

Transportation of Oil and Gas by Sea: Maritime Salvage, SCOPIC and the Vexed Issue of Environmental Salvage Regime

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Abstract: Societies at all times loathe damage to the environment and in modern times have adopted a zero tolerance for environmental pollution. In doing this governments have adopted a pollution response and liability mechanism controlled by public international law on one hand. There is also the private sector mechanism of minimizing damage to the environment regulated by Salvage. There is a distinction between salvage dimension to preventing and minimizing environmental damage or pollution and on the other hand, pollution response. Salvage has undergone a metamorphosis to its present SCOPIC stage in the effort of minimizing pollution damage. This article explores the process of this journey, SCOPIC challenges and the sustainability or otherwise vis – sa- vis the recent calls for a distinct environmental salvage regime.

Keywords: Society, Salvage, SCOPIC, pollution.

INTRODUCTION

The history of salvage stretches back to the time of the origin of maritime commerce and well beyond into antiquity. The basic principle of salvage is very clear that if the salvage operation was successful, the salvor was paid a large award but if he failed he got nothing. The improvement of ships and equipment of professional salvors who had their tugs and equipment normally redundant and ready to save a ship and to earn a large salvage award benefited the whole maritime community but the costs of keeping vessels and crew ready at all times eventually became a problem for the professional salvors.

When large crude oil carriers first started to be used, another danger arose in the maritime community. This was not a danger of losing a ship or cargo but a danger or threat of damage to the environment. A disaster happened just outside Scillies where the wreck of *Torrey Canyon* caused great damages to the environment. An event of worse disaster occurred on the coastline of France where *Amoco Cadiz* got stranded. She was laden with 220000 tons of crude oil and effects the disaster was monumental and devastating.

The traditional salvage rules gave no solution to this ecological problem since the only way to get paid as a salvor was to successfully save a ship or cargo. The owners of the salvaged objects were the people who had to bear the salvage costs and they had no

interest in protecting anything else. The result of this was that a salvor who attempted to minimize or prevent these environmental damages became unremunerated for doing so if the ship was lost or damaged, even though the salvor performed an important task. A change was needed to correct this problem and to achieve a new form of remuneration for the salvors.

The maritime industry responded and developed a safety net which in its turn led to a new remedy called special compensation. The English House of Lords interpreted the special compensation provision in the *Nagasaki spirit* case. The maritime industry, perhaps, especially the salvors as a result of Nagasaki Spirit case created a new clause, SCOPIC, which was produced. This article intends to answer the question as to whether or not the SCOPIC has changed the situation to the better and to proffer possible improvements.

SALVAGE

Salvage used to be performed by mariners without any contract. The salvor had no obligation to continue or contribute his services to the maritime operation being successful. The modernization of the maritime community led to professional salvors that rendered their services under agreements which eventually developed into LOF (Lloyds Open Form). Nowadays most of the salvage services are performed

by professional salvors under salvage agreement in LOF .[1]

There are four basic principles that concerns salvage as a maritime salvage. First the salvage operations must be voluntary and secondly the property in question for salvage must be maritime property. The third principle is that the property must be in real danger and last but not least the salvor must in some degree succeed in his salvage operations.[2]

Voluntary

A salvage operation is voluntary if the salvors are not operating under a pre-existing agreement or under official duty or purely for the interests of self preservation. There is no statement in 1989 salvage convention about the salvors being voluntary. However article 17 states that “no payment is due under the convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose”. This means for example that in most cases the master and crew cannot become salvors. They are employed and therefore have an obligation to protect the ship and cargo. Most of the time the danger has occurred after the employment contract was entered into with the ship-owner.[3]

Maritime Property

Article 1 of the 1989 Salvage Convention defines maritime property as “any property permanently and intentionally attached to the shoreline and includes freight at risk”. Traditionally ship, cargo and freight at risk have been classified as maritime property.

The term property is used to describe a physical thing. As components of ship and cargo, there are flotsam, jetsam, lagan, derelict and wreck. All these constitute maritime property of tangible kind. Maritime property is at the center of all maritime transaction. A maritime claim for instance is a claim in relation to maritime property. Maritime claims are only those claims for which a ship can be arrested under the Arrest convention or under applicable national Arrest regime. Such claims are enumerated in the convention and in the relevant legislation.[4] A maritime lien is specie of maritime claims. A maritime lien can only attach to a ship which is the most fundamental kind of maritime property, and outranks virtually all kind of claims against a ship, maritime or otherwise. A salvage claim is usually a maritime lien in almost all national maritime regimes.

Even the environment can be considered as maritime property. This is consequence of oil spill from tanker vessels. Environmental salvage is sometimes called liability salvage because when a salvor attempts to minimize pollution to the environment he also

reduces the ship owner’s liability towards governments.[5]

Real danger

It is difficult to define what makes a situation such of a kind that can amounts to real danger. The court or arbitrator has to consider all the facts and circumstances in the specific case and every situation has to be treated on its own merits. The salvor has to show that real danger exists when the salvage operation begins.

