The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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.” (Emphasis added)

Comments

1.1 The International Convention on Civil Liability for Oil Pollution Damage, 1992, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.” (Emphasis added)

Article II of that Convention also provides:

“This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

(ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimise such damage.” (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken" (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)

Article II provides as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and

(ii) in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea
of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage.* (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

**ANSWER:** Yes, we consider that words: "in coastal or inland waters or areas adjacent thereto", should be deleted.

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

**ANSWER:** Yes, in order to widen the scope of application of the Convention and to be consistent with the other international conventions previously quoted, the words: "where ever such may occur" should be included.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

**ANSWER:** Argentina, is not a State Party to the 1989 Salvage Convention.

1.4.1 If so, could you provide a copy of the decision?

**ANSWER:** See the answer above.

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

**ANSWER:** We think that the word "substantial" should be maintained or replaced by another word to put clear that the damage to the environment should be considerable or of importance to allow the operation of the Special Compensation. A minimum damage would not suffice to trigger this exceptional system.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

**ANSWER:** See answer to question 1.4.2 above

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your
jurisdiction to come within the meaning of the words "or similar major incidents")?

**ANSWER:** Argentina, as said above, is not a State Party to the Convention, and, therefore, our Courts would not render opinion on the issue.

An occurrence that causes dangers to navigation would not fall within the definition of Article 1 (d), save that from the circumstances surrounding the incident a serious and real risk to the environment could reasonably be produced.

In the same direction, a loss of containers at sea does not imply by itself a risk of environmental damage, but the environmental damage could be present if the cargo stuffed into them, or by other circumstances such as sensitivity of the area or dense navigation in a narrow channel, could lead to a threat of physical damage to human health or to the marine life or resources.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

**ANSWER:** No, see answer to 1.5

1.5.2 If so, can you suggest any wording that you think might be appropriate?

**ANSWER:** See answer to 1.5.1

2. **Article 5 in the Salvage Convention 1989 provides as follows:**

"Salvage operations controlled by public authorities

1. *This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.*

2. *Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.*

3. *The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.*"
Question:
2.1 Can public authorities pursue claims for salvage in your jurisdiction?

**ANSWER:** According to Section 386 of our Navigation Act, public vessels can pursue claims for salvage in our jurisdiction. However, Section 4 of the same Act rules that military and police vessels are excluded from the scope of the law. Consequently, the prevailing construction is that vessels that usually intervene in rescues at sea—belonging to the Navy and to the Coast Guard—are not entitled to claim a salvage reward, but only the expenses incurred in the assistance.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

**ANSWER:** A deletion of paragraph 3 will not improve military and police vessels’ position, but an appropriate amendment could have that effect.

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Comment

3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

3.2 Has your country ratified the Salvage Convention 1989?

**ANSWER:** No, even though our National Association has recommended several times ratifying the 1989 Salvage Convention, Argentina has still not ratified it.

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

**ANSWER:** See the answer to question 3.2 above.

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

**ANSWER:** See the answer to question 3.2.1 above.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

**ANSWER:** Due to the absence of an international convention stating that the allowance of a place of refuge to vessels in need of assistance is mandatory to the States our answer is positive. At least the Guidelines on Places of Refuge rule the assessment process and other relevant questions, even being only soft law.

4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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
salved 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."

Comment

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

ANSWER: The opinions of legal scholars are in agreement that a salvage reward shall fall on the salved interest. Section 378 only allows the shipowner to represent the cargo in a lawsuit when the cargo interest does not appear but it does not imply to allocate liability for cargo proportion on the Owner. Section 378 of our Navigation Act has been interpreted in an obiter dictum in an isolated case as allowing the salvor to pursue the award against the shipowner despite recovery actions against cargo interests.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

ANSWER: No, because then the problem would be of the shipowner.

5. Article 14 in the Salvage Convention 1989 provides as follows:

"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 minimized 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 granted 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."

Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

ANSWER: Yes, our MLA would be in favour of amending article 14 in order to create an entitlement to an environmental award and to investigate who should pay for such award. The issue of who is going to pay for the bill is defining.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."
Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

ANSWER: Yes.

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

ANSWER: Yes.

8. Article 27 of the Salvage Convention 1989 provides as follows:

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."
Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

**ANSWER: Yes.**

9. General - Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

**ANSWER: As mentioned before, Argentina is not a Party to the 1989 Salvage Convention.**
The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

   "For the purpose of this Convention:
   
   (d) Damage to the environment being 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." (Emphasis added)

**Comments**

1.1 The International Convention on Civil Liability for Oil Pollution Damage, 1992, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

   "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, *wherever such escape or discharge may occur*, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

Article II of that Convention also provides:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

(ii) in the *exclusive economic zone* of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, *wherever taken*, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;"

(Emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken"

(Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;"

(Emphasis added)

Article II provides as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(l) in the territory, including the territorial sea, of a State Party; and
(ii) in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can take place anywhere within the exclusive economic zone.

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted? Australia and New Zealand: Yes

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "wherever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention? Australia and New Zealand: It is not necessary to add any additional words.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted? Australia: Yes; New Zealand: No.

1.4.1 If so, could you provide a copy of the decision? United Salvage v Louis Dreyfus Armateurs SNC [2007] FCAFC 115 is attached.

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation? Australia: N/A; New Zealand: No.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition? Australia and New Zealand: N/A

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")? Australia and New Zealand: Yes

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened? Australia and New Zealand: N/A

1.5.2 If so, can you suggest any wording that you think might be appropriate? Australia and New Zealand: N/A
2. **Article 5 in the Salvage Convention 1989 provides as follows:**

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

**Question:**

2.1 Can public authorities pursue claims for salvage in your jurisdiction? Australia: Yes; Navigation Act 1912 s.329C(1); New Zealand: Yes; Maritime Transport Act 1994, s 218.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended? Australia and New Zealand: N/A

3. **Article 11 in the Salvage Convention 1989 provides as follows:**

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

**Comment**

3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

**Questions:**

3.2 Has your country ratified the Salvage Convention 1989? Australia and New Zealand: Yes

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11? Australia and New Zealand: No

3.2.2 If so, please supply a copy, if possible with a translation into English or French. Australia and New Zealand: N/A

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003. Australia and New Zealand: No
4. **Article 13 of the Salvage Convention 1989** establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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 salved 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."

**Comment**

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

**Question:**

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph? Australia and New Zealand: No

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares? Australia and New Zealand: Such a provision is likely to benefit Australian and New Zealand interests.

5. **Article 14 in the Salvage Convention 1989** provides as follows:

"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 minimized 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 granted 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."

Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20). Australia and New Zealand: Consideration should be given to this but views need to be widely canvassed and carefully balanced.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment."

Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor? Australia: Yes; New Zealand: Yes. Although domestic legislation (Maritime Transport Act 1994, s 219A) covers this issue in
respect of life salvage in NZ waters and on NZ ships and aircraft, the Convention text should be amended to correct this anomaly.

7. **Article 20 of the Salvage Convention 1989 provides as follows:**

"Maritime lien

1. Nothing in this Convention shall affect the salvor’s maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

**Question:**

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim? Australia and New Zealand: Such a claim would already be the subject of a statutory claim in rem in Australian and New Zealand law.

8. **Article 27 of the Salvage Convention 1989 provides as follows:**

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

**Comment**

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group? Australia and New Zealand: Yes

9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment? Australia and New Zealand: Yes – the issue of whether a salvage reward should take account of potential liability to third parties is difficult. It is neither specifically included nor excluded in Article 13 but if the salvor raises it then the other side needs to be able to argue a case within a case which is hypothetical, time consuming and expensive. It is suggested that it be specifically excluded as a factor to be taken into account within the context of Article 13.

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention? Australia: Very few (fewer than 10); New Zealand: None.

June 2010
Loi du 13 May 2003 portant assentiment à la Convention internationale sur l'assistance, faite à Londres le 28 avril 1989

Article 1. La présente loi règle une matière visée à l'article 77 de la Constitution.

Art. 2. La Convention internationale sur l'assistance, faite à Londres le 28 avril 1989, sortira son plein et entier effet.
Promulguons la présente loi, ordonnons qu'elle soi revêtue du sceau au de l'État et publiée par le Moniteur belge.
Donné à Bruxelles, le 13 mai 2003.

ALBERT
Par le Roi :
Le Ministre des Affaires étrangères,
L. MICHEL
La Ministre de l'Emploi, chargée de la Mobilité et des Transports,
Mme L. ONKELINX
Scellé du sceau de l'Etat :
Le Ministre de la Justice,
M. VERWILGHEN
We are pleased to submit our finalized reactions and comments to the Questionnaire on the 1989 Salvage Convention.

Globally speaking the 1989 Salvage Convention has proven to work well. The today SCOPIC regime offers for instance practical benefits and certainties.

It might be worth mentioning that the works of the Lloyd’s Salvage Working Group on Environmental Salvage are still running and that it might be wise to first wait for their final result before (re-)initiating the debate (see question 5).

If there might indeed be here and there some legal remarks (question 1.2, 1.3), it is our understanding that it would be premature to revise the 1989 Salvage Convention. A revision should have as prerequisite, inter alia, substantial and tangible critics against the Convention, quod non. There is a need first to identify what possible elements into the current casualty response regime should be amended and to identify in which way these amendments would improve the casualty responses and confer benefit to those currently paying for said casualty response. If the improvement in salvage response can not be clearly stated, it looks premature to reopen the debate at this stage.

Belgium did ratify the 1989 Salvage Convention (Loi du 13 Mei 2003 portant assentiment à la Convention internationale sur l’assistance, faite à Londres le 28 avril 1989) copy of which legislation is attached for your kind consideration.

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

   "For the purpose of this Convention:

   (d) Damage to the environment being 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." (Emphasis added)
Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted? Should this be the case, then the scope of the Convention would be extended to EEZs and High Seas. As a matter of fact, solutions to incidents in the EEZs and High Seas are technically speaking much more difficult if not impossible in certain cases. There are technical limits to cleaning operations in high depts. So we hence support the existing wording of the Convention and advocate to keep the existing wording as it is.

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?
No for the reason expressed under 1.1

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision? Because of the recent ratification by Belgium is there limited case-law. This specific question has not been handled yet. So no.

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation? It is believed that judges will appreciate the scope on a case by case basis. Such approach is actually a pragmatical one: a fixed interpretation in the Convention itself could be too narrow.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition? "Substantial" like "significant", "serious" or "major" are equivalent terms that are used in domestic or EU legislations without causing major difficulties. The one is not better than the other one.

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")? It looks to be a confusion between two separate issues: the navigation issue on the one hand, and the environment issue, on the other. As drafted the question is not appropriate.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities."
2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?  
Yes, they can

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Questions:

3.1 Has your country ratified the Salvage Convention 1989? 
Yes by Belgian Act dd.13.05.2003

3.1.1 If so, has it enacted any legislation or regulation to give effect to Article 11? 
In case of danger for the marine environment, Belgian authorities may impose measures to shipowners. See the Belgian Act dd. 20.01.1999 for the protection of the marine environment under Belgian jurisdiction.

3.1.2 If so, please supply a copy, if possible with a translation into English or French. 
It states in its single article that « La Convention internationale sur l’assistance, faite à Londres le 28 avril 1989, sortira son plein et entier effet ».

3.1.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003. These IMO provisions will actually been integrated in the very near future in domestic legislation of the EU member states (Dir 2009/17/EC amending the vessel traffic monitoring and information system Dir. So and as far as Belgium is concerned (and probably the 26 other EU countries) such an amendment would not offer an added value.
4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

4.1 Comment.

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?
Art.263 of the Belgian Maritime Act doesn’t provide for such a reference to a one single interest for the payment of the reward.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?
This proposal faces practical problems like in estuarial cases for instance. In such circumstance part of the cargo will already be discharged before the security is provided and the possibility to recover the related claim will be vanished. The freedom of contracts offers a better alternative and the proposal can hence not be supported.

5. Article 14 in the Salvage Convention 1989 provides as follows:

5.1 Comment

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20). No we don’t.

6. Article 16 of the Salvage Convention 1989 provides as follows:

6.1 Comment

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor? Not in particular

7. Article 20 of the Salvage Convention 1989 provides as follows:

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?
See above for question 14. So, our answer is no.

8. Article 27 of the Salvage Convention 1989 provides as follows:

8.1 Comment.

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group? Well, the today wording of the Convention offers both options, ie the publication or not of arbitral awards. The final decision is in the hands of the parties. The privacy
9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?
   - No

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?
   - Since the rather recent transposition into domestic legislation, non.

May 2010
1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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.” (Emphasis added)

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

Answer:

It is the view of the Brazilian MLA that only risks of environmental damage on high seas would be excluded. Thus, the words “in costal or inland waters or areas adjacent thereto” should be replaced by words such “in territorial waters and in the exclusive economic zone of any State”.

Questions:

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

Answers:

There are no Brazilian reported cases in which the word “substantial” has been interpreted.

It is the view of the Brazilian MLA that it is difficult to distinguish what is substantial damage from what is not, as well as major incidents.
Question:

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Answer:

We can not imagine a word or group of words to clarity those concepts. For these reasons we suggest to delete the words "substantial " and “major”.

Question:

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?

Answer:

No. We do not think that an incident that could give rise to dangers to navigation (as a loss of container at sea) would be covered by the definition in Article 1(d) unless it causes risk to the environment. We think that dangers to navigation can not be considered as “similar major incidents” under the definition in Article 1(d).

Question:

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

Answer:

No. We think that any attempt to increase the scope of the Convention may cause negative consequences at this stage.

Question:

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Answer:

Not applicable.

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations."
3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Answer:

There is no provision under the Brazilian law preventing public authorities to pursue claims for salvage. As per the Brazilian law the Maritime Authority is empowered to approve and to coordinate all salvage operations, but the liability rests with the registered owner. We have some precedents that Brazilian Navy performed assistance or salvage to vessels but in these cases the amount claimed is the equivalent to costs and expenses incurred without any “salvage premium”. In respect of salvage of life the Brazilian Navy considers as a public service with no remuneration to be charged.

Question:

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Answer:

Brazilian MLA considers that this provision should remain unchanged.

3. Article 11 in the Salvage Convention 1989 provides as follows:

Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

Question:

3.2 Has your country ratified the Salvage Convention 1989?

Response:

Brazil recently accepted the Salvage Convention 1989 by a Legislative Decree dated June 12, 2009, but it is not ratified up to now.

Question:

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?
Answer:

No.

Question:

3.2.2. If so, please supply a copy, if possible with a translation into English or French.

Answer:

Not applicable

Question:

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

Response:

Brazilian MLA is of the opinion that such amendment is not convenient at this moment.

4. Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:

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 salved 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.

Question:

4.2. Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Answer:

There is no provision in this respect in Brazilian law.

Question:

4.3. Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?
Answer:

No, we do not think it would be appropriate that the vessel only be responsible for Salvage claims. The Salvors have the right of detention of the cargo that must be made effective before the releasing of the cargo.

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

   **“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 minimized 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 granted 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.”

Question:

5.2. Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).
Answer:

In our opinion it is not the case to create an entitlement to an environmental award in the Salvage Convention. Thus, we consider that no consideration should be given to amending Article 14.

6. **Article 16 of the Salvage Convention 1989 provides as follows:**

   “Salvage of persons

   1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”

   2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”

Question:

6.2. Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Answer:

We consider that the wording of this Article should be left unaltered.

7. **Article 20 of the Salvage Convention 1989 provides as follows:**

   “Maritime lien

   1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

   2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Answer:

We are of the opinion that Article 14 should remain unchanged, and any special lien is to be created under the Salvage Convention 1989.
8. **Article 27 of the Salvage Convention 1989 provides as follows:**

   “Publication of arbitral awards

   *States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.*”

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

**Answer:**

In our opinion the amendment is not required nor necessary.

9. **General – Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

**Answer:**

We have no amendment to the Salvage Convention 1989 to suggest at this moment.

**Question:**

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

**Answer:**

Considering that the Salvage Convention 1989 was accepted by Brazil recently but is not in force up to this moment, we have not any case to report that have been decided under our jurisdiction based on the above Convention.

***
COMITE MARITIME INTERNATIONAL
SALVAGE CONVENTION

RESPONSE OF THE CANADIAN MARITIME LAW ASSOCIATION TO THE QUESTIONNAIRE TO MEMBER ASSOCIATIONS

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

Article 1(d) states:

"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"

In considering any change to the existing wording the original intent of the drafters of the Salvage Convention must be carefully considered. Article 1(d) may have been intended to preclude over reaching claims for salvage reward by defining damage to the environment as "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto". The high seas, intentionally or otherwise, would seem to be excluded from that definition (unless same could be construed as an area adjacent to coastal waters). The reasoning for this may have been that the potential for damages occurring exclusively on the high seas would be both difficult to quantify and to ascribe. Thus, deletion of the words "in coastal or inland waters or areas adjacent thereto" could have the effect of broadening the scope of the convention. We are not convinced that there is a demonstrated need or other justification for such an change.

See response to Question 1.3 below

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

Consistency in the language of related international conventions should be utilized whenever practicable.

Although we would not wish to revise Article 1(d) such that it would alter the original intent of the Convention, we agree that consideration could be given to bringing the definition of "damage to the environment" closer in line with the
1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

We make no specific recommendation in this regard.

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e., do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

We do not think that such an incident would come within the meaning of the words "similar or major incidents." Read alone, Article 1(d) applies to actual physical damage to the environment, not potential damage arising from navigational hazards. Under Canadian law it is most likely that a ship owner would be required to remove a container (cargo) that posed a hazard to navigation pursuant to the Navigable Waters Protection Act.

However, "Salvage operation" is defined in Article 1(a) to mean "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever." Thus, it is arguable that if containers lost from a ship are "in danger" and contained substances that if released into the environment as a result of another passing ship colliding with same would result in substantial "damage to the environment" it may be a salvage operation and Article 1(d) could apply.

That said, we would be reluctant to support any interpretation that might tend to confuse salvage with operations which are not truly salvage in nature.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

Probably not, for the reasons stated above. It would also be necessary for us to review the background of this provision to determine the original intent of the drafters.

