

**Belgian Maritime Law Association's
response to the Second Questionnaire on Review of the
Salvage Convention 1989**

- 1(a)** No
- 1(b)** N/A
- 2** There are no reported art. 13 Courts decisions in our Jurisdiction.
- 3** N/A
- 4 (a)** There are no reported art. 14 Courts decisions in our Jurisdiction.
- 4 (b)** N/A
- 4 (c)** N/A
- 5 (a)** Salvage of Seagoing vessels.
- Less then 30% LOF. In the last 3 years out of the 55 Salvages only 14 where on an LOF basis.
 - More then 70% without prior agreement. Mostly settled amicably or in arbitration on an ad hoc basis.
- Salvage of inland crafts.
- Mostly (+90%) NO LOF
- 5(b)** Many different ones such as:
- The 'Arbitragereglement van het College van Dispatcheurs'.
 - Tamara (Netherlands)



- 6 (a)** Towage Vessels are permanently available and can be engaged on a very short notice for Salvage.
- 6 (b)** Yes/ No. Yes, the Flemish Region has a tug which could be used but NO it is not used for Salvage(unless pollution coordination).
- 6 (c)** State (Flemish Region)
- 7** N/A
- 8** No
- 9** No

Prepared on the 12th of May 2011 for the BMLA,
by **André KEGELS, Kegels & Co Advocaten**

Second Questionnaire on Review of Salvage Convention 1989

This Second Questionnaire is directed to those countries that have given effect to the Salvage Convention 1989 and in order to answer the questions it is envisaged that NMLAs will need to consult with Salvors who operate in their jurisdiction.

Brazil accepted the Salvage Convention 1989 by a Legislative Decree dated June 12, 2009. The deposit of instrument of accession occurred on 29 July 2009. However, the Convention was not yet incorporated into Brazilian legislation as demanded by our legal system. Thus, we do not have any case of application of the Salvage Convention 1989 to report that have been decided under Brazilian jurisdiction. For this reason in our view questions 1 to 4 and 7 are not applicable to Brazil at this moment.

- 1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

Not applicable.

- 1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

- 2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, ie about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?

Not applicable.

- 3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

Not applicable.

- 4 (a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (ie contrary to the House of Lords decision in the "Nagasaki Spirit")?

Not applicable.

- 4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?

Not applicable.

- 4(c) If so, what percentage uplift was applied?

Not applicable.

- 5(a) Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

Although we can not indicate the percentage of salvage operations are conducted pursuant Lloyds Open Form it seems important to note that the Brazilian legislation enables the parties involved to negotiate the remuneration to be paid what gives the chance to use Lloyds Open Form.

5(b) What contractual terms are used in your jurisdiction apart from Lloyds Open Form?

The Parties are free to negotiate the term of the contract, subject to the limits of any applicable law.

6(a) Do salvors in your jurisdiction have emergency towage vessels on standby?

It is not usual.

6(b) Does the State own or operate ETV's in your jurisdiction?

Yes, vessels part of Brazilian Naval Force.

6(c) If so, are they financed by:

- (a) State Revenue
- (b) A levy on shipowners
- (c) Some other means

Option (a). However, according to domestic legislation if the Navy is directly involved in the salvage operation it has the right to be remunerated.

7 What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?

Not applicable.

8 Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?

We are not informed.

9 **Attached** is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

No. Brazil has a specific legislation relating research and removal of wrecks including those of historic and cultural interest. According to the Brazilian Constitution the properties of archaeological, prehistoric and historical interest belong to Brazilian State in its federal concept. Therefore the process since its early stage is submitted to a specific procedure which includes own rules of remuneration, if applicable.

Stuart Hetherington
Chairman, International Working Group



CMI International Working Group on Salvage

SECOND QUESTIONNAIRE

Response of the Chilean Maritime Law Association

The Chilean Maritime Law Association responses to the second questionnaire on Review of Salvage Convention 1989 as follows:

Previous explanation:

As we anticipated in our response to the first questionnaire, Chile has not ratified the Salvage Convention 1989. However, most of its principles have been enacted in the Chilean Code of Commerce.

