

Lloyd's Open Form and the Special Compensation P&I Clause (SCOPIC)

Under English law claims for salvage may be brought under the terms of a contract or in common law. Contractual terms may be agreed prior to the commencement of salvage services, during the course of such services, indeed, even after the services have been completed. One of the advantages of having an agreed form of contract, particularly Lloyd's Open Form in its various manifestations, is that in an emergency no time need be lost in agreeing the terms under which the salvage services are provided but if no contract has been agreed a claim for the saving of property may be pursued at common law.

The most widely used salvage contract is Lloyd's Open Form of Salvage Agreement which incorporates the principle of "no cure - no pay". Lloyd's Open Form provides for English jurisdiction and London arbitration. Other forms of contract are used from time to time and for example Japan, Russia, China and Turkey use their own standard contracts.

In England, the Admiralty Court has developed as a specialist branch of the Commercial Court in order to hear disputes or to consider claims involving salvage, collisions and maritime cases generally. An Admiralty judge may, as an alternative, hear salvage cases as the Lloyd's arbitrator.

The Development of Lloyd's Open Form

LOF Salvage contracts have been used for more than 100 years. The first standard form was approved by the Committee of Lloyd's in 1892. Following revisions which were approved in 1908 the agreement was given the name by which it is known today. Various further revisions have taken place over the years but the most significant occurred with the publication of Lloyd's Open Form 1980.

LOF 80 introduced the first movement away from the principle that remuneration should be based solely upon the value of property salvaged. This form provided that the salvor might still be paid, even if there was no cure, if the services were rendered to a laden oil tanker which was a

threat to the environment. Except perhaps with the agreement of the P&I clubs concerned, salvors had not previously been entitled to payment under such circumstances. LOF 80 introduced a new concept. This provided that the shipowners should reimburse the salvor for his expenses, plus a supplement up to an additional 15 per cent which would be dependent upon the value of the result of the salvors' efforts. This term was referred to as the "safety net" and its introduction reflected an ever-increasing awareness worldwide of the effects of oil pollution on the environment. A number of headline incidents only served to reinforce the general concerns which were being expressed by governments and environmental organisations.

Although LOF 80 introduced significant changes to the standard salvage contract, major pollution incidents during the 1980s ensured increasing pressure from environmentalists which eventually lead to further significant change in the salvage industry.

The International Convention on Salvage 1989

An international conference in 1989 agreed a new salvage convention which made a profound change in the nature of salvage. The previous convention of 1910 had been based on the traditional principle of "no cure no pay". The awards were paid pro-rata by hull and cargo underwriters in proportion to the respective salvaged values and the P&I clubs were not involved. The fear under the old convention was that salvors might think twice about attempting to save a ship where the risk of failure was great and the costs likely to be incurred were also great. The intention of the Salvage Convention 1989 was to encourage salvors to act in cases where there is a threat to the environment.

Under the Convention the main salvage award is still based upon "no cure no pay", but the award will take into account "the skill and efforts of the salvors in preventing or minimising damage to the environment", as well as the traditional factors of salvaged value, danger, out of pocket expenses, success, time, and skill. The basic "no cure no pay" award is dealt with under Article 13 but the Convention provides a safety net for a salvor who has worked on a ship or cargo which threatens damage to the environment but has failed to earn sufficient reward under that Article. In such circumstances, he is entitled to special compensation under Article 14,

based upon the cost of his tugs and personnel and his out-of-pocket expenses, plus an uplift of 30-100 per cent if he has prevented or minimised environmental damage. The hull and cargo underwriters continue to pay Article 13 awards, even if they are increased because of environmental factors, but the P and I clubs cover Article 14 awards.

Article 14 extended the "safety net" concept beyond laden tankers to include any vessel carrying bunkers or other polluting materials on board. However, whereas LOF80 provided that this compensation might be paid no matter where the incident occurred, LOF90, which incorporated various provisions from the 1989 Convention, restricted special compensation payments to "coastal or inland waters or areas adjacent thereto".

With the introduction into English law of the 1989 Convention by means of the Merchant Shipping (Salvage and Pollution) Act 1994, Lloyd's Open Form was further amended to LOF 1995 and incorporated other significant revisions as follows: (a) that the master is entitled to conclude contracts for salvage on behalf of the ship and the cargo without fear of challenge by the cargo interests if the terms are reasonable; (b) that the salvors must exercise "due care" compared with using their "best endeavours" under LOF80; (c) that when circumstances so dictate the salvors should seek assistance from other salvors; and (d) that the shipowner acquires a stronger duty to ensure that security is provided before cargo is released.

