage' in a new Salvage Convention.

This ‘compromise’ came about following Professor Erling Selvig’s proposal to introduce the concept of Liability Salvage into a new salvage convention. The ISU would say Professor Selvig's initial approach was right. They supported it at the time but, in Montreal it was quite clear that the P&I Clubs were totally opposed to this new concept, and as a consequence ISU went along with the proposed compromise (the Montreal Compromise) that was eventually incorporated into the Convention.

Subsequently the Article 14 Special Compensation provisions proved time consuming and expensive to assess, and the commercial parties to Lloyd’s Form produced an alternative method of assessing Special Compensation, namely the Special Compensation P&I Club Clause, or SCOPIC.

SCOPIC is a tariff based system of assessing Special Compensation, with a fixed bonus of 25% of the salvor’s expenses under the SCOPIC Clause. It is a system that has the support of the ISU and the P&I Clubs, but that in itself does not mean there is no need for change.

Since those days in Montreal, over 30 years ago, when the 1989 Salvage Convention was being debated, much has changed. The structure of the salvage industry is one of the significant changes. Today, there are only a few salvors with a global reach and capability.

Some of the salvage companies that existed 30 years ago have withdrawn from the business, and others have become part of larger organisations through mergers and acquisitions. There has also been a decline in the amount of work available. 20 years ago there were on average about 200 Lloyd’s Form cases a year, today there are less than 100 each year but the industry has adjusted to it and no doubt will continue to adjust to the prevailing circumstances. What should be of concern to the shipping industry as a whole is whether the salvage industry will continue to make a satisfactory response to future casualties. The ISU suggests salvors are far more likely to be there in the future if its members are paid fairly for what they actually do and achieve.

THE NEED FOR CHANGE

Any reward under Article 13 of the 1989 Salvage Convention is limited by the size of the salved fund – the market value of ship and cargo at the termination of the salvage services.

The ISU has data collected since 1978 covering nearly 2,900 Lloyd’s Form cases, which shows that the annual salvage revenue, (Awards and negotiated settlements), amounts to an average of 8.12% of salved values. The highest year was 2000 when the revenue from Awards and settlements averaged 12.5% of salved values.

Compared to the values at risk, which under Lloyd’s Form have amounted to US$ 24.5 billion from 1978 to 2008, the revenue is comparatively modest.

A further exercise carried out by ISU since 1994 shows that each year members of the ISU have salved ships laden with an annual average of just over 1 million tonnes of potential pollutants. Not every vessel was a casualty which would have given rise to actual environmental damage, but obviously every year some real risks of environmental damage were avoided.

Under the SCOPIC Clause the salvage revenue is based upon a tariff, and since it is 'compensation' it is not a reward system. As a consequence the degree of success achieved by the salvor in 'preventing or minimizing environmental damage' is not taken into consideration.

A FUTURE SALVAGE CONVENTION

The question arises, 'should the Montreal compromise continue into the future?'

ISU would suggest that it should not do so for the following reasons:-

- The compromise was made some 30 years ago and must be capable of being reviewed in the light of changing circumstances. It cannot have been intended to be binding forever!

- The circumstances are very different today from what they were in 1981. Environmental issues, while important then, are even more important today and play a far larger part in today's salvage operation than they did 30 years ago.

- The bunker fuel capacity of modern day shipping is considerably in excess of the capacity of shipping of 30 years ago. Today there are bulk carriers, container ships, oil tankers and cruise liners with bunker capacities well in excess of 5,000 tonnes.

- Practically every salvage operation today has an environmental dimension. After safety of life, the environment is the primary concern of coastal states. Salvors are often required to undertake environmental protection measures which are not strictly necessary for the successful salvage of ship and cargo.

- **In the majority of shipping casualties, it is only the salvage industry that has the necessary expertise and equipment to both salve the casualty and protect the environment.**

- The salvage industry, one of the principle parties to the compromise, is no longer comfortable with the 1989 Salvage Convention and wishes to re examine it.

How change could be achieved?

The ISU suggests replacing the current Article 14 with an Environmental Award which, in appropriate circumstances, should be made in addition to the traditional award against ship and cargo. How could this be achieved? ISU suggests it could be done fairly simply by amending just three of the Articles of the Convention, as follows:-

As can be seen we have adopted the current Convention wording as much as possible. The current wording is in blue and the proposed amendment is in red.

Article 1 Definitions

Revise Article 1 (d) to read:

d) Damage to the environment" means significant ~~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.

'Significant' is considered to be a more realistic measure in this day and age than 'substantial', particularly given that even a casualty with only a small quantity of bunkers on board may be regarded by a coastal state as a significant threat to the environment. For example, the 'CARRIER' aground in North Wales April 2012 with 20 tonnes of bunkers on board.