The subject matter for salvage operation does not necessarily need to be in immediate danger; however the danger cannot be remote. In other words, it is not a mere possibility. Hill is of opinion that real danger exists if a ship is unable to save itself or bring itself to a place of safe refuge without help from another vessel. He makes an illustration of a situation where a ship is drifting towards rocks that are miles away, which shows that the danger must not be immediate to be real.[6]

Success

For the salvor to be able to collect an award for his services, his actions need to be successful. The principle is often stated as “no cure-no-pay”. However the salvage operation does not have to be total success, it is enough that partial success is achieved and the only requirement is that the success is measurable. The rule exists for the simple reason that the salvage award is based on the value of the property being saved, thus if no property has been saved there will be nothing to anchor the salvage award on.[7]

In the 1989 Salvage Convention the ‘no cure-no-pay principle’ is regulated in article 12 : “Salvage operations which have had a useful result give right to a reward” and “except as otherwise provided, no payment is due under this Convention if the salvage operation has had no useful result”. The later statement refers to article 14 and special compensation, which will be discussed below.

LOF 1980 and the safety net, special compensation in article 14 of the 1989 salvage convention and the SCOPIC clause can all be considered as exceptions to the ‘no cure-no pay principle’, these will be examined below.

LOF 1980

The Lloyds open form (LFO) from 1980 established an exception from the ‘no cure-no-pay principle’ which became known as the “safety net”. This was essentially founded due to the oil pollution disaster during the 1970s. Salvors who were involved in services to prevent pollution take the risk of being unremunerated as they were not saving maritime

property. There was no success in the original sense and thus no value to base salvage award on. Nevertheless these services played an important part in preventing pollution damage.

The problem described above led to the creation of a fourth specie of maritime property, the environment. Thus salvors could protect the environment and obtain remuneration for doing so. The meaning of this 'safety net' was to create a motivation for salvors to take on casualties which could be a hazard to the environment in the form of oil pollution.[8]

Lloyd's safety net was a guarantee for the salvor to recover his out-of-pocket expenses and a fair rate for all personnel, tugs, craft and other equipment used in the salvage operation. The salvor could also be rewarded with an increment on the expenses of up to 15 per cent by an arbitrator. Since the safety net was an exception from the 'no cure-no pay principle' the salvor could recover his expenses even when the salvage operation was not successful.

The safety net was only applicable when the salvage operation concerned a tanker laden with cargo of pollutant oil. One difference between the regular salvage award and the safety net award was that the latter was only payable by the owner of the vessel. An ordinary salvage award is made against all the salvaged interests (Ship-owners, cargo owners etc) who should contribute ratably to the award according to their respective values. The safety net award was only applied when the salvor's expenses in addition to the possible increment were greater than a regular salvage award.[9]

1989 Salvage Convention[10]

The 1989 Salvage Convention was adopted on the 28th day of April 1989 by a conference organized by the IMO (International Maritime Organization). The intention was that the convention should come into force one year after 15 states had expressed their consent to be bound by it.[11] The required ratification was reached and the convention came into force internationally in July 1996.[12]

The purpose of the Convention was to make further improvement in the area where the LOF 1980 and its safety net had laid foundation of the developments. Article 14[13] in the 1989 Salvage Convention also made an exception from the no cure-no pay principle called "special compensation". The rules of special compensation both widened and restricted the possibility for an exception from the no cure-no pay principle. The safety net only applies to laden oil tankers whereas the special compensation is applicable to all kinds of vessels. However an award for special

compensation is only payable if there is a threat of damage to the environment. What constitutes a threat of damage to the environment is defined in article 1 (d) in the convention: "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". As can be seen there is also a geographical restriction in that the threat of damage to the environment has to be in coastal or inland waters or in areas close to inland or coastal water whereas the safety net remedy had no geographical restrictions, it was applicable everywhere.[14]

The salvor is entitled to special compensation under article 14 (1) in the Convention if the salvage operation concerned a vessel (or its cargo) which threatened to cause damage to the environment. If the salvor has earned a regular salvage award, under article 13 in the 1989 Salvage Convention, which is greater than the special compensation (under article 14) no special compensation will be payable. It does not matter if the salvor is unsuccessful in preventing or minimizing environmental damage, he is still entitled to special compensation. It should be noted that if the salvage operation is successful, in this matter, the salvor is entitled to a larger amount of special compensation according to article 14 (2). The expenses can then be increased with up to a maximum of 30 per cent. An arbitrator or a judge can, if he or she deems it fair, increase the special compensation even further to a maximum of 100 per cent of the expenses incurred by the salvor, according to the criterion set out in article 13 (1). The development of special compensation led to a possibly larger increment for the salvor, compared with the 15 per cent increment in LOF 1980. The special compensation can only be claimed from the owner of the vessel in question.[15]

A salvor can only recover his out-of-pocket expenses which the salvor incurred in the salvage operation and a fair rate for personal and equipment actually and reasonably used in the operation, according to article 14 (3) in the 1989 Salvage Convention.

As an illustration if a salvor tries to save a tanker full of oil which threatens to damage the environment but fails, he is not entitled to a regular salvage award (article 12 and 13 of the Convention). The salvor can still claim special compensation for his expenses and if he or she was somewhat successful in minimizing damage to the environment, an increment can be assessed on the expenses (article 14 paragraph 2).