Interpreting Articles 13 and 14

The texts of Articles 13 and 14 of the Salvage Convention read as follows:

"Article 13 - Criteria for fixing the reward"

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 minimising 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 salving 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.”

“Article 14 - Special compensation

1. 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.
2. 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.
3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1 (h), (i) and (j).
4. 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.
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 special compensation due under this article.
6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.”

Salvage claims which have arisen in circumstances where there is no threat to the environment are settled in accordance with the criteria set out under Art.13. The size of the award will take account of the salved value of ship and cargo, the skill and efforts of the salvors, the nature and degree of the danger, the time and expenses used and incurred, etc, etc.

Where there is a threat to the environment and the salvor has failed to earn sufficient reward under Art.13, the salvor is entitled to special compensation from the owner equivalent to his expenses as defined within the Art.14. A key point is that the salvor may not have prevented damage to the environment but during the course of the operation there may have been a threat of damage. If the salvor had actually prevented or minimised damage to the environment he is entitled under Art.14.2 to receive an additional sum equivalent to a maximum of 30 per cent of his expenditure. The arbitrator may in fact increase the award up to 100 per cent if the salvor has achieved an exceptional result. Only the owner of the ship is liable to pay special compensation. Cargo interests are not liable for special compensation but will contribute to the overall payment to the salvors in the event of an award under Art.13. The calculation of owner's special compensation will be based upon the award under Art.14 less the amount payable under Art.13, in accordance with Art.14.4.

P&I Clubs extended their cover to provide for reimbursement of a shipowners' liabilities under Art.14.

Difficulties experienced under Articles 13 and 14

A number of problems became apparent with the operation of Articles 13 and 14, some of which concerned shipowners and the clubs, and others concerned salvors. The clubs were worried that the safety net gave the salvors an incentive to prolong the operation as long as possible and allowed the property underwriters to delay the decision as to whether the ship would be accepted as a CTL, with little that the club or shipowner could do to influence the situation. Salvors in turn were concerned that Article 14 only applied if there was a threat to the

environment, which had to be proved, and that Article 14 was not relevant outside “coastal or inland waters or areas adjacent thereto”, a geographical restriction. They often also remained unsecured for this element of their remuneration. The salvors were also concerned by a decision of the English courts, in the case of the NAGASAKI SPIRIT, that the rates for equipment and personnel should not include any element of profit. Profit was to be limited to the uplift, which only applied if damage to the environment was minimised or prevented. All these issues lead to arbitration under Article 14 being long and expensive, costs generally being for the account of the shipowners and the clubs.

Various aspects of salvage had been considered on a number of occasions by the P&I Clubs and their Boards since the advent of the "safety net" provisions in LOF 1980 heralded the participation for the first time of the P&I clubs in the traditional "no cure no pay" salvage contract to recognise the efforts of salvors in attempting to avoid casualties giving rise to pollution liabilities.

These developments ran in parallel with anxiety expressed increasingly vociferously during the late 1980's by salvors as to the future viability of the salvage industry and the dangers of it dying completely. In 1989 Smit, whose managing director was then President of the International Salvage Union (ISU), produced a paper entitled "Salvage in Crisis". It expressed concerns as to the degree of financial commitment to equipment and personnel that was necessary to maintain first class salvage capability, complained of the erosion of the industry by the activities of so-called "yellow pages" salvors and proposed a joint venture between clubs and Smit to sustain a viable salvage capacity world-wide. The proposal to enter into a joint venture with Smit was rejected on the basis that it was not appropriate to favour any one salvor against others, but support was given to the idea of developing a dialogue between the various shipping and insurance participants in salvage.

This resulted in the setting up of the "Salvage Working Group" which met for the first time in September, 1990 and commissioned an investigation into the salvage industry by Tecnicas, the consultancy arm of Bureau Veritas. In a report at the end of 1992, the Salvage Working Group concluded that international salvage resources were in serious decline as a result

of a reduction in casualty rates, falling levels of remuneration, and competition created by the availability of offshore support vessels and other ancillary craft leading to the withdrawal of professional salvors from the market, the reduction of dedicated salvage craft and the closure of traditional salvage stations.