We also propose to remove the geographical restriction from the current definition. The IWG in its note accompanying the questionnaire to member Maritime Law Associations, pointed out that all subsequent Conventions such as the 1992 Protocol, the HNS Convention and the Bunker Convention all refer to the 'Economic Zone' and suggested this might be more applicable. The vast majority of responses to the questionnaire agreed this would be more appropriate.

Whilst an alternative new limit of the Exclusive Economic Zone would be more acceptable, the ISU would suggest that there really is no need for a geographical limit. Under the existing definition, the damage has to be 'substantial' or as the ISU proposes, 'significant', and what may be 'significant' in one area may not be in another. The ISU feels that any informed tribunal would be quite capable of making up its mind as to the risk of 'significant' damage to the environment in the light of all the circumstances and in the interest of simplicity sees no purpose in imposing any geographical limit.

Article 13 Criteria for fixing the reward

Revise Article 13.1

Very little change is in fact required save, for the removal of 13.1 (b) which will be incorporated into the new Article 14.

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 salved 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 salving 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 reward under the revised Article 14.

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

The new 13.1(j) and 13.4 are not really necessary and are only inserted for clarity of intent.

Article 14 Special Compensation

Revise Article 14

It is this Article that needs the most amendment. It was extensively examined in numerous LOF arbitrations between 1990 and 1999 and carefully examined by the House of Lords in the "Nagasaki Spirit". Industry found it uncertain in outcome, cumbersome to operate and expensive to implement. It was replaced in LOF cases by SCOPIC but is still the law in 59 countries. The proposal of the ISU is that it be struck out completely and replaced with the following:

14.1. 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 also be entitled to an environmental award, in addition to the reward to which he may be entitled under Article 13. 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.

It will be noted that any 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. This is the position under the existing Art. 14.1. The only difference is that under the existing Article the recovery is limited to expenses as defined in the convention whereas here, as we shall see, the recovery is left entirely to the discretion of the tribunal.

(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.

These criteria basically 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. Such an award would also be paid by the shipowner and his liability insurers and not the property insurers.

14.2 Any reward payable by the Shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to;

a) In respect of a vessel of 20,000 Gross Tons or less, 'x' Special Drawing Rights.
b) For a vessel exceeding 20,000 Gross Tons, 'x' Special Drawing Rights, plus 'y' Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of 'z' Special Drawing Rights.

There has to be a cap to any award and the cap proposed under 14.2 only looks to the Gross Tonnage of the casualty with a multiplier, (to be decided), of Special Drawing Rights. This avoids the potential confusion which could arise by using different Convention fund calculations, as to which is the appropriate Convention.

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 for salvors for they cannot be put in the position of competing with third party claimants and the inevitable delays that result.

14.4 Any environmental award shall be paid by the shipowners.

The liability for an environmental award is placed on the ship owner, rather than the cargo, as it is he who is liable for any pollution under modern Conventions and Laws

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 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. The LOF system deals with many cases every year – some of enormous proportions. 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 also examine the danger of damage to the environment.

Additional Changes to the 1989 Salvage Convention Proposed by ISU

There is an anomaly within Article 16 Salvage of Persons, as 16.2 provides that the salvor of human life is entitled to a fair share of the payment awarded to the salvor for salving the property.

However the rescue of crew and passengers, if any, usually takes place before a salvor has arrived on the scene, and in many instances even before a salvor has been engaged.

Under such circumstances an Arbitrator, Court or Tribunal will not be able to take the life salvage services into consideration when making a reward in favour of the property salvor.

The ISU therefore requests that Article 16.2 be amended as below. It is the Shipowner who should be responsible for any such payments to the Life Salvor.

Art. 16 Salvage of Persons

Amend Art 16.2 to read

16.2 A salvor of human life, who has saved lives from a ship or property that was salved by another, shall be entitled to a fair reward, based on the criteria set out in Article 13. Any such reward shall only be payable by the shipowner.

Article 21 Duty to provide security

Thirty years ago Container Ships were of a very modest size in comparison to the giant vessels trading today and likely to be developed in the future.

Today a large Container ship may be carrying cargo owned by many thousands of different interests. A salvor, in many jurisdictions, is obliged to seek security for his salvage claim from each and every cargo owner.

This is a time consuming and expensive exercise, and difficulties do arise when the vessel owner wishes to continue the voyage with unsecured salved cargo on board. The exercise of the salvor's lien may not be possible, and to ameliorate these difficulties, the ISU proposes that Article 21.2 be amended as proposed below.

Amend Art. 21.2 to read;

21.2 Add additional sentence;

If any such cargo is released without the cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salved vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s).

The ISU sincerely hopes that Maritime Law Associations will recognise that these proposals are a real attempt to reflect the need for a change in the 1989 Salvage Convention, to bring the law up to date to reflect the reality of present day salvage operations, whilst maintaining the degree of encouragement necessary in salvage activity.

This Proposal, and other papers relevant to this matter, will soon be published in a special section of the ISU's website, specifically relating to environmental salvage awards. The website can be accessed via www.marine-salvage.com.

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