Nagasaki Spirit[16]

On September 19, 1992 *Nagasaki spirit* collided with the container ship *Ocean Blessing* in the northern parts of the Malacca Straits. *Nagasaki spirit* was, at the time of the collision, part laden with a cargo of 40 154 tonnes of crude oil. About 12,000 tonnes of crude oil was released into the sea due to the collision. The unconfined crude oil caught fire and engulfed both the vessels. All crew of the *Ocean Blessing* lost their lives and only two members of the crew on *Nagasaki spirit* survived.

The following day professional salvors (Semco Salvage) agreed to save *Nagasaki Spirit* and her cargo under terms of LOF 1990, articles 13 and 14 of the 1989 Salvage Convention are incorporated in LOF 1990. The contractor used a number of tugs and on the 26 of September the fire stopped and there was a transshipment of the cargo. About 26 466 tonnes of crude owners was saved.[17] The most important issue which called for determination in the case was the interpretation of expenses as encapsulated in article 14 (3) and especially the part which refers to “a fair rate” for equipment and personnel. The question before the arbitrators and the courts whether a profit could be included in a fair rate or whether the salvor only was entitled to reimbursement of expenditure.[18]

The arbitrator took into account the need for encouragement of salvage operations when he assessed special compensation. He argued that a salvor would not be encouraged to stay in business if he would only receive his expenditure if he failed in preventing damage to the environment. In order for the rate to be fair the rate should make some contribution to future investments. When assessing this contribution the arbitrator must consider the fact that an even larger encouragement can be assessed if the salvor is successful in preventing or minimizing damage to the environment. The arbitrator applied an increment of 65 per cent according to article 14 (2) in the convention.[19]

On appeal, the arbitrator disagreed. He assessed a greater salvage award under article 13 in the convention and he took a different view on special compensation and a fair rate. According to the appeal arbitrator a fair rate did not include a profit but he took the view that the type and scope of the job would be factor in assessing a fair rate because it would reflect the costs incurred by the salvor. His reasoning was that no special compensation was payable since his salvage award (under article 13) was higher than the special compensation.[20]

The case went on to further appeal before Mr. Justice Clarke (Queen’s Bench Division). He came to the conclusion that a fair rate means a fair rate of

expenses, including both direct and indirect expenses as defined in article 14 (3), and not fair rate of remuneration. There was no element of profit included, according to Mr. Justice Clarke. He interpreted the words (fair rate) in a contextual sense and established that the compensation or expenses on the other to be remunerated or rewarded is to receive some profit whereas to be compensated is to receive recompense for expenditure.[21]

In the court of Appeal the majority agreed with Mr. Justice Clarke. They reasoned that a fair rate only included expenses, indirect or overhead expenses with account taken to additional costs of having vessels and personnel instantly available. Profit is only to be provided in article 14 (2), when a salvor succeeds in preventing or minimizing damages to the environment.[22]

As the case went to House of Lords the learned lords came to the conclusion that fair rate did not include any element of profit but only expenditure. The only way for the salvor to get some sort of profit is through the increment in article 14 (2). Lord Mustill made a contextual interpretation that the concept of expenses permeates the first three paragraphs of art. 14 [...] it is moreover highly significant that art. 14.2 twice make use of the expenses as recompense, not a source which yields him a profit. The idea of an award of expenses as recompense, not a source of profit, is further reinforced by the general description of the recovery as compensation, which normally has a flavor of reimbursement.

He also pointed out that it was not the intention of the promoters of the convention to create a new and distinct form of salvage (that is, environment salvage) simply for the purpose of keeping vessel ready for protecting the environment. The purpose is still to assist vessels in distress. The remedy under article 14 is subordinate to the reward under article 13, and its functions should not be confused by giving it a character similar to salvage.[23]

The Effect of the Nagasaki Spirit Case

There was great disappointment among the professional salvor after the final decision in the *Nagasaki Spirit* case. They saw the profit element disappear from a fair rate. The only way for them to make some sort of profit was to obtain the 20 per cent (or 100 per cent) increment in article 14 (2) in the convention. If the salvage operation was not successful in minimizing or preventing damage to the environment the salvors would only recover their expenses. The ship-owners and the underwriters were worried that salvors now recover string out salvage operations when they were dealing with a situation which might lead to

special compensation, which could create more costly disputes between the parties.[24]

Geoffrey Brice is authoritatively of the opinion that the decision that a fair rate is determined by reference to direct and indirect costs has three major complications. First he mentions the problem with idle time. For example: if a tug is stationed in one place for a whole year and works for only one day, how will the costs of that idle time be calculated in the fair rate according to article 14 (2) which refers to article 13 (h), (i) and (j). This leads to uncertainty for the salvor and ship-owner in the assessment of a fair rate for a particular tug. The amount of inactive time can lead to varied rates of the same kind of tugs even within the same ownership. The second problem is how one should deal with depreciation as an indirect cost. The third difficulty that Brice reflects over is the problem of how overheads[25] should be distributed across the fleet.[26]

