

Part B

An historical review of the efforts by the Comite' Maritime International in dealings with the post 1910 problems associated with the Salvage Convention.

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1. Background

To understand the efforts of the C.M.I. in dealing with the problems exposed by events occurring after 1910 it is first of all necessary to appreciate the role played by the C.M.I. in the preparation of the 1910 Salvage Convention. This may be best expressed in the words of the learned author of Volume 8 of the British Shipping Law Series, Nagendra Singh, who at page 1337 states:-

"In the codified development of private international maritime law the "Comite' Maritime International" of the Antwerp has rendered unique service inasmuch as the movement for standardisation, unification and codification of maritime law takes its origin from the activities of the Committee. The "Comite' Maritime" has a world-wide organisation, with national associations on maritime law in almost all maritime states of the world. Though a non-governmental body, it has helped to bring together the divergent views of many maritime nations and, after preparing the draft texts of several Conventions on important and complicated problems of maritime law it has, through the agency of the Government of Belgium, brought about many diplomatic conferences where very useful legislation has been forced, which is now well known by the name of the "Brussels Conventions." The Government of Belgium has been performing a vital function in the international sphere in this respect, inasmuch as it has convened, as a host country, no less than eleven sessions of the Diplomatic Conference on Maritime Law so far and each Conference has succeeded in producing an international Convention. The first of these Conventions dates back to 1910 when two important subjects, namely assistance and salvage at sea as well as collisions, were tackled."

Being a brainchild of the C.M.I., it was naturally anxious that amendments to the 1910 Salvage Convention originate from

it or at the very least that it had a hand in updating the Convention. Accordingly when, following the Amoco Cadiz disaster in March 1978, the legal Committee of IMCO at its 35th session asked the IMCO secretariat to prepare a report on that disaster, the C.M.I. also began to take an interest in the matter. These separate strands of development culminated in:-

- (i) the IMCO report on the Amoco Cadiz disaster (1);
- (ii) consideration of that report at the 37th session of the IMCO Legal Committee resulting in the subject of revision of the 1910 convention being made a priority item on the Legal Committee's work programme (2);
- (iii) an offer by the C.M.I. Assembly in March 1979, where it was concluded that the matter required immediate attention, to IMCO to co-operate -

"to explore whether the 1910 Salvage Convention should be revised or a separate convention should be prepared in order to cover those casualties which may cause a threat of pollution, thereby creating a direct and primary interest of the coastal state in the salvage operations."

- (iv) acceptance of this offer by the IMCO Legal Committee in the following terms:-

"62. It considered that the CMI should be requested to review the private law principles of salvage, centering its examination of the matter on the 1910 Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, with Protocol of 1967. Such a review would not encompass questions of coastal State intervention or the control of salvage operations by public authorities in the context of intervention.

63. The Committee would be grateful for all the facilities and co-operative effort which have characterized the collaboration between IMCO and CMI in the past. It would be desirable for the international sub-committee established by the

CMI to be guided entirely by its own expertise, with the understanding that among the purposes of the two Organizations undertaking this study were the need to induce and accelerate effective salvage operations in particular cases and generally to encourage the salvage industry in its beneficial activities.

64. The CMI would be aware that the question of the content of the salvage contract was being dealt with elsewhere and, like the public law matters mentioned above, need not be a concern of the CMI". (3)

Having been advised of the scope of its suggested assistance the C.M.I. through its executive council at its 19.9.1979 meeting set-up an international sub-committee headed by Professor Erling C. Selvig of the Norwegian Maritime Law Association to prepare a report on the subject of Salvage.