1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

As far as we know, the answer is negative. In addition, we remind that Article 13 (1) of the Convention is basically the same than Article 1138 of the Commercial Code.

1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

Not applicable.

2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, ie about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?

The answer is negative, because Article 1138, is applicable, with the limit provided in Article 1139 of the Commercial Code, which states as a maximum limit of the award the salvaged value of the properties at the end of the salvage operations. Our law does not refer to any specific percentage to fix a limit to the award.



3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

We are not aware about cases such as those mentioned in this question.

4(a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (ie contrary to the House of Lords decision in the "Nagasaki Spirit")?

We are not aware of awards on this specific issue, but in our opinion the answer should be affirmative, based in Article 1142 of the Chilean Commercial Code, which states that for the relevant purposes, salvor's expenses, means disbursement reasonably incurred during the salvage operation and a "suitable rate" for material and the personnel actually and reasonably employed in that operation must be considered (it can be noted that the wording is quite similar to Article 14 (3) of the Convention).

We think that the words "suitable rate" (or "fair rate") do permit some element of profit, as opposed to the words "disbursement" or "out-of-pocket". The latter means an expense actually incurred and paid, and it would not make sense to include in addition the concept of fair rate, with an element of profit, because otherwise it would have the same nature than a simple expense or disbursement.

4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?

Yes, we know that some uplift has been applied in Chile, in accordance with Article 1141 of the Commercial Code, which is similar to Art. 14 (2) of the Salvage Convention but with the difference that our rule does not refers to any specific percentage.

4(c) If so, what percentage uplift was applied?

See response to above question.



5(a) Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

In our jurisdiction the salvage operations are conducted pursuant to the Chilean Code of Commerce. In some exceptional cases, the parties have agreed to sign a LOF, bringing the matter to a foreign jurisdiction. We do not know what percentage.

5(b) What contractual terms are used in your jurisdiction apart from Lloyds Open Form?

In general terms, the answer is that in Chile the LOF is not used. Usually, it is sufficient and satisfactory for salvors the applicability of the rules contained in the Commercial Code.

6(a) Do salvors in your jurisdiction have emergency towage vessels on standby?

In Chile there are no salvage enterprises. There are only enterprises operating tugs to assist vessels in the maneuvers of entrance and departure in Ports. By exception, if there is a casualty, the same tugs are employed to assist in salvage operation.

6(b) Does the State own or operate ETV's in your jurisdiction?

No.

6(c) If so, are they financed by:

- (a) State Revenue
- (b) A levy on shipowners
- (c) Some other means

Not applicable.

7 What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?

We do not know if there have been cases in which the salvors have obtained an award only under Article 1143 of the Commercial Code, which will be the equivalent rule to Article 14 of the Convention. In general terms, we can say that it has always existed a salvaged value, so it is considered that the salvage operation had a useful result.



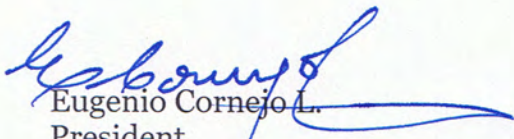
8 Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?

We are not aware about this kind of situations, and we doubt that they have existed, because the Maritime Authority is duly empowered to order some vessel to carry out the salvage operation notwithstanding the low value of the property to be salvaged.

9 Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

Yes.

Valparaíso, May 6th. 2011


Eugenio Cornejo L.
President
Chilean Maritime Law Association

China

Response to the Second Questionnaire on Review of Salvage Convention 1989

In December 2010, International Working Group on Review of Salvage issued *Second Questionnaire on Review of Salvage Convention 1989* (hereinafter referred to as “the Convention”). Based on the comments and opinions taking from our concerning entities, combined with the Convention’s application in China and considering comprehensively the new trends and features of national and international salvage, China Maritime Law Association now submits the following opinions:-

1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

We are not aware of any such There have not been the above-mentioned examples of cases in our jurisdiction.