One other major problem is that of security for special compensation to the Salvor. According to article 21 of the 1989 Salvage Convention the ship-owner has a duty to provide security, however if the ship is not salvaged there could be a problem to enforce this obligation under the Convention. But even if the ship is saved there is still the problem that special compensation does not constitute a maritime lien. So if the ship is arrested there can be other claims on priority of payment in the overall ranking of competing maritime claims.[27]

These problems among others became a concern to the whole maritime industry. The liability insurers had an interest in giving the salvors incentive in protecting the environment. If damage to the environment occurs the consequences can be devastating and the costs for the liability insurers can be huge. It was in the best interest for all parties involved to devise the system to give salvors more encouragement to help in casualties, where the article 13 award is likely to be small and where there is no threat to the environment, with remuneration for doing so. It was thought to be best if the remuneration was assessed on a commercial basis and not simply as a reimbursement of expenditure. Representatives from the maritime industry[28] tried to produce such a result and their meetings resulted in SCOPIC.[29]

SCOPIC[30]

The people involved in the development of SCOPIC could not change the law; however they were smart enough to give their vision the form of a contract. The clause can now be incorporated into a LOF agreement. SCOPIC stands for "Special Compensation Protection and Indemnity Clause". It is somewhat unfortunate that the name has such a close connection

with special compensation in article 14 of the 1989 Salvage Convention. However it is important not to confuse the two since they are quite different, which will be explained below.[31]

SCOPIC has two essential functions: One is to replace most of article 14 and the other is to provide salvors with a guaranteed form of payment calculated according to specific tariff rates. One difference between SCOPIC and article 14 is that article 14 relies on a threat of damage to the environment which has been obliterated in SCOPIC.[32]

For the clause to have effect it must be incorporated consciously with a LOF (LOF 1990, LOF 1995 or LOF 2000 or 2011). A mere incorporation does not give the clause effect; it only gives the salvor the option of invoking SCOPIC. From the point when the salvor gives the ship-owner a written notice that he will use SCOPIC the terms of the clause will be given effect and the payments under the SCOPIC terms will be assessed from that point. It is the salvor's decision whether to invoke SCOPIC or not and when to invoke it. It matters not whether or not there was a threat of damage to the environment for the salvor to invoke SCOPIC, (clause 1 and 2 of SCOPIC).

It is important to note that the timing for invoking the clause is very critical. Before a salvor invokes the clause he will only be able to be remunerated under the terms of article 13 of the Convention but from the point the salvor gives the ship-owner the written notice additional remuneration becomes payable according to the SCOPIC terms. If the salvor invokes the clause too soon and the reward under article 13 is greater than the assessed SCOPIC remuneration he will lose some of the article 13 award. A discount of 25 per cent of the difference between the article 13 awards and the SCOPIC remuneration, that would have been assessed if the SCOPIC had been invoked on the first day of services, will then be applied on the article 13 award. When determining whether or not a discount is payable the actual SCOPIC remuneration is used but when determining the amount of the discount it is the total possible SCOPIC remuneration which might have been earned that is used. This is a punishment for wrongly invoking SCOPIC (see clause 7). But the salvor must also bear in mind that the longer he waits the less SCOPIC remuneration he earns. Therefore, it is important for a salvor to be conscious about timing for purposes of invoking the SCOPIC.[33]

The issue of security is dealt with in clause 3. The owner of the vessel must provide the salvor with security, US\$3m., within two working days (from when he received the written notice). The sum of the security can either be reduced or increased depending on the

circumstances. If the owner of the vessel does not provide security the salvor can withdraw from the SCOPIC terms by giving the ship owner notice under clause 4. The result from the withdrawal is that the SCOPIC terms never existed in their agreement. Usually it is the ship owner's P. & I. Club that provides the security but the liability for failure to do so is on the ship-owners.[34]

One of the great advantages with SCOPIC is that it uses tariff rates for assessing the compensation to the salvor.[35] As previously stated Article 14 in the 1989 Salvage Convention is substituted by the method of assessment set out in SCOPIC and not article 14 (1) to (4)[36]. SCOPIC remuneration means the total of the tariff rates of personnel, tugs and other crafts, on board salvage equipment plus out of pocket expenses and a bonus.[37] The assessment of the rates shall be made on a time and material basis. The rates are all set out in Appendix A of SCOPIC. Clause 5 (iii) defines out of pocket expenses, which are all those monies reasonably paid by the salvor to third parties. If the salvor's out of pocket expenses are higher than those set out in the tariff rates he can under certain circumstances use the real cost instead of the tariff rates.[38] The salvor is also entitled to a bonus of 25 per cent of the total tariff rates and the out of pocket expenses by virtue of clause 5 (iv). The right to salvage remuneration under article 13 continues simultaneously with the operation of SCOPIC and the rules of article 13 of the 1989 Salvage Convention applies. But SCOPIC remuneration is only payable to the extent that it exceeds the total in the article.[39]

SCOPIC gives the ship-owner the choice of pointing out a SCR (Ship owner's Casualty Representative) to attend the salvage operation by virtue of clause 11. There are detailed provisions concerning SCR in Appendix B of SCOPIC. The salvage Master has a duty to report on a daily basis to the SCR activities with the Salvage Master are documented.[40]

The most important task in salvage operations has perhaps changed from protecting the ships and cargo to environmental protection. But the salvage industry is, according to ISU (International Salvage Union), experiencing difficulties.[41] The safety demands of the global shipping community have improved and as a consequence, the casualties and the demand for salvors have declined. Yet, at the same time the salvors are playing a very important part in preventing pollution damage. They are doing a job with the expertise and equipment like no others and they are indeed needed. Perhaps, more has to be done to allow the salvors to have their crew and equipment ready around the clock

on a global basis to perform this important however rare task.[42]

Environmental Salvage Question.

