ENVIRONMENTAL SALVAGE – Plus ça change … ?

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Abstract

At its conference in Beijing in October 2012 the Comité Maritime International (CMI) is due to consider various proposals for possible reform of the law and practice of salvage. Among these is a proposal, sponsored by the International Salvage Union (ISU), for the provision of further remuneration to salvors through the creation of a new "environmental salvage" award. This article reviews the background to these developments, including the decisions reached when similar proposals have been made in the past. Apart from the rival arguments of the commercial interests involved, consideration is given to the public interest implications of the proposals which have been made for revision of the 1989 International Convention on Salvage.

Introduction

On 5 October 2011 the container ship *Rena* grounded on Astrolabe Reef, New Zealand, spilling part of her bunker oil. A threat of further fuel escaping, and of hazardous cargo entering the environment, created an urgent need for professional salvage assistance. Contractors promptly commenced work under Lloyd's Open Form of Salvage Agreement, whilst exercising their option to invoke the Special Compensation P&I Clubs (SCOPIC) Clause which the Agreement incorporated. This effectively gave them a guarantee from the vessel's P&I Club that even if no property were saved, they would recover as a minimum the full amount of their expenses, at tariff rates agreed in SCOPIC, plus a 25% uplift.

In due course, after difficult and at times dangerous operations, the salvors had reduced the threat of pollution and saved a number of containers of cargo. However the vessel later broke in two pieces, and on 5 April 2012 the salvage agreement was terminated and replaced by a contract for removal of the wreck. This was expected to take some months to accomplish. In addition to the payment the contractors will receive for the wreck removal services, their SCOPIC expenses are expected to amount to some US$95 million.

Whilst this sets a record for a single case, a number of other major casualties in recent years have established a trend in which it has become increasingly common for SCOPIC expenses to run into the region of US$20 million. Some of these have then moved into a wreck removal phase, and as these operations have become more sophisticated, costs exceeding US$100 million have been incurred in a number of cases. At the time of writing, the estimated cost of wreck removal operations resulting from the *Costa Concordia* incident in January 2012 has recently risen to a total of about US$400 million.[1]

It might be supposed that the amounts paid for these operations are considered appropriate by the commercial parties involved, given that they were paid under contractual terms which were freely agreed, and which have been refined over the years through negotiation between their respective industry bodies. However, it is contended by the ISU that its members are

[1] See "Costa Concordia wreck removal costs rise by $100m", *Lloyd's List*, 28th Sept. 2012.

inadequately remunerated for their role in preventing pollution, and that international law on the subject needs to be changed.

This is not, of course, the first occasion on which proposals of this kind have been made. Indeed, in the 45 years since the world's first major tanker spill, the *Torrey Canyon* incident in 1967, few areas of maritime law and practice have been so repeatedly reviewed and revised.

Further legal change can now come about only by revision of the 1989 International Convention on Salvage, and this cannot get off the ground unless the International Maritime Organization (IMO) accepts that there is a "clear and well-documented compelling need" to bring the subject into its work programme.[2] The preamble to the Convention recognizes the "major contribution" which salvage operations can make to the protection of the environment, as well as to the safety of property; and it expresses the need to ensure that "adequate incentives" for such operations are available. As matters stand, no government has suggested that the Convention fails to meet this need, or that it does not effectively serve the public interest. Indeed, if it needs any seal of public international approval, few could be clearer than its attainment of that ultimate accolade of maritime conventions, ratification by the United States.

Clearly, if the salvage industry believes that the rewards it receives are insufficient encouragement for the investment required, there is a need carefully to consider its concerns: no one has disputed the importance of its role, or the need for periodic financial increases, and established mechanisms exist for these to be made. The issue raised by the proposals is whether change is needed to the form which the incentives take. This calls for recollection of how the relevant law and practice came to be shaped as they are today.

Background

The *Torrey Canyon* is well known as the original catalyst for the international regime of compensation for oil pollution from tankers. However, one of the first matters to be addressed after the incident was the public interest in official intervention in response to such an incident.

Efforts by salvors to refloat the tanker were abandoned over a week after the grounding, when finally it broke its back. The British Government then gave orders for the wreck to be bombarded by military aircraft, with the aim of burning off some 40,000 tons of oil remaining on board. However these measures were less successful than hoped, for by the time they were taken the wreck had settled lower in the water, and there were problems in setting the oil on fire when the decks were awash. This prompted questions whether the Government could or should have acted sooner.

The legal issues were referred to the Inter-Governmental Maritime Consultative Organization (IMCO) and led to the Intervention Convention 1969.[3] This clarified the right of coastal states to take measures, on the high seas as well as in their own waters, to protect their shorelines against a grave and imminent threat of pollution.

[2] IMO Assembly Resolution A500 (XII).

[3] IMCO was the forerunner of the present-day IMO, prior to a change of name in 1982.

The practical issues were addressed in the UK in an official report by a Committee of Scientists. This supported the Government's decision to intervene only after salvage had been attempted as the first line of defence.[4] In common with other coastal states, the UK followed a policy of developing its oil pollution clean-up capability whilst continuing to rely on commercial salvage arrangements for shipboard emergency response.