2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, ie about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?

China is NOT a case-law country, and there is no such general rule or directives, even though some cCourts or tribunals in our jurisdiction often may in particular cases apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than half of the salvaged value. In the circumstance that the salvaged value is high, a salvor’s work normally can be properly and satisfactorily compensated. But lots of vessels and cargoes’ remaining value, after suffering the sea disaster, is not that high. In such case, a stick to the rule of thumb principle will more often than not make the salvor run behind its expenses.

3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

In 2004, bunker oil spillage occurred in the mouth of Pearl River due to a collision between M/V MSC Ilona and M/V Hyundai Advance and more than 10 vessels took part in the salvage operations under the control of public authorities. However, the salvors could not be sufficiently compensated since the limitation fund constituted by the shipowners according to China Maritime Code was inadequate for covering the expense incurred during salvage and oil-removal operation
Yes..

4(a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (ie contrary to the House of Lords decision in the "Nagasaki Spirit")?

4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?

4(c) If so, what percentage uplift was applied?

An element of profit was not permitted in our jurisdiction in the calculations under Article 14, nor was any uplift under Article 14 applied. However, we understand from one case before a PRC court where court judge suggested that an element of profit should be given, though the matter eventually settled out of court.

5(a) Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

5(b) What contractual terms are used in your jurisdiction apart from Lloyds Open Form?

We have no such data, but as per our inquiry with some salvors, we understand that Approximately 20%-25% of salvage operations in our jurisdiction are conducted pursuant to Lloyds Open Form.

Apart from Lloyds Open Form, China Maritime Arbitration Commission Salvage Agreement (1994) Standard Form and other forms of salvage agreement reached by the parties are also being used.

6(a) Do salvors in your jurisdiction have emergency towage vessels on standby?

6(b) Does the State own or operate ETV's in your jurisdiction?

6(c) If so, are they financed by:

(a) State Revenue

(b) A levy on shipowners

(c) Some other means

6(a) Yes.

6(b) Yes

6(c) some other means

Chinese central government established the National Professional Rescue & Salvage Service i.e. China Rescue & Salvage, which is specialized in maritime property and environment salvage, with state-owned emergency towage vessels on standby. However, all expenses on daily maintenance and standby personnel of ETV's are derived from incomes earned by engaging commercial activities such as offshore engineering service during such time when these ETV's are not on duty.

7 What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?

We do not have such data available, but as per our inquiry of some salvors, we understand that the percentage is approximately 10%. According to this data, under the current Convention's framework, the environmental compensation for salvor in China is normally paid by property insurers in the form of property salvage rewards, the result of which is that property insurers are unreasonably undertake responsibilities which should have been undertaken by liability insurers.

8 Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?

We are not aware of any such situations in our jurisdiction. In the event that commercial salvors are unwilling to provide service, Chinese government will order National Professional Rescue & Salvage Service to carry out the salvage task. However, as a result of lack of relevant legal mechanism, it is often difficult for National Professional Rescue & Salvage Service to recover its salvage cost. Therefore, it is necessary to establish an independent environment salvage award. However, we understand that there may be example where a salvor refused if SCOPIC were not agreed upon.

9 Attached is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

We are in the opinion that the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee.

Comité Maritime International

SALVAGE CONVENTION

**RESPONSES OF THE ITALIAN MARITIME LAW ASSOCIATION
TO THE SECOND QUESTIONNAIRE ON REVIEW OF SALVAGE CONVENTION 1989**

This Second Questionnaire is directed to those countries that have given effect to the Salvage Convention 1989 and in order to answer the questions it is envisaged that NMLAs will need to consult with Salvors who operate in their jurisdiction.

1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

No.

1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

Not applicable.

2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, ie about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?

No.

3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

No.