The Salvage Working Group recommended that salvage awards should provide sufficient encouragement to dedicated professional salvors and that, in contracting salvage services, the shipping and insurance industries should give more weight to salvors who had a major investment in salvage equipment and expertise.

The Salvage Working Group considered but rejected proposals that the salvage industry should be financially supported by an industry fund or directly by underwriters, but foresaw a continuing dialogue between users and the salvage industry, working together to ensure the long-term maintenance of world-wide salvage capability.

There has indeed been continuing dialogue established through six monthly meetings of a so-called Salvage Liaison Group. During the middle years of the 1990s the topics on the agendas for those meetings tended to recur, with concerns expressed by both ISU and club representatives as to fundamental aspects of both salvage and wreck removal.

For their part club managers had been concerned that the interaction of Articles 13 and 14 in LOF gave rise to an inherent conflict of interest between hull underwriters and P&I clubs and that owners and their clubs were potentially exposed to abuses by salvors of the special compensation regime with little possibility of control.

The developments within the salvage industry had been taking place during a period of rapidly increasing sensitivity of governments and local authorities to the potential environmental hazards posed by any casualty. In response, the clubs wished to take an increasingly participative role in casualty management in order to ensure that the exposure to environmental damage claims was minimized, wherever possible.

The development of SCOPIC

Dissatisfaction with the uncertainties of the current system lead to serious discussions between representatives from leading salvors and a number of P and I clubs and amongst the clubs themselves. One idea was given the tentative title of 'Salvage 2000' and would be designed for use by shipowner Members of a new 'Salvage Federation', modelled on ITOPF, for whom participating salvors would provide services at a daily rate according to a pre-determined and generous tariff. The salvage services would be fully underwritten by P&I clubs in the first instance, but mechanisms would be developed to obtain appropriate contributions from hull and cargo underwriters in cases where property was salvaged. This was a radical proposal and it is fair to say that doubts were expressed as to whether it would ultimately prove viable as acceptance by property insurance interests seemed unlikely.

However, before this and other ideas could be developed, an approach was made to the International Group of P and I Clubs by the President of the International Salvage Union (ISU). At his request a meeting took place in London in early August, 1997 which was attended by a fellow member of the ISU, a lawyer instructed by the ISU, and members of the International Group Managers' Salvage Sub-Committee.

It became clear at an early stage that the main aspects of the discussions which had taken place amongst the Clubs regarding "Salvage 2000" had become available to the ISU, even though there had been no formal communications between the two parties on the subject. This concept had apparently been the main topic for discussion at the ISU Annual General Meeting which had taken place in Sweden two weeks before. The Executive Committee of the ISU had been given authority to open discussions with the Clubs and was hoping for early progress.

There was an encouraging recognition that the clubs had justifiable grounds for concern in respect of the way in which cases involving Article 14 had been seen to operate, and the ISU conceded that the clubs should have a greater say in what actions were taken in relation to incidents where P&I liability was likely to be involved. They wished to move towards a flexible

approach to contracting which would not give rise to the replacement of LOF but rather the integration of "Salvage 2000" terms within it. It was accepted that the clubs had no interest in becoming involved in those incidents where it was clear from the outset that there would be no environmental threat. There were, however, instances where the extent of the environmental threat and the potential value of any salvaged property remained unclear in the early days of a casualty and where a degree of flexibility would be required.

There was a general feeling around the table that it might be possible to move forward to contractual terms which were based upon LOF, but excluding Article 14, which in appropriate cases could be enhanced to encompass the general principles of the "Salvage 2000" discussion document. The new contract terms would incorporate payment on a daily rate basis, with the rates being agreed in advance, combined with the club/shipowner being entitled to appoint a salvage manager who would have the authority to exercise a measure of control over the salvage operation. It was felt that the salvor should have the option to invoke the "Salvage 2000" provisions and that notice could be given at any stage of the operation. Any payments assessed under this element would be reduced according to the amount awarded under Article 13 of LOF in respect of property.

The meeting was wholly constructive and amicable. It was clear that salvors had recognised that the Clubs wished to consider options for change which would give them and their members better control and certainty of costs in salvage cases. Through the ISU they had, therefore, decided to seize the initiative with a proposal which would retain the best elements of LOF but replace Article 14 with more than satisfactory terms.