This was likewise the position in France when the *Amoco Cadiz* foundered on the Brittany coast on 16 March 1978. Never before or since has so much oil come ashore from a ship. There were claims that a salvage tug had delayed putting a line on board while the parties haggled, and legal proceedings against the salvors were among the many lawsuits filed in Chicago. Six years later the court dismissed the allegations against them, holding that they had acted with best endeavours at all times.[5] But by that time the politics had moved on. The incident prompted fresh concerns among governments that it was not in the public interest to rely on private commercial salvors to provide such an important line of defence against environmental disaster. The issue was referred to IMCO, which within months of the incident produced a detailed report canvassing replacement of the 1910 Brussels Salvage Convention, introduction of state-sponsored salvage, and other legal changes to widen the powers of the coastal state to intervene.[6]

These concerns were fuelled by a belief that the readiness of salvors to assist could not be taken for granted, as casualties involving the new breed of supertankers presented problems and risks on a scale not previously seen. On the *Torrey Canyon* itself, the greater hazards of explosion and fire had tragically claimed a salvage master's life; tugs and equipment capable of handling a fully laden VLCC involved the risk of a substantial capital outlay, and high mobilisation costs, with an uncertain financial return; to boot, the *Amoco Cadiz* highlighted the risk of salvors being sued for their efforts.

Soon after the IMCO report came early signs of complications to expect from coastal state intervention. In October 1978, as salvage services neared completion in the *Christos Bitas* incident, the UK Government declined to allow the damaged tanker into port, and later she was scuttled at a dumping site in the North Atlantic. The following year, whilst seeking sheltered waters in the Caribbean for the stricken VLCC *Atlantic Empress*, salvors were instructed by coastal state authorities to tow her 300 miles into the Atlantic, where she was ripped apart by explosions and sank.[7] As it happened, an *ex gratia* payment was made in recognition of their success in avoiding pollution, and in neither case did the salvors suffer financial loss. However, an additional risk was now discerned of salvors being prevented from completing their services and earning a reward.

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[4] See *The Torrey Canyon, Report of the Committee of Scientists on the Scientific and Technological Aspects of the Torrey Canyon Disaster*, HMSO, 1967.

[5] *The Amoco Cadiz* [1984] 2 Lloyd's Rep. 304 (McGarr J).

[6] See IMCO Secretariat study, *Coastal State Protection Against Major Maritime Disasters* (Misc. (78)7.E).

[7] The 270,000 tons of crude oil released into the sea from the *Atlantic Empress* still constitute the world's largest ever spill of oil from a ship – a fact sometimes overlooked as none came ashore or gave rise to any claims for pollution.

Revision of Lloyd's Open Form

Against the background of these developments the Committee of Lloyd's decided in 1979 to appoint a Working Party to review Lloyd's Open Form and consider revisions to address the problems involved.[8] These were thought to include the following:

(1) There were concerns that the scale of awards had not kept pace with the higher investment costs now involved.

(2) Whilst success in avoiding pollution could be reflected in an "enhanced award", funded by property insurers, this depended on success in saving property, and might not be adequately remunerated if salved values were low.

(3) If a salvor succeeded in avoiding pollution, nothing was paid by one of the parties deriving the greatest benefit from the services, namely the ship's liability insurer.

Under the chairmanship of Mr Gerald Darling QC[9] the Working Party formulated a proposal involving two fundamental amendments. First, in respect of all vessels, it was proposed that the salvor should be under a duty to avoid or minimize pollution damage, and that services of this nature should qualify for a salvage award. Secondly, in the case of laden tankers, it was proposed that in addition to the traditional salved values there should also be a "pollution fund" from which the salvor would be rewarded for his services in avoiding or minimizing pollution. This fund would be available to remunerate such services even if no property was saved.

Background negotiations: liability salvage vs. safety-net

The Working Party's proposal for a "pollution fund" rested in effect on a concept of "liability salvage". Whilst there was precedent for enhancing a salvage award in cases where the services had avoided a legal liability which the shipowner would otherwise have incurred, the new proposal involved a significant extension of this principle. An attempt would be made to place a value on the potential liability, and success in avoiding it would be treated as independent grounds for a salvage award. This would be paid by the shipowner – and in effect by the P&I Clubs – irrespective of whether any property had also been saved.

The Clubs had not been represented on the Working Party. Their reaction to the proposal was to accept the need for additional funding of the salvage industry, and the case for this to be contributed by liability insurers. However they had a different view of the form which this contribution should take.

Whilst recognising that an award payable out of a known fund (the value of salved property) might well be a suitable method of rewarding traditional salvage services, they argued that insuperable difficulties were involved in applying the same approach to pollution avoidance. Apart from the complex questions involved in valuing the anti-pollution services, there would be many imponderables in calculating the proposed "pollution fund". There would be room for debate as to the scale of pollution avoided, and as to the likely extent of any financial loss thereby saved. The shipowner's liability for the incident could not always be taken for

[8] The edition in use at that time was the 1972 revision of Lloyd's Standard Form of Salvage Agreement.