Rhys Clift and Robert Gay suggested in an article that special compensation and SCOPIC cannot provide the necessary incentive to keep professional salvors in business and that special compensation and SCOPIC only are steps on the way towards a new remedy of liability salvage as an independent form of salvage. They argued that as the occasions for the professional salvors to earn a reward reduces the amount of the award that is actually earned has to increase. SCOPIC and special compensation is unlikely to provide the answer to this problem. The problem lies in the costs of keeping vessels and equipment ready for when an accident occurs. They are suggesting that the solution might be to create a new remedy of an independent liability salvage that is not based on the value of the property being saved but the possible liability being avoided. Another solution is that salvors should perform salvage under fixed rate contracts between the salvor and the liability insurer. Their contention is that the incentive for the professional salvors has to increase for them to stay responsive to their demands.[43]

Similarly, the International Salvage Union has emphasized that SCOPIC is in essence, a safety net, not a method of remuneration. It is also not a globally answer but only one for LOF. They contend that there would be problems if it were sought to apply it as a matter of law rather than contract and that there is no currency fluctuation cause, which has caused concerns to the Salvage industry.[44] According to Todd Busch' the president of International Salvage Union "ISU has been concerned for a number of years that its members are not always fairly rewarded for the benefit they confer in protecting the environment".[45] He articulated the considerable problem which Salvors face when he stated that " Let me say straight away that we recognize that salvors are in many cases rewarded for protecting the environment by virtue of the Salvage Convention's Article 13 .1 (b). However, all too often the tribunal is unable to give full effect to this provision because of low value of the salvaged property".[46] He went further to identify three reasons why the Salvage Convention should be amended. Firstly, he contended that much has changed since the Salvage Convention was first drafted in 1981. He pointed out specifically to the issue of environment which he said are now dominating every salvage case. Secondly, he pontificated that 'whilst salvors are rewarded for saving the ship and cargo, they are not fully rewarded for the benefit they confer in protecting the environment.'[47]

Thirdly, he pontificated that it is not fair that traditional salvage reward which presently, but poorly

'reflects the salvor's efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurance without any contribution from the liability insurers who cover the shipowner's exposure to claims for pollution and environmental damage.' [48] In other words, the ISU has therefore proposed that salvors should be entitled to a separate environmental salvage award, distinct from that which they earn for salvaging property, when they have carried out salvage operations in respect of a ship or cargo which has threatened damage to the environment.

However, contrary to the above contentions by the Todd Busch, Ms Khosia expressed the view that the SCOPIC tariff rates are both 'profitable and purposely alter the basis of salvage operation. The prime objection would be no longer to save property. The basis of the award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented. It hardly needs saying that this would entail a difficult and speculative enquiry into what damage might have occurred had pollution resulted from the casualty. There is moreover no guidance on what an appropriate award amount would be in any given In relation to the ISU 's submission that P & I clubs , as eventual beneficiary of the pollution prevention services provided by salvors, should be responsible for paying the environmental award Ms Khosia emphasized that :Governments have recognized that there is a shared responsibility, by governments, by shipowners, by cargo and by the general public. They have done this through the mechanisms created in the CLC Liability

The above stated reasoning seems incontestable in logic and common sense. Again, the better view is as emphasized by Ms Khosia that governments are not asking salvage industry to build up capacities for preventing damage to the environment. Rather, they are accepting that this is a task for governments as such. 'In Europe for example, EMSA has been entrusted with the task of pollution response, supplementing the resources and arrangements that have already been set up at national levels.' [52]

Michael Howard QC commented that " There is relatively little evidence in most cases of specific work

Consideration of the vessel's exposure to liability is not excluded by the convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the

These opinions entirely commend themselves to a good and dispassionate judgment. Therefore, taking these considerations and pontifications above into

generous for personnel, equipment and tugs and that the rates had been increased significantly in 2007.' She went on to say that in relation to the SCOPIC clause that it has "effectively disposed of all the difficulties associated with Article 14 and when incorporated and called into use it has resulted in an efficient and orderly provision of salvage services for the prevention of pollution to the environment and generally on an amicable basis".[49]