The following is an extract taken from the ISU's summary of a subsequent meeting when the ideas were developed:

"It is generally recognised that there are currently a number of problems in relation to the special compensation provisions of the 1989 Salvage Convention and its enactment in the Merchant Shipping Act 1995. The difficulties relate to the lack of certainty as to when the provisions will apply,

overall control once they apply and the prolonged litigation and attendant costs which are currently necessary in assessing the amount of Special Compensation in accordance with the provisions of the Convention and to resolve many unsettled issues.

It is with a view to easing these problems that the parties are working to develop an alternative scheme which will give both parties greater certainty; greater control and participation by the Clubs once liability falls on their shoulders; and a simpler system for the assessment of Special Compensation."

Subsequent discussions included representatives from the property underwriters. They initially expressed concern with the concept of an expert attending at the scene of the casualty on behalf of the shipowners, believing that the expert would, in many instances, be controlled by the P&I club concerned and possibly to the detriment of the property interests. These worries were largely overcome in the interests of achieving a simplified framework for special compensation which would promote a fast response to casualties but reduce the potential for legal disputes. After many meetings, draft texts and redrafts an agreement was reached on substituting the method of assessing special compensation under Article 14 by the SCOPIC provisions. For a trial period of two years the SCOPIC clause would be incorporated by reference into LOFs signed between members of the ISU and owners entered in an International Group club, and the clubs would recommend their members to contract on these terms. If the trial period was successful it was intended that LOF be formally amended. The main provisions of SCOPIC would be as follows:

- (i) The contractor would have the option to invoke the special provisions of the SCOPIC Clause at any time of his choosing, regardless of the circumstances. He would not have to prove an environmental threat and there would be no geographical restriction. The assessment of the SCOPIC remuneration commences from the time of that notice. Prior to the invocation salvage would remain on a pure "no cure no pay" basis, without a safety net. Under Article 14 the calculation of the safety net commences with the start of the salvage.

- (ii) The shipowner would provide security within two working days in the sum of \$3 million. If at any time thereafter the shipowner believed that this was too much or the contractor believed that it was too little, an adjustment to a reasonable sum would be made. Upon a failure to provide security within the two working days the contractor may withdraw from the provisions of the SCOPIC Clause and revert to his rights under Article 14.
- (iii) Rates. SCOPIC remuneration would be based on time and materials, plus an uplift in all cases of 25 per cent. The clubs reached agreement with the ISU on rates for tugs, personnel and equipment which were "profitable" for salvors. Charges for portable equipment being capped at 1.875 x the replacement cost of the equipment. If the salvor had to contract in for equipment and the price exceeded the applicable tariff rates then the contractor would be entitled to the contracted-in price plus an uplift of 10 per cent on the tariff rates, or the tariff rate plus 25 per cent, whichever was the greater. It was impossible to tell whether these SCOPIC rates are higher or lower than the Article 14 rates, because, since the decision in the NAGASAKI SPIRIT, Article 14 rates depend on how much the tug is used in any particular year.
- (iv) Salvage services would continue to be assessed in accordance with Article 13, even if the contractor invoked the SCOPIC Clause. SCOPIC remuneration would be payable only to the extent that it exceeded the total Article 13 award. If the contractor invoked the SCOPIC Clause and the Article 13 award was greater than the SCOPIC remuneration, then the Article 13 award would be discounted by 25 per cent of the difference between it and the amount of the SCOPIC remuneration that would have been assessed had the SCOPIC provisions been invoked on the first day of the services. If there was no potential Article 13 award then the undisputed amount of SCOPIC remuneration would be paid by the shipowner within one month of the presentation of the claim. If there was a claim for an Article 13 award then 75 per cent of the amount by which the assessed SCOPIC

remuneration exceeded the total Article 13 security would be paid by the shipowner within one month.

- (v) The contractor could terminate the services if he reasonably anticipated that the total cost of past and future services would exceed the value of the property capable of being salvaged and his SCOPIC remuneration. Shipowners could terminate the SCOPIC agreement by giving five days notice.
- (vi) The shipowner was to have the right to send on board a casualty representative (SCR) and hull and cargo underwriters would each have the right to send on board one special hull and special cargo representative. These representatives would be selected from a panel appointed by a committee made up of three representatives from the International Group, three representatives from the ISU, three representatives from IUMI and three representatives from the ICS. The salvage master would send daily reports to Lloyd's and the shipowner until the SCR arrived on site, and after that only to the SCR. The SCR may disagree with the daily salvage report and prepare a dissenting report. If the SCR gives a dissenting report then the initial payment by the shipowner would be based only on what the SCR considers the appropriate equipment or procedures until any dispute is resolved. (The role of the SCR is set out in detail in appendix B of the SCOPIC Clause).
- (vii) A non-binding Code of Practice was agreed between the ISU and the International Group. In this the clubs confirm that although they expect to provide security for SCOPIC, it is not automatic. The clubs will not refuse to give security solely because the contractors cannot obtain security in any other way. The clubs confirm that they will be willing to consider the provision of security to a port authority to permit a ship to enter a port of refuge and will not refuse to give security solely because the contractors cannot obtain such security in any other way.