[9] Mr Darling took over as chairman from Mr Barry Sheen QC on the latter's appointment as Admiralty Judge of the English High Court, and on succeeding him as Lloyd's Appeal Arbitrator.

granted, and there would also be the question whether any liability for pollution would extend to all categories of claim, including for example pure economic loss or theoretical evaluations of environmental damage. Was it to be assumed that the owner would have been able to limit his liability for pollution, or would an enquiry be necessary into the question whether he had been guilty of conduct barring the right of limitation? Another issue would be whether account should be taken, in calculating the "pollution fund", of any rights of recourse available to the shipowner against third parties such as the owners of a colliding vessel.

In these circumstances a firm view was maintained by the Clubs that the proposals in their existing form were unworkable and unacceptable. The divisions of opinion were highlighted at an International Symposium on Marine Salvage which took place in New York in October 1979, as a result of which the Chairman of Lloyd's expanded the Working Party into an enlarged Lloyd's Form Review Committee, to include representatives of the International Chamber of Shipping, the International Group of P&I Clubs, and the Oil Companies International Marine Forum (OCIMF).

In the subsequent discussions the P&I Clubs advanced an alternative proposal more radical than any put forward so far. This would not only result in liability insurers contributing for the first time to salvage remuneration. Even more far-reaching, it would depart from the principle of "no cure, no pay", and entitle the salvor to payment irrespective of success or failure. The offer of this so-called "safety-net" was accepted by the other industry interests and adopted in a new revision of Lloyd's Open Form.

LOF 1980

Under the new form of salvage agreement the contractor agreed to use his best endeavours not only to salve the property at risk but also to prevent the escape of oil from the vessel whilst performing the salvage services. Awards for successful operations would continue to be enhanced, in accordance with the existing practice, to reflect measures taken to prevent or minimize pollution damage. In addition, a safety-net payment could be awarded if, without negligence on the part of the contractor, his servants or agents, the services were not successful, or were only partially successful, or the contractor was prevented from completing the services. Such an award was to be made against the shipowner alone and would be paid by his liability insurer.

A "safety-net" award was to be available only where the property being salved was a tanker laden or partly laden with a cargo of oil. It was to amount to the contractor's reasonably incurred expenses plus an increment not exceeding 15 per cent. However, the safety-net was to apply only if and to the extent that the increment plus expenses exceeded any amount otherwise recoverable under the contract, i.e. the amount of a conventional salvage award, if any, in respect of any property saved by the services.

The safety-net established by LOF 1980 did not cover measures to prevent or minimize pollution by hazardous or noxious substances other than oil, nor by bunkers from non-tankers or tankers in ballast. Nevertheless, in principle it was an innovation which was not only historic for the form itself, but was also to provide a model for further development of law and practice in this field.

Financial backing: Funding Agreement 1980

Before a revised LOF could be finalized it was first necessary for property underwriters and liability insurers to agree how they would apportion between them the financial burden of the proposed new arrangements. This was resolved in March 1980 by the so-called Funding Agreement, which was concluded in the following terms:

"In order that the revision of the Lloyd's Open Form can proceed as quickly as possible, the International Group of P&I Clubs for their part and the Institute of London Underwriters and Lloyd's Underwriters' Association for their part confirm the following:

(1) the Clubs, as shipowners' pollution liability Underwriters, will provide security for and bear the full cost of the "safety net" provisions in Clause 1 of the new LOF for tankers laden or partly laden with a cargo of oil;

(2) the Underwriters will continue to accept that Salvage Awards are recoverable by ship, cargo and freight under the existing forms of policies for those interests, notwithstanding that such Awards may have been enhanced to take account of measures taken to prevent the escape of oil from the Ship.

The foregoing undertakings are given subject to usual policy terms and applicable deductibles and shall continue until either party gives reasonable notice to the other that there has been a material change in circumstances."

Underlying this agreement was recognition by the various insurance interests of the benefit gained by property underwriters when salvors, relying on the safety-net, provided services which they would not, or might not, have undertaken or continued on "no cure, no pay" terms. This made it appropriate for property underwriters to contribute to the funding of these new arrangements. That was achieved by continuing the practice of "enhanced" awards being funded by property underwriters, despite the fact that they did not cover liability for pollution.

Although the property insurers bound by the Funding Agreement were limited to underwriters in the London market, their lead was later followed in other major insurance centres, and also by the oil company members of OCIMF, in their capacity as self-insured owners of oil cargoes.

With the necessary funding arrangements in place, LOF 1980 was published in May 1980 and came into effect the following month.

Revision of international law of salvage: 1989 Convention

Whilst the review of Lloyd's Form was in progress, IMCO accepted an offer from the Comité Maritime International (CMI) to review the private law aspects of the subject in the 1910 Brussels Convention, and to explore whether new rules could be devised to deal with the modern problems involving a threat of pollution.[10] The CMI appointed an international sub-committee, chaired by Professor Erling Selvig of Norway, to prepare a report.

