

1. Introduction

I have been committed to summarising two main issues: first of all, the answers to the Questionnaires from the National Maritime Law Associations and secondly, the discussions that took place at the International Subcommittee meeting in London on May 12th 2010¹.

2. Recent history

To start with, I would like to summarize the recent history. As you already know, in May 2009 an International Working Group on Salvage was created by the CMI in order to analyze if the 1989 Salvage Convention calls for amendments. Therefore, as a first step, in July 2009 a Questionnaire was sent by the International Working Group to all the national MLAs. So far, 19 answers have been received. Next, the first meeting of the IWG was held in London on 18th September 2009 in order to analyze the answers received from the MLAs. To listen to the voice of the people involved in the industry, namely the ship-owners, the P & I clubs, the property underwriters, the salvors and the arbitrators, an International Sub Committee meeting was summoned and took place in London on 12th May 2010. As a result, two reports, one for each meeting, have been issued so far. In addition, the Chairman of the IWG presented a paper for the ISC meeting.

As a summary, 2 meetings were held in London (one of the IWG and another of the ISC), 1 questionnaire was sent to all the MLAs, 19 answers have been received so far, 2 reports were issued by the IWG, 1 discussion paper was sent by the Chairman for the ISC meeting.

3. Main issues of the questionnaire

The main matters asked to the MLAs in the questionnaire were the following:

- Could the word "substantial" in article 1.d. create difficulties in interpretation? (we should recall that *substantial physical damage is required for considering environmental damage*)
- Then it was analysed whether the geographic scope for environmental damage is accurate.
- Can public authorities pursue claims for salvage in your jurisdiction? Should they? (art. 5)
- In containership cases or when there is a large number of receivers, for the sake of simplicity, should only the vessel be liable for reward and security despite recovery actions against other properties? (art. 13.2.).
- One of the most important questions posed is: should an entitlement to an environmental award be created and therefore art. 14 amended?

¹ This paper is just a summary of the main issues of both the questions and answers to the questionnaire and of the debate at the ISC. For more details you can address the reports issued by the IWG.

- Then, should a lien against the ship be created for a claim for environmental salvage? Amendment of art. 20.
- Should life salvage claims be made directly against the property owner and not against the salvor? This refers to amendment of art. 16.
- Should publication of awards be encouraged? This refers to an amendment of art. 27.
- Are there any other issues or problems regarding the 1989 Salvage Convention which should be considered for amendment?

a) The definition of damage to the environment:

Environmental damage is addressed in several articles of the 1989 Salvage Convention, (e.g. articles 6.3, 8.1.b., 8.2.b., 13.1.b., 14.1, and 14.2.) and it is a condition which enables the salvor the special compensation of articles 14.1. and 14.2. Therefore, the definition of environmental damage is crucial in the structure of the Convention.

According to article 1.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*”.

Therefore, there are three main elements in the definition of environmental damage, namely:

1. *substantial physical damage to human health or to marine life or resources,*
 2. *in coastal or inland waters or areas adjacent thereto,*
 3. *caused by pollution, contamination, fire, explosion or similar major incidents.*
- The word “substantial”

Regarding the definition of environmental damage according to art. 1, d), of the 1989 Salvage Convention, one of the first questions was whether the word “substantial” could create problems or difficulties of interpretation and the answers received included the opinion of the MLAs related to retaining or deleting the word “substantial”. Then, as regards this issue, there were divided positions. Some MLAs were in favour of retaining the word substantial or replacing it by a similar concept or supported excluding minor cases. Other MLAs favoured deleting the word substantial because of possible interpretation problems or inconsistency, which was also the ISU proposal. It should be added that, deleting or retaining the word “substantial” was discussed during the debates at the Diplomatic Conference that led to the 1989 Salvage Convention and the word remained.

Geographic scope of application

According to the present text, the environmental damage should occur “...*in coastal or inland waters or areas adjacent thereto...*”. The question was whether it should be widen to territorial sea and Economic Exclusive Zone or wherever such damage may occur. A large majority of MLAs favours the extension to territorial waters and to the exclusive economic zone. Some MLAs favours even the extension to wherever such may occur and this is also the ISU proposal. Very few MLAs supported no change. It should be mentioned that again, at the Diplomatic Conference, it was said that “...*in coastal or inland waters or areas adjacent*

thereto...” was a vague expression that was adopted in order to avoid speculative claims and therefore, the 1989 Convention excluded damage occurred in high seas.

b) Salvage operations by public authorities:

As you know, the Salvage Convention states that it shall not affect any provisions of national law or international convention relating to salvage operations by or under the control of public authorities (art. 5.1.) and that salvors carrying out such operations are entitled to avail to the rights of the Convention (5.2.) and that salvage operations carried out by public authorities are excluded from the Convention and submitted to national law (art. 5.3.)

At the discussions that lead to the Convention two main issues were considered. One, if public authorities, such as the coastguard or fire services, might recover in salvage and also to preserve salvors right to an award when services were performed under the control of public authorities.