1.5.2 If so, can you suggest any wording that you think might be appropriate?

N/A
Part 1 of Schedule 3, is approved and declared to have the force of law in Canada.

Schedule 3 sets out the Salvage Convention in whole, including Article 11.

Canada's only reservation (Part 2) is the right not to apply the provisions of the Salvage Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situate on the seabed.

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

The relevant provisions of the Canada Shipping Act, 2001 are attached.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

There may be merit to amending Article 11 of the Salvage Convention to incorporate the International Maritime Organization Guidelines. That approach would be consistent with the position we adopted (albeit not exclusively in the salvage context) in connection with the CMI's deliberations on Place of Refuge and the draft instrument which it adopted in Athens in 2008. That instrument, which we supported, provides that, in a place of refuge situation, a state should make an assessment of the situation in accordance with the IMO Guidelines, in deciding whether to grant refuge. While the instrument does not have force of law, we supported the position that it should be considered by IMO for promotion as the starting point for an international convention. Based on this it would be consistent to support incorporation into the Salvage Convention a requirement to act in accordance with the Guidelines.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

No

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security)
Question:

6.2 Do you consider that the wording of this Article [16] should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Article 16.1 states that no remuneration is due from persons whose lives are saved, but nothing in that article shall affect the provisions of national law on this subject. Under Canadian law there are no special provisions pertaining to payment for life salvage by persons whose lives are saved.

As written, the application of Article 16.2 is not entirely clear. It could be interpreted such that even if the life salvor is only involved in the salvage of life then it would be entitled to a share of the award to the property salvor or one involved in minimising damage to the environment and raising the question of whether the life salvage claims would be made against the owner of the salved property or against the salvors of that property.

We do not know if this has been a problem in practice in other jurisdictions (it has not in Canada) but agree that consideration should be given to revising the wording to ensure that any life salvage claims are made directly against the vessel or other property owner, rather than the salvor, and that they would be a separate reward, not a part of the property salvage award.

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Under Canadian common law a maritime lien for salvage is a privileged claim upon maritime property. It accrues from the moment the claim arises. It travels with the property unconditionally, even into the hands of bona fide purchasers for value whether with or without notice. It is enforced by means of an action in rem.

It is questionable if there is any need to create a statutory lien except perhaps where the total special compensation payable under Article 14 is greater than any reward that may be recovered by the salvor under Article 13 (i.e. the value of the salved property is less than the salvors costs and the salvor by its action prevented damage to the environment). But in that event it is difficult to see what a statutory maritime lien would accomplish as the value of the res had been exceeded.

We think it unlikely that the Canadian government would support an initiative to create a statutory lien in such circumstances or be willing to
CMI International Working Group on Salvage

QUESTIONNAIRE

Response of the Chilean Maritime Law Association

The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

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

Article I in the Salvage Convention 1989 contains the following definition:

"For the purpose of this Convention:

(d) Damage to the environment being 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." (Emphasis added)

Previous explanation:
As a previous matter, we must clarify that Chile has not ratified the Salvage Convention 1989. However, as a consequence of the main Amendment to our Maritime Law, introduced by Law No 18.680, published in the Official Gazette on the 11th January 1988, which came into force 6 months later, Book III of the Commercial Code, dealing with “The Navigation and Maritime Commerce” was substituted in full. Specifically, the subject of salvage is ruled in articles 1128 to 1156 of this Code.

In this internal legislation, the principles stated in the Montreal Draft Convention of 1981 were enacted into the Chilean Code of Commerce. Considering that this Draft was the base of the Salvage Convention of 1980, we could say that most of its principles and rules should be considered applicable in Chile.
Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

On this subject, we must remark that Chile has ratified International Conventions that, in principle, should conduct us to the conclusion that the words emphasized above in the definition of Article 1 (d) of the Salvage Convention 1969, should be deleted, because in the light of those conventions they have become obsolete, and in fact they are unnecessarily restrictive.

We must point out that Chile ratified the CLC 1969 and the 1992 Protocol as well as the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which extended the jurisdiction of the coastal State’s rights and obligations to 200 nautical miles from the coast by recognizing the exclusive economic zone.

Likewise, it is necessary to remind that the Chilean Navigation Law, which is applicable in those situations not covered by the CLC 1969 and the 1992 Protocol, contains wider rules which means, for instance, that the mere threat of oil pollution if preventive and reasonable measures have been taken grant the right of reimbursement to who adopted them.

Obviously, within these measures we should include the salvage of a ship which by herself or by reason of her cargo on board constitutes a threat of contamination notwithstanding that the source may be located in high seas, but due to the effect of marine currents or other naturals phenomena may threat damages to the exclusive economic zone.

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur "I" exclusive economic zone "I" territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

Based on the arguments referred to in the former question, the answer is yes.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial1 (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

As far as we know, the answer is negative.

1.4.1 If so, could you provide a copy of the decision?

Not applicable.
1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

No, because in all the cases it will be necessary a qualification and evaluation about the effects of the spill of polluting substances. In other words, each situation must be carefully considered by the competent Tribunal.

Besides, if we analyze the term through the antonym i.e. insignificant, we may conclude that damages should be of some importance, and the real issue will be to decide how considerable or important the damages have to be. For instance, if the effects in human health or life affect a high proportion of a population; if the noxious substance may cause irretrievable damages to persons and/or to the environment itself, etc.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Not applicable.

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e. do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

It is doubtful, because the situation proposed in the example not always is linked with real damages to the environment or with a threat to cause those damages. In fact, we believe that an incident that could create dangers to navigation, by itself is not covered within the definition of Article 1(d), unless at the same time, and based on the real circumstances of the particular case, one should conclude that due to the features or conditions of the cargo inside of the container, that cargo is able to cause damages by contamination or may became a threat to cause those damages.

In conclusion, we reiterate that the answer is doubtful and it will depend on the circumstances of each case.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

In our opinion it is preferable to not make changes on the matter. In other words, the definition should remain as at present, so that the decision will depend on the circumstances of each case, as explained above, and in case of an incident with a loss of containers at sea with innocuous cargo for the human health or the environment, and if at the same time there is no risk of accident for the navigation of other vessels in the area, then the incident does not qualify within the definition of Article 1(d).
1.5.2 If so, can you suggest any wording that you think might be appropriate?

Please see the reply to the above question.

2. Article 5 in the Salvage Convention 1989 refers to:
"Salvage operations controlled by public authorities"

Questions:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Yes, they can.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

See the above mentioned reply.

3. Article 11 in the Salvage Convention 1989 refers to:
"Cooperation".

Questions:

3.2 Has your country ratified the Salvage Convention 1989?

No, but as we explained as a previous comment of this questionnaire, Chile enacted to the internal legislation in the Code of Commerce, a special paragraph entitled "About the services in favor of a vessel or other properties in danger", based on the Montreal Draft Convention of 1981.

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

Before the enactment of the new rules in the Commercial Code, It was also in force the Law of Navigation, contained in Decree Law N°2.222 of 1978. Articles 102, 123, 124, 132 and 142 paragraph 7 of the Decree Law N°2.222 refer to this matter.

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

We hereby transcribe a free into English of Arts. 123 and 124 of the Navigation Law.
**Art. 123** The Maritime Authorities will adopt the necessary measures in order one gives soon assistance to the ship in danger, coordinating the salvage services that are needed. Likewise, when it will be possible, they will have to direct the salvage or rescue operations and arrange the necessary measures to obtain the safety of persons who are on board and of the salvaged properties. For that purposes, the tugs of the port will be put at the disposal of the Maritime Authority.

The tugs of port will be also at the disposal of the Maritime Authority to comply with tasks of port safety, in those cases indicated by the regulation, in order to prevent the risk of sinking, collision and other casualties.

**Art. 124** When the Maritime Authority is aware of a sinking or any another disaster or danger that affects a ship and the safety of her passengers and crew, the Maritime Authority will be allowed to command other vessels sailing in the surroundings or being in port ready to sail, that they must move immediately to help her. As soon as the danger of loss of human lives has stopped, the Authorities will inform to the above mentioned ships that they are free to go anywhere.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949 (23)) Adopted in December 2003.

We do not think so. In our opinion the terms of Article 11 are wider enough to provide the Authorities of each State Party to decide on matters relating to salvage operations, taking into account the surrounding circumstances.

**4. Article 13 of the Salvage Convention 1989** establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 refers to:

"Payment of a reward fixed according to paragraph I shall be made by all of the vessel and other property interests in proportion to their respective salvaged values".

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Yes, our national law has solved this problem. Paragraph second of Article 1129 of the Commercial Code provides that “the owner of the vessel to which assistance has been rendered, shall be liable before the salvors in respect of all the rights arising in favor of the latter, including those affecting the cargo or other benefited properties”.

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Paragraph 3rd, adds “All the foregoing is without prejudice to the right of the owner of the assisted vessel to recover whatever may correspond from the other benefited or obliged parties”.

Therefore, in principle, we could say that according to our legislation it is possible that the vessel’s interests are the only responsible for the provision of security in favor of the salvors. However, the law also states that the latter have a privileged claim on the properties benefited with the salvage operation, and they are allowed to retain or arrest those properties, which includes the cargo.

In other words, it will depend on the attitude or decision adopted by the salvors, who may be satisfied exerting its claim and requesting security in respect of all the benefited properties only against the salved vessel, based on Article 1129. However, the salvors could also demand security against all the interests favored with the salvage operation.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

As we have mentioned above, in our local legislation the matter is solved by Article 1129 of the Commercial Code. However, if we exclusively rely on the text of the Salvage Convention 1989, we think affirmatively that it would be appropriated to specify in this Article that the container ship is the only responsible for the payment of claims and for the provision of security.

5. Article 14 in the Salvage Convention 1989 refers to:
“Special Compensation”

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognized that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favor of an investigation of this issue. It is also recognized that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

We think that it would not be advisable to create and entitlement to an environmental award, and it would be enough to introduce some minor amendments to Article 14 just to simplify its wording.
6. Article 16 of the Salvage Convention 1989 refers to: "Salvage of persons"

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

No.

7. Article 20 of the Salvage Convention 1989 refers to: "Maritime lien"

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

No.

8. Article 27 of the Salvage Convention 1989 refers to: "Publication of arbitral awards"

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Considering the importance of the matters, specially when the environment is threaten, we are of the opinion that we cannot qualify these arbitrations as "privates" and therefore we believe that it is convenient to publish the awards, so that Article 27 should be amended, granting the publication without any exceptions.

9. General - Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

No by the moment, because we believe that Chilean law has resolved most of the issues or problems.
9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Chile has not ratified the Salvage Convention 1989, but more than 20 years have elapsed from the enactment of the new Book III of the Commercial Code, including the rules concerning the Maritime Salvage whose foundations were motivated by the Montreal Draft Convention of 1981.

Most of the cases conclude through a settlement negotiation and therefore there are no so many cases counted that end through a final award. Moreover, as a general rule the awards are not published, unless the parties have presented recourses of appeal or cassation to a Court of Appeal or before Supreme Court. In fact, we are aware about only one that was brought to the Supreme Court.

Valparaíso, May 4th, 2011

[Signature]

Eugenio Cornejo I.
President
Chilean Maritime Law Association
THE RESPONSES OF CHINA MARITIME LAW ASSOCIATION
TO THE SALVAGE CONVENTION 1989
QUESTIONNAIRE TO MEMBER ASSOCIATIONS

1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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." (Emphasis added)

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

Article 1 (d) in the Salvage Convention 1989 provides that: "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 incidents”. The Convention limits the scope of damage to environment to the coastal, inland waters or the area adjacent and excludes the application to the exclusive economic zone as well as the high seas, which is inconsistent with "International Convention on Civil Liability for Oil Pollution,1992", "International Convention on Liability and Compensation in connection with the Carriage for Damage in connection with the Carriage of Hazardous and Noxious Substances by sea,1996 (the NHS Convention)" ,"International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001" and other relevant Conventions. Moreover, this provision in practice easily leads to disputes, which is not conducive to motivating the salvor’s enthusiasm to save environment, and contradicts with the intent to encourage environmental salvage explicitly expressed in the 1989 Convention.

Therefore, we consider that "damage to environment" should not be limited to the coastal areas, inland waters or adjacent areas, but should be extended to the exclusive economic zone of coastal states. Meanwhile however, we believe that the high seas should be excluded out of application, considering the big difficulties of salvage operations,
the relatively low threat of damage to environment, and the strong self-cleaning capability, etc., on high seas.

Questions:

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

There have not been in China reported cases in which the word “substantial” has been interpreted.

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

We believe that the word "substantial" will increase the difficulties of interpretation. There may well be different understandings about whether the damage to environment is "substantial" or not as a result of different national realities and the inconsistent ecological and environmental protection standards in different states. We believe that the judges, arbitrators of various countries may very likely differ in the factual finding of the word "substantial", which will increase the difficulty of a uniform and consistent interpretation.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

We consider that the word "substantial" should be deleted from the Convention.

The word "substantial" brings at least three problems in practice. Firstly, it excludes the ordinary, non-substantial claims for compensation of environmental damage. Secondly, it is very difficult to give an internationally acceptable standard which can draw a clear line between "substantial" and "non-substantial", thus bringing the difficulty of application. Thirdly, it is contrary to the present trend of strengthening environmental protection, and also to existent environmental protection legislation to which international communities are attaching ever more importance. The environment is increasingly becoming the subject of protection in most countries, and the concept of prevention of environmental damage has achieved unprecedented consensus in the international community. Therefore, we consider that the word "substantial" should be deleted from the Convention, which is in agreement with the legislative intent to encourage environmental salvage.

Question:

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the
definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?

We consider that the danger described in this question can not be covered by the definition of “damage to the environment” in Article 1 (d).

The “similar substantial incident” in the definition in Article 1 (d) means pollution, contamination, fire, explosion or similar incidents, and does not cover navigational accidents caused by loss of containers and ship wreckage.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

We believe that the definition in article 1 (d) in the Salvage Convention1989 can not be widened at liberty.

It is impossible for Article 1 (d) in the Salvage Convention to cover all dangerous threats; otherwise the application of the Convention will be affected. We believe that the definition of “damage to environment” in Article 1 (d) in the Salvage Convention1989 is appropriate, which is consistent with the common-sense understanding and identification of “damage to the environment”. Therefore, there is no need to widen the definition, or to replace it by other wording. We believe that the connotation should remain unchanged.

2. Article 5 in the Salvage Convention 1989 provides as follows:

“Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?
In accordance with China Maritime Code (hereinafter referred to as the CMC), the competent authorities of the State shall be entitled to avail themselves of the rights to claim compensation for performing salvage operations. However, there is no clear provision on their claim for salvage rewards for salvage operations performed under their control.

In accordance with the 1989 Convention, Article 192 of CMC expressly stipulates as follows: with respect to the salvage operations performed or controlled by the relevant competent authorities of the State, the salvor shall be entitled to avail themselves of the rights and remedies provided for in this Chapter in respect of salvage operations.” Therefore, with regard to the salvage operations performed by the relevant competent authorities of the State, the authorities shall be entitled to claim salvage rewards in accordance with Article 192 of CMC as well as Article 179, 180, 182, 188 of CMC.

However, with regard to the salvage operations performed under the control of the relevant competent authorities of the State, Article 192 of CMC does not expressly provide whether they are entitled to the salvage rewards or not and whether the “salvor” referred to should include the competent authorities of the State who control and command the salvage operations.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

We consider that Article 5 paragraph 3 should be deleted in revision. Salvage operations performed by and under the control of competent national authorities of the State is a special behaviour. It is both public behaviour and private behaviour. The competent national authorities that have performed and controlled the salvage operations shall gain appropriate remuneration and compensation. However, their claim for salvage payment must be necessary and reasonable. In the event that the competent national authorities only control the salvage operations under their authority but do not perform the operation themselves, they have no rights and obligations as salvors, and accordingly have no right to claim salvage payment. To stipulate as such is not only helpful to the alleviation of financial burden of coastal States, but also enables timely and effective salvage operations, thereby contributing to the promotion of maritime safety, and at the same time being in line with the concept of “encouraging public participation in salvage” embodied in Salvage Convention 1989.

Therefore, we consider that paragraph 3 of Article 5 should be deleted in revision. This will clarify and stipulate the claim right for salvage rewards in the event that the competent authorities perform the salvage operations as the salvor, and thereby explicitly exclude claim right for salvage rewards in the event that the competent authorities of the State act purely as controllers. However, since the great differences in the functions of salvage-related competent authorities provided in the national laws of different States,
some States may strongly oppose the deletion. Therefore, it may be attemptable to allow a contracting State to have reservation over the deletion.

3. **Article 11 in the Salvage Convention 1989 provides as follows:**

   **Co-Operation**

   A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

**Question:**

3.2 Has your country ratified the Salvage Convention 1989?

   China ratified the Salvage Convention 1989 on December 29, 1993, but make a reservation on paragraph 1, a, b. of article 30, The Convention entered into force for China on July 14, 1996.

**Question:**

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

   China has not enacted any specific legislation or regulation to give effect to Article 11.

**Question:**

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

   We consider that Article 11 in the Salvage Convention 1989 should remain unchanged.

   Since the vessels in distress entering into coastal ports or places of refuge may damage the interests of coastal States economically and environmentally, the approval of their entrance by coastal States may ultimately be decided by political factors, and often on a case by case basis and out of humanitarian considerations. Since the Salvage Convention 1989 in nature is a private law, mainly regulating the contractual rights and obligations between the salvor and the party salved, it will not be very appropriate for it to involve too much that is to be stipulated by a public law, or to impose on countries concerned obligations they may hardly accept, thereby affecting the effectiveness of
implementation of international conventions. Therefore, we think that it is more appropriate to keep Article 11 in the Salvage Convention1989 unchanged.

4. Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:

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 salved 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.

Question:

4.2. Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

China does not make a special provision for "payment of a reward has to be made by one of these interests."

Article183 of CMC stipulates: "the salvage reward shall be paid by the owners of the salved ship and other property interests in proportion to their respective salved values." That is to say that China does not have a special provision for "payment of a reward has to be made by one of these interests."