The committee's initial report, published in 1980, supported a case for higher total remuneration being paid to salvors, and favoured extending the law to embrace the concept of liability salvage. By this time LOF 1980 had recently taken effect. The new form did not

[10] The CMI is an international non-governmental organisation founded in 1897 with the object of promoting the unification of maritime law. It has undertaken the preparatory work leading to numerous international conventions and other instruments in the maritime sector.

pretend to solve all the problems of salvage and the environment, but it did represent agreement among the relevant industries that the safety-net was to be preferred over the controversial approach of liability salvage.

Consequently, although the CMI proposals were in line with the aspirations of the salvage industry, which was not fully satisfied with the changes introduced in LOF 1980, in other quarters the view was taken that these changes should be given a chance to work, and that it would be highly divisive, so soon after they had been agreed, if the CMI were to encourage IMCO to embark on the type of far-reaching changes proposed by Professor Selvig.[11]

The issue was then referred to the CMI Conference in Montreal in May 1981, which adopted a Draft Salvage Convention designed to replace the Brussels Convention of 1910. The CMI Draft did not take up the concept of liability salvage but followed instead the approach agreed in LOF 1980, whilst developing it in certain respects. These included extending the safety-net to all vessels (rather than just tankers laden with oil), and providing for a more generous increment than that available under LOF 1980 in cases where the salvor succeeded in preventing or minimizing damage to the environment.[12] In this way the Conference achieved the so-called "Montreal Compromise". This struck a balance between the different commercial interests involved, whilst serving the public interest in promoting protection of the marine environment.[13]

After various amendments by the IMO the CMI Draft evolved into the 1989 International Convention on Salvage. The main features of the Convention which deal with remuneration of the salvor were contained in Articles 13 and 14: under Article 13 the award to a successful salvor is to take into account any success in preventing or minimizing damage to the environment, whilst under Article 14 a safety-net of "special compensation" could be awarded in cases involving a threat of such damage. This would consist of a "fair rate" for equipment and personnel, plus an increment to reflect the degree of success achieved in avoiding or minimising pollution.

The Convention came into force in July 1996, but in the meantime its central provisions had been given contractual effect by incorporation in LOF 1990, and the Funding Agreement was adapted to the new regime along similar lines to the Agreement of 1980.

Cases governed by the new regime raised a number of important issues concerning the interpretation of the 1989 Convention. Most of these were resolved by arbitration or appeal arbitration proceedings under the contract, but one case, *The Nagasaki Spirit* (1997), led to appeals up to the House of Lords and to rulings on a number of these issues.[14]

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[11] See A. F. Bessemer Clark, *The Role of Lloyd's Open Form* [1980] 3 LMCLQ 297.

[12] However, the increment of 15 per cent under LOF 1980, unlike the larger increment potentially available under the 1989 Convention, was to be included in all cases where the safety-net applied, irrespective of success in preventing or minimizing pollution.

[13] An official report of the CMI's work in preparing the 1981 Montreal Draft, the *CMI Report to the IMO*, was prepared by Mr Bent Nielsen of Denmark and approved by the CMI at its General Assembly on 6 April 1984. The CMI Report has been the most frequently consulted of the *travaux préparatoires* and is set out in *Brice on Maritime Law of Salvage*, ed. Reeder (4th edn, 2003), Appendix 8.

[14] *Semco Salvage & Marine Pte Ltd* v. *Lancer Navigation (The Nagasaki Spirit)* [1995] 2 Lloyd's Rep. 44, Clarke J; [1996] 1 Lloyd's Rep 449, CA; [1997] 1 Lloyd's Rep 323, HL.

Problems with special compensation

Although the different industry interests generally welcomed the new regime in principle, there was dissatisfaction with how it operated in practice.

From the viewpoint of the salvage industry it was unsatisfactory that no special compensation would be available for attending a mid-ocean casualty which did not cause a threat of damage to the environment in coastal or adjacent waters.[15] Salvors were disappointed by the decision of the House of Lords that the “fair rate” to be paid for equipment and personnel was to be a fair rate of *expenditure*, excluding any element of profit;[16] and they were aggrieved by difficulties sometimes experienced in obtaining security for claims for special compensation, despite the requirement in the Convention that this be provided on request.

From the perspective of owners and their P&I insurers, liability to pay special compensation had been incurred more frequently than some had expected, due to the perceived readiness of salvage arbitrators to find that a relatively low risk of pollution, or a risk of relatively minor contamination, was a sufficient threat of environmental damage to bring the Article 14 regime into play.[17] They were also dissatisfied that special compensation was to be assessed by reference to expenses incurred in the entire salvage operation, even though the threat of pollution had been lifted by removal of bunkers at an early stage.[18] An allied concern was that owners’ right to terminate the salvage operation, or their exposure to safety-net payments, was too limited; and it was felt by all insurers that their interest in the conduct of operations was not adequately protected by any rights of consultation or control.