Now, the questions posed were:

Question:

- 1.1 *Can public authorities pursue claims for salvage in your jurisdiction?*
- 1.2 *If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?*

As regards the question if public authorities can pursue salvage claims in their jurisdictions, most of the answers were yes and the provision of art. 5 should remain unchanged. A few MLAs answered that public authorities were entitled to obtain a salvage reward only in case they have performed services beyond their authorities’ duties. Other MLAs answered that no reward should be paid in case the services were carried out by the military or by the navy and some stated that they are entitled only to a cost recovery.

c) Salvage Award - Payment by one interest: for and against

As we also know, according to art 13.2. the salvage reward is paid by the vessel and other property in proportion to their salvaged value. Then, another important issue in which the opinion of the MLAs was requested is if, when there were a large number of receivers, for example containership cases, the salvage reward should be paid by one of the interests, -e.g. the ship or cargo-, and then recovered from the rest of the interests in their proportion. Almost all the MLAs answers’ were no. It should be mentioned that for example according to Netherland law, the salvage reward is paid by the shipowner who is entitled to recover the proportion due by other properties.

d) Considering amending art. 14 to create an environmental award

Creating the environmental award: this is the main issue. May be it can be said that if there’s no agreement to create what is called the environmental award, it is not worth amending the 1989 Convention.

Those against

It was noted that a slight majority of MLAS were against creating an environmental salvage award and the main reasons alleged were that it would disrupt Montreal Compromise or damage the structure of the 1989 Convention. It was also said that it would lead to uncertainty and that the environmental salvage has the opposition of the shipowners & the P I clubs. Others stated that there was

no need for a change, taking into account that the salvor would get a reward through articles 13 and 14 of the 1989 Convention.

Those in favour

On the other hand, those in favour of the amendment considered that the SCOPIC clause used by the industry in replacement of the special compensation of art. 14, shows the deficiency of the 1989 Convention and that nevertheless, the industry support was needed including clubs, underwriters and the International Salvage Union. Some added that it should be paid by ship and other properties. However, it should be pointed out that some of the MLAs, including a few that are against the environmental salvage, stated that the wording art 14 should be simplified, that we should begin studying the issue, or that the matter should be revisited.

e) Statutory lien

Regarding the issue of creating a statutory lien against the ship for the environmental award, a large majority answered no, stating that there is already a lien or that the matter is reserved to the Convention on Maritime Liens or to national law. Yet, few MLAs answered that a lien should be created over the ship and other properties while others recall that the salvage reward is a maritime claim according to the 1999 Arrest Convention (article 1.1.c.) where the special compensation of art. 14 is included. However, the convention is not yet in force and the special compensation does not include the environmental award.

f) Life Salvage directed against the property or salvor

As regards the question if life salvage should be directed against the property rather than against the salvor half of the MLAs answered that no change is needed. The other half said yes, it should be conducted against the property rather than against the salvor. One of the reasons for this proposal is that as life salvage was not an element for assessing the reward, it would be unfair if the property salvor had to pay the life salvor when that life salvage was not considered in assessing the property salvor's reward. This matter –directing the claim against the property rather than against the salvor- was discussed at the Diplomatic Conference in which the concern was raised stating it would imply granting a separate reward for life salvage, and this issue received no support.

g) Publication of awards

Publication of awards is a very important subject, even though it appears to be a minor one: certainty on the one hand, and confidentiality on the other hand, are at stake, and that is why at the Diplomatic Conference the matter was extensively discussed. The majority of the answers received at the IWG considered that the publication was not necessary or that it was a parties' or an arbitrators' issue. Other MLAs, considered that arbitrators' decisions should be published but it required the parties' agreement or answered that it was a national law issue or that only a summary should be published. What's more, the publishing of the awards should be subject to opposition, or even some mentioned that the award should be published without parties' names.

h) Other issues to be considered

When the question was posed as to whether there were any other issues to be discussed, most of the MLAs answered no. However, some of the proposals were that liability to third parties should be excluded from art. 13, or else to grant the owner the right to retain the cargo until a letter of undertaking is provided to the salvor. Others considered that it is too early to amend 1989 Salvage Convention. Other matters proposed were that the salvor's misconduct should not affect human's life salvor (arts. 16.2. and 18).

4. Discussions at the International Subcommittee Meeting

Now, we should turn the page and address the discussions at the International Subcommittee Meeting that took place in London on 12th May 2010 in order to hear the people involved in the industry. Two main positions were observed: those in favour of amending the 1989 Salvage Convention to create an environmental award, and those against.

In favour of change, it was said that today is a different world from that of 1989, we face a more litigious society in which environmental issues are of greater importance than when the 1989 convention was drafted. There is a stricter control from states and harbour authorities, while there is higher state involvement in salvage and salvors are more exposed to liability. Plus, there is a more concentrated market in which shareholders of salvage companies need incentives to invest. It was also said that big corporations are more risk adverse than family companies.

Other changes were mentioned, indeed the following acts and conventions were signed: OPA'90, Oil Pollution Preparedness, Response and Co-operation Convention 1990, HNS Convention 1996, UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, The Bunker Convention 2001, FUND Protocol 2003, The Wreck Removal Convention 2007, among others.