Question:

4.3. Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Response:

We consider that paragraph 2 of Article 13 should be properly amended to solve the problems and difficulties, mainly the provision of security and the handling of unrepresented cargo, that the ever increasing size of containerships are bringing to salvage operations, We suggest that further work be done to explore solutions to the problems, giving consideration to the interests of both shipowners and salvors.

In addition, the above-mentioned problems not only exist in salvage operations of containerships, but also in those of general cargo ships. Therefore, it is likely to cause confusion within the convention if a special provision is made only for the salvage of container ships.
5. Article 14 in the Salvage Convention 1989 provides as follows:

“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 minimized 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 granted 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.”

Question:

5.2. Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative,
consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).

We support the establishment of “the entitlement to an environmental award”. Special compensation, designed as a safety net, is the minimal amount paid to salvor, for the purpose of moving away risks inherent in the rule of “no cure, no pay”. However, in practice, the assessment of special compensation is extremely costly and time-consuming. Therefore, the industries created SCOPIC, which seemingly solved this problem.

However, the emergence of SCOPIC virtually proves the serious defect of the special compensation system in the Salvage Convention 1989. Special compensation, breaking through from the traditional rule of "no cure, no pay", actually admits the entitlement to an environmental award. Also, the payment of special compensation by the P & I clubs instead of the ship owners is a compromise forced by the Convention and is actually abnormal.

We support the establishment of “the claim for environmental salvage award”. So far as the salvor succeeds in “preventing or minimizing environmental damages”, the salvage shall be deemed effective and the salvor shall be entitled to an environmental award. The law can explicitly provide that the environmental award shall be paid by the owners of vessels and other property interests in proportion to their respective salved values.

6. **Article 16 of the Salvage Convention 1989 provides as follows:**

   “Salvage of persons

   1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”

   2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”

**Question:**

6.2. Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

We consider that the claims for remuneration for saving human life shall be independent, and this remuneration shall be separated from that for salvage of property. As one form of mandatory salvage, life-saving ought to be regulated by public international law and should not involve civil liabilities. In China, life-saving is a statutory responsibility prescribed by both national law and international conventions, and in principle no remuneration shall be due for the salvor of human life. However, in the event that life saving and property salvage are performed concurrently in a salvage operation,
the salvor of human life is entitled to “a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment”, pursuant to Article 185 of CMC and Salvage Convention 1989.

According to such provisions, the payment awarded to salvor of property or environment has to be shared by the salvor of human life, which seems to impair the interests of the former and is not conducive to the encouragement of property and environment salvage.

Meanwhile, the fact that remuneration for saving of human life relies on the results of property or environment salvage may also discourage life saving at sea. However, it will complicate the legal relationships and procedures of salvage if salvor of human life is conferred with the remuneration claim directly against the property owner. It is also unfair to the property owners if they are required to share the payment for life-saving.

The saving of human life, similar to salvage of ships and other property and environment, will run risks and incur considerable cost. Therefore, in order to protect human lives at sea and encourage saving of lives, claims for life-saving shall be recognized independently and remuneration for life-saving shall be separated completely from that for property salvage. We consider that efforts should be made to promote the establishment of a “a Fund for Life-saving”. By doing so, salvor can gain remuneration as long as they succeed in saving lives. Thus, the payment procedures will be simple and convenient, and the enthusiasm for life-saving can be protected as well as that for property salvage.

7. Article 20 of the Salvage Convention 1989 provides as follows:

“Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

We consider it necessary to create a statutory maritime lien of salvage reward against salvaged vessel and other property.

Article 21(3) of the Salvage Convention 1989 provides as follows: “The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.” However, that does not constitute a statutory lien of salvage reward, and can
not achieve the purpose of securing salvage reward since it does not confer the salvor the right of auction. From the point of view of a public policy encouraging salvage, the practice should be established that salvors are secured to realize salvage reward by means of detaining the property salved (including ships, ship’s apparel, cargo on ships, other properties, and so forth).

8. **Article 27 of the Salvage Convention 1989 provides as follows:**

   “Publication of arbitral awards

   *States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.*"

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

   We do not consider this amendment to be necessary.

   Article 40 of Arbitration Law of the People’s Republic of China provides as follows: “The arbitration tribunal may not hear a case in open sessions. But when parties concerned agree to have the case heard in open sessions, the hearing may be held openly, except cases that involve State secrets.” The Convention should not deprive the parties’ autonomy by a way of compulsorily requiring disclosure of an arbitral award, which is contrary to the principle of confidentiality of arbitration. Therefore, we do not suggest amending the original provision.

9. **General – Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

   There is no thought of this kind of issues or problems at present.

**Question:**

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

   The data is yet to be collected.
Dear Miss Sterckx,

**Questionnaire on the Salvage Convention 1989**

Referring to the CMI's questionnaire of 9 July 2009 regarding "Salvage Convention 1989", we hereby provide you with our preliminary response of the Danish Branch:

**Questions 1.2 - 1.5**

1.2 and 1.3: The words "in coastal or inland waters or areas adjacent thereto" constitute an important element of the so-called Montreal compromise which is the foundation of the Salvage Convention. If essential elements of the Montreal compromise are modified, taken away or changed, the whole package would have to be reconsidered. However, we are prepared to make an exception from this basic point of view, because the words "in coastal or inland waters or areas adjacent thereto" are rather unclear, and therefore their effective importance for the Montreal compromise may be questioned. For this reason we would be prepared to consider not a deletion, but a replacement of the words with "the exclusive economic zone or an area adjacent to the territorial sea equivalent to an exclusive economic zone".

1.4: We are not aware of any reported court decisions.

1.5: We are not sure we can fully understand your question here, because dangers to navigation do not fall under Article 1 (d) of the 1989 Salvage Convention.

**Questions 2.1 - 2.2**

2.1: Yes.

2.2: Not applicable.
Questions 3.2

3.2: Yes.

3.2.1: No.

3.2.2: Not applicable.

3.2.3: No, but Article 11 might be further strengthened by replacing the words "take into account" by some more binding words.

Questions 4.2 - 4.3

4.2: No.

4.3: No. We are opposed to having a special rule for containerships. Why should a special rule be applicable to containerships but not to ordinary liner cargo vessel or many other types of vessels with a large number of consignments on board?

Question 5.2

We are strongly opposed to creating an entitlement to an environmental award. This was carefully considered during the preparatory work leading to the Salvage Convention and was firmly rejected. If the concept "environmental award" were to be introduced, a lot of uncertainty would be created. How is the avoided liability going to be measured? How is limitation of liability going to be taken into account etc.? Introducing the concept "environmental award" would create a high degree of uncertainty in the settlement of salvage awards, and we are most strongly opposed to having this concept introduced. Introducing the concept would constitute a fundamental breach of the Montreal compromise.

Question 6.2

We are opposed to introducing an article which entitled a life salvor to make a claim directly against the property owners rather than the property salvor. Such a rule would in fact very much contribute to give life salvors a right of their own to which we are very much opposed.

Question 7.1

Not applicable.
**Question 8.2**

Although we would agree to the publication of arbitral awards provided the parties to the arbitration do not object thereto, we believe this is very much for national law/the parties involved to decide and not for a convention to regulate.

**Questions 9.1 - 9.2**

**9.1:** No.

**9.2:** Is under investigation.

Kind regards

Alex Laudrup
TO: COMITÉ MARITIME INTERNATIONAL

FROM: THE FINNISH MARITIME LAW ASSOCIATION

Reply to the CMI Questionnaire on salvage

Questions 1.2 - 1.3.

These are difficult policy issues and there might be different views within the membership.

However, what can be said is that merely deleting the word in bold in the Questionnaire relating to Article 1 (d) of the Salvage Convention might cause more confusion than clarification. It would be better in this particular context to include clarifying words, if there is support to amend Article 1(d) at all.

Support has been expressed for either to delete the wording in bold or for coordinating the wording on the geographical scope in comparison with the CLC, Bunker and HNS.

To the extent it has been possible to clarify the views within the Association in Finland, there is not a full unanimity of the correct policy to pursue.

Question 1.4.

1.4.1: No.

1.4.2: Of course the word “substantial” is open to discretion, but that is the function of legislation. The underlying policy is to avoid dealing with minimum pollution problems in a salvage context. Law is full of similar words intended to take a standpoint separately in each individual case. We do not see the need to change the wording, based on the arguments in the
Questionnaire. No other views have been actively expressed.

1.4.3: -

Question 1.5.

Containers at sea or similar incidents seem not to be covered by Article 1 (d). This Article enumerates certain specific types of environmental risks and it would be surprising if a floating container as such would belong to such risks. It is another matter if the container content represents environmental risks.

Question 2.1.

Yes, they can if they are considered to operate in the capacity of salvors. No, they cannot if particular national law provides them with duties to be performed in the capacity of public authorities, for example, in saving human lives.

Question 2.2.

See 2.1 under which salvage is possible.

Question 3.2.

Finland has ratified the 1989 Salvage Convention.

3.2: -

Questions 4.2. - 4.3.

Yes, there is the provision in Chapter 16 Section 7 of the Finnish Maritime Code covering the first sentence only of Article 13.2 of the 1989 Salvage Convention.

Collecting security and payments from a great number of cargo owners is a problem.
Interestingly, somewhat similar phenomena are found in General Average concerning sizeable container ships, but the CMI has not addressed such issues in that particular sector.

It might be too much of a burden for the ship to be primarily responsible for the cargo’s share. The ship’s right of recourse does not ensure true payment from cargo. Also, often recourse arrangements take a long time and cargo might not even have clarity, after time has passed, on who is to pay, the seller or the buyer of the goods. This again, is dependent on the terms of the sale of goods.

The idea of channelling administration and primary responsibility of payment to the ships sounds to be imbalanced. Who should truly carry the administration and the risk for collection, the ship or the salvor?

Whatever the solution, the burden easily becomes unreasonable on the one who is primarily focussed.

*Question 5.2.*

We are in favour of investigating further, but the economic burden shall not become unreasonable for any subject concerned. Automatic unanimous support for any kind of stand-alone environmental salvage award cannot be counted upon.

*Question 6.2.*

No change.

*Question 7.1.*

It is difficult to see why there should be a separation between different bases of salvage remuneration in relation to statutory liens against the ship. Thus, it seems that special compensation should enjoy a lien against the ship. May it be added that by lien in this connection is meant a situation where the lien brings a prioritised claim against the owner in
the form that the ship functions as the security. The word “lien” has different meanings in different jurisdictions (e.g. English law on the one hand and Nordic law on the other). See 5.2.

Question 8.2.

Arbitral awards are non-public in Finnish law, unless all the parties consent to publication. There is no reason to see a different conclusion in view of salvage awards.

Question 9.1.

- 

Question 9.2.

We have received report on two salvage cases in Finnish Courts under the 1989 Convention. One was settled. In the other an individual salvage agreement was concluded and the focus was on how to interpret this agreement. No report on judgements, however, exists. It is presumed that the few cases that arise in view of legal matters would mainly be directed to London or a non-Finland jurisdiction by contract.

Helsinki
December 16, 2010

On behalf of the Finnish Maritime Law Association

Hannu Honka
President of the Finnish Maritime Law Association
The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

   > "For the purpose of this Convention:
   
   (d) Damage to the environment being 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." (Emphasis added)

   **Comments**

   1.1 **The International Convention on Civil Liability for Oil Pollution Damage, 1992,** defines "Pollution damage" in Article 1 paragraph 6 as meaning:

   > "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

   Article II of that Convention also provides:

   > "This Convention shall apply exclusively:
   
   (a) to pollution damage caused:
   
   (i) in the territory, including the territorial sea, of a Contracting State, and
   
   (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;
   
   (b) to preventive measures, wherever taken, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken" (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)

Article II provides as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and
(ii) in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

**Question:**

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland wars or areas adjacent thereto") should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "wherever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

**RESPONSE:**

In order to harmonize the conventions, the definition of “damage to the environment” as given by the present article 1, d) might become:

“d) Damage to the environment means.....in territorial waters and in the exclusive economic zone of any State, established in accordance with international law, or, if a Contracting State has not or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation

**RESPONSE:**
No case seems to have been held in France since the date of ratification (Decree 2002, April 23\textsuperscript{rd}).

The term “substantial” has been translated in the French wording of the convention, by “important”, which would leave a large power of appreciation to any Judge, of what is important..., without any possible control from our Supreme Court.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

RESPONSE: It is not clear that all incidents which could give rise to dangers to navigation, to be considered as covered by the definition in Article 1(d); any French jurisdiction would have to qualify how such an incident would be “a major incident”

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

RESPONSE: No, because such incidents are not major ones and should not be covered by the convention

1.5.2 If so, can you suggest any wording that you think might be appropriate?

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

RESPONSE: No provision in French Law to prevent French public authorities to pursue claims for salvage. Common Maritime Law apply to such claims
2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Comment

3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

3.2 Has your country ratified the Salvage Convention 1989?

RESPONSE: Yes, by a Decree dated 2002, April 23rd.

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

RESPONSE: Apparently no!

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

RESPONSE: No, because this Article is drafted in general terms and any reference to IMO Guidelines would be too much restrictive

4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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 salved 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."

Comment

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

RESPONSE: No, there is no such a provision under French Law. French Law (1967, July 7th) is based on 1910 Salvage Convention.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

RESPONSE: No, there is no apparent reason to have specific provisions for containerships.

5. Article 14 in the Salvage Convention 1989 provides as follows:

"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 minimized 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 granted 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."

Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

RESPONSE: There seems no reason to create an environmental award, in addition to what is already provided for by articles 13 and 14.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."

Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be
Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

RESPONSE: French Law, 1967, July 7th Article 17 has the same wording as the Salvage Convention, Article 16.

No opinion as the necessity to amend the Article 16 wording to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor.

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

RESPONSE: No reason to change Article 14 wording

8. Article 27 of the Salvage Convention 1989 provides as follows:

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?
RESPONSE: No opinion

9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

June 2010
COMITE MARITIME INTERNATIONAL

SALVAGE CONVENTION

RESPONSES OF THE GERMAN MARITIME LAW ASSOCIATION

TO THE QUESTIONNAIRE

1. Article 1 in the Salvage Convention 1989 contains the following definition:

"For the purpose of this Convention:

(d) Damage to the environment being 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." (Emphasis added)

Comments

1.1 The International Convention on Civil Liability for Oil Pollution Damage, 1992, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

Article II of that Convention also provides:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

(ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken" (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)

Article II provides as follows:

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(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and
in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

Germany has ratified the Salvage Convention, 1989, which entered into force for Germany on 8 October 2002. The Convention, however, is not part of the German law and thus not directly applicable. Rather, the previous German law on salvage as enacted in the German Commercial Code has been amended to reflect the „operational“ provisions of the Salvage Convention; see Sections 740 through 753a Commercial Code. These provisions are also applicable all inland waterways and all river vessels (no reservation under Art. 30 (1) (a) Salvage Convention has been declared by Germany).

1. Preliminary Remarks

The definition „damage to the environment“ in Article 1 (d) Salvage Convention refers, as far as the geographical scope is concerned, to „... coastal or inland waters or areas adjacent thereto...“. The expression „coastal waters“ has been understood in Germany as referring to, in any event, the territorial sea (see Article 3 – 16 UNCLOS). One writer also suggested that „coastal waters“ include the contiguous zone (see Article 33 UNCLOS). The opinions are divided whether or not the „coastal waters“ extend to a state’s exclusive economic zone (EEC). The official government reasons published in relation to the Salvage Convention („Denkschrift“) confirm that the EEC is not encompassed in the „coastal waters“, while one author submits that they are. There is a common understanding, however, that the high seas are not included.

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

No, the words relating to the geographical scope of article 1 (d) Salvage Convention should not be deleted but rather amended (see 1.3 below). Fully deleting the phrase might give rise to special compensation claims under Article 14 of the Convention relating to salvage operations anywhere, i.e. also on the high seas. In our view, this is not justified. Rather, some restrictions on the geographical scope should be maintained, even if there are no corresponding limitations to claims for salvage reward under Article 13 of the Convention. Consequently, we do not promote a full deletion of the words „... coastal or inland waters or areas adjacent thereto ...“ from article 1 (d) of the Convention.
1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

Rather, Article 1 (d) should be amended to include the EEC or, where no EEC has (yet) been proclaimed, a corresponding area as defined in the various provisions of the liability conventions. We suggest that a clarifying sentence is added to article 1 (d): „Costal Waters include a State’s territorial sea and its Exclusive Economic Zone established in accordance with international law or, if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured."

We acknowledge that, in principle, the respective liability conventions serve a different purpose than the Salvage Convention and the claim for special compensation under Article 14. However, this does not exclude adopting the same terminology to achieve some conformity on basic definitions. A reference to the EEC (or a corresponding area) in Article 1 (d) Salvage Convention is a helpful clarification which is (at least in Germany – see above) recognized anyway. The reference to the EEC (or a similar area) in the liability conventions re-confirms that the EEC is an area closely enough related to the costal state to be protected by the conventions. This concept should thus be adopted in respect of the Salvage Convention. It should also be clear that it is not necessary that the EEC belongs to a state party of the Salvage Convention (or any liability convention), which appears to correspond to the prevailing interpretation.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

No, there have not been any reported decisions applying the Salvage Convention (or rather Sections 740 through 753a Commercial Code) at all.

1.4.1 If so, could you provide a copy of the decision?

Not applicable

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

Yes, the word „substantial“ in Article 1 (d) Salvage Convention might well be difficult to apply and give rise to disputes. The same would apply to the further reservation at the end of Article 1 (d) that the similar incidents should be of a „major“ kind. Difficulties in interpretation are inherent to such expressions. However, in many cases it will be obvious whether or not there is „substantial“ damage or a „major“ incident. Expressions of a similar nature are found in quite a number of international and national legal provisions. Whether they are of any effect depends to a large extent on the facts of the particular case. We therefore feel that it may well be left to the courts to decide whether there is „substantial“ damage or a „major“ incident.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?
It follows from what has been said in the proceeding paragraph that in our view in respect of the expressions „substantial physical damage” and „major incidents” the wording of Article 1 (d) should remain as it is.