At the same time all industry interests shared a common dissatisfaction with the levels of uncertainty and cost involved in the assessment of claims for special compensation. The task of proving, and then scrutinizing, salvors’ claimed expenses was time-consuming and also very costly. Arguments over the degree of success achieved in avoiding pollution often led to long and expensive legal proceedings to estimate what damage might have been sustained but for the salvors’ efforts, and what financial loss it might have involved. All interested parties wanted a simpler regime of special compensation which could be determined quickly and at less cost to both sides.

SCOPIC

Against the background of these concerns discussions took place between the International Salvage Union, the International Group of P&I Clubs and representatives of hull and cargo insurers with a view to devising an acceptable substitute for the special compensation provisions of the 1989 Convention. The essential aims were to define with greater certainty the circumstances in which salvors would receive remuneration on terms other than “no cure, no pay”, and to simplify its assessment, whilst improving the arrangements for provision of security as well as consultation among the parties.

The product of these discussions was the Special Compensation P&I Clubs (SCOPIC) Clause. First promulgated in 1999 it is designed for use in conjunction with Lloyd’s Open

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[15] See the definition of the term *damage to the environment* in Art. 1(d) of the Convention, as applied in the cases of the *ABT Summer* and the *Castor* (discussed in *Shipping and the Environment* (2nd edn, Informa 2009) Chap. 14 at p. 552).

[16] Art. 14.3, as interpreted in *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep. 323, HL.

[17] See for example the *Yinka Folawio* case (discussed in *Shipping and the Environment* pp. 551–552 and 558). For the sufficiency of a reasonable apprehension of environmental damage see pp. 558–559 above.

[18] Art. 14.3, as interpreted in *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep. 323, HL.

Form. In cases where it applies it establishes a self-contained regime of remuneration which entirely replaces the special compensation provisions in Article 14 of the 1989 Salvage Convention.

Notable features of the Clauses include agreement that SCOPIC remuneration is to be paid irrespective of any threat of damage to the environment; detailed tariff rates for craft, equipment and personnel employed in providing salvage services; a 25% uplift on these amounts to be paid in all cases, regardless of success or failure; arrangements for security to be given for the remuneration due; and provision for rates to be reviewed on a regular basis. Increases have been made on a number of occasions, most recently in 2010.

The current proposals for environmental salvage awards

The ISU's current proposal is that Article 14 of the 1989 Convention be entirely replaced by a new provision entitling the salvor to a discretionary environmental award, whenever there has been a threat of damage to the environment.

The proposed award would be determined by the same criteria as those prescribed by Article 13 for the assessment of a conventional award for salvage of property, save that in place of "the salved value of the vessel and other property" account would be taken of "the extent to which the salvor has prevented or minimised damage to the environment and the resultant benefit conferred."

The award would be payable by the shipowner alone, or in effect by his P&I insurers. At the same time, Article 13 would be amended to provide that conventional salvage awards, payable by property underwriters, are no longer to be enhanced by the skill and efforts of the salvor in preventing or minimising damage to the environment.

Commenting on its suggested text, the ISU explains that "if there was a threat of pollution in waters that would impose a liability on the owner, the award would be more than if it had been in waters which did not impose such a liability, for the benefit conferred would be that much greater."[19] In substance, therefore, the proposal is one of liability salvage as debated in the past, with the notable exception that on this occasion the salvor would, according to the ISU, be entitled to an environmental salvage award whenever there is a threat of pollution, irrespective of whether he has actually succeeded in preventing it.

In principle this seems a problematic suggestion. Whilst a threat of damage to the environment is an obvious pre-condition to a claim for avoiding it, an award based on the threat alone, regardless of success, is a safety-net by another name. The safety-net was devised as an alternative to environmental salvage, and in all its forms it has been an express exception to the principle "No cure, no pay". The proposed revision of Article 14 involves replacing this system by a new type of award to be assessed in the same manner as awards for saving property; and the proposed removal of the element of enhancement from Article 13 reflects removal of the benefit to property underwriters of services rendered in reliance on the safety-net.

On the face of it these proposals mean that all salvage remuneration would be based on the principle "No cure, no pay", both because the only exception to it has been abolished, and because it is inherent in a reward system reflecting the value of the property saved or other

[19] ISU Position Paper, April 2012.

benefit conferred: success results in more bountiful awards than remuneration based on tariff rates plus uplift; failure has the opposite effect, and where the benefit is nil it results in “no pay”.

If it is in fact intended that the salvors should still receive some form of safety-net, protests can be anticipated that this would give them the best of both worlds, and that clear language is needed to achieve this result. As matters stand, there appears to be considerable uncertainty, and scope for litigation, over questions such as whether the tribunal’s discretion extends to making an exception to “No cure, no pay”, and if so, what principles should govern the assessment of awards where no cure is achieved, in the absence of an express safety-net formula.

Whatever answers may be suggested to these questions hereafter, there is no dispute that these proposals involve not merely amending the 1989 Convention but indeed dismantling the industry agreements and Montreal Compromise which have underpinned the law and practice for over thirty years.