The advantages and disadvantages of SCOPIC

The advantages for shipowners and clubs are summarised as follows:

1. In future there should be little need for arbitrations on special compensation awards. The problem areas (environmental threat, geographical restriction, tug rates, and uplift) have all been settled.
2. Owners/clubs have much more control, or at the very least, knowledge of what is happening during a salvage operation.
3. The shipowners' right to terminate under Clause 9 of SCOPIC is clearer than the right under Clause 4 of LOF.
4. The uplift is capped at 25 per cent.

The disadvantages for shipowners/clubs are as follows:

1. The salvors may recover more for the agreed tug rates than they would under the NAGASAKI SPIRIT decision, but this is not certain because of the different utilisation factors.
2. Shipowners/clubs have given up the environmental threat and geographical restriction defences.

The advantages for salvors are as follows:

1. It is no longer necessary for salvors to prove that there was an environmental threat or to overcome any geographical restriction defence.
2. Salvors will be paid profitable tug rates.

3. Cash flow problems will be eased.
4. Security is more certain.

The disadvantages are:

1. Salvors can never recover more than a 25 per cent uplift.
2. There is a greater risk that the owner terminates the contract.

The London Property Underwriters Market Working Group recommended acceptance of the SCOPIC text. The International Chamber of Shipping (ICS) indicated that whilst supporting the main objectives of SCOPIC, namely to provide clarity and thereby reduce the need for expensive and time consuming litigation, some ICS members indicated that they would have preferred a more modest approach which would have avoided sacrificing the principles reflected in the 1989 Salvage Convention. Some also questioned whether the discount provision would introduce sufficient disincentive to salvors invoking SCOPIC on every occasion. In view of the concerns expressed by some of its members the ICS welcomed the fact that SCOPIC would initially be introduced on a two-year trial basis, following which its operation in practice would be reviewed.

With the publication of Lord Donaldson's report entitled "Review of Salvage and Intervention and their Command and Control" it was anticipated that, at least in so far as the United Kingdom was concerned, it would be necessary to consider whether the special representatives appointed on behalf of hull and cargo would be allowed on board the casualty. The report's proposals would probably have no effect upon access by the SCR.

SCOPIC in practice: LOF 2000 and SCOPIC 2000

The role of the Shipowner's Casualty Representative

One of the key changes brought about by the introduction of SCOPIC was the acquisition of the right by the shipowners to send an expert to the scene of the casualty, and where practicable to attend on board the ship, or the salvage craft in order to be in a position to report the circumstances and the progress made by the salvor. The SCR's title, however, lead to unfortunate misunderstandings as to his status. In fact the SCR's reports are made widely available and he is not reporting exclusively and confidentially to the shipowner. His correct title should be Ship Casualty Representative.

At the instigation of the SCR Committee, which is responsible for the appointment of SCRs and the regular reviewing of the tariff rates for craft, personnel and equipment, a new document was produced to assist SCRs in properly defining their role and obligations. These guidelines are attached as an appendix to this paper.

In general terms the role of the SCR is defined within the document in the following terms "..... to monitor the salvage services and liabilities and provide a Final Salvage Report which forms the basis for the settlement of any claim in SCOPIC remuneration which the salvor might have against the shipowner."

Advice is given within the Guidelines concerning the duties which are to be performed, including the receipt of daily reports from the salvage master and the production of daily cost schedules. These reports are to be sent to all parties. It is made clear, so far as his powers are concerned, that he may consult with the salvage master but may not attempt to direct the salvage operation. His powers are limited by the description contained within the guidelines. He cannot bind any party, including the shipowner, the cargo interests or the insurers and if he disapproves of the conduct of the salvage operation or the employment of craft, personnel or equipment he should merely inform the salvage master in writing and include a dissenting report in his daily and final reports.