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?

The expression „… or similar … incidents” suggests that the respective circumstances, in order to be a valid cause for damage to the environment, must follow the line set by the preceding events (ejusdem generis rule). These may be divided into two groups, i.e. pollution and contamination and, secondly, fire and explosion. The latter examples refer to the underlying event and not to navigational hazards, which may be the result of a fire or an explosion. However, are navigational hazards such as floating containers or other cargo, lost parts of a vessel’s gear (e.g. lifeboats) be akin to water pollution or contamination? We think not, because the expressions „pollution” or „contamination” suggest that the condition of the water itself must be affected, which is different from floating objects which, generally speaking, simply may be lifted from the water.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

2. **Article 5 in the Salvage Convention 1989 provides as follows:**

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

**Question:**

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Yes, in German law, public authorities carrying out salvage operation with their vessels, equipment and personal may, in principle, claim a salvage reward. This is less clear in relation to special compensation. However, if the public authorities are under a duty to provide salvage services free of charge or if they are only entitled to claim for a reimbursement of costs, salvage claims are excluded. In relation to public authorities having a duty to render salvage services, where there are no reservations as to a reimbursement of costs, the opinions among legal writers are divided, with the prevailing traditional view favouring the authorities’ right to raise salvage claims.
2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

We feel that the question whether public authorities under a duty to perform salvage operations may raise salvage claims should best be decided by the law of the state where the respective authorities are located. This corresponds to Article 5 (3) of the Salvage Convention as it is worded today. Deleting Article 5 (3) completely may allow the authorities to make salvage claims under the Convention, whilst they may be traditionally prohibited to do so under their national law. This situation should in our view be avoided. Any amendment of Article 5 (3) of the Convention to the effect that public authorities under a duty to perform salvage operations in fact may pursue salvage claims based on the Convention or, conversely, are prohibited to do so would, in our view, amount to an undue interference of the Convention with a primarily domestic matter.

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Comment

3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

3.2 Has your country ratified the Salvage Convention 1989?

Yes, Germany has ratified the Salvage Convention (see the introducing remarks above).

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

No, there is no particular German legislation on issues addressed in Article 11 of the Salvage Convention. As can be seen from the official reasons provided by the government on the Salvage Convention („Denkschrift“), Article 11 is mainly understood to be of a mere appeal character, which does not require further legislation on the issues referred to.

However, meanwhile „Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system” has been published. The amendments of Directive 2002/59, inter alia, expressly refer to Resolution A.949(23) and requires the EU Member
States to implement the instrument in their national law. Directive 2009/17
requires the Member States to bring the relevant legislation into force by 30
November 2010.

Obviously, all this only concerns EU Member States. In order to promote
worldwide legal uniformity on place of refuge issues, we would indeed
approve an amendment of Article 11 of the Salvage Convention which
would require the Contracting States to observe the provisions of Resolution
A.949(23).

4. **Article 13 of the Salvage Convention 1989 establishes the ”Criteria for Fixing the
Reward”. Paragraph 2 of Article 13 provides as follows:**

"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 salved 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."

**Comment**

4.1 In recent years the salvage of container ships, which continue to grow in size, has
given rise to problems in collecting security from cargo interests. Thousands of
interests are often involved and it can take months to collect security. Often it is
not obtained at all. Further, even when security is provided, cargo often remains
unrepresented and has to be given notice of a pending arbitration, an award, and
an appeal of an award, causing considerable expense and delay. It has been
suggested that the problem could be solved if, in container ship cases, ship
owners were responsible for the provision of cargo security.

**Question:**

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2
for the payment of a reward by one of the interests referred to in the opening
sentence of this paragraph?

No, Section 742 paragraph 3 Commercial Code clearly provides that both the
vessel and the other property interests are liable for their share in proportion to
their respective saved values. Germany has thus clearly decided against the
option provided in the second sentence.

4.3 Do you think it would be appropriate to specify in this Article that in containership
cases the vessel only is responsible for the payment of claims (and therefore
would be responsible for the provision of security) subject to a right of recourse
against the other interests for their respective shares?

No, we feel that Article 13 (2) should not be amended as suggested in your
question, not even in containership cases. It is the salvor who pursues salvage
claims against the vessel or property interests and it thus, as it would normally be
in other businesses, should be his job and responsibility to enforce the claims.
Also, the salvor in many cases will have both the vessel and the cargo under his
control and therefore be able to enforce his lien on the property. We do not see a
valid reason why the risk of failure of the salvage claims should be shifted to the
vessel owner, who is in no better position than the salvor and who would face the
same problems as the salvor when the recourse claims are pursued against the
cargo interests.
5. **Article 14 in the Salvage Convention 1989 provides as follows:**

"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 minimized 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 granted 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."

**Comment**

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

**Question:**

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

The fact that SCOPIC exists and has been agreed in a number of cases demonstrates that the concept of special compensation as devised in Article 14 of the Salvage Compensation, perhaps the greatest innovation introduced by the 1989 Convention, is not accepted by the industry. It would seem, however, that the underlying idea, i.e. that there should be some form of remuneration if
threatening damage to the marine environment is prevented, is widely recognized. We therefore, in principle, would appreciate and support a re-consideration of the issue by the IWG.

However, we are also aware that a possible revision of Article 14 and the concept of an environmental award is presently discussed between the ISU and the property underwriters on the one side and the International Group of the P&I Clubs and the ICS on the other. These parties represent the major interests who amongst them share the ultimate financial responsibility relating to environmental damages caused by ships. We think that any amendments to the Montreal compromise, as reflected in Article 13 and 14 of the Salvage Convention, in favour of either side should first be negotiated between these parties. The agreement then reached may subsequently be the basis for corresponding amendments of the Salvage Convention, if required.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."

Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Yes, we think that Article 16 (2) of the Salvage Convention should be amended to include a clarification to the effect that the salvor of human life (who satisfies the requirements of Article 16 (2) of the Convention) must pursue his claims directly against the respective property owners. However, this does not somehow create a separate claim for a life saving award, but the claim still is only for a share of the award or special compensation the property salvor is entitled to. Consequently, the amounts owed to the property salvor are reduced accordingly.

Beyond Article 16 (2) of the Salvage Convention, German law provides that in case of a reduction of the salvor’s claims under Article 16 the salvor of human life may pursue his claims for a share of the award or special compensation, insofar as they are reduced by the property salvor’s misconduct, directly against the property owners (Section 749 paragraph 2 second sentence Commercial Code).
7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor’s maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

As a matter of German law, the salvor, in relation to his claim for special compensation, has a statutory lien on the vessel (Section 751 paragraph 1 Commercial Code). If Article 14 of the Salvage Convention is amended to the effect that the salvor is entitled to an environmental award from the ship owner, there is no reason to treat that claim, as far as security is concerned, different from the regular claim for a salvage award. Allowing an express statutory lien in respect of the environmental award but referring to national law or other conventions in respect of the corresponding lien relating to the salvage award appears somewhat arbitrary. In our view, Article 20 (1) of the Salvage Convention should provide express statutory liens on the property saved in respect of all kinds of salvage claims including possibly an environmental award.

8. Article 27 of the Salvage Convention 1989 provides as follows:

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Yes, we strongly favour a publication of arbitration awards issued by Lloyds, on the Lloyds or other website, free of charge, as it would give invaluable guidance on how to handle salvage cases in jurisdictions where such cases perhaps are tried less frequently. Consequently, Article 27 should be amended to reflect the amendments made to the LSSA Clauses. We would prefer further amendments to the effect that all awards be published, perhaps after having been made anonymous. But we also appreciate the involved parties’ interest in privacy and accept that one parties’ objection may prevent publication, although we also fear that such an objection may be raised as a matter of routine.
9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

We suggest that the IWG considers the following points which we feel might justify amendments of the Salvage Convention:

- The definitions of “Ship” and “Property” in Article 1 (b) and (c) of the Salvage Convention might be re-considered in view of the definition of “Wreck” in Article 1 No. 4 of the Wreck Removal Convention. Whether there still is a ship or already a wreck may have effects on the applicability of either Convention and thus on the “salvor’s” position.

- The Salvage Convention does not include a definition of the vessel owner who may be liable for a salvage reward or special compensation. It may thus be argued that only the registered owner can be responsible. In German law and probably in other jurisdictions as well the registered owner in many respects is replaced by the owner pro hac vice (“Ausrüster”), i.e. the operator of the vessel, often a bareboat charterer. It is unclear whether the respective provisions apply in respect of claims for salvage awards or special compensation.

- The salvor’s misconduct (Article 18 of the Salvage Convention) should not affect the claim of the third party salvor of human life for a share of the salvage award as per Article 16 (2); see 6.2 above.

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Although we are aware that a number of salvage cases occurred and were negotiated and subsequently settled, there are no reported German cases (see 1.4 above).

Hamburg, 9 September 2009

Yours sincerely

[Signature]

President German Maritime Law Association
(Dr. Klaus Ramming)
Comité Maritime International

SALVAGE CONVENTION

RESPONSES OF THE HELLENIC MARITIME LAW ASSOCIATION
TO THE QUESTIONNAIRE TO MEMBER ASSOCIATIONS

Responses:

1.2 Yes
1.3 Yes
1.4 No
1.4.1 No
1.4.2 Yes
1.4.3 The word “substantial” should be deleted and the following sentence should be added to the end of Article 1(d): “Such damage does not include minor cases”.
1.5 No
1.5.1 Yes
1.5.2
2.1 No, according to the prevailing view. Public authorities are entitled to expenses and damages.
2.2 Public authorities should have the right to claim expenses and damages.
3.2 Yes
3.2.1 No. Perhaps because Greece has ratified the 1979 Convention on Maritime Search and Rescue and the EC directive 2005/59 of 27 June 2002 setting up a Community vessel traffic and information system, as well as decision 2001/792/EC of the European Council and the European Parliament, dated 23/10/2001, and decision 2850/2000/EC
of the European Council, dated 20/12/2000. In addition the Greek Code of Public Maritime Law permits the Port Authority to intervene during salvage which takes place in territorial waters and to coordinate the work of the salvors.

4.2 No. The prevailing opinion is, however, that it is permissible to submit a claim against the shipowner for the fee which relates to the cargo.

4.3 Yes

5.2 Yes

6.2 Yes. According to the wording of the Convention’s provision (Art. 16§2), as it is today, a salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to claim from the salvor a fair share of the payment awarded to the salvor for salvaging the vessel or other property. It would be preferable, however, if the salvor of human life would be entitled to claim a fair share of the payment from the owner of the salvaged vessel or of other property. This is because the salvor of the vessel or of other property avoids, in practice, to inform the salvor of human life of his fee, which may lead to a time barring of the latter’s claim. If the wording of the Convention remains unchanged, it would be preferable to provide for a time barring period of more than two years regarding the claim of the salvor of human life.

7.1 Yes

8.2 No. In any case, the Arbitral Tribunal must have the authority to order the publication of the arbitral award, when it finds that the award may be of interest to other persons that were not parties to the hearing before the Arbitral Tribunal.

9.1 No

9.2 It is not possible to determine the number of cases. The number of cases is, anyway, limited and it mostly involves minor cases, due to the fact that almost every important case is resolved by Lloyd’s Arbitrators in London.
1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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.” (Emphasis added)

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

Response:

In the CMI Report to IMO (document LEG 52/4, Annex 21) prepared by Bent Nielsen and approved by the CMI Assembly held on 6th April 1984 the following explanation of the such words was given:

The use of the words “coastal or inland waters” serves to make clear that cases where there is only a risk of damage to the environment on the high seas are excluded. This is felt to be important since there would often be a possibility of speculative and inflated claims based on loose assertions that general environment damage to fishing or other ecology was involved. It must be stressed, however, that damage in coastal waters emanating from a ship in danger on the high seas is not excluded.

It must be pointed out that at that time the 1984 Protocol to the CLC 1969, by which the scope of application of the CLC had been extended so to include also the EEZ, had not yet been adopted (it was adopted on 25th May 1984). However its adoption, even if the Protocol had not entered into force (it never did, and was replaced by the 1992 Protocol), was not considered by the Salvage Conference in 1989, when a question as to the meaning of the words “areas adjacent thereto” was asked by Chile. On the

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1 See also “The Travaux Préparatoires of the 1989 Salvage Convention”, p. 111
2 The question was as follows (Travaux, p. 114):
“Can thus be territorial waters, Exclusive Economic Zone or what? I don't know what happens in the open sea but I don't consider the open sea to be an adjacent area”.
invitation of the Chairman, Dr. Mensah explained that that wording had been adopted pursuant to a decision of the Legal Committee at its 11th session and quoted the following from the report:

*It had been agreed to limit the concept of environmental damage to damage in areas adjacent to coastal States, specifically the definition would serve to make clear that cases involving only a risk of environmental damage on the high seas would be excluded.*

It is the view of the Italian MLA that that opinion still holds, but the notion of high seas should apply beyond the EEZ to which all relevant conventions (CLC, HNS and Bunker Convention) apply and that it might therefore be appropriate to replace the present definition of “damage to the environment” with one based on the scope of application of such conventions, such as the following:

* (d) Damage to the environment means ... in territorial waters and in the exclusive economic zone of any State, established in accordance with international law, or, if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State, determined by that State in accordance with international law an extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured.*

Questions:

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

Response:

There are no Italian reported cases in which the word “substantial” has been interpreted. In the CMI Report to IMO (document LEG 52/4, Annex 23) the following explanation of the such word was given:

*By using the words “substantial” and “major” as well as the reference to “pollution, explosion, contamination, fire” it is intended to make clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage.*

However during the Diplomatic Conference concern was expressed in respect of the words “substantial” and “major” by the Advisory Committee on Pollution of the Sea (ACOPS) who suggested their deletion. The following statement was made by them:

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3 See also “The Travaux Préparatoires of the 1989 Salvage Convention”, p. 111.
The ACOPS proposal to article 1(d) was fairly minor and a modest one. Its purpose was to remove the distinction between substantial and possibly non-substantial and more importantly, the distinction drawn by the use of major incident compared to any other incident. It is certainly the experience of many in environmental matters that the definition of major or minor or substantial or insubstantial are very difficult to define, are generally imprecise and generally lead to the opportunity to people to do nothing where something should be done.

That suggestion was supported by DDR, Australia, Zaire and Kuwait, but the majority of the delegations, including USSR, Greece, United Kingdom and Italy, were in favour of the retention of those words without giving any clear explanation of their opinion.

It is the view of the Italian MLA that, besides the difficulty of distinguishing between damage that is substantial and damage that is not substantial or incident that is major and incident that is not major, and the difficulty of finding words that would enable to draw a clear border line between various categories of damage or incidents, the very basis of any such distinction is disputable. In fact the same damage may be considered to be substantial in one country and not in another in view of the different economies and the same holds for incidents. In addition no such distinction is made in the CLC, nor is it made in the HNS and in the Bunker Conventions.

Question:

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Response:

For the reasons stated, it is suggested to delete the words “substantial” and “major”. An additional argument in support of such deletion is that no parallel distinction is made in respect of the notion of danger.

Question:

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?

Response:

We have some difficulties in understanding this question. If we take the example of loss of containers at sea, what would the subject matter of the services be? The action to prevent the loss? The action of collecting the containers? What effect would such action have on the right to a reward? Would that justify an enhancement of the reward on account of the increased importance of the criterion set out in paragraph (1) (b) of article 13? Would such action justify the application of article 14? If so, would the Montreal compromise survive? We are afraid that by attempting to widen the notion of

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damage to the environment to events that have nothing to do with the environment we would trespass into very dangerous grounds.

It is thought that by allowing the relevance of a danger external to the vessel or the property in whose favour the services are rendered the very notion of salvage would become uncertain. For example, if such an extension were allowed, the removal of a wreck causing danger to navigations might be treated as a salvage operation in favour of all vessels that might navigate in the waters close to the wreck.

Coming to the last part of the question, we do not think that events that could constitute dangers to navigation (this would be the case for a wreck) would come within the meaning of “similar major incidents”, for those words are related to damage to the environment, and therefore the major incidents that are similar to fire and explosion are incidents that are of prejudice to the environment and not to the navigation.

Question:

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

Response:

We do not think so and are of the view that any attempt to widen the definition would endanger the survival of the Montreal Compromise and would give rise to unpredictable consequences and a great increase in litigation.

Question:

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Response:

The only change that in our opinion might be considered in case an amendment to the Salvage Convention (by way of a Protocol?) were deemed worthy of consideration (we suggest this would require very careful thoughts) is that referred to under paragraphs 1.2-1.4 above.

2. Article 5 in the Salvage Convention 1989 provides as follows:

“Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this
Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Response:

There is no provision in Italian law that prevents public authorities that perform or organise the performance of salvage operations to claim a salvage reward but to our knowledge this has never happened. The Italian Navy has always considered salvage services as services rendered for a public interest and never claimed any reward. There has been only an old case concerning a claim for salvage reward of an Admiral of the Italian Navy whose warship had rendered salvage services to a merchant vessel. His claim was rejected by the courts of first and second instance (Tribunal of Rome 6 June 1938, 1938 Dir. Mar. 324 and Court of Appeal of Rome 5 July 1939, 1939 Dir. Mar. 551) and finally by the Court of Cassation (with judgment of 17 May 1941, 1941 Dir. Mar. 362) on the ground that an officer of the Navy who with his vessel renders salvage services performs a public activity and is not entitled to any remuneration.

Question:

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Response:

We consider this provision to be appropriate and we are of the view that it should be left unaltered.

3. Article 11 in the Salvage Convention 1989 provides as follows:

Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

Question:

3.2 Has your country ratified the Salvage Convention 1989?

Response:

Italy has ratified the Convention on 14 July 1996.

Question:
3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

Response:

No.

Question:

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

Response:

Not applicable.

Question:

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

Response:

In our opinion that is neither necessary nor advisable. Article 11 is drafted in general terms and therefore would at any time be applied on the basis of the laws or the practice in force. If it were amended so to include a reference the IMO Guidelines, it would then be superseded if a different instrument were adopted, for example a convention.

4. Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:

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 salved 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.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Response:

There is no provision in this respect in Italian law. Italian jurisprudence has been generally of the view, under the 1910 Salvage Convention, that the owner of the salved vessel is bound to pay the whole of the salvage reward, and has a recourse action against the owners of the cargo. But that cannot be the case anymore under the Salvage Convention 1989.

Question:
4.3. Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Response:

Why for a containership? Is the specification suggested for a possible difficulty in identifying cargo property interests on a containership? If bills of lading are issued the problem should not arise otherwise the question may also extend to vessels carrying general cargo or to ro-ro ferries.

The practice is for the average adjusters to approach cargo insurers in order to obtain guarantees and for salvors not to release the vessel and cargo until security is obtained.

In any event, if it will be decided to change the present rule, that it should be done in respect of all vessels.

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

   “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 minimized 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 granted 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.”

Question:

5.2. Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).

Response:

We are concerned that a possible radical change of article 14 might give rise to a great many problems and that, if adopted, might give rise to diffomity, certain States adopting the Protocol and others keeping the original text. If really this provision has given rise to problems (we believe that the House of Lords is responsible for some of them) we would rather favour a simplified wording of that article, without adopting such a revolutionary alternative as that of an environmental award.

As regards the “environmental award”, the Italian MLA agrees with the comments made by its President in his paper “Places of Refuge and certain issues relating to salvage, financial security and authorities of the costal State” delivered at the XII Congress on Maritime Law-XX Anniversary of the Instituto Iberoamericano de Derecho Maritimo (Sevilla 13-16 November 2007) quoted below:

Probably because of the potential liability of salvors vis-à-vis Coastal States in case the casualty must be taken to a place of refuge, a proposal was recently made on behalf of the International Salvage Union to replace the special compensation of art. 14 of the Salvage Convention with what is described as an “environmental award” which is due in the same situations in which the special compensation is payable, but is due in addition to the reward payable under art. 13, apparently irrespective of whether or not the amount of the art. 13 reward is lower of the salvor’s expenses.

The “environmental award” thus becomes a second reward, payable by the shipowner only and, according to the proposal, becomes due irrespective of the salvage operations having prevented or minimized damage to the environment. If that happens, it will become only one of the criteria for the assessment of the environmental award.

It is thought that this proposal would disrupt the Montreal compromise, that was the condition for a consensus on the text of articles 13 and 14 of the Salvage Convention since it made possible the inclusion among the criteria for the assessment of the reward under art. 13, payable by the vessel and her cargo, whether dangerous or not, of the skill and efforts in preventing or minimizing damage to the environment and of the separate allowance to the salvor, when the art. 13 reward is insufficient to cover its costs, of the special compensation,
payable by the shipowner only. In fact under the new proposal the shipowner and its P&I Club would have to pay a much greater compensation, while at the same time the criterion under art. 13(1)(b) would disappear.

6. **Article 16 of the Salvage Convention 1989 provides as follows:**

   “Salvage of persons

   1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”

   2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”

**Question:**

6.2. Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

**Response:**

We are not so sure that under the 1910 Convention claims for life salvage should be made against the owners of the property salved. Article 9 of that Convention had in fact in its paragraph 2 a provision almost identical to that of article 16.2 of the 1989 Salvage Convention. In any event we are of the view that this provision is sound, and has an important moral justification: in fact the hope of a salvage reward may induce salvors to salve property rather than life and for the salvor salving lives and not property it may be quite a problem to recover something from the owners of the cargo, in particular when the owners of the cargo are many. In any event that would not be anymore a share of the salvage reward that has been paid or is payable to the salvors of the property, but rather an additional sum.

7. **Article 20 of the Salvage Convention 1989 provides as follows:**

   “Maritime lien

   1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

   2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

**Question:**

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

**Response:**
As previously stated, we are not of the opinion that article 14 should be radically changed, nor are we of the opinion to create any special lien under the 1989 Convention.

8. **Article 27 of the Salvage Convention 1989 provides as follows:**

   "Publication of arbitral awards

   States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

**Response:**

We do not think this to be required. We suggest that unnecessary changes to a Convention that has been very successful ought to be avoided. It should also be considered that although London is the centre of the shipping world and salvage companies operating internationally refer to arbitration in London, quite many salvage operations are made by local tug companies, most of them operating in ports. Such salvage companies either institute judicial proceedings before their Courts or, if the salved property agrees, local arbitration proceedings. It should therefore be kept in mind that an international convention must be tailored for all jurisdictions.

9. **General – Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

**Response:**

Our general opinion is that it is too early for a possible review of the 1989 Salvage Convention and that the Convention should be tested for a longer time before deciding whether any change might be convenient. So far a provision that in our opinion might deserve particular attention and a thorough exchange of views on possible improvements is article 14.

Another provision that ought to be the subject of consideration by the CMI is article 21

Pursuant to paragraph (1) the owner of each property salved is bound to provide security for the share of the reward due by it.

Pursuant to paragraph 2 the owner of the salved vessel has only the obligation to use his best endeavours to ensure that the owners of the cargo provide satisfactory security. If, for example, the owner of the vessel is also the carrier, it is likely that such best endeavours entail his obligation to refuse delivery of the cargo unless the owners thereof provide such satisfactory security. But it is unclear in what such best endeavours should consist in case he is not the carrier: the vessel may have been bareboat chartered.
and then time chartered and the carrier may the bareboat charterer or even the time charterer. In such cases the owner of the vessel has no control over the cargo. It is submitted that the only thing he can do is to intimate the bareboat charterer or the time charterer to refrain from delivering the cargo unless satisfactory security is provided. But the bareboat charterer or time charterer may not take proper action. What would be the position of the salvor in such case? Under the Convention he would have no claim against the owner if it will be found out that he did use its best endeavours. Nor would he under the Convention have any claim against the bareboat or time charterer. It is submitted that a better protection of the salvor should be ensured. One way of doing that would be to provide that the owner of the vessel has the obligation not to deliver the cargo or to cause that the cargo be not delivered unless satisfactory security is provided otherwise he would be bound to pay the entire salvage reward.

**Question:**

9.2. How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

**Response:**

The success of the 1989 Convention is also proved by a significant reduction of litigation.

Salvage cases decided by Italian Courts after the entry into force of the 1989 Salvage Convention (14th July 1996) and reported have been four:


1. Article 1 - (d), Definition

Question 1.2

Basically, we do not consider that those words should be deleted. But if there would be a proposal of any better wordings, we would be prepared to consider it.

Q 1.3

(Not applicable)

Q 1.4

There have been no reported cases in Japan.

Q 1.4.1

(Not applicable)

Q 1.4.2

We do not consider that it would likely create difficulties of interpretation.

Q 1.4.3

(Not applicable)

Q 1.5

Whether those incidents would be covered by this Article or not, would depend upon the nature of each incident.
Q 1.5.1

We do not consider that this definition should be widened.

Q 1.5.2

(Not applicable)

2. Article 5, Salvage operation controlled by public authorities

Q 2.1

There is no domestic law in Japan which would allow public authorities to claim salvage.

Q 2.2

We do not consider that it would improve the position of the public authorities. We consider that the present Article is appropriate as it is.

3. Article 11, Co-operation

Q 3.2

Japan has not ratified this Convention.

Q 3.2.1

(Not applicable)

Q 3.2.2

(Not applicable)

Q 3.2.3

We do not consider that this Article should be amended to refer to the IMO Guidelines. These Guidelines cover the issues mainly in the field of public law, and therefore, they do not fit with the nature of this Convention.
4. Article 13, Criteria for fixing the reward

Q 4.2

We have no such provisions in Japanese law.

Q 4.3

We do not think it would be appropriate to make such provisions.

5. Article 14, Special Compensation

Q 5.2

We do not consider it necessary to examine the possible amendment with respect to Article 14.

We do not consider that an environmental award should be created. If we would create such an award, the assessment of the amount of the award would likely to become arbitrary and subjective. This would also result in damaging the fundamental structure of the Salvage Convention 1989, which is mainly based upon the property salvage.

The principal purpose of the Salvage operation is to assist the vessel or any other property in danger, as referred to in Article 1(a), and therefore, consideration for the protection of the environment should be, and has successfully been made through payment of special compensation (Article 14) associated with this Salvage operation. Protection of the environment should not be a matter for an independent salvage claim.

This understanding was shared by almost all nations when the Salvage Convention 1989 was made, and it has not been changed yet.

6. Article 16, Salvage of persons

Q 6.2

We do not consider that this Article should be amended.

7. Article 20, Maritime Lien
Q 7.1
(Not applicable)

8. Article 27, Publication of arbitral awards

Q 8.2
We do not consider that this Article should be amended.

9. General Question:

Q 9.1
We are not aware of any other issues for amendment.

Q 9.2
There is no such a case.

The Japanese Maritime Law Association
Salvage Convention Subcommittee

Noboru Kobayashi, Chairman

Toshiaki Iguchi, Reporter
COMITE MARITIME INTERNATIONAL
SALVAGE CONVENTION
QUESTIONNAIRE TO MEMBER ASSOCIATIONS

The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. Article 1 in the Salvage Convention 1989 contains the following definition:

"For the purpose of this Convention:

(d) Damage to the environment being 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. " (Emphasis added)

Comments

1.1 The International Convention on Civil Liability for Oil Pollution Damage, 1992, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

Article II of that Convention also provides:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

(ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken" (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)

Article II provides as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(l) in the territory, including the territorial sea, of a State Party, and
in the Exclusive Economic Zone of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured.

(b) to preventive measures, wherever taken, to prevent or minimise such damage.

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

It is our view the environment remains "the environment" irrespective of its distance from the coastline and therefore maintain that all stretches of sea should be protected and covered by the Convention.

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "wherever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

In light of our reply to question 1.2 above, we would be of the view that the words "wherever such may occur" replace the current wording in Article 1(d) which reads "in coastal or inland waters or areas adjacent thereto".

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Malta is not a party to the Salvage Convention 1989
1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e., do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Malta is not a party to the Salvage Convention 1989 however if it was, we suspect that the Courts would interpret the clause restrictively and the said clause would probably not be deemed to cover the scenario being presented. Consequently we would recommend the introduction of a specific reference to such an occurrence.

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Malta is not a party to the Salvage Convention 1989. That said Public Authorities such as for instance our Armed Forces can pursue and have pursued claims for salvage in Malta.

Furthermore the provisions of our Merchant Shipping Act, Chapter 234 of the laws of Malta, regulating salvage, do not prohibit public authorities from advancing a salvage claim since no distinction is made between different categories of salvors.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation
between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Comment
3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:
3.2 Has your country ratified the Salvage Convention 1989?

No.

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

No.

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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."
Comment

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

No since Malta is not a party to the Salvage Convention 1989

4.3 Do you think it would be appropriate to specify in this Article that in container ship cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Whilst it would certainly make things easier and less cumbersome, we have doubts as to how acceptable this would be to owners and their insurers.

5. Article 14 in the Salvage Convention 1989 provides as follows:

"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 minimized 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 granted 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."

Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(c), to article 13, article 15 and article 20).

Yes we are of the view that consideration should be given to amending article 14 in order to create an entitlement to an environmental award.

Furthermore the Malta Maritime Law Association (MMLA) is in favour of investigations being conducted in exploring the subject of environmental salvage. In fact the Salvage Subcommittee of the MMLA on the 26th September 2008 organised a seminar on the topic of environmental salvage that was precisely intended to highlight the importance of the need to explore the concept of environmental salvage. The conference was chaired by Dr Ann Fenech chairman of the subcommittee and addressed by Mr Arnold Witte, President of the ISU, Mr Mike Lacey Secretary General of the ISU, captains Nick Sloane and Hendrick land from Svitzer Salvage, Mr Archie Bishop, legal advisor to the ISU and Mr Mario Mifsud, former senior manager of the policy and legislative development at the MMA.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."
Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Yes we would be in favour of introducing this amendment.

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

It is to be noted that under our law one does not find the notion of "statutory liens". Our Merchant Shipping Act however in its article 50 lists a number of claims which give rise to Special Privileges which essentially survive the voluntary sale of the vessel for a period of one year. Article 50 also provides the order of ranking in the eventuality that there are not enough funds to cover all the claims.

In so far as Malta is concerned, the current wording of the provision in our Merchant Shipping Act creating a special privilege in favour of salvors is sufficiently wide to cover a salvage award arising in the circumstances contemplated in article 14 of the Salvage Convention. Furthermore should article 14 be amended to introduce the possibility of a salvor claiming an environmental award, the current wording of our Merchant Shipping Act is likewise sufficiently wide to allow for the creation of a Special Privilege in favour of the salvor in case of an environmental award being due to the salvor.

Nonetheless we wish to advance an observation in light of the wording of Article 20 of the Salvage Convention in the sense that should article 20 be amended to create a statutory lien against the ship in favour of the salvor in case of an environmental award, would this not create a situation where the Salvage Convention would give rise specifically to a statutory lien in relation to a claim for an environmental award while not granting such a lien in all other salvage situations not giving rise to an environmental award?
8. **Article 27 of the Salvage Convention 1989 provides as follows:**

"Publication of arbitral awards

*States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.*"

**Comment**

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Yes we would agree that article 27 be amended to ensure that awards are published as a matter of course unless any party to the arbitration objects. We feel that there is much to gain by way of valuable information from access to such awards.

9. **General - Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

No.

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

None since Malta is not a party to the Salvage Convention.

November 2010
The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. Article 1 in the Salvage Convention 1989 contains the following definition:

   "For the purpose of this Convention:

   (d) Damage to the environment being 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." (Emphasis added)

Comments

1.1 The International Convention on Civil Liability for Oil Pollution Damage, 1992, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

   "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

Article II of that Convention also provides:

   "This Convention shall apply exclusively:

   (a) to pollution damage caused:

   (i) in the territory, including the territorial sea, of a Contracting State, and

   (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

   (b) to preventive measures, wherever taken, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

“(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;” (emphasis added)

Article III of that Convention provides as follows:

“This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken” (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines “Pollution damage” as meaning:

“(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;” (Emphasis added)

Article II provides as follows:

“This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and
(ii) **in the Exclusive Economic Zone** of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage.” (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can take place anywhere within the exclusive economic zone.

**Question:**

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “wherever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

**Answer:**

Our opinion is that the words “coastal and inland waters or areas adjacent thereto” are not precise enough, therefore we suggest to use the alternatives mentioned in 1.3, therefore reading “… in territorial waters and in the exclusive economic zone of any state, established in accordance with the International Law …”.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

**Answer:**

There has not been any case in which the term “substantial” has been defined nor interpreted. Although there may be problems in the interpretation of the term “substantial” we do not consider that this term should be deleted, as it would change the sense of this article. The term “substantial” should remain.
1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Answer:

We consider that loss of containers at sea would be considered in our jurisdiction to fall under the “similar major incidents" term. In principle, we do not oppose to widen the definition.

2. **Article 5 in the Salvage Convention 1989 provides as follows:**

"Salvage operations controlled by public authorities

1. *This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.*

2. *Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.*

3. *The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

**Question:**

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

**Answer:**

Yes, Public Authorities can pursue claims for salvage in our jurisdiction.

3. **Article 11 in the Salvage Convention 1989 provides as follows:**

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."
Comment

3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

3.2 Has your country ratified the Salvage Convention 1989?

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

Answer:

Mexico has ratified the Salvage Convention 1989. The Maritime Navigation and Commerce Act has enacted the contents of this Convention, including Article 11.

Article 166 (First Paragraph) of the Maritime Navigation and Commerce Act reads:

Árticulo 166.- Las operaciones de búsqueda, rescate y salvamento, así como las responsabilidades, derechos y obligaciones de las partes, se regirán respectivamente por los convenios internacionales en la materia.

Which free translation reads: Article 166.- The operations of search, rescue and salvage, as well as the responsibilities, rights and obligations of the parties, will be ruled according to the international conventions of the subject matter in force.

The only Salvage Convention in force in Mexico now is the 1989 Convention.

We consider that this article should not be amended.

4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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 salved 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."

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Comment

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Answer:

The only provision in our local jurisdiction refers to the provisions of the International Salvage Convention 1989 (see article 166 transcribed above).

Mexico strongly opposes to specify that in case of containerships or any other type if ship, the vessel be the only responsible for the payment of claims, regardless of a right of recourse or not.

5. Article 14 in the Salvage Convention 1989 provides as follows:

"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 minimized 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 granted 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."

Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

Answer:

Mexico does not consider that article 14 be amended as suggested.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."
Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Answer:

Mexico favours to amend the wording to ensure that any life salvage claim be made directly against property.

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Answer:

Article 20 should remain as it is now.

8. Article 27 of the Salvage Convention 1989 provides as follows:

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."
Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Answer:

Mexico agrees with the LSSA position that the awards should be published as a matter of course unless any party to the arbitration objects.

9. General - Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Answer:

Six cases have been decided in our jurisdiction under this Convention.

June 2010
1. Article 1 Salvage Convention 1989

1.2. Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

Netherlands: No. The Commissie Scheepsongeval (Ships’ Casualty Committee) of the Dutch MLA is of the opinion that there needs to be a limit to the geographical scope of the Salvage Convention which is based on the principles of public international law adopted since the Torrey Canyon incident. This means that the rules may only apply where the areas under the sovereignty or functional jurisdiction of the coastal state are likely to be affected.

1.3. Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

Netherlands: Yes. The current wording is vague, which may be due to a lack of consensus at the time of the preparation and the conclusion of the Salvage Convention 1989 regarding coastal state jurisdiction: the 1982 Law of the Sea Convention (Montego-Bay) had only recently been concluded and had not yet received worldwide approval. The Ships’ Casualty Committee of the Dutch MLA is of the opinion that the concept of Exclusive Economic Zone is sufficiently defined and appropriate to replace the wording ‘in coastal or inland waters or areas adjacent thereto’.

1.4. Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

Netherlands: We are not aware of any such case in our jurisdiction.

1.4.1. If so, could you provide a copy of the decision?

Netherlands: Not applicable.