This raises the question whether circumstances have so changed as to call for a return to the drawing-board. It is no doubt the case that public concerns about environmental damage have continued to grow, and that salvors’ investment costs have likewise increased. However the questions of principle remain as to whether a system of environmental salvage awards is workable, whether it can be viably funded, and – for some most important – whether it is in the public interest.

Workability

The issues involved in assessing environmental impacts have not changed significantly since oil first escaped from a ship. Underlying them is the fact that the marine ecosystem is highly complex, and that natural fluctuations in species composition, abundance and distribution are a basic feature of its normal function. The extent of damage can therefore be difficult to detect against this background variability. The key to understanding damage and its importance is whether spill effects result in a downturn in breeding success, productivity, diversity and the overall functioning of the system.[20]

Efforts to arrive at or present a balanced view of the effects of an oil spill are also made harder by the often highly charged and emotional nature of the incident and its aftermath. The scientific community can become polarised into opposing camps, with one side intent on quantifying every aspect of damage, and the other emphasising the capacity of the environment to recover naturally. The simple reality is that sometimes significant damage occurs, and sometimes not.[21]

Translating environmental impact into legitimate claims for financial loss involves further challenges. In this area much progress has been made in the last twenty years through the development by the International Oil Pollution Compensation Funds of criteria for the assessment of claims for oil pollution from tankers. Whilst these have addressed many issues of principle, in practice the assessment of most claims depends primarily on the particular facts and on the evidence of loss actually suffered. Commonly it takes time both for the relevant data to be assembled and for an analysis to be made of the extent, for example, to

[20] See *Effect of Oil Spills*, ITOPF Ltd (http://www.itopf.com/marine-spills/effects/).

[21] *Ibid.*

which a reduction in revenue from fish catches is attributable to the incident or to other market forces.

For reasons such as these, coupled with the sheer number of claims sometimes made after a serious spill, it has been typical for a period of years to pass before experienced claims-handlers in the IOPC Funds and P&I Clubs, or their technical advisers, have been able to form a reliable estimate of the total cost of the incident.

The difficulties of early quantification are compounded by considerable regional variations in a number of relevant factors. One is the average increment between claim figures originally presented and those finally agreed or determined. Another is the willingness or otherwise of local courts to abide by the IOPC Funds' criteria, to the exclusion of other domestic environmental laws. The 1992 Civil Liability and Fund Conventions exclude claims for damage to the marine environment assessed by abstract quantifications or theoretical models. However not all incidents fall within the Conventions, and there are many parts of the world where claims of this kind are routinely made.

Foremost among these is the United States, where federal and state laws have long provided for recovery by public trustees of amounts determined in accordance with natural resource damage assessment (NRDA) regulations. As is well known, these involve the use of highly complex and controversial methodologies, and commonly there is considerable argument about the appropriate input data in any particular case. The experience of those who have been involved in these cases is that it typically takes a period of years to assemble the relevant data and resolve these issues.

The full scope for NRDA claims to give rise to expensive and time-consuming litigation has not so far been seen. That is mainly because the US Oil Pollution Act of 1990 (OPA-90) stipulates a rebuttable presumption that assessments made in accordance with the prescribed methodologies are to be accepted as valid, and regulations implementing OPA-90 further limit judicial review of the public trustees' assessments to an administrative record, which can only be overturned by showing that the trustees' determination was "arbitrary and capricious."[22] Although many of the government's methodologies may not withstand scientific scrutiny, to date responsible parties and their insurers have taken the view that the regulatory presumption and record review would weigh too heavily against them in litigation, and they have therefore preferred to settle rather than face the costs and risks involved in contesting a full-scale assessment. However the presumption and "arbitrary and capricious" standard of review apply only to claims by public trustees. In the event of a salvor relying on the same methodologies to support a salvage claim, it would be open to the shipowner to challenge the validity of the entire process.

If the effects of an actual spill can be hard to evaluate, those of an avoided incident are obviously harder still. It has been suggested that "the same can be said, of course, about ships and their cargoes. Arbitrators are skilled in assessing the likely consequences, had salvors not intervened to save ship and cargo."[23] In the same vein it has been suggested that there is "no reason why Environmental Salvage Awards should not be capable of assessment in the same way as Art. 13 Awards have been for over 100 years."[24] In theory it is no doubt the case that if salvage arbitrators were required to make such assessments then it would not

[22] 33 U.S.C. §2706(e)(2); 15 C.F.R. §990.45.

[23] ISU Position Paper April 2012.

[24] ISU Position Paper September 2012.

be open to them to throw up their hands and declare the task impossible – they would be bound to do their best. However this alone does not make environmental salvage a workable proposition. The real issue is whether a system of this kind is subject to so many imponderables, and to such uncertainty as to the financial burden to be borne by those expected to pay for it, that it is simply not a reasonable one for legislators to adopt or for sensible commercial people to agree. In practice the assessment of oil spill effects on the marine ecosystem involves very different processes and time-scales from evaluation of damage to ships and cargoes. Rarely is it possible for such effects to be determined reliably within the normal time-scale of a salvage arbitration. Attempting to evaluate them when they have not in fact occurred runs the obvious danger of bringing the assessment process into the realm of sheer speculation.

