PART C

THE DRAFT SALVAGE CONVENTION APPROVED AT MONTREAL

By: P.A. Willee

1. Introduction:

Much of the following material involves a comparison of the provisions of the 1910 Salvage Convention, (17) Lloyds Open Form 1980 (LOF80), (18) the initial draft convention prepared for the conference at Montreal by the sub-committee of C.M.I. established for that purpose under the chairmanship of Professor Erling Selvig, (19) and the final draft convention approved in plenary session at the conference in Montreal, (20). The more important provisions of each of these documents are reproduced within this paper, but the reader may be further assisted by reference to the full text of them reproduced at the end of this paper.

At Montreal the delegates were presented with two principal reasons for revamping the 1910 Convention, they were:-

(a) to update a convention prima facie outmoded by the passage of 70 years; to accomodate changes produced by technical and economic developments in shipping, salvage and marine insurance; and

(b) to encourage salvors to act in situations where the risk of worsening the damage likely to be caused by the escape of oil or other pollutants is so high as to render it uneconomic for the salvor to intervene.

The second reason was by far the most important consideration.

As was to be expected the strong commercial orientation of the individual delegates and the various organisations granted observer status at the conference was displayed in a way which almost completely transcended normal political boundaries. Nevertheless no single commercial or economic interest was advanced to the point of eclipsing another point of view. Debate was for the most part rational and unheated, conducted with considerable tolerance for opposing view points probably because earlier discussions relating to LOF80 had provided a forum for the synthesis of the views of the interests represented at the conference.

The debates were not, however, conducted in an atmosphere of de ja vu. The observers were granted the right of audience and indirectly of effecting amendments to the Draft Convention if their proposals were accepted and adopted by national delegations. They used their not inconsiderable influence to flesh out the bare skeleton of the first rational for revamping the 1910 Convention by providing legitimate reasons for change. For example, the International Salvage Union (ISU) and the European Tug Owners strongly contended that any new convention should provide:-

(i) a means of forcing ship owners and their crews to cooperate with salvors;

../2

(ii) a means of obtaining security from cargo interests whom they could not identify and trace where ships were carrying multifarious cargoes;

(iii) a right to the salvor to limit his liability;

(iv) a method of accelerating the making of awards; and

(v) a means of enriching existing awards (quite independently of any enhancement referable to protection of the environment).

As debate proceeded it became increasingly apparent to delegates that despite the industry of Professor Selvig's committee in most cases it was very difficult to improve on the principles encapsulated in the articles of the 1910 Convention which most delegates regarded as having proved their efficacy, rather than having obdurately withstood 70 years of attempts to change such principles. This focused the debate on those articles which were regarded as unwarranted attempts to effect a radical change on a pre-existing efficient principle or alternatively, which tended to upset any consensus previously arrived at in formulating LOF80.

In view of the influence exerted by the observers at the conference it is worthwhile mentioning that they included: International Maritime Consultative Organisation, (IMCO), International Group of Protection and Indemnity Associations, (IGPIA), International Chamber of Shipping, (ICS), International Oil Pollution Compensation Fund, (IOPCF), Association Internationale Des Dispacheurs Europeans, (AIDE), International Union of Marine Insurance, (IUMI), Oil Companies International Marine Forum, (OCIMF), International Salvage Union, (ISU), and the American Institute of Merchant Shipping, (AIMS).

Similarly the total lack of representation from any of the Middle East oil producing/carrying nations either as delegates or observers is equally significant, having regard to the fact that Liberian registered vessels for example may well carry up to 30% of the world's oil.

2. <u>Providing an incentive to the salvor to act in uneconomic and environmentally threatening situations - the Regime.</u>

The means of achieving salvor participation opted for in the Draft Convention was to provide for payment to the salvor of his expenses incurred in preventing damage to the environment regardless of whether or not he was successful ("the safety net") and if he was successful to enhance the award by a significant amount referable to those expenses. ("The special reward").

The safety net and the special reward (both payable by the

../3

ship owner) were only to be paid where their combined total exceeded the general salvage award.

The safety net solution represents a compromise between those interests seeking reimbursement to the salvor only if he was successful in avoiding damage to the environment and those seeking payment of expenses where the task was undertaken by the salvor even if he was not successful.

The Draft Convention

3. (a) Definitions Article 1-1.

The draft definition of items or circumstances which might be the subject of salvage was not simply extended to cover "damage to the environment" to provide the basis of payment for the safety net; it also extended the type of marine property which might become the subject of salvage operations.