1.4.2. If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

Netherlands: It is a vague term which indeed need to be interpreted by the courts. It serves to filter out bagatelle cases and should thus remain in place.

1.4.3. If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Netherlands: No.
1.5. *Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?*

Netherlands: It is submitted that ‘or similar major incidents’ seems to refer in a "such like" manner to the words ‘pollution, contamination, fire, explosion’. Article 1(d), however, requires ‘substantial physical damage to human health or to marine life’. In our view a loss of containers which do not pose a threat to the environment (within the meaning of Article 14) as such (e.g. where there are no hazardous or noxious contents), but merely pose a navigational hazard, would not come under the definition of Article 1(d), but only under Article 1(a).

1.5.1. *If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?*

Netherlands: No. A floating container is not an environmental hazard, for which Article 1(d) and Article 14 were introduced.

1.5.2. *If so, can you suggest any wording that you think might be appropriate?*

Netherlands: Not applicable

2. *Article 5 Salvage Convention 1989*

2.2. *Can public authorities pursue claims for salvage in your jurisdiction?*

Netherlands: Yes, unless the salvage consists of fire fighting by the official fire departments regulated by the Brandweerwet 1985 (Fire Fighting Act 1985) which rules out the recovery of fire fighting costs (Hoge Raad 11 December 1992, Schip & Schade 1993, 35 ‘Rize K’). It is furthermore suggested in case law that competition law may forbid a public authority to be involved in salvage activities (for free) in direct competition with private companies offering similar services (against payment).

2.3. *If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?*

Netherlands: Under the current circumstances we do not see a need for amendment.

3. *Article 11 Salvage Convention 1989*

3.2. *Has your country ratified the Salvage Convention 1989?*

Netherlands: Yes.

3.2.1. *If so, has it enacted any legislation or regulation to give effect to Article 11?*

Netherlands: We are not aware of any such legislation or regulation.

3.2.2. *If so, please supply a copy, if possible with a translation into English or French.*

Netherlands: Not applicable.

3.2.3. *Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.*
4. **Article 13 Salvage Convention 1989**

4.2. *Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?*

Netherlands: Yes. Liability for the salvage reward is channelled to the shipowner under Article 8:563 paragraph 3 of the Dutch Civil Code:\(^1\):

“For salvage to a vessel and the things on board, the remuneration shall be due exclusively by the owner of the vessel, on the understanding that the shipowner will have a right of recourse against other interested parties for their respective share. For salvage rendered to other things, the remuneration shall be due by the person entitled thereto."

Article 8:565 Dutch Civil Code provides further:

“1. No remuneration shall be due by any person whose life was saved.
2. Notwithstanding the provision of paragraph 1, remuneration shall be due by the shipowner for the separate salvage of persons on board of the vessel. (…)”

4.3. *Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?*

Netherlands: The Ships’ Casualty Committee of the Dutch MLA supports the proposed amendment which is in line with Dutch law. It may eliminate difficult questions of private international law/conflict of laws in respect of agency (whether or not agency of necessity), negotiorum gestio/non-contractual salvage and contractual salvage in determining who may or who may not be considered the debtor of a salvage reward. However, we do not understand why it is proposed that the amendment only applies to containerships. We also foresee difficulties with regard to the proposed limiting the proposed amendment to containerships only.

5. **Article 14 Salvage Convention 1989**

5.2. *Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).*

Netherlands: No. The Ships’ Casualty Committee of the Dutch MLA is of the view that there is no need to investigate the possibilities for an environmental award. However, it appears that Article 14 Salvage Convention 1989 does not (always) satisfy the needs of the industry. The Ships’ Casualty Committee of the Dutch MLA would therefore welcome an investigation to amendment Article 14 along the lines of

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\(^1\) Translations from H. Warendorf et al., *The Civil Code of the Netherlands*, Deventer: Kluwer 2009
6. **Article 16 Salvage Convention 1989**

6.2. *Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?*

Netherlands: It is submitted that the words ‘Prior to the Convention’ in paragraph 6.1 of the Questionnaire must refer to the Brussels Salvage Convention 1910. It is our view that Article 9 Brussels Salvage Convention 1910 contained wording almost identical to that of Article 16 Salvage Convention 1989.

Both provisions State Parties to provide for specific rules of national law.

Article 8:565 Dutch Civil Code provides:

“1. No remuneration shall be due by any person whose life was saved.
2. Notwithstanding the provision of paragraph 1, remuneration shall be due by the shipowner for the separate salvage of persons on board of the vessel.
3. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”

We are unaware of any problems with claims for a fair share of the salvage reward being directed against the salvor. Such problems are also not expected in the Netherlands as a claim for life salvage is due from the shipowner and not from the salvor pursuant to Dutch law.

The Ships’ Casualty Committee of the Dutch MLA supports the proposed amendment.

7. **Article 20 Salvage Convention 1989**

7.2. *If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?*

Netherlands: No. Issues of maritime or statutory liens should be left to the Mortgages and Liens Conventions (1926, 1967 and 1993) or to national law.

Article 8:211 Dutch Civil Code provides:

“The following claims have a privilege on a sea-going vessel in priority to all other claims to which thors or any other law grants a privilege, except Article 210:

(...)

(c.) The claims for salvage as well as for the contribution of the vessel to general average.

(...)

It appears that the wording ‘claims for salvage’ refers to the salvage reward only, and not to the special compensation of Article 14. It has been suggested to amend the provision of Dutch national law so as to include the special compensation (Flach, *Scheepsvoorrechten*, Deventer: Kluwer 2001), but this has not yet been done.
8. Article 27 Salvage Convention 1989

8.2. Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Netherlands: The current situation in the Netherlands is that decisions in salvage cases by the courts are of course made available for publication in *Schip & Schade* whereas arbitration awards are confidential in principle. However, most arbitration rules of Dutch arbitration institutes have for a long time provided for a similar rule as now apparently introduced in the UK:

Tamara ([www.tamara-arbitration.nl](http://www.tamara-arbitration.nl))

"XII Publication of award
TAMARA has the power to have an award published without the parties’ names or any information that could disclose the parties’ identities, unless a party has objected to TAMARA in writing to that publication within one month of receiving the award.

Netherlands Arbitration Institute ([www.nai-nl.org](http://www.nai-nl.org))

"Unless a party communicates in writing to the Administrator his objections thereto within one month after receipt of the award, the NAI shall be authorised to have the award published without mentioning the names of the parties and deleting any further details that might disclose the identity of the parties."

While the Dutch MLA understands the possible frustration with the small amount of arbitration awards being published, we see no basis for a rule in an amended Salvage Convention which would interfere with the basic right of parties to a possible dispute to decide upon their mode of dispute resolution, and whether or not these parties may want to choose for confidential arbitration.

9. General

9.2. Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

Netherlands: No

9.3. How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Netherlands: The precise number of cases is unknown. Only seven cases have been reported in *Schip & Schade* but it is fair to say that the vast majority of cases have not been published.

Rotterdam, 16 August 2010

Nederlandse Vereniging voor Zee- en Vervoersrecht
Commissie Scheepsongevallen

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E.J.L. Bulthuis
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COMITE MARITIME INTERNATIONAL

SALVAGE CONVENTION

RESPONSE OF THE NIGERIAN MARITIME LAW ASSOCIATION
TO THE QUESTIONNAIRE TO MEMBER ASSOCIATIONS

1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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” (Emphasis added);

Question:

1.2 Do you consider that the words emphasized above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted.

1.3 Alternatively do you think words such as those used in the other Convention which have been quoted above (e.g. “where ever such may occur”/ “exclusive economic zone” / “territorial sea”) should replace those words in Article 1(d) or the Salvage Convention?

Response:

It is the view of the Nigerian MLA that with respect to question 1.2 above the highlighted words “coastal or inland waters or areas adjacent thereto”: be deleted and replaced with the words “inland waters or exclusive economic zone”.

It is the view of the Nigerian MLA that with respect to question 1.3 above the highlighted words “where ever such may occur”/ “exclusive economic zone” / “territorial sea” should replace those words in Article 1(d) of the Salvage Convention.

It is the view of the Nigerian MLA that with respect to question 1.3 above the highlighted words “where ever such may occur”/ “exclusive economic zone” / “territorial sea” should replace those words in Article 1(d) of the Salvage Convention.
We agree that the suggested amendments in question 1.3 would also adequately replace the current wording in Article 1 (d) subject to our suggested changes above.

It must be pointed out that section 387(1) of the Nigerian Merchant Shipping Act, 2007 (MSA 2007) has domesticated the International Convention on Salvage, 1989 and Section 399(1) MSA 2007 and provides that:

“The provision of this part of this Act shall not apply to:

a) Salvage operation which takes place in inland waters of Nigeria and in which all the vessels involved are of inland navigation and

b) a salvage operation which takes place in inland waters of Nigeria and in which no vessel is involved;

c) fixed or floating platforms or to mobile offshore drilling units when the platforms or units are on location engage in the exploitation or production of seabed mineral resources.

However, it was agreed that in any review of the MSA 2007, the maritime regulatory agency Nigerian Maritime Administration and Safety Agency (NIMASA) should be urged to note the above provision of the law as it relates to Salvage operations and to consider amendment to include “inland waters” in Salvage operation.

**Question:**

1.4. Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

**Response**
There is no Nigerian reported case in which the word “substantial” as used in the context that has been interpreted by the court.

**Question:**

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

**Response**

We agree that the word “substantial” as contained in Article 1(d) should be retained as it would not create difficulties in interpretation.

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

**Response:**

We are of the view that no other word or group of words could better identify what is intended by the definition.

**Question:**

1.5 Do you think that there where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e. do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?
1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Response:

In responding to questions 1.5, 1.5.1 and 1.5.2, we think that the definition should be widened.

2. Article 5 of the Salvage Convention 1989, provides as follows:

“Salvage operation controlled by public authorities”

(1.) This Convention shall not affect any provision of national law or any international convention relating to salvage operation by or under the control of public authorities.

(2.) Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of Salvage operations.

(3.) The extent to which a public authority under a duty to perform salvage operation may avail itself of the rights and remedies provided for in this convention shall be determined by the law of the state where such authority is situated.”

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Response:

Section 395(4) of MSA 2007, provides that “where salvage services are rendered by or on behalf of the Federal Government, the Government shall be entitled to claim salvage in respect of those services to the same extent as any other salvor and shall have the
same right and remedies in respect of the services as any other salvor.”

Question:

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Response:

The provision is appropriate and it should be left unaltered.

3. Article 11 of the Salvage Convention 1989 provides as follows:

“Co – Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

The CMI observe that the International Working Group on Places of Refuge asked questions in its first questionnaire in relation to the above provision. In order to assist the IWG on the Salvage Convention they have repeated the first three below under 3.2, 3.2.1, 3.2.2 and 3.2.3

Question:

3.2 Has your Country ratified the Salvage Convention 1989?

Response:
Yes, Nigeria has ratified the Salvage Convention 1989, which has been domesticated by Section 387 of the Merchant Shipping Act, 2007.

**Question:**

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

**Response:**

No legislation or regulation has been enacted to give effect to Article 11 though Section 400(1) MSA 2007 empowers the Honourable Minister of Transport to make regulations with respect to Salvage operations and related matters.

Section 400(1) of Merchant Shipping Act 2007 states as follows:

Any regulation made under this section may provide for:

a) Enforcing the duty of every master to render assistance to persons in danger at sea;

b) Steps to be taken to protect the coastline from pollution following maritime casualty;

c) Admittance to Nigerian ports of vessels in distress;

d) Facilities to be provided to salvors and the mode and fees of such facilities;

e) Co-operation between salvors and other interested parties.

**Question:**

3.2.2 Do you think this Article should be amended to refer to the IMO Guidelines on places of Refuge SEC/LA (Resolution A. 949(23) adopted in December 2003.

**Response**

It is not necessary to do so.
4. Article 13 paragraph 2 of the Salvage Convention 1989

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13, paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Response:

There is no such provision in Nigerian Law. Section 391(2) of the MSA adopted the first two lines of Article 13 of the Salvage Convention 1989.

Question:

4.3 Do you think it would be appropriate to specify in his Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Response

We are of the view that it would be more appropriate to specify in the Article that in containership cases, the vessel only is responsible for the payment of claims.

5. Article 14 in the Salvage Convention 1989
Question:

5.2 Do you consider that consideration should be given to amending Article 14 in order to create an entitlement to an environmental award? (it is recognized that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognized that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 15 and article 20)

Response

Yes, but it is important to know who pays and how it will be calculated. Section.392 of MSA 2007, has adopted Article 14 of the Salvage Convention 1989. Section 392(1) of the MSA and Article 14(1) provide that the owner of the vessel is the party that will pay compensation but there is no provision on calculation.

6. Article 16 of the Salvage Convention 1989

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Response:

This provision has already been captured under S.394 of the MSA 2007, which recognizes the fact that the property salvor may not be involved in salving lives and may be financially over burdened by any claims made by the life salvor on his claims.

7. Article 20 of the Salvage Convention 1989

Question:
7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Response

Yes, so that if the salvor fails to claim on the security tendered for any reason whatsoever, the salvor can fall back on the statutory lien. Section 395 (1) & (2) of the MSA adopted Article 20 of the Salvage Convention, 1989.

8. Article 27 of the Salvage Convention 1989

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Response

Yes, as long as there is a clause that provides that both parties must give their consent to the award being published.

9. General

Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

Response

Not currently

Question
9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Response

None yet, to the best of our knowledge
INTRODUCTION TO THE CMI QUESTIONNAIRE ON SALVAGE

The Norwegian Maritime Law Association (NMLA) wants to give some general remarks in the relation to questionnaire. The reason for this is that we are a little bit uncertain about what is the purpose of this exercise.

As we know the 1989 Salvage Convention is based on the principle of no-cure-no pay. This means that an award can only be claimed if the salvage is successful. In this respect the convention gives the salver an incentive. It seems to be a common understanding that the convention is a compromise between the ship-owner and the salver. An important part of this was the introduction of special compensation in case of environmental damage.

As a supplement to the Convention as such in 1999 SCOPIC was introduced to be used in conjunction with Lloyd’s Open Form of Salvage Agreement. The tariff rates in SCOPIC was revised in 2007. On Lloyd’s home page the revision is referred as following:

The new rates, agreed by the International Salvage Union and the International Group of P&I Clubs and endorsed by property underwriters and owners, took effect on 1 July 2007 and will continue until 31 December 2010. The new tariff will apply to LOF Agreements entered into after 1 July 2007.

Under the new tariff arrangements, SCOPIC rates for tugs and other craft have increased by 25%. Rates for Salver’s own portable salvage equipment have increased by 15%, and rates for personnel have increased by 5%, following an earlier increase of 10% in this area, introduced with effect from 1 January 2006.

The SCOPIC Clause has further been amended by incorporating Article 18 of the 1989 Salvage Convention into the Clause.

It is well known that International Salvage Union (ISU) in many years have been advocating the need of revising the 1989 Salvage Convention and also related conventions such as CLC. NMLA is by no means convinced that there is a compelling need (compelling need is requirement issued by IMO Assembly which have to be in place before a revision process can be started) for a revision of the 1989 Salvage Convention. This is due to following circumstances:

1) It is a large number of contracting states all over the world

2) The convention is quite new

3) The need for flexibility and rapid changes is taken care of in LOF/SCOPIC

4) Still the SCOPIC is not invoked by contractors in many salvage operations – this shows that many contractors are satisfied with the general provisions in 1989 Salvage Convention/LOF

5) Revision of conventions is lengthy process where the outcome always is very hard to predict.

On this basic we are questioning what the purpose of this CMI project is.
Taking into consideration the above introductory comments, the Norwegian MLA will nevertheless provide some brief comments to the questionnaire.

**Salvage Convention 1989 Questionnaire**

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

   “For the purpose of this Convention:

   *(d) Damage to the environment being 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.*” (Emphasis added)

1.2 **Do you consider that the words emphasized above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?**

   The defined term is used in connection with the obligations of the salvor and to delimit the scope of pollution prevention measures relevant to the rule on special compensation.

   In respect of the duties of the salvor, the intention can hardly be to limit the scope of general duties that may exist to prevent pollution, even if this duty should extend to, e.g., the prevention of pollution at the high seas and the prevention of pollution by poisonous gases that may cause harm far from the coastal or inland waters. A deletion of the words would make it clear that the salvor should adhere also to such general duties to prevent pollution, and that this, if he so does, should be taken into consideration when the salvage award is fixed under article 13.

   In our view, it would be worth considering extending the rule for special compensation accordingly. If there is a duty of the salvor under general anti-pollution legislation to prevent damage to human health or to marine life or resources even if not in coastal or inland waters or areas adjacent thereto, it seems reasonable that the rules for special compensation also should apply.

   In the Norwegian implementation legislation, the duty for the damage to the environment relevant for the duties of the salvor, the fixing of salvage rewards and special compensation is already somewhat extended from the narrow scope of the Convention. This is not a priority issue.

   In the same vein, we mention that it is difficult to justify that a salvor only should be obliged to prevent environmental damage to “marine life or resources,” and apparently not to non-marine resources.
1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1 (d) of the Salvage Convention?

While it does seem appropriate to widen the scope of damage to the environment relevant to salvage, it is not easy to see why the scope should be defined by reference to the zones of enforcement jurisdiction on public international law. The alternative “where ever such may occur” is therefore preferred. However, it would in our view not seem to be necessary to amend the Convention on this point separately before the Convention otherwise is due to be revised.

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1 (d) of the Salvage Convention), as used in that definition, has been interpreted?

No

1.4.1 If so, could you please provide a copy of this decision?

N/A

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

No. The Norwegian Courts are well accustomed to applying terms such as “major”, “substantial” etc when interpreting Conventions, Acts or other regulations. The word “substantial” is thus unlikely to create any special difficulties of interpretation.

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e. do you think it would be held in your jurisdiction to come within the meaning of the words “or similar major incidents”)?

Yes. The definition in Article 1(d), as incorporated into the NMC, has been criticized for being vague. However, we would think that a Norwegian court would find that such dangers to navigation as mentioned in the example would be held to be covered by the definition if the dangers to the navigation constitute a risk of substantial physical damage.