Apart from the inherent uncertainties involved, it is hard to see that such a process could be conducted without inviting a great volume of rival expert opinion and associated legal argument. That would be a recipe for long and expensive proceedings of the kind which unfortunately became common in resolving claims for special compensation under Article 14. As that was a major reason for adopting a simpler and more certain regime in SCOPIC, this must also be seen as a major disadvantage to expect in any system of environmental salvage awards.

Funding

In addition to the other problems which would bedevil the assessment of environmental salvage awards, there is the question of how they are to be funded.

In its principal report on the subject the CMI sets out the ISU's view that such an award would rank as a cost of "preventive measures" for the purposes of pollution compensation regimes such as the 1992 Civil Liability and Fund Conventions and the HNS Convention; the shipowner, it is suggested, should be able to have the award taken into account against his liability limit when facing other claims under CLC, and to include it in a claim against the IOPC Funds if his CLC limit is exceeded.[25] Clearly it would be an issue of great importance whether this view is correct. However the past practice of the Funds suggests that governments are unlikely to accept it without agreeing on a change of policy.

Although salvage has often had the effect of avoiding pollution, generally the Funds have not accepted the cost of salvage as an admissible expense under the international oil pollution compensation regime. This practice dates back to the *Patmos* incident (1985), in which the Italian courts rejected a claim by cargo owners for compensation to reimburse them the cost of a salvage award for saving an oil cargo. The basis for the decision was that the claim depended on the purpose for which the measures were taken. Although the salvage services had the *effect* of preventing pollution, their primary *purpose* had been salvage of property.

In later cases a concept of "dual purpose" operations was developed, in which the IOPC Funds agreed to bear part of the cost of operations which were not true salvage, and which were funded (usually by the Clubs) at least partly for the purpose of avoiding pollution. This opened the door to pragmatic compromises, but few clear principles evolved.

The uncertainties were highlighted in the 1990s when the first payments of special compensation were made in oil tanker incidents under Article 14 of the Salvage Convention.

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[25] Report of the CMI International Working Group on Review of the Salvage Convention, 1 May 2012, p.30.

In a series of cases including the *Aegean Sea*, *Braer* and others the Clubs argued that such payments gave rise to admissible claims against the Funds as they were not in the nature of salvage, but were an expense borne by the shipowner when there had been a threat of damage to the environment. However no agreement was reached, as the Funds took the view that special compensation was essentially a safety-net for the salvor's protection where the salved fund was insufficient, and that there was no direct correlation between Article 14 payments and the reasonable cost of measures to avoid pollution.

When SCOPIC was introduced in 1999 the case for the Funds contributing to the amounts paid by the Clubs to contractors became subject to a further obstacle: SCOPIC remuneration was to be payable irrespective of any threat of damage to the environment. As a result, there have been few instances in modern times of the Funds contributing to the amounts paid for salvage or related operations.

Against this background the creation of a new environmental salvage award would give rise to some significant funding issues. Arrangements for funding of oil spill compensation, like those for funding of salvage operations, rest on an apportionment of the financial burden among different contributing interests: just as salvage remuneration has been subject since 1980 to a funding agreement between property underwriters and P&I insurers, so also the oil spill compensation regime is underpinned by an apportionment of the cost between tanker owners on the one hand and, on the other, the international oil industry whose participants contribute through levies to the IOPC Funds.

The need for funding apportionments to be kept in balance was a key element in the review of the 1992 Conventions which took place after the *Erika* and *Prestige* incidents, and in the adjustments made by the STOPIA and TOPIA schemes. This balance would be upset if environmental salvage awards were to be introduced without it being clearly established that they are, as the ISU proposes, to be considered costs of preventive measures. This means, at the very least, that the express agreement to this proposal would be needed on the part of the IOPC Funds. However, unless and until such agreement is reached, it is safer to assume that the Funds' long-standing reluctance to contribute to salvage awards will be a significant obstacle. At the end of the day, if there is no agreement on viable arrangements to fund these proposals, that is likely to be a fatal stumbling block.

The public interest

All agree that it is in the public interest for salvors to have proper incentives to do their important work. There is nothing new about this – it has always been vital for those involved in maritime transport, and the need for awards to keep pace with investment costs was appreciated long before a wider public interest came to the fore with the first tanker disasters.

What was then recognised was that readiness to respond involved not just the *capacity* to intervene, based on adequate investment, but also the *willingness* to do so in the particular case, despite the risks involved.

The concern was not that the rewards for success were too low an incentive; on the contrary, the values of these giant ships and cargoes could fund awards beyond a salvor's dreams. The real concern was that the risks of failure were too great a deterrent. This was particularly so in the most serious cases, where an unhesitating response was most needed. The usual position, in both contractual and non-contractual salvage, was that the salvor was free to decide against intervening, or to abandon his efforts if he appeared unlikely to earn a reward.