So far as damage to the environment was concerned the draft sought to give recognition to physical damage caused by every potentially damaging agent but to exclude the economic consequences of such damage. This immediately raised the following issues in debate:-

(i) What sort of damage should be recognised?

(ii) What if any type of potentially damaging agents other than oil should be recognised as having to be guarded against or should the provisions of the Convention be simply limited to oil? Poland, Japan and Ireland all wanted to limit the Convention to oil on the basis that to expand the list of agents likely to cause damage to the environment would saddle the ship owner with too much responsibility in a private law convention which should only take account of private law responsibilities.

(iii) To what extent should vessels foundering on the high seas be encompassed by the definition when their cargoes were likely to pollute a coastal state, or which would need to be brought to a place of safety in a coastal state once salved, but still presented a pollution hazard in the salved state?

(b) The words of the final draft article 1-1-4 are in the following terms:-

"Damage to the environment means substantial physical damage to human health or to marine life

../4

> or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, explosion, contamination, fire or similar major incidents."

These words seem to recognise that the conference opted for physical damage (and not its economic consequences) caused by the widest range of agents to a narrow group of primary as opposed to manufactured or constructed human and ecological resources, situated in a fairly wide area of coastal or inland waters or areas adjacent thereto. The words do not specifically mention ships on the high seas. However, the rejection of an attempt by the Irish Delegation to limit the definition to damage arising from an incident occurring in coastal or inland waterways must mean that such a limit was rejected by the conference in favour of the wider concept that the Convention should cover the situation of marine accidents occurring well away from coastal areas which might still cause damage to the coastal environment.

The specification of the type of property which is protected, that is to say marine life or resources is specifically designed to account for objections to the draft definition being so wide as to include matters which would relate to economic loss or individual property damage, for example, one ship blowing up and setting fire to another or oil blackening a sea wall but not otherwise causing damage. So far as it can be, the problem of salvors bringing pollution risks into port is covered by article 2-1-3 and article 2-4.

(c) Property and Vessel

Article 1-1-3 of the original draft defined property in a somewhat circular fashion as:

> "Property means any property in danger in whatever waters the salvage operations take place, but including freight for the carriage of cargo, whether such freight be at the risk of the owner of the goods, the ship owner or the charterer."

The phrase "property in danger in whatever waters the salvage operations take place" simply repeated the definition of salvage operations as defined in Article 1-1-1 as: "any act or activity undertaken to assist a vessel or property in danger in whatever waters the act or activity takes place."; and was therefore deleted.

The need to ensure that "freight for carriage of goods" is included in salvagable property is obvious. If freight for the carriage of goods is being earned in respect of cargo carried during the voyage, or has been earned prior to completion of the voyage, or, can be

../5

earned for voyages yet to be undertaken, and through a salvors efforts a vessel is able to continue voyaging then in that sense the salvor has saved the loss of that freight. Although strictly a chose in action according to our concepts, there is no reason in principle preventing the value of such freight being taken into consideration as part of the value of the property salved against which the salvors general award can be assessed for payment.

Similarly the need to broaden the definition of vessel to include self propelled oil rigs and the like type of structures is also obvious. Hence:

> "vessel means any ship, craft or structure capable of navigation, including any vessel which is stranded, left by its crew or sunk".

Despite this definition the overall provisions of Article 1-1 do not seem to exclude non-navigable property because the definition of salvage operations in Article 1-1-1 includes any act or activity undertaken to assist a vessel or property in danger. But it was never clarified whether the word property in this context was intended just to cover cargo from a vessel in danger or was intended to expand the definition deliberately to include fixed marine structures such as oil rigs, jetties, dolphins and the like. Certainly some delegates understood it to be wide enough to include those items.

There were proposals in debate, from Japan, Ireland and the United States; to broaden the definition of property as widely as possible to encourage the best salvage award available to the salvor and even to include within the definition human life. Part of this broadening process is evidenced in the definition of salvage operations. In the original draft this was "any act ... undertaken to assist a vessel or property in danger" whereas in the final draft the word "any" was inserted before property to make the definition read "any act ... undertaken to assist a vessel or any property in danger".

(d) Sunk

The remaining issue of significance related to the word "sunk" as used in the definition of vessel. Delegates feared that a sunken vessel would be equated to a wreck. The convention was never intended to apply to the latter [see Article 1-2-2 (d)]. Wreck removal was intended by the Drafting Committee to be within the province of national regulations. The inclusion of both terms (it was feared) would cause endless wrangling on when a sunken vessel became a wreck;