The Guidelines also define the SCR's relationship and obligations to any special representatives appointed by hull or cargo with whom he should co-operate and to whom he should provide copies of the salvage master's daily reports and his own comments.

Detailed advice is given as to what should be included within the SCR's Final Salvage Report which should include information to assist with the assessment of an award under Article 13 but it should not seek to attribute a cause which lead to the casualty. The report should contain facts and not opinions as it was felt that with the SCR's reports being circulated to all interested parties it should be based solely upon his own, neutral, observations of the facts. It should be for the various parties to interpret these observations and to investigate by other means matters of causation and liability which may need to be dealt with at a later date. In certain given circumstances the findings of the SCR will lead to decisions being taken concerning the prospective success of the salvage operation and whether that operation should be terminated in favour of an alternative means of solving the problem.

The final report is to be produced within one month of the completion of the salvage services. -

The attendance of a SCR should provide an improved means by which local, port and national maritime authorities are able to communicate with all interested parties. This pivotal figure, as opposed to numerous other experts and representatives who might also be present at the scene, provides the best means for authorities seeking information and seeking to discuss courses of action to conduct discussions and hopefully achieve consensus in the most efficient and swift manner.

The best definition of the role of the SCR is contained both within Appendix B of the SCOPIC and within the SCR Guidelines themselves, namely as follows:

“The primary duty of the SCR shall be the same as the Contractor, namely to use his best endeavours to assist in the salvage of the vessel and the property thereon and in so doing to prevent and minimise damage to the environment”.

SCOPIC: A review

After only a few years in place it had become clear that Article 14 was not providing a satisfactory answer to the needs of the shipowners, salvors and the interested insurers, nor indeed to the interests of maritime and port authorities. It says much about the extent of these concerns that such disparate interests could get together to overcome their differences and compile such a detailed solution by means of the SCOPIC clause. Besides overcoming the perceived major problems inherent in the use of Article 14 it has been designed to be adaptable as the introduction of SCOPIC 2000 shows, together with the annual review of tariff rates and the setting up of an SCR panel. So far, it has proven to be a far better means of accessing “special compensation” and by doing so provides encouragement to salvors, and indirectly should engender piece of mind for maritime authorities worldwide.

The clause was put in place in 1999, initially for a trial period of two years. P and I Clubs in the International Group recommended to their members that it should be incorporated into all future LOF contracts. Partly as a consequence of Lloyd’s Form Working Party producing a new version in the form LOF 2000, there was in any event a need to revise SCOPIC which specifically referred to LOF 95. The revised SCOPIC 2000 can now apply to any LOF agreement which incorporates the provisions of Article 14 of the International Convention on Salvage 1989. However, if a salvage is undertaken on the basis of a LOF agreement incorporating SCOPIC, the traditional Article 14 safety net will not apply, even if SCOPIC has not been invoked.

According to other amendments:

- The salvor's right of withdrawal from the SCOPIC provisions for a failure to provide SCOPIC security within two working days does not apply if that security is provided before notice of withdrawal is given;
- SCOPIC remuneration is only payable in excess of any potential Article 13 award, even if no such award is sought or paid;
- Termination provisions have been re-worded in order to achieve clarity;
- Various amendments have been made to the tariffs in Appendix A in order to make clear how remuneration for personnel, for craft during mobilisation and demobilisation, for portable equipment on the tug etc is to be calculated.

During the ten years leading up to the introduction of SCOPIC there had been a steady decline in the number of salvage contracts performed under LOF. In 1990 there were 178 cases and in 1998 100 cases. The early years where SCOPIC has been an option indicate an increase in the use of LOF. The statistics available are presently immature and this may be pure coincidence. Indeed, these figures in isolation from comparison with the number of all other salvage contracts, perhaps on day rate or lumpsum terms, or on other forms of contract, are obviously difficult to analyse. It is believed to be the case, however, that at least one salvor who did not previously wish to make use of LOF contracts has since done so because of the security provisions available under SCOPIC. In other ways SCOPIC has proved adaptable to such an extent that casualties which might otherwise have been treated as potential wreck removals from the outset have largely been solved under LOF with SCOPIC. One or two of the cases within the speaker's presentation fall into that category.