4(a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (ie contrary to the House of Lords decision in the "Nagasaki Spirit")?

No.

4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?

Not applicable.

4(c) *If so, what percentage uplift was applied?*

Not applicable.

5(a) *Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?*

Small and only if there are foreign salvors.

5(b) *What contractual terms are used in your jurisdiction apart from Lloyds Open Form?*

No other contractual terms.

6(a) *Do salvors in your jurisdiction have emergency towage vessels on standby?*

Yes.

6(b) *Does the State own or operate ETV's in your jurisdiction?*

No.

6(c) *If so, are they financed by:*

- (a) *State Revenue*
- (b) *A levy on shipowners*
- (c) *Some other means*

Not applicable.

7 *What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?*

Very small.

8 *Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?*

No.

9 *Attached is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?*

No.

Second Questionnaire on Review of Salvage Convention 1989

Mexico Reply.

1(a) No, we are not aware of any case in which the vessel has been denied permiso to enter a port.

2 Our Courts do not have a rule of thumb regarding percentages, the percentage that they rule must be according and reasoned as per the principles of article 13 of the Salvage Convention.

3 Yes, there have been some cases in which the salvor was not in agreement with the Court decision and were appealed, using the remedies available. In some cases, the Court of Appeal amended the decision and in other cases the rule stood.

4(a) No, as far as we are aware, no profit element has been allowed in a salvage case in our jurisdiction.

4(b) No, we are not aware of any uplift in our jurisdiction.

5(a) When vessels are in imminent danger, most of the time LOF is used. In cases of wreck removal, refloating, recovery of goods, etc. LOF is rarely used.

5(b) BIMCO forms such as WRECFIXED, WRECKHIRE and WRECKSTAGE are of common use for wreck removals, and other private contracts are negotiated when vessels are not in imminent danger in a case by case basis.

6(a) Salvage companies have agreements in place with towing companies serving the Mexican ports for use of their tows in case of emergencies near Mexican coasts. There are no specific emergency vessels on standby in our jurisdiction as port tows are normally used.

6(b) No, all tows are private or owned by state companies, such as Petroleos Mexicanos (PEMEX).

7 Normally there is an award on both articles 13 and 14 or for none, we are not aware of any case where an award was made only under article 14.

8 No, we are not aware of such case.

9 We agree that consideration to recommend the Brice Protocol by the CMI should be taken. Mexico is specially interested in protecting its cultural heritage and is important to point out that any payment for salvage of historical wrecks will be pecuniary, as all historical or cultural goods are exclusive property of the state and under no circumstance can be owned by private parties.

Second Questionnaire on Review of Salvage Convention 1989

This Second Questionnaire is directed to those countries that have given effect to the Salvage Convention 1989 and in order to answer the questions it is envisaged that NMLAs will need to consult with Salvors who operate in their jurisdiction.

1(a) Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of its being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

No

1(b) If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC) payment (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

N/A

2 Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, ie about half, of the salvaged value, except in rare cases and then 70% would be considered exceptional?

No. The courts do seldom calculate the awards on the basis of a percentage of the salvaged value. If the salvaged value is especially high or especially low this normally has the consequence that the award is set correspondingly low, or respectively high, compared to the salvaged value. From reviewing case law, it appears that the courts generally award a lump sum award which is based on all the relevant circumstances, out of which the value of the salvaged property is only one factor. The courts rarely express what percentage of the salvaged values the salvage award amounts to,

The rule set out in Article 13 is also, of course, a deciding factor in cases where the salvaged value is very low, cf. Norwegian Maritime Act Section 445, first paragraph. (As one example from old case law, we could mention a decision rendered by Hålogaland Court of Appeal in 1963; ND 1963 p. 13: Salvaged value NOK 28.500, salvage award calculated to NOK 27.000.)

3 Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged vessel, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

No.

4(a) Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculations under Article 14 (i.e. contrary to the House of Lords decision in the "Nagasaki Spirit")?