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

From a Norwegian law point of view the current wording is satisfactory, and gives the courts the necessary room for interpretation.

1.5.2 If so, can you suggest any wording that you think might be appropriate?

N/A

2. Article 5 in the Salvage Convention 1989 provides as follows:
“Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

Yes, in principle, public authorities are entitled to claim salvage. However, a public salvor performing services as part of their duty prescribed by law will most probably only be entitled to claim salvage if their services have reached beyond their “obligations” as prescribed by law. If the relevant public authorities are carrying out their primary task during the salvage operation, e.g. fire-extinguishing performed by the public fire force, the public authorities will as a general rule not be entitled to claim salvage. However, if the public authority/servants take part in a salvage operation and the nature of the assistance stretches beyond their primary task prescribed by law, then the public authority may be entitled to bring a salvage claim.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

N/A

3. Article 11 in the Salvage Convention 1989 provides as follows:

Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

3.2 Has your country ratified the Salvage Convention 1989?


3.2.1 If so has it enacted any legislation or regulation to give effect to Article 11?
There are several provisions under Norwegian law that prescribe rules on how the authorities shall act in a salvage situation, however these provisions were already in force when the Salvage Convention was ratified by Norway.

3.2.2 If so, please supply a copy, if possible with translation into English or French.

N/A

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003?

No.

4. Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:

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 salved 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.

4.2. Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence for this paragraph?

Section 447 of the NMC prescribes that “the salvage reward is payable by the ship owner and the owners of other objects in proportion to the values salved for each of them”, which is in accordance with Article 13 paragraph 2 first sentence.

4.3. Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is liable for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares.

It would in our view not be necessary to amend the Convention on this point. In our view, Article 13 paragraph 2, gives the parties to the convention the necessary flexibility to deal with this as they think fit in national legislation, as Norway has done in the NMC Section 447.

5. Article 14 in the Salvage Convention 1989 provides as follows:

“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 minimized 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 granted 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.”

5.2. Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognized that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognized that if you answer this question in the affirmative, consequential changes may need to be made to definition of damage to the environment” in Article 1(d), to Article 13, Article 15 and Article 20.)

Alternativ 1: No. We refer to the points made in the introduction to our note.

Alternativ 2: The Norwegian NMA recognizes that this is a sensitive issue, and there are different opinions also within the Norwegian NMA. The so called “Montreal compromise” was no doubt an important achievement at the time it was reached. However, the Norwegian NMA has nevertheless reached the view that it is time to revisit this issue, and we would welcome a new discussion on “liability salvage”/”creation of an entitlement to an environmental award”.

Without going into any details, we would in particular emphasis that there has been an increased focus on the environmental side of casualties in the past years. Many
salvage operations are therefore more concerned with avoiding/minimizing damage to the environment than salvage of property. This should be reflected in Article 14 of the Convention, and the principles for remuneration should be drafted with a view to encourage professional salvors to maintain vessels and equipment dedicated to prevent environmental damage. Without expressing any views on the proposals from the ISU, we do find that these proposals may be a useful start for further discussion.

6. Article 16 of the Salvage Convention 1989 provides as follows:

“Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”

6.2 Do you consider that the wording of this article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

No. The present regulation is in our view sound, and should be left unchanged.

7. Article 20 of the Salvage Convention 1989 provides as follows:

“Maritime lien

1. Nothing in this Convention shall affect the salvor’s maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

No. Maritime liens should only be created by the International Convention on Maritime Liens and Mortgages and national law as set out in Article 20.

8. Article 27 of the Salvage Convention 1989 provides as follows:

“Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.”

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?
No. The present regulation does in our view seem to be satisfactory – and would not seem to be in conflict with the position achieved in London.

9. General – Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

N/A

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

The following cases have been decided under the 1989 Salvage Convention in Norway.

Norwegian Supreme Court: 2004-12-14. ND-2004-383 - NMC Section 441 (Question of whether the salved interest was in danger)

Agder Court of Appeal: 2004-11-12. ND-2004-546 (fixing of salvage award)

Gulating Court of Appeal: 2004-04-22. ND-2004-378 NMC Section 441 (Question of whether the salved interests were in danger)

Ofoten District Court: 2005-02-17. ND-2005-217 –NMC Section 445 (Question of whether the salvage operation was useful/necessary)
1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being 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.” (Emphasis added)

Question:

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?

Response:

In our opinion such wording is not accurate enough. This is particularly related to the “coastal waters”. The wording in our opinion shall be amended by reference to distance by land or the inclusion of the terms “territorial sea” and the EEZ or, if a state has not established the EEZ ... “in an area beyond and adjacent to the territorial sea of that state determined by that state in accordance with the international law and extending not more 200 n.m. from the baselines from which the breadth of its territorial sea is measured”.

By defining the exact distance from the land it will be clear what is the scope of application of the convention.

Question:

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (e.g. “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

Response:

In our opinion it is necessary to include in the provision 1(d) of the convention the wording “exclusive economic zone”/“territorial sea”. See response to question 1.2.
Question:

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

Response:

Until now, there are no such cases.

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

Response:

The above word can create difficulties of interpretation and can give rise to various legal arguments on several issues. This is particularly true in cases where damage is not huge but also not negligible. Would that be qualified as a substantial physical damage?

To sum up what is clear is that whether damage is substantial or not depends on the particular circumstances of each individual case. Therefore the word substantial can be interpreted in different ways by courts and doctrine even in cases where similar circumstances occur. As an example in the Mediterranean Sea the well known case is the CASTOR\(^1\) which illustrates the difficulty of such definition. In this case the vessel was refused to enter a place of refuge by seven states which feared a potential damage. However, it was found that damage was not substantial. An important tool in the interpretation of this term is represented by the practice of arbitral tribunals and nationals courts.

Question:

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Response:

We propose to delete the word “substantial” and "major". Even if we define the meaning of this two words, the ambiguities in their interpretation will not be solved.

Question:

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e. do you think it would be held in your

\(^1\) Castor appeal decision 22 April 2002
jurisdiction to come within the meaning of the words “or similar major incidents”?

The definition shall not be widened. In our opinion the relevant provision can apply only to cases where containers are afloat and salvors are attempting to remove them to prevent damage to the environment. However, we think that these are so specific cases that they shall not be included in the definition. It is possible, however, that the aforementioned case would fall under the definition “similar major incidents”.

Question:

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

Response:

In our opinion it shall not be widened.

Question:

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Response:

In our opinion the wording shall not be widened on to specific cases such as containers.

2. Article 5 in the Salvage Convention 1989 provides as follows:

“This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?
Response:

According to the Slovenian Maritime Code certain salvage provisions do not apply to military vessels. Claims by public authorities are not regulated and there is no relevant jurisprudence. However, there is nothing de iure to prevent public authorities from pursuing claims for salvage in the Republic of Slovenia.

Question:

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Response:

In our opinion this provision shall not be amended. It is up to each country to determine duties and rights of public authorities when performing salvage. However, it is fair to say that any additional unification of salvage law in this regard would definitely not hurt, perhaps by model rules.

3. Article 11 in the Salvage Convention 1989 provides as follows:

Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

Question:

3.2 Has your country ratified the Salvage Convention 1989?

Response:

Slovenia has ratified the Convention on 15 July, 2005.

Question:

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

Response:

No.
Question:

3.2.2. If so, please supply a copy, if possible with a translation into English or French.

Response:

Not applicable.

Question:

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.

Response:

In our opinion the purpose of Art. 11 is to provide a few suggestions to the state parties whenever regulating or deciding upon matters relating to salvage operations. The reference to the IMO Guidelines is not necessary but it could be an improvement of international salvage practice.

4. Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:

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 salved 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.

Question:

4.2. Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Response:

According to Article 8 of the Constitution of the Republic of Slovenia the national laws must be in accordance with generally accepted principles of international law and international agreements binding Slovenia. The ratified and published international conventions shall be applied directly by courts, i.e. they take precedence over national laws.

Therefore the first part of Article 13 providing that “Payment of the reward fixed according to paragraph one shall be made by all of the vessel and other property interests in proportion to their respective salved values” is applicable. The second part of the provision was not inserted in our jurisdiction. Salvage at
sea is also regulated by the Slovenian Maritime Code (Arts. 756-774) which does not include additional provisions regarding the payment of the reward on the basis of Art. 13. However, the salvor has a right for a direct action against the ships and/or cargo insurer with respect to an award and/or amount of special compensation.

**Question:**

4.3. Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

**Response:**

In our opinion the relevant provision if amended should be revised in order to applicable to all cargo ships and not only to containers vessels.

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

   “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 minimized 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 granted 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.”

Question:

5.2. Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in article 1(d), to article 13, article 15 and article 20).

Response:

In practice the claim of a salvor for salvage remuneration under article 13 is settled prior to the hearing of the claim for special compensation under article 14. This is often to avoid needless costs investigating the salved value. If article 14 is amended we are concerned that it might cause dissatisfaction and reluctance to shipowners and P&I Clubs. Due consideration should be given to salvors’ concerns regarding their increasing costs and priority should be given to environmental considerations. An “environmental award” could represent an additional incentive for salvors undertaking salvage operations in respect of vessels which by itself or its cargo threatened damage to the environment.

6. Article 16 of the Salvage Convention 1989 provides as follows:

“Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.”

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.”
Question:

6.2. Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Response:

If there is a salvor who has saved lives and that salvor also saves property, he will have a claim for salvage against the property. Another situation is where one salvor saves life and another saves property. In that case, the salvor of lives will have a claim but the convention implies that the claim of this “life salvor” will be against the salvor of the property and not against the property owner or the person salved. Thus, the life salvor will be entitled to a fair share of the payment awarded to the property salvor. The problem is that the property salvor might not be aware and would probably have no control over the life salvor’s activities. When the property salvor claims salvage award against the property, he has to take into consideration his future contribution to the human life salvor”, so he will ask for more.

In general, life salvage is tackled by the 1989 Salvage Convention which in Article 10, imposes a duty on every master to render assistance to any person in danger of being lost at sea. The second states that every state party has to take appropriate measures to enforce this provision. For all this reasons this article shall not be amended.

7. Article 20 of the Salvage Convention 1989 provides as follows:

“Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Response:

Article 14 should not be amended, therefore there is no need to create any specific maritime lien.
8. **Article 27 of the Salvage Convention 1989 provides as follows:**

   “Publication of arbitral awards
   
   States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.”

**Question:**

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

**Response:**

Article 27 shall not be amended as it reflects the position of Llyods Salvage Group only. The Convention itself should reflect arbitration proceedings which are established through arbitration practice all states parties.

9. **General – Question:**

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

**Response:**

We have not additional suggestions at this stage.

**Question:**

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

**Response:**

None. The main reason is most likely the fact that Slovenia has about 47 kilometers of cost only.

See:


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 salved 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 salved 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 salver 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.
1.2 It is the view of the Swedish Maritime Law Association that the principles being the basis for this Convention shall apply also for “coastal or inland waters or areas adjacent thereto“, hence no deletion.

1.3 No, but the notion of the high seas should apply beyond the Exclusive Economic Zone (EEZ), or if such is not established in accordance with international law, not extend more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured, which would be in line with other relevant conventions such as the CLC, HNS and Bunker.

1.4 No such cases are reported.

1.4.1 Not applicable.

1.4.2 Yes, that is likely to be the case bearing in mind the difficulty in defining what a “substantial damage“ would be.

Since no distinction is made between substantial damage and non-substantial damage in the CLC, HNS or Bunker conventions, “substantial” should be deleted. This argument also applies to “major” in “similar major incidents”.

1.4.3 In view of what is stated under 1.4.2 here above, both “substantial” and “major” should be deleted.

1.5 No not necessarily would it come within the meaning of the words “or similar major incidents”. It would depend on the contents of the container(s) in question. We do not however believe in a widened definition in view of the efforts made to put this convention together.

1.5.1 Not applicable.

1.5.2 Not applicable.

2.1 Yes, public authorities can pursue claims for salvage.

2.2 In view of what has been stated under 2.1 here above, Article 5, paragraph 3 should remain as is.
3.2 Sweden ratified the Convention on December 19, 1995.

3.2.1 No, since this provision was not found meaningful to be incorporated in Swedish law and the subject matter of this provision is be covered by other applicable rules and regulations.

3.2.2 Not applicable.

3.2.3 No, the issues raised in Article 11, are better dealt with in a convention specifically dealing with these issues. The Swedish MLA already in its reply to the Additional Questionnaire concerning Places of Refuge doubted that mere guidelines would have the same effect as a convention and suggested that any future work should take the route of a convention.

4.2 Yes, such provision has been made in regards to the opening sentence only (the Swedish Maritime Code, Section 7). Payment of an award shall be made by the vessel owner and the property interests in proportion to their respective salved values.

4.3 We do not see any reason for distinguishing between a container vessel and other kinds of cargo vessels.

5.2 Creating an entitlement of an ”environmental award ” which would go beyond what was created under the 1989 Convention would give rise to a number of complex issues for which an investigation could be initiated.

6.2 This provision is acceptable and should be left unaltered. It appears also that Article 16.2 is just about the same as Article 9, paragraph 2 of the 1910 Salvage Convention, so no change was envisaged by the 1989 Convention.

7.1 No special lien should be created under the 1989 Convention. The outcome of an investigation referred to under 5.2 above may however lead to a different position.

8.2 No, publication of arbitral wards in salvage cases should be a matter for the parties thereto to decide.

9.1 It appears to be too early to consider amendments to the Salvage Convention 1989.

9.2 No salvage cases have been decided in Sweden under the 1989 Salvage Convention.
COMITE MARITIME INTERNATIONAL

SALVAGE CONVENTION 1989

BMLA RESPONSE

Introduction

The BMLA sets out below its answers to the Questionnaire in relation to the Salvage Convention 1989. To the extent that specific information and opinions have been sought, these have been provided where possible. The BMLA has also sought to highlight particular issues to which the CMI may wish to have regard in its deliberations.

It is important to point out that the membership of the BMLA represents a wide range of interests. In the event, therefore, there are some who fully support proposals for change and others who fundamentally oppose any changes being made to the Convention at this time. There is also a view that “environmental salvage” is one aspect of the wider consideration of the protection of the marine environment. However, in this event, consideration of other related liability and compensation Conventions would be necessary. Some are of the view that there is no justification for such a review.

To the extent that the BMLA has been able reach a consensus on the text of replies, this is reflected in this report. However, it should be understood that any such consensus represents compromise and does not derogate from the view held by some that any change is, in any event, unnecessary.

Question 1

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention (“in coastal or inland waters or areas adjacent thereto”) should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?
Answer

The BMLA is of the opinion that these issues are matters of policy. However, the BMLA would point out that the Convention, in its present form, will reflect the compromises and the balancing of interests made at the time of drafting. To change some provisions piecemeal, without regard to the whole, could upset that balance.

As a practical matter, the BMLA would note that in most cases effective salvage services will involve a ship being brought within territorial waters and/or services being terminated in territorial waters.

1.4 Have there been any reported cases in your jurisdiction in which the word “substantial” (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word “substantial” could create difficulties of interpretation?

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

Answer

There have been no reported cases in England and Wales in which the word “substantial” as used in Article 1(d) of the Salvage Convention has been interpreted.

However there have been a substantial number of decisions in LOF arbitrations in which the word “substantial” has been interpreted by LOF arbitrators. Because these awards and reasons are confidential full particulars cannot be given but a summary of a selected number of these cases is contained in Schedule 1 hereto. It will be noticed that many of the reasons for the awards refer to the case of R v. Monopolies and Mergers Commission ex. parte South Yorkshire Transport Limited [1993] 1 WLR 23 and the CMI report to the IMO of 6 April 1984 in the latter of which it was said “… the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage.”

Should the matter come before the English Courts it is possible that the Court would have made available to it a selection of LOF awards and reasons to assist it in its deliberations as was done for example on the issue of quantum in the “HAMTUN” [1999] 1 LLR 883 at 899-900.
Given the amount of arbitral consideration that the word “substantial” has already received the BMLA does not feel that another word or group of words could better identify what is intended by the definition.

1.5 Do you think that where an accident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (i.e. do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents").

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Answer

It is not possible to give a blanket answer to this question as each case must depend on its facts. But it seems unlikely that an incident that could give rise to dangers to navigation such as loss of containers at sea, in the absence of other dangers such as pollution (direct or indirect), explosion, contamination and fire, would be covered by the definition of “substantial” in Article 1(d) having in mind the words quoted in 1.4 above from the CMI report to the IMO of 6 April 1984 and the way in which the Court approached the interpretation of the word “substantial” in R v. Monopolies and Mergers Commission Ex-parte South Yorkshire Transport Limited (supra).

As to whether the definition should be widened this is a question of policy.

Question 2

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Answer

2.1 Article 5 of the Salvage Convention 1989 (“Salvage operations controlled by public authorities”) raises a number of questions of possible interpretation, which will not be considered here. The most obvious understanding of the current position in English law is that it applies to national or local bodies discharging functions for the benefit of the public and not for private profit. These include the Crown (i.e. “the Government”) and its Armed Forces, magistrates and other officials, the Receiver of Wreck, the Maritime and Coastguard Agency, other emergency services and at least some port and harbour authorities. Whether or not a public authority can pursue a claim for salvage depends on the nature of the service it is providing rather than simply on its status as a public authority. The general rule of English law is that a person or body that performs a pre-
existing duty to a casualty is not entitled to claim a salvage reward. In most situations in practice, therefore, a public authority will be discharging its public duty and so be unable to claim salvage. On the other hand, if it is not simply discharging its pre-existing public duty but is doing more than that, or doing something different, it may be able to claim salvage for such service as is rendered outside the scope of the normal performance of its public duties. National law may also make specific provision for specific circumstances. For example, UK law now allows fire brigades to make a charge for fire fighting services.