2. Identification of the problems

The first task of the international sub-committee consisted of the identification of the problems which had arisen since 1910. To that end it produced a report dated April 1980 (4) in which it expressed the conclusion that -

"The International law of salvage is in need of a thorough revision" (5)

advancing several developments for that conclusion, viz -

(a) such technical and economic advances in international shipping as -

(i) the reduction in danger to ship and cargo coupled with a substantial increase in the danger which the ship and cargo represents vis-a-vis the environment and other third party interests causing salvage to become of prime concern to third parties and public authorities in coastal states;

- (ii) the enormous increase in value of ship and cargo resulting in a concentration of larger risks in fewer bottoms, giving fewer but more valuable opportunities at salvage to professional salvors;
 - (iii) the improvement in the worldwide communications systems which creates greater competition among salvors with possible detrimental effects on that industry;
 - (iv) the improvement in salvage techniques requiring greater capital investment;
 - (v) the attachment to ship and cargo of new and valuable economic interests such as -
 - (a) the risk of liability for marine casualties;
and
 - (b) the increasing importance of time factors.These economic interests may benefit from salvage operations, even if ship and cargo do not;
 - (vi) The ever increasing influence and control of marine insurers in salvage situations. It is seldom the ship-owner who carries the loss or faces the liability nor does he generally benefit from a successful salvage operation.
- (b) The changes since 1910 in international law evidenced by such recent international conventions as -
- (i) International Convention on Civil Liability for Oil Pollution Damage 1969;
 - (ii) Convention on Limitation of Liability for Maritime Claims 1976;

- (iii) Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the 1973 Protocol thereto;
- (iv) Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage 1971

Professor Selvig concludes that -

"these developments suggest that the 1910 Convention is not meeting present-day needs, nor those of the foreseeable future. Accordingly, new provisions amending or amplifying existing rules should be adopted internationally in order that an appropriate long-term basis for the law of salvage be established. It is the conclusion of this report that revision of existing standard salvage contracts is not an adequate answer, and that the remedy needed is a new international treaty on salvage " (6)

3. C.M.I. Questionnaire and Answers

Prior to the production of the final report Prof. Selvig had prepared a preliminary report which had been forwarded to the British Maritime Law Association for its comments. That association in dealing with the report did so in an unusual manner. Instead of commenting on the contents of the preliminary report it extracted from it questions which it considered were raised by it. These questions were as follows:-

- "1. Are commercial interests in your country satisfied that private salvage in its present form or in an improved form is adequate to modern requirements?
 - a. Should total compensation of salvors be higher than at present?
 - b. Is there a risk that salvors will not undertake salvage for fear of incurring liabilities or not being properly compensated?

- c. Does the content of the salvage contract pose special problems in modern salvage? Are these problems soluble by provision in an International Convention?
2. When damage to third party interests has been avoided which might otherwise have involved ship/cargo in liability (liability salvage), should this be a proper subject for salvage? Should compensation be available?
 - a. Are salvage awards in your country enhanced to include an element in respect of "liability salvage" or in any other respect?
 - b. Should "liability salvage" extend only to pollution risks or should other risks e.g. wreck removal, be included?
 - c. Should the award in respect of "liability salvage" be limited by reference to the value of hull and cargo? Alternatively, if liability underwriters are to contribute separately in respect of "liability salvage" should a separate limit be imposed?
 - d. Do shipowners in your country prefer that the element of "liability salvage" should be met by their hull underwriters or by their liability underwriters?
 3. Under the law of your country are third party interests considered to be "in danger" for the purpose of Article 1 of the 1910 Convention?
 - a. Can salvors claim the cost of preventive measures in salvage in your country? Does this right exist independent of salvors' rights under the 1969 and 1971 Conventions?
 - b. Do preventive measures refer to danger before or after an accident has occurred?
 - c. Should there be an award in respect of preventive measures and, if so, should the salvage award also be enhanced in respect of liability salvage?
 4. In view of the instruction of the Legal Committee of IMCO to the CMI contained in paragraph 64 of the report of the 40th Session should the CMI concern itself with the content of the salvage contract agreed by the interested parties?
 - a. Should the content of the salvage contract be superseded by rights and duties enforced under a Convention?

- b. Is there a necessity for a jurisdiction clause in the proposed Convention?
- c. Is a new Convention or Protocol necessary?" (7)

The B.M.L.A. then proceeded to answer its own questions.(8) In due course the C.M.I. circulated both the questions and the answers to the various national associations for their comment.