In a brilliant and well articulated response to the ISU'S proposal for an environmental salvage award, Ms Khosia has argued that the creation or adoption of environmental salvage award would:

incident. This would raise the bar significantly and increased sums at stake would inevitably result in contentious expert evidence and speculative theorizing. This would no doubt result in more litigation and serve no one's interests. It is why Bryce, upon reflecting on similar discussions arising from the proposal for 'liability' in the eighties concluded ultimately that it is appropriate for such concerns to be regarded as an enhancement and not independently.[50]

Conventions (including the Fund Convention) and the HNS Fund Convention. The funds provide for additional compensation which is contributed to by cargo interests, once the shipowner's liability has reached the agreed limits. By attributing the liability on to the cargo interests, the governments explicitly recognize cargo's responsibility for the environment.[51]

done to prevent damage to the environment"[53] He said further that " awards do not reflect work done in relation to environment protection by and large; Arbitrators tend to think in terms of physical benefits. Where a shipowner is saved from liabilities to third parties that tends to be taken into account in the overall assessment of an award".[54]

Such an approach according to Stuart Hetherington[55] is consistent with adopted by Tamberin J in the Australian case of *United Salvage Pty Ltd v Louis Drefus Armateurs SNC*[56]. In that case his Honour concluded that:

salvors and, in appropriate circumstances, this may inform the fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability.[57]

account it may argued with some force that the argument for the creation of an environmental salvage and liability salvage as is been canvassed by ISU is misconceived. Salvors' now seeming only rationale for

introducing the concept is that in recent times, there has been increasing attention on protection of the environment when there is a casualty and often this takes priority in any salvage over and above any operations to save property.[58] The ISU claim that the operations they perform to protect the environment benefit the liability insurers enormously by way of minimized pollution liability and yet they, the salvors are not entitled to a salvage award that would reflect the benefit to the P&I interests. This kind of reasoning seems very dubious. It should be observed that the background to the Salvage Convention just described in the preceding paragraphs of this article explains the very carefully negotiated compromises between the various interests and the principles underlying it. It is important to stress that these compromises were regarded and agreed as a package and therefore to amend any part of it would entail an unraveling of the whole. The principle reflected the concepts in the public law Conventions of the CLC, the fund Convention and later the HNS Convention by way of the new protocol. These Conventions recognize that all parties to the marine adventure and governments share a responsibility for the environment and its protection.

The way forward.

The development of exceptions from the no cure-no pay principal began with the oil disasters in the 1970s. This happened in a time when the public was concerned with the environmental issues which led to new demands on the maritime industry. For long it has been known that the no cure-no pay principal failed to meet the new ecological needs, especially the call for greater security for large crude oil carriers. The no cure-no pay principle did not bring the necessary incentive for the salvors to involve themselves in dangerous and costly salvage operations that had little or no chance for success.[59]

The maritime community responded to the public demand for greater security and developed the exceptions from the no cure-no pay principle.

The whole purpose of LOF 1980 and article 14 of the Convention was to encourage salvors to respond to threats to the environment under circumstances where the chance for a salvage award was minimal. Mr. Brice, who represented Semco Salvage in the *Nagasaki Spirit* case, argued that if fair rate was not interpreted as fair rate of remuneration the entire purpose of the exceptions would be undermined and the incentive for the salvors would be lost.[60]

Lord Mustill thought that a profit element was not needed as a further incentive for the salvors. If the article 13 award would be little or none, due to an unsuccessful salvage operation, the salvors would still

be awarded a profit if they were successful in minimizing environmental damages. Even if the operation failed in environmental protection the salvor would still be assured of an indemnity against his outlays and he would receive at least some contribution to his standing costs. Lord Mustill stated that “lack of success no longer means ‘No pay’, and the provision of this safety net does suffice, in my opinion, to fulfill the purposes of the new scheme”.[61] As expected the maritime community did not agree with Lord Mustill and consequently they created the SCOPIC clause.

There may be ‘give and take’ for both parties to the SCOPIC. One of the great advantages for salvors is that they are relieved from the burden of having to prove a threat of damages to the environment. The reward is furthermore based on commercial rates for the use of their tugs and equipment which leads to more predictable awards and thus hopefully reduces the number of conflicts between the parties. Salvors are also in a better position to obtain security for their claim. Nevertheless, SCOPIC also provides some disadvantages for the salvors, they can for example not acquire a greater increment than 25 per cent even if the operation would be a total success in preventing damages to the environment and further more they are exposed to the risk that the owner of the vessel will terminate the salvage service. The advantages for ship-owners are that it is much easier to predict the costs of salvage operations and therefore it is also easier to make the risk assumption for the insurers of salvage operations and therefore it is also easier to make the risk assumption for the insurers due to the tariff rates. Owners of vessels have an even greater advantage in that they now can terminate the salvage services with a five day notice.[62] This is useful if they suspect that the costs of the salvage operation will exceed the value of the property being salvaged.[63]

Perhaps the greatest advantage of SCOPIC is that the clause was created by the maritime community for the maritime community. The long and hard negotiations between the parties, when founding SCOPIC, and their willingness to compromise led to a clause which is for the benefit of all involved. The inherent ‘give and take’ situation is a factor which resulted in a clause that provides owners with more control over the salvage operations (by the SCRs and the right to termination) and salvors a more fair remuneration and a better security, therefore the content of SCOPIC is a good balance of the interests of all parties involved. SCOPIC is a good balance of the interests of all the parties involved. SCOPIC did change the situation to the better.