In the three years for which figures are available there were:

123 LOF cases in 1999 and SCOPIC was invoked in 14 cases

133 cases in 2000 and SCOPIC was invoked in 18 cases; and,

102 cases in 2001 and SCOPIC was invoked in 26 cases.
(2001 subject to final verification)

It is not possible to compare the number of occasions when Article 14 became relevant in the past but present figures suggest that SCOPIC is being invoked in more than 15 per cent of cases.

One of the main benefits of SCOPIC is that cases are capable of being resolved swiftly and of the more than fifty cases so far only two have gone to arbitration, although to be strictly correct a number of more recent cases most certainly remain unresolved.

As previously indicated, the presently available statistics are insufficient in themselves to enable valid conclusions to be drawn and to do so would be to risk being reminded of the expression "lies, damned lies and statistics". There does, however, appear to be a significant increase in the use of LOF contracts since the introduction of SCOPIC and one of the additional reasons for this is the elimination of the complications created by Article 14, this being one of the main difficulties identified by all sides of the industry.

From a more practical perspective there has been a fundamental change in the flow of information from the scene of the casualty. Salvage operations conducted before the introduction of SCOPIC were often conducted in isolation from many parties who had a direct interest in the prospective outcome. There was no routine flow of information from the salvor to the liability underwriters and as a consequence independent consultants and experts were regularly instructed to report to P and I clubs concerning claims which might potentially flow from the incident, including oil pollution and wreck removal, both of which could represent losses which far exceeded the value remaining in the property which might be salvaged. These experts would not have an official place around the table where important decisions were taken regarding the casualty. This situation was not ideal from any party's viewpoint, least of all local or national authorities confronted with difficult decisions concerning anti-pollution measures, actions to be taken if the salvage operation was unsuccessful and the operation turned into a

wreck removal or on a more positive note if consultations were required in respect of salvor's request to allow the ship into a port of refuge.

Before the introduction of SCOPIC those insuring the hull would have appointed a surveyor to determine the extent of the damage but any feedback would not necessarily have been immediate as the underwriters would, quite naturally, be able to rely upon the professional salvor whose instinct would be to ensure the preservation of the highest possible value in the property in order to enhance the ultimate award – an objective wholly in the interest of the underwriters.

Underwriters were initially suspicious of the changes proposed and the motivation of the P and I clubs. Would there be an inclination in certain situations to sacrifice property in order to reduce potential pollution and wreck removal liabilities? That could never be an acceptable standpoint, although, from time to time difficult decisions must be taken by salvors, and others, often in consultation with local and national authorities. In any event, on many occasions the P and I club would have pertinent reasons for wishing the property to be saved, being the insurer of cargo liability for the shipowner, for example. The P and I clubs would have no wish to sacrifice value needlessly.

As more experience has been gained with the passing of time it is noticeable that the property underwriters views have changed radically and they too recognise the advantages which have been achieved. One of the leading Lloyd's underwriters, who actively participated in the discussions which lead up to the introduction of SCOPIC recently expressed a positive view in the following terms:

“SCOPIC has been a very worthwhile development. Salvors are responding to difficult casualties with greater confidence. The Special Casualty Representative has been a useful development. So far, the SCRs have been well chosen, but this high standard must be maintained. We have been monitoring the performance of SCRs with interest and I am pleased that they have demonstrated a very high degree of objectivity”.

Through the appointment of the SCR there is a structured chain of communication, all parties – the shipowners, the salvors, the property and liability insurers – being kept fully informed and authorities can expect to receive better informed and swifter responses when key decisions need to be taken.

SCOPIC has introduced improved opportunities for co-operation and communication and a reduction in confrontation. Through the SCR there is better knowledge of changing events, a much improved element of certainty over expenditure and when necessary a measure of influence over events.

This paper has not addressed one question within the profile of the conference title for this session, namely are there any alternatives e.g. remaining under the control of the Port/Harbour Master. There are indeed other forms of salvage contract but none would appear to have the all round possibilities of LOF with SCOPIC and the flexibility which has recently been introduced. Where salvage operations are being undertaken on such terms by a professional and qualified salvor dialogue with the salvor and through the SCR to all parties should satisfy the harbour master that all that can be done is being done. The harbour master will undoubtedly wish to express his views and insist in certain situations on courses of action but otherwise control of the operation itself should be left to the salvor. Clearly the exercise of any overall control regarding prospective places of refuge must remain with the local authority but hopefully any related decisions will be taken after full consultation with all interested parties.

Graham Daines/SCOPIC/2/2002