It is interesting to note the reason advanced by the B.M.L.A. for the manner in which they proceeded, this is stated to have been

"not merely to provide a focus for enquiry, but in order to ensure that unwarranted assumptions are not made and furthermore to draw more explicitly on the comparative experience of Maritime Law Associations." (9)

In due course C.M.I. circulated comments from other associations, such as

- i. The Japanese Maritime Law Association (10); and
- ii. Yugoslav Maritime Law Association (11);

Concurrently with the production of the questionnaire the sub-committee on Salvage had some meetings during which it considered Professor Selvig's report and several of the replies (12). Draft texts had been prepared by a Working Group of the Sub-committee and by the B.M.L.A. and these were considered in some detail, especially as they evidenced different approaches to the problem. The working group draft reflected the principles of liability salvage while the B.M.L.A. draft reflected the principles contained in the recently amended Lloyd's Open Form of Salvage agreement (13). A composite draft text was later prepared by the Working Group on the basis of the discussions in the sub-

committee. This composite draft was forwarded to all National Associations for their comments (14). In due course another Composite Draft was so forwarded as some further alterations were considered necessary by the International Sub-Committee following its meetings on 2nd and 3rd February 1981 (15). All these documents were received by the Maritime Law Associations of Australia and New Zealand which in turn appointed a sub-committee to deal with the matter.

4. The Work of the M.L.A.A.N.Z. sub-committee

A. The sub-committee appointed consisted of the authors of these papers. This committee met on numerous occasions, between December 1980 and May 1981 to deal with each question posed in the B.M.L.A. questionnaire, whereupon a position paper was produced. This paper was adopted by the Executive Council as the Associations submission to Montreal. It is reproduced as Addendum A to these papers.

In summary the sub-committee agreed with the approach suggested by the B.M.L.A. although it was obvious that the problems in our part of the world were generally different from those encountered elsewhere, because of

- (i) the extent of the coastlines of Australia and New Zealand;
- (ii) the geographical position of Australia and New Zealand away from the world's main shipping routes and maritime disaster areas;
- (iii) the relative sparsity of population of both countries; and
- (iv) the need for salvors to operate in diverse areas to remain viable.

The sub-committee took the view that the 1910 Convention posed problems in modern salvage which were curable both by

- (a) an amendment to the 1910 Convention; and
- (b) the use of the "L.O.F. 80".

One of the main problems envisaged by the sub-committee related to salvage financing, as is evident from its answer to question 1(c) reproduced in addendum "A". The other main problem centred around the award for "liability salvage" dealt with in answer 2 of addendum "A".

- B. While the committee was carrying out its task the Draft text of the Convention, as proposed, was also remitted to it for its consideration. Since the Chairman of the sub-committee was intending to attend as the Association's delegate to the C.M.I. conference at Montreal it was considered that discussion by the committee of the draft text would assist him to participate in the discussions at Montreal. Accordingly several meetings of the committee were dedicated solely to a detailed scrutiny and discussion of the final draft text produced by the C.M.I. sub-committee. In all the task of the committee was interesting and rewarding because it required both consideration of the views of other National Associations as well as the views of the C.M.I. sub-committees as encapsulated in the draft text and the drafting of the Australian position taking into account the divergent views and requirements of the different interested parties.

- (1) Doc. Leg. XXXV11/2 - of September 22, 1978.
- (2) Doc. Leg. XXXV11/7 - of September 22, 1978.
- (3) Doc. Leg. XL/S - of June, 1979.
- (4) Salvage - S/ IV-80, April 1980.
- (5) Ibid. page 3.
- (6) Ibid. page 4.
- (7) Salvage 3/ IV-80.
- (8) Salvage 4/IV - 80.
- (9) Ibid. page 1.
- (10) Salvage 13/X - 80.
- (11) Salvage 17/II - 81.
- (12) Minutes of Sub-committee meeting 27/28 October 1980.
- (13) Ibid. Page 2.
- (14) Salvage 15/X11 - 80.
- (15) Salvage 18/II - 81.