It seems very doubtful, uncertain and dubious that anyone will be able to demonstrate a ‘clear and

well documented compelling need ‘to amend the Convention so as to create a distinct environmental salvage. The following extract is hereby quoted with

Numerous commentators have pointed to the inherent practical difficulties of introducing an award for ‘environment salvage’. I do not propose to go into them now. Suffice to say that if Article 14 proved to be commercial impractical, ‘environmental salvage’ would

It is instructive to recognize the distinction between salvage dimension to preventing and minimizing environment damage or pollution and on the other hand, pollution response. Many salvage ventures do have collaborations with pollution responses but the interface is imperative because there is an entirely different legal regime applicable to salvage as opposed to pollution liabilities regimes. Whereas states may refuse to take responsibility for salvage enterprise done in their waters they undoubtedly desire to preserve it in the case of

The importance of SCOPIC is that it provides the all – important financial incentive when salvors are confronted with cases which might otherwise lack financial viability. Given society’s zero tolerance of pollution, it is important that salvors have this incentive to respond to all casualty – related pollution threats –

In the final analysis and in the premise of the forgoing, therefore, it worth concluding that the

1. Mandaraka-Sheppard, Aleka, Modern Admiralty law, 1st edn, Cavendish Publishing Limited, 2001; 651 – 652
2. Hill, Christopher, Maritime law, 6th edn, LLP, 2003; 335-336
3. Mandaraka-sheppard Aleka, Modern admiralty law,(1st edn, Cavendish Publishing Limited, 2001; 668
4. In England, for admiralty court can only be invoked if a claim qualifies as maritime claim, that is , it falls within the list of claims enumerated in the supreme Court Act, 1981 where the Arrest Convention is incorporated.
5. Hodges, Susan and Hill, Christopher, Principles of maritime law, 6th edn LLP 2001;196
6. Hill, Christopher, Maritime Law pp 340-342
7. Hodges, Susan and Hill, Christopher, Principles of maritime law, 1st edn, LLP, 2001;203-204
8. Hill, Christopher, Maritime Law, 6th edn, LLP, 2003; 347-348
9. Hill, Christopher, Maritime Law 6th edn, LLP, 2003; 348 and Brice, G., “The law of salvage: a time for change? No cure-no pay no

approval in this article and very instructive and germane:

be so much worse. There is an inherently and intellectually fatal flaw in trying to align environmental salvage with property salvage; if it is to be done it must be logical be proportional to quantifiable savings in savings in liability for environmental damage. This is impossible to demonstrate.

pollution response arrangements. It is important however, to state that the element of risk sharing between property interest insurers and liability insurers cannot be overemphasized. In any case, environmental award would inevitably be exploratory, groping, subjective, speculative and hypothetical which would lead to a lack of reliability and consistency between awards. It would also severely delay any payment to salvors unlike the position under SCOPIC. And ironically and in the telling and illuminating perspective of the ISU President:

even when property values are low and the risks are high. The fact that the international P & I system has agreed to an increase in the SCOPIC tariff confirms this system’s valuable role in preventing damage to the environment. The decision also contributes to the maintenance of high levels of salvage services... [64]

SCOPIC work sufficiently well both for the salvage industry and the whole maritime community.

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19. [1997] 1 Lloyd’s Rep. 323 (HL) p330
20. [1997] 1 Lloyd’s Rep. 323 (HL) p 331
21. [1997] 2 Lloyd’s Rep. 44 (HL) p 50 and 63
22. [1997] 1 Lloyd’s Rep. 323 (HL) p331
23. [1997] 1 Lloyd’s Rep. 323 (HL) Pp 332 – 333

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Appendix 2

SCOPIC CLAUSE

1. General

This SCOPIC clause is supplementary to any Lloyd's Open Form of Salvage Agreement "No Cure - No Pay" ("Main Agreement") which incorporates the provisions of Article 14 of the International Convention on Salvage 1989 ("Article 14"). The definitions in the Main Agreement are incorporated into this SCOPIC clause. If the SCOPIC clause is inconsistent with any provisions of the Main Agreement or inconsistent with the law applicable hereto, the SCOPIC clause, once invoked under sub-clause 2 hereof, shall override such other provisions to the extent necessary to give business efficacy to the agreement. Subject to the provisions of Clause 4 hereof, the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive shall be submitted by the method of assessment set out hereinafter. If this SCOPIC clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14 except in the circumstances described in sub-clause 4 hereof. For the purposes of liens and time limits the services hereunder will be treated in the same manner as salvage.

2. Invoking the SCOPIC Clause

The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a "threat of damage to the environment". The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with convention Article 13 as incorporated into the Main Agreement ("Article 13")

3. Security for SCOPIC Remuneration

(i) The owners of the vessel shall provide to the contractor within 2 working days (excluding Saturdays and Sundays and holidays usually observed at Lloyd's) after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P & I Club letter (hereinafter called "the initial security") in a form reasonably satisfactory to the contractors providing security for his claim for SCOPIC remuneration in the sum of US\$3 million, inclusive of interest and costs.