2.2 The traditional objection to awarding salvage to a public authority is that the incentive of earning a salvage reward should not be allowed to affect due performance of the pre-existing public duty. Therefore, this position would not be improved by relaxing the current rule. Nor is it necessary, since public authorities are at present generally able to claim salvage if they provide services outside the scope of their public duties. The question posed is somewhat different, since it does not ask whether the present law would be improved if Article 5.3 were deleted or amended (which it would not) but whether the position of public authorities would be improved if the paragraph were changed. On one view, the position of public authorities might be improved as they would have greater opportunity to earn salvage money. However, the current understanding is that their position would not be improved: their primary function is to discharge their public duties; they should not be encouraged to risk their public duties or property by engaging on salvage services for the sake of reward; and, as already stated, there is already the possibility of rendering and being rewarded for salvage services in those cases where they act beyond the scope of their public duties.

Question 3

3.2 Has your country ratified the Salvage Convention 1989?

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

Answer

The International Convention on Salvage 1989 was done at London on 28 April 1989 and entered into force on 14 July 1996. The UK ratified the Convention by depositing its instrument on 29 September 1994 and it came into force in the UK on 14 July 1996.

By Section 224 Merchant Shipping Act 1995 the Salvage Convention 1989 has the force of law in the UK. The provisions of the Convention are set out in Part 1 of Schedule 11 and the Convention has effect subject to the provisions of Part 2 of Schedule 11 of the Merchant Shipping Act 1995 which, inter alia,

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1 Fire Services Act, Section 3(4A)
• excludes the Convention from applying in the inland waters of the UK where all vessels involved are of inland navigation or to a salvage operation which takes place in inland waters in the UK and in which no vessel is involved;

• makes the Master of a vessel who fails to render assistance to a vessel and persons thereon (as he is obliged to under Article 10 of the Convention) criminally liable;

• applies the Convention subject to the "common understanding" that in fixing an award under Article 13 and in assessing special compensation under Article 14 the Court or arbitrator is under no duty to fix the award under Article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under Article 14;

• where the salved fund is totally or mostly destroyed and of little or no value the Secretary of State may, if he thinks fit, make payments to the salvor in respect of life salvage.

No legislation or regulation has been introduced specifically to give effect to Article 11 as such. However, indirectly a number of measures have been introduced which take into account the need for cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations. These include:

(a) The “ERIKA 2” Directive – The “ERIKA 2” Directive was issued on 27 June 2002 and it came into force throughout the EU in July 2003. Article 20 of the Directive said:

"Member States shall make necessary arrangements to ensure that ports are available on their territory which are capable of accommodating ships in distress. To this end, having consulted the parties concerned, they shall draw up plans specifying for each port concerned, the features of the area, the installations available, the operational and environmental constraints and the procedures linked to their possible use to accommodate ships in distress.

Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission of the measures taken in application of the preceding paragraph."

(b) The “ERIKA 3” Directive – The “ERIKA 3” Directive was issued on 23rd April 2009 and entered into force on 31st May 2009. The Directive provides for its implementation by Member States by 30th November 2010 – enquiries suggest it is yet to be implemented by the UK Government. The Directive amends Article 20 of the “ERIKA 2” Directive. The provisions of Article 20 a, b, c and d are attached as Schedule 2.

(c) The UK National Contingency Plan – Pursuant to its obligations under the Oil Pollution Preparedness Response and Cooperation Convention 1990 the UK Government published its National Contingency Plan to deal with causalities involving a threat of oil pollution in 1999.
Appendix H of the UK's National Contingency Plan has a section entitled "Shelter for Damaged Vessels". Part of the foreword to the section states:

"It has long been established that whenever possible the best way of avoiding continuing an extensive pollution from a marine casualty is to remove the cargo of oil from the damaged ship into a sound vessel. As long as oil remains on board a casualty, particularly in an exposed situation where subsequent hull damage is likely, the greater is the chance of substantial spillage. If a casualty can be removed to a sheltered place, the risk of spillage is lessened; an emergency cargo transfer operation can more safely be mounted, and counter-pollution resources can be more effectively deployed."

It is believed that twelve anchorages and ports have been earmarked (if required) for vessels in distress in UK waters and that the Maritime and Coastguard Agency has information on each such location including the maximum draft and length of vessels suitable for each particular location, the quality of the navigational access, the local facilities, environmental factors and in the case of anchorages, the quality of the shelter and holding ground. However this information is not in the public domain.

(d) The SOSREP: The Secretary of State's Representative's ("SOSREP") role was created in 1999 as part of the Government's response to Lord Donaldson's Review of Salvage and Intervention and their Command and Control. On behalf of the Secretary of State for the Department of Transport the SOSREP is tasked with the job of overseeing, controlling and, if necessary, intervening and exercising "ultimate command and control" acting in the overriding interest of the United Kingdom in salvage operations within UK waters involving vessels or fixed platforms where there is a significant risk of pollution. The first SOSREP was Robin Middleton who took up his position in October 1999 and he was succeeded by the current SOSREP, Hugh Shaw, in 2008. The Secretary of State's powers of intervention and direction are contained in a number of instruments including the Merchant Shipping Act 1995 as amended by the Merchant Shipping and Maritime Security Act of 1997 and the Dangerous Vessels Act of 1985. These gave powers to the Secretary of State or his duly authorised representative to intervene in any salvage situation or where there is a specific risk of pollution. With the introduction of the SOSREP one person was specifically identified to act as the Secretary of State's representative at all times who could not choose to ignore a substantial marine casualty situation in UK waters. In all cases where he is aware of a shipping casualty the SOSREP is deemed to have "adopted" and be "tacitly approving" every action and decision relating to a salvage whether he is actively intervening or not.

In September 2003 the SOSREP gained new powers when the Marine Safety Act 2003 replaced his previous powers of direction in section 100A-E and sections 137-141 of the Merchant Shipping Act 1995 with new consolidated powers. This extended the power of the Secretary of State so he can now issue directions to riparian owners of berths, wharfs and jetties to make their facilities available for use during a salvage or counter pollution operation where their use may assist in protecting the coastal environment.
In practice the SOSREP tries to cooperate with salvors in salvage situations in UK waters.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003?

Answer

The BMLA has some reservations at the prospect of incorporating the IMO Guidelines on Places of Refuge (the “Guidelines”). In particular, the BMLA notes that guidelines are, by nature, intended to be flexible and capable of amendment with relative ease. Incorporation into the Convention could erode the intended flexibility of the Guidelines.

The BMLA notes a further difficulty which may arise in including any reference to the Guidelines. Incorporation into the Convention will arguably elevate the Guidelines to a status beyond that intended to be afforded to them. States may be reluctant to consent to this, particularly since, as discussed above, the Guidelines should remain a flexible document, capable of being amended easily. The Guidelines could conflict with the laws of a state which is a signatory to the Convention, giving rise to issues of primacy.

Question 4

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

Answer

The UK has made no provision for the payment of a salvage reward by one of the interests referred to in the opening sentence of Article 13(2) Salvage Convention 1989; Salvage awards are payable by ship and cargo and other property at risk in proportion to their salved values: The M. Vatan [1990] 1 Lloyd’s LR 336.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Answer

There are differing views as to the necessity for special provisions in relation to salvage security in containership cases. Some are of the view that the proposal would entail a significant alteration to the principles underpinning the Convention, namely, that each property interest contributes to salvage and that to alter this in the manner proposed would mean that one party
takes on the burden and liability of another. It was also suggested that there is insufficient evidence to conclude that the practical problem referred to in paragraph 4.1 is real. Others consider that it is an issue that will only grow as containerships increase in size. It is noted that one practical solution that has developed is shipowners agreeing to “absorb” cargo’s portion of salvage security to a certain limit. The Lloyd’s Salvage Group is currently giving thought to the possibility of resolving the difficulty in LOF cases in a number of ways but no final conclusion has yet been reached.

Question 5

5.2 Do you consider that consideration should be given to amending Article 14 in order to create an entitlement to an environmental award? (It is recognised that there are “political” issues involved as to who would pay for such an award, but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of “damage to the environment” in Article 1(d), to Article 13, Article 15 and Article 20).

Answer

The BMLA can reach no consensus on an answer.

The wording of Article 14 raises a number of issues. Some have been touched on in Answers to Question 1.4. Others include:-

(a) To benefit from the uplift referred to in Article 14.2, the salvor must show he “has prevented or minimised damage to the environment”. A perceived threat is insufficient.

(b) “A fair rate for the equipment and personnel actually and reasonably used in the salvage operation” has been held by the House of Lords in The Nagasaki Spirit [1997] Lloyd’s Rep did not include any profit element.

(c) Special compensation does not attract a maritime or statutory lien (though this will be corrected by Article 1.1(c) of the International Convention on the Arrest of Ships of 1999 when it comes into force) making the obtaining of security for such compensation difficult.

Whether a satisfactory drafting solution to all these issues could successfully be devised is an open question. However, the SCOPIC clause has created a framework which contains its own compromise between the interests of ship, salvors, cargo and their respective property and liability underwriters. It is a complex regime which seeks to balance the “no cure no pay” principle of risk to the salvors at the same time as encouraging salvors to attend casualties where the salved fund is low but there is a risk of pollution.
It has worked satisfactorily and continues to do so. Of some 950 LOF cases since the inception of SCOPIC in August 1999 to date, the clause had been incorporated in the LOF contract some 330 occasions (34%); and it has been invoked on some 210 occasions (22%).

Some are of the opinion that Article 14 is effectively redundant. It has been displaced in practical terms by SCOPIC and, in light of this, if the Convention is to be amended, Article 14 should form part of this change. It was suggested that it was unsatisfactory to have an international convention, part of which is recognised as being inadequate and unworkable.

Others point out that it is not correct to say Article 14 is redundant. In situations where it does not work, SCOPIC provides a commercial solution. Thus, when paired with SCOPIC, Article 14 and the Convention which permitted it operates effectively. Interfering with Article 14 in such circumstances risked opening up the whole Convention to amendment.

Question 6

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?

Answer

It is thought that the Article has not hitherto proved a problem.

Question 7

7.1 If you are of the opinion that the suggestions made for reform of Article 14 should be considered, do you also agree that Article 20 should be amended to create a statutory lien against the ship for such a claim?

Answer

As noted in Answer 5.2, this issue had also raised difficulties in the drafting of SCOPIC. A provision was ultimately made for this within SCOPIC, but it has hitherto never been tested. If no issue is likely to arise, it is an open question whether it is necessary to include it in the Convention.

Question 8

8.2 Do you consider that Article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Answer

The matters raised in this question are currently under discussion elsewhere and it would be premature to answer.
Question 9

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

Answer

No.

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Answer

Since 1990 there have been 675 awards of which 282 have resulted in awards following appeals.
The CMI Executive Council has set up an International Working Group (IWG) to consider whether any changes need to be made to the Salvage Convention 1989.

The questionnaire which follows has been developed with a view to collecting your views on areas which have been identified by the International Salvage Union as possibly needing reform.

We would be grateful if you would provide your responses to this questionnaire as soon as possible.

1. **Article 1 in the Salvage Convention 1989 contains the following definition:**

   "For the purpose of this Convention:

   (d) Damage to the environment being 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." (Emphasis added)

**Comments**

1.1 **The International Convention on Civil Liability for Oil Pollution Damage, 1992**, defines "Pollution damage" in Article 1 paragraph 6 as meaning:

   "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profits from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." (Emphasis added)

Article II of that Convention also provides:

   "This Convention shall apply exclusively:

   (a) to pollution damage caused:

   (i) in the territory, including the territorial sea, of a Contracting State, and

   (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending nor more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

   (b) to preventive measures, wherever taken, to prevent or minimise such damage." (emphasis added)
The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 defines damage in Article I paragraph 6 as meaning:

"(b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;

(c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (emphasis added)

Article III of that Convention provides as follows:

"This Convention shall apply exclusively:

(a) to any damage caused in the territory, including the territorial sea of a State Party;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and

(d) to preventive measures, wherever taken" (Emphasis added)

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) provides as follows:

Article I paragraph 9 defines "Pollution damage" as meaning:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;" (Emphasis added)

Article II provides as follows:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a State Party, and
(ii) **in the Exclusive Economic Zone** of a State Party, established in accordance with international law, or, if a State Party has not established such a Zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured

(b) to preventive measures, wherever taken, to prevent or minimise such damage." (Emphasis added)

It will be seen that the International Conventions that deal with the liability for causing pollution are not as restrictive in the geographical scope of the Convention as the definition contained in the Salvage Convention in Article 1(d) quoted above. It will be seen that the words emphasised in that definition leave considerable scope for debate as to what is intended by those limiting words, particularly when the liability conventions seem to envisage preventive measures being taken anywhere, including on the high seas and the pollution damage itself can taken place anywhere within the exclusive economic zone.

**Question:**

1.2 Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted? **ANSWER:** The United States MLA has not taken a position on the issue.

1.3 Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "wherever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention? **ANSWER:** The United States MLA has not taken a position on this issue.

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted? **ANSWER:** The only U.S. decision on Art. 14, *International Towing & Salvage, Inc. v. F/V Lindsey Jeanette*, 1999 AMC 2465 (M.D. Fla. 1999), considers the effect of Art. 1(d) implicitly but not explicitly. The court in that case held that a threat of "damage to the environment" was established by evidence that the vessel and its contents threatened a discharge of oil and other pollutants into "the Exclusive Economic Zone" (*id.* at 2469). The court made no finding about the magnitude of the threat and did not explicitly consider whether the threatened damage would have been "substantial". Because the court ordered Art. 14 special compensation, it must have been satisfied that the substantiality requirement had been satisfied. Incidentally, the reference to the EEZ indicates that this judge, at least, thought that "coastal waters" extended that far. There is no case that explicitly considers the meaning of "substantial".

1.4.1 If so, could you provide a copy of the decision? **ANSWER:** A copy is included in Microsoft word format.

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation? **ANSWER:** The United States MLA has not taken a position on this issue.
1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition? ANSWER: See above

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")? ANSWER: See above

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened? ANSWER: Not applicable.

1.5.2 If so, can you suggest any wording that you think might be appropriate? ANSWER: Not applicable.

2. Article 5 in the Salvage Convention 1989 provides as follows:

"Salvage operations controlled by public authorities

1. This convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction? ANSWER: Yes, either when authorized by statute, e.g., 10 U.S.C. § 4804 (U.S. Army); 10 U.S.C. § 7363 (Dept. of the Navy); 10 U.S.C. § 9804 (U.S. Air Force); and 46 U.S.C. § 30916; or otherwise, when the actions of the public authority are voluntary and are not required as a pre-existing duty of the authority.

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended? ANSWER: Not applicable.

3. Article 11 in the Salvage Convention 1989 provides as follows:

"Co-Operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."
3.1 The International Working Group on Places of Refuge asked questions in its first questionnaire in relation to this provision. In order to assist the IWG on the Salvage Convention we repeat the first three questions that were posed in that questionnaire as follows:

Questions:

3.2 Has your country ratified the Salvage Convention 1989? ANSWER: Yes.

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11? ANSWER: There is no legislation or regulation. It is treated as a matter for policy implementation under existing powers, rather than a matter for new legislation or regulation. On July 17th, 2007, the Commandant of the U.S. Coast Guard issued Commandant Instruction 16451.9, entitled U.S. Coast Guard Places of Refuge Policy. On July 26th, 2007, the multi-agency National Response Team (NRT) developed and approved Guidelines for Places of Refuge Decision-Making. These two documents provide the framework for implementation by the United States of IMO Resolution A.949(23), which essentially covers the same subject-matter as Art. 11.

3.2.2 If so, please supply a copy, if possible with a translation into English or French. ANSWER: The documents are attached.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003. ANSWER: The United States MLA has not taken a position on this issue.

4. Article 13 of the Salvage Convention 1989 establishes the "Criteria for Fixing the Reward". Paragraph 2 of Article 13 provides as follows:

"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."

Comment

4.1 In recent years the salvage of container ships, which continue to grow in size, has given rise to problems in collecting security from cargo interests. Thousands of interests are often involved and it can take months to collect security. Often it is not obtained at all. Further, even when security is provided, cargo often remains unrepresented and has to be given notice of a pending arbitration, an award, and an appeal of an award, causing considerable expense and delay. It has been suggested that the problem could be solved if, in container ship cases, ship owners were responsible for the provision of cargo security.

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph? ANSWER: No, there is nothing that says that the salvage reward must be paid by one particular party.

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other
interests for their respective shares? ANSWER: The United States MLA has not taken a position on this issue.

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

   "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 minimized 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."
Comment

5.1 Over time this provision proved to be cumbersome, expensive to operate and uncertain in outcome. It also became counter-productive and discouraged rather than encouraged the salvage industry. As a result industry devised SCOPIC to replace article 14 contractually. SCOPIC has been successful and has substantially cut down the amount of litigation following a salvage operation. It is, however, only relevant in about 20% of modern cases and is still only a safety net.

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20). ANSWER: The MLA of the United States has not taken a position on this issue.

6. Article 16 of the Salvage Convention 1989 provides as follows:

"Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject."

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."

Comment

6.1 Prior to the Convention life salvage claims would have been made direct against the owners of the property, but as a result of the Convention it would appear that such claims now have to be made against the salvor. This could create problems for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim which the salvor makes under Article 13 and any claim for special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include any effort by some third party over which the salvor had no control.

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor? ANSWER: The MLA of the United States has not taken a position on this issue.

7. Article 20 of the Salvage Convention 1989 provides as follows:

"Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law."
2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided."

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim? ANSWER: See above.

8. Article 27 of the Salvage Convention 1989 provides as follows:

"Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."

Comment

8.1 The ISU is in favour of the publication of awards. The Lloyds Salvage Group has recently agreed to amend the LSSA clauses so that awards are published as a matter of course, unless any party to the arbitration objects. There is clearly a conflict between the expectation that arbitrations will be conducted in private.

Question:

8.2 Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group? ANSWER: See above.

9. General - Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment? ANSWER: No.

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention? ANSWER: Only two by a courts, International Towing & Salvage, Inc. v. F/V Lindsey Jeanette, 1999 AMC 2465 (M.D. Fla. 1999); Dorothy J. et al. v. City of New York- attached. Dozens, perhaps even hundreds, of arbitrations have been decided under the Convention's provisions.