No.

4(b) In respect of any such Article 14 payment, was any uplift applied under Article 14 paragraph 2?

N/A

4(c) If so, what percentage uplift was applied?

N/A

5(a) Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

We have been in contact with a leading Norwegian salvor, and they suggested that about 50 pct of the salvage operations carried out in Norwegian waters are conducted pursuant to LOF. (The salvor in question added that they are very satisfied with the form.)

5(b) What contractual terms are used in your jurisdiction apart from Lloyds Open Form?

Standard contractual terms are normally used in Norway. Apart from Lloyds Open Form which is the most commonly used form, the standard form «Skandinavisk bjergningskontrakt» (1994) (in English; Scandinavian Salvage Contract) is also used in Scandinavia. This form is to a large extent based on the terms found in Lloyd's Open Form.

6(a) Do salvors in your jurisdiction have emergency towage vessels on standby?

Yes

6(b) Does the State own or operate ETV's in your jurisdiction?

Yes. In North Norway the standby center for towage vessels is administrated by the Norwegian Coastal Administration –NCA- (Kystverket), which is the national agency for coastal management, maritime safety and -communication in Norway. In general this means that there shall be towage vessels located in the Northern areas that are able to respond if an incident occurs. The standby center for towage vessels in North Norway is run in close cooperation with the Norwegian Defence Command (Landsdelskommando Nord-Norge (LDKN) and the Coast Guard). In South Norway the standby center for towage vessels has been based on private available capacity, however it is an ongoing debate whether there shall be placed a State owned ETV in the area.

6(c) If so, are they financed by:

- (a) State Revenue
- (b) A levy on ship owners
- (c) Some other means

Financed by State Revenue

7 What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?

Difficult to assess, but according to a leading Norwegian salvor this is a fairly large portion of the salvage cases.

8 Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?

No.

9 Attached is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

Yes

SECOND QUESTIONNAIRE ON REVIEW OF SALVAGE CONVENTION 1989

RESPONSE OF MARITIME LAW ASSOCIATION OF SOUTH AFRICA

NOTE:

As members of the Maritime Law Association of South Africa we have attempted to answer the questions below to the best of our ability. Much of the information requested, however, is peculiarly in the knowledge of salvors. We would respectfully suggest that a body such as the International Salvage Union be asked to circulate the questionnaire amongst its members as this might result in a more detailed and helpful response.

1. **Question 1(a)**

Are you aware of any examples of cases in your jurisdiction in which a salvor has been unable to obtain an award under Article 13 of the Salvage Convention by reason of it being unable to complete a salvage operation because of the refusal by authorities to permit the vessel into a port and thus necessitating its scuttling?

Response

We are aware of two instances where this may have occurred.

2. **Question 1(b)**

If so, did the salvor benefit from an Article 14 (or equivalent, such as SCOPIC payment) (whether by way of an award from a court or tribunal or negotiated agreement between the parties)?

Response

We assume that throughout the questionnaire reference to "a court or tribunal" is to a South African court or tribunal. There has been no award by a South African court or tribunal granting a salvor a benefit from Article 14 or an equivalent, such as SCOPIC. We have no knowledge as to whether the salvors involved in the above two incidents entered into a negotiated agreement.

3. **Question 2**

Do courts or tribunals in your jurisdiction apply a rule of thumb principle to the calculation of Article 13 awards such that a salvor cannot expect to recover more than a moiety, about half, of the salvaged value, except in rare cases and then 17% would be considered exceptional?

Response

No.

4. **Question 3**

Are you aware of any cases where the salvor considers that its efforts have not been sufficiently rewarded by reason of the low value of the salvaged value, whether or not that arose as a result of an award by a court or tribunal or a negotiated settlement between the parties?

Response

We are not aware of any cases where there has been an award by a South African court or tribunal in which the level of the reward has caused dissatisfaction to a salvor. We are aware of one instance where a salvor concluded a negotiated settlement which left the salvor dissatisfied with the level of the negotiated award.