(ii) If, at any time after the provision of the Initial Security the owners of the vessel reasonably assess the SCOPIC remuneration plus interest and costs due hereunder to be less than the security in place, the owners of the vessel shall be entitled to require the Contractor to reduce the security to a reasonable sum and the Contractor shall be obliged to do so once a reasonable sum has been agreed.

(iii) If at any time after the provision of the Initial Security the Contractor reasonably assesses the SCOPIC remuneration plus interest and costs due hereunder to be greater than the security in place, the Contractor shall be entitled to require the

owners of the vessel to increase the security to a reasonable sum and the contractor shall be obliged to do so once a reasonable sum has been agreed.

(iv) In the absence of agreement, any dispute concerning the proposed Guarantor, the form of the security or the amount of any reduction or increase in the security in place shall be resolved by the Arbitrator.

4. Withdrawal

If the owners of the vessel do not provide the initial security within the said 2 working days, the contractors, at his option and on giving notice to the owners of the vessel, shall be entitled to withdraw from all the provisions of the SCOPIC clause and revert to his rights under the main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed. PROVIDED THAT this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initial Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.

5. Tariff Rates

(i) SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.

(ii) SCOPIC remuneration in respect of all personnel; tugs and other craft; and portable salvage equipment shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix "A". This tariff will apply until reviewed and amended by the SCR Committee in accordance with Appendix B (1) (b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.

(iii) "Out of pocket" expenses shall mean all those monies reasonably paid by or for and on behalf of the Contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation. They will be agreed at cost, PROVIDED THAT:

(a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate (s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost.

(b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Shipowner's Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if

there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all in the circumstances.

- (iv) In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates except that if the out of pocket expenses described in sub-paragraph S(iii)(b) exceed the applicable tariff rates in Appendix "A" the Contractor shall be entitled to a bonus such that he shall receive in total
 - (a) The actual cost of such men, tugs, other craft and equipment plus 10% of the tariff rate, or
 - (b) The tariff rate for such men, tugs, other craft and equipment plus 25% of the tariff rate whichever is the greater.

6. Article 13 Award

(i) The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the owners of the vessel to the extent that it exceeds the total Article 13 Award (or, if none, any potential Article 13 Award (or, if none, any potential Article 13 Award) payable by all salvaged interests (including cargo, bunkers, lubricating oil and stores) after currency adjustment but before interest and costs even if the Article 13 Award or any part of it is not recovered.

(ii) In the event of the Article 13 Award or settlement being in a currency other than United States dollars it shall, for the purposes of the SCOPIC clause, be exchanged at the rate of exchange prevailing at the termination of the services under the Main Agreement.

(iii) The salvage award under Article 13 shall not be diminished by reason of the exception to the principle of "No Cure - No Pay" in the form of SCOPIC remuneration.

1. Discount

If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (after currency adjustment but before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.

2. Payment of SCOPIC Remuneration

(i) The date for payment of any SCOPIC remuneration which may be due hereunder will vary according to the circumstances.

(a) If there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim. Interest on sums due will accrue from the date of termination of the services until the date of payment at US prime rate plus 1%.

(b) If there is a claim for an Article 13 salvage award as well

as a claim for SCOPIC remuneration, subject to Appendix B (5) (c) (iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total

Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due. Interest will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(ii) The Contractor hereby agrees to give an indemnity in a form acceptable to the owners of the vessel in respect of any overpayment in the event that the SCOPIC remuneration due ultimately proves to be less than the sum paid on account.

3. Termination

(i) The Contractor shall be entitled to terminate the services under this SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before the bonus conferred by sub-clause 5(ii) hereof) will exceed the sum of:

(a) The value of the property capable of being salvaged; and

(b) All sums to which he will be entitled as SCOPIC remuneration

(ii) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including time for demobilization to the extent that such time did reasonably exceed the 5 days' notice of termination.

(iii) The termination provisions contained in sub-clause 9(i) and 9(ii) above shall only apply if the Contractor is not restrained from demobilizing his equipment by Government, Local or Port Authorities or any other officially recognized body having jurisdiction over the area where the services are being rendered.

4. Duties of Contractor

The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavors to save the vessel and property thereon and in so doing to prevent or minimize damage to the environment.

5. Shipowner's Casualty Representative ("SCR")

Once this SCOPIC clause has been invoked in accordance with sub-clause 2 hereof the owners of the vessel may at their sole option appoint an SCR to attend the salvage operation in accordance with the terms and conditions set out in Appendix B.

6. Special Representatives

At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the "Special Hull Representative" and the "Special Cargo Representative"

and collectively called the "Special Representatives") at the sole expense of the appointer to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practicing lawyers.

7. Pollution Prevention

The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of A pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.

8. General Average

SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel.

9. Any dispute arising out of this SCOPIC clause or the operations there under shall be referred to Arbitration as provided for under the Main Agreement.

Appendix 1

Article 14 - Special compensation

10. 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.
11. 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.
12. 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).
13. 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.
14. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.
15. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.