On the other hand, at the International Subcommittee Meeting we heard about the criterion for the International Chamber of Shipping and the International Group of P & I, in order to analyze the ISU's amendment proposal. It was said that it should be sufficiently clear, substantial and tangible to understand, it would demonstrably improve casualty response and benefit those currently paying, and it would identify what elements of the current casualty response regime would be either retained or adjusted.

It was also mentioned that it was unclear how the ISU proposal would improve environmental salvage response or how it would benefit ship-owners and liability insurers, or how an arbitrator could assess what damage had been prevented in order to grant an environmental award. Furthermore, it was added that liability underwriters have certainties from the SCOPIC clause and that an environmental award might endanger that certainty. In addition, if the salvage award of article 13.1.b) -skill and efforts of the salvors in preventing or minimizing damage to the environment- was paid by property underwriters, this was part of a compromise by which the SCOPIC compensations paid by liability underwriters were excluded from general average, and therefore not recovered from the property underwriters.

The comments received from the other side were that in today's world the environment is everything; it is at the forefront in every major casualty, in which the personnel comes first, the environment next, and the property comes third. What's more, it was said that the proposal of creating an environmental award is simple: art. 13.1.b) should be transferred into an environmental award in art. 14. It was

also mentioned that there are two main elements in every environmental award: one the one hand, preventing and minimising damage to the environment, remove bunkers, lay booms, etc. and on the other hand, preventing environmental liabilities to third parties.

5. Other reasons for and against considering an environmental award

First of all, salvors should be encouraged to invest more in pollution prevention and response equipment. Then, SCOPIC, and art. 13.1.b), do not provide sufficient reward to invest. It was stated that the problem with the SCOPIC clause –which works- is that it is tariff based, and even though SCOPIC rates are renewed every 3 years (2007/2010), SCOPIC does not allow to make a reward for success and does not provide sufficient incentive to invest. As regards art. 13.1.b), it was said that it is insufficient to reward environmental salvage and that property underwriters pay for something they do not actually insure, and therefore the environmental award paid by liability insurers will be a remedy to an inequity. It was added that the reward of art. 13.1. is limited by the salvaged value of the ship and the cargo, which discourages investment.

It was added that the ERIKA & PRESTIGE cases occurred and more litigious society enhanced the importance of environmental salvage. It was also said that as the CLC and FUND Conventions were amended, the Salvage Convention also calls for a change and that art. 14 showed not to have worked, it was replaced by SCOPIC and that therefore, a new compromise was needed starting from scratch.

However, it was also said that amending the 1989 Convention is not in the IMO agenda and that in order to amend the convention the governments should be convinced that there is a compelling need for change.

Other opinions expressed that IOPC Funds are reluctant to assess natural resource damages. On the other hand, it was stated that the costs of response (equivalent to the liability prevented) are available in ITOPF.

6. Bunker Removal

The bunker removal was always present at the discussions. It was said that it is a previous authority requirement and even though it is safer to keep the bunker on board, it was said that it is a risky and time consuming operation in which specialised equipment is needed. And then, salvage award might help to persuade to invest in equipment. It was also pointed out that the bunker removal was not necessary to save the vessel, and that it was anyway reflected in an award paid by the property insurers. In fact, as proposed, that should be paid by the liability insurers.

7. Limitation or cap of the environmental award

As regards the limitation, the proposal was to consider either the gross tonnage of a ship multiplied by x SDR, or else make use of the existing funds as the CLC Fund.

8. Arbitration

As regards arbitration, arbitrators see little evidence of specific environmental threat. It was also mentioned that awards do not reflect a substantial proportion of the work done in environmental protection. Furthermore, there is a tendency to

think in terms of physical benefits –the property saved- instead of thinking about the liability avoided. We also heard that arbitration awards would need to turn to consider the evanescent concept of diminishing environmental liabilities to third parties. For that purpose, more evidence of the scope of danger might be needed, and the award should justify costly enquiries. It was added that there is no difference from assessing the award under Article 13.1.b) from assessing an award for environmental salvage. Thus, there shouldn't be any real difficulties for arbitrators in arriving at an award.

9. Emergency Towing Vessels

The issue of Emergency Towing Vessels (ETVs) was also discussed and it was mentioned that they were introduced in some countries. In some cases were funded by tax paid by shipowners and then presumably transferred into the freight. The work of the European Maritime Safety Agency (EMSA), based in Lisbon, was also mentioned. It was asked whether the ETVs mean that the salvage industry can't provide salvage services or that they are needed for assistance. Yet, are ETVs able to assist in a real major situation?

10. Conclusion

The possible course of action to be taken and the most ambitious one was drafting a new Salvage Convention or instead, drafting a Protocol to the Salvage Convention. Or the task could only be assisting in redrafting the LOF or just assisting the interested parties in further discussions or else only debating topics in CMI forums, which is what was done at the Buenos Aires Colloquium on 25th October 2010.