The US approach to safeguarding the public interest in salvage operations is now to require shipowners to conclude pre-negotiated contracts for salvage, fire-fighting and lightering services, and to list the providers of these services in their vessel response plans. The regulations require contracts to establish funding arrangements (including tariff rates for craft, equipment and personnel) and to commit service providers to intervene within stipulated response times. It is therefore unlikely that the environmental salvage proposals, even if adopted internationally, would have much significance in the US without regulatory changes to accommodate them.

Outside the US there are few examples of similar regulatory requirements, and the public interest has rested on progressive reduction of risk that might operate as a disincentive: the introduction of the safety-net in LOF 1980 for laden tankers; its extension in the 1989 Convention to all cases involving a threat of damage to the marine environment; its further extension through the availability of SCOPIC, at the salvor's option, in all Lloyd's Form cases, whether involving such a threat or not; and, in parallel with these changes, the mitigation of legal risk by the progressive extension of responder immunity.

Looking back over the last thirty years it is not hard to recall many cases where salvors would have caught a nasty cold had they responded without the safety-net; and there appears to have been no modern case of them being deterred from intervening by the risks involved. It may therefore be suggested that these arrangements have worked remarkably well, and that if they were now to be unravelled, this would turn the clock back to the public interest concerns, canvassed by IMCO in 1978, which originally led to them.

On the face of it, the ISU's proposals are less concerned with risk than reward, and with the question whether conventional awards are generous enough to ensure the capability to respond. But, needless to say, risk and reward go hand-in-hand, not least because arrangements agreed to mitigate risk – most recently SCOPIC – have added considerably to the rewards.

The riposte from the ISU is that SCOPIC does not fairly reward salvors for the value of their services in protecting the environment. SCOPIC remuneration should be seen, it suggests, as no more than a "bare minimum". However SCOPIC does not merely provide for a 25% uplift over the tariff rates for craft, personnel and equipment. It also sets these rates at a level which includes a significant element of profit, as demonstrated by their common use, without uplift, in wreck removal contracts and other agreements. Consequently the effect of the modern safety-net is not merely to eliminate any risk to the salvor of incurring a loss, but to guarantee a margin of profit which by any standards is handsome.

In any review of the funding of the salvage industry account must also be taken of revenue from wreck removal services, towage operations and similar activities. The sophistication of modern wreck removal methodology, which sometimes involves extremely complex and novel engineering processes, has increasingly led to lengthy operations being undertaken which would not previously have been possible or required. Laudable as these services are, they have involved a considerable increase in wreck removal costs borne by shipowners and, correspondingly, in revenue which salvage contractors have been able to derive from these sources of work.[26]

[26] See "Costa Concordia wreck removal costs rise by $100m", *Lloyd's List*, 28th Sept. 2012.

If it were the case that the industry's revenues do not provide a viable return on investment, with the result that salvage capability is at risk of decline, this would certainly be a matter of concern not only for governmental guardians of the public interest, but also for the commercial interests at risk when these incidents happen. Consequently, if ever the IMO Legal Committee comes to consider whether a "compelling need" has been shown for bringing onto its agenda a review of the Salvage Convention, it may have in mind that if the proposal serves the public interest, it would surely also benefit commercial interests and have industry-wide support. It may then find, among the large volume of background material on the CMI's excellent website, that one short sentence is particularly telling.

When the CMI started its review of this subject it circulated a questionnaire in which it asked: "Do you consider that consideration should be given to amending Article 14 in order to create an entitlement to an environmental award?" The response of the British Maritime Law Association was: "The BMLA can reach no consensus on an answer." The Maritime Law Association of the United States (USMLA) has similarly resolved to take no position with respect to the proposed amendment.

Given the proportion of salvage services performed under Lloyd's Form, and the access of the BMLA and USMLA to the different industry viewpoints, this lack of consensus speaks volumes. There is, quite simply, no industry-wide agreement that there is anything wrong with the existing system, that the proposed changes are necessary or appropriate, or – what is more –that there is any tenable way of funding them.

Conclusion

Recent high-profile incidents have provided striking examples of the salvage industry's role in protecting the environment, and emphasis has rightly been laid on the public interest in maintaining these efforts. There is, however, no consensus that environmental salvage awards serve to promote this interest.

The current proposals differ in detail but not substance from others made in the last thirty years. The main bones of contention, once again, are the speculative uncertainties which such a system imposes on those expected to pay for it.

Whatever view may be taken of the rival industry interests and private law arguments, public policy over these years has not been pinned on increasing rewards for success; it has been founded on reducing the risks of failure. What has counted is not so much the ability of salvors to respond under the incentive of a high award, as their readiness to act when the prospects are dim.

In the public sector there are no complaints that the present law and practice have failed to work very well; and it will not be enough to say the world has changed if there's no material difference. Otherwise there's only one conclusion: *plus ça change, plus c'est la même chose*.