5. **Question 4(a)**

Are you aware of any awards under Article 14 in your jurisdiction (whether by way of court or tribunal award or negotiation between the parties) whereby an element of profit was permitted in the calculation under Article 14 (i.e. contrary to the House of Lords decision in The "Nagasaki Spirit")?

Response

We are not aware of any award made by a South African court or tribunal under Article 14. We also have no knowledge as to whether an award under Article 14 has been the subject of negotiation between a salvor and any other party.

6. **Question 4(b)**

In respect of any such Article 14 payment, was any uplift applied under Article 14, par. 2?

Response

See the response to question 4(a) above.

7. **Question 4(c)**

If so, what percentage of uplift was applied?

Response

See the answer to question 4(a) above.

8. **Question 5(a)**

Could you indicate, approximately, what percentage of salvage operations in your jurisdiction are conducted pursuant to Lloyds Open Form?

Response

To the best of our knowledge most, if not all, salvage operations involving large vessels are conducted pursuant to Lloyds Open Form contracts. There are, however, numerous salvage operations involving fishing vessels which are the subject either of an informal oral agreement or a salvage agreement which arises by implication.

9. **Question 5(b)**

What contractual terms are used in your jurisdiction apart from Lloyds Open Form?

Response

Apart from Lloyds Open form there are no standard contractual terms that are applied in salvage operations.

10. **Question 6(a)**

Do salvors in your jurisdiction have emergency towage vessels on standby?

Response

Yes, the South African government concluded a contract with Smit Amandla Marine (Pty) Ltd ("Smit") pursuant to which Smit is obliged to

keep its salvage tug, the "Smit Amandla", on station on the South African coast. This contract is put out to tender periodically.

11. **Question 6(b)**

Does the State own or operate ETV's in your jurisdiction?

Response

Save for the contract referred to in the answer to question 6(a) above the State does not operate ETV's in its jurisdiction.

12. **Question 6(c)**

If so, who are they financed by:

- (a) State Revenue;
- (b) A levy on ship owners; or
- (c) some other means?

Response

The contract referred to in the answer to question 6(a) above is financed from State revenue.

13. **Question 7**

What percentage of salvage cases in your jurisdiction (whether in court or by way of tribunal decision or negotiation between the parties) results in salvors recovering only an award under Article 14 (or an equivalent such as SCOPIC)?

Response

We are not aware of any matter that has come before a South African court or a South African tribunal that has resulted in salvors recovering only an award under Article 14 or an equivalent such as SCOPIC. We have no knowledge as to whether such an award has resulted from a negotiation between parties.

14. Question 8

Are you aware of any situations which have occurred in your jurisdiction in which a salvor has declined to offer its services because of the low estimated value of the property to be salvaged and pollution has then resulted?

Response

No.

15. Question 9

Attached is a copy of the Brice Protocol which was discussed at the Singapore conference of the CMI. Do you consider that as part of the Review of the Salvage Convention 1989 the International Working Group should give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention by the IMO Legal Committee?

Response

Having regard to the fact that the UNESCO Convention on the Protection of the Underwater Cultural Heritage came into force during January 2009 we believe that the International Working Group should

give consideration to recommending that the Brice Protocol be considered in any review which is to take place of the Salvage Convention. We point out the following, however:

- 15.1 We believe that should the Salvage Convention be amended in accordance with, or in a manner similar to, the Brice Protocol care should be taken to specify that the provisions of the Convention are subordinate to national laws relating to the protection of underwater cultural heritage. For example the protection of historic wrecks off the South African coast is regulated by the provisions of the National Heritage Resources Act 25 of 1999.
- 15.2 We believe that, whilst it is questionable as to whether the definition of "Salvage Operation" should be amended as suggested in Article 2 of the Protocol, the addition of Article 13(1)(k) to the criteria to be applied in fixing a reward seems to us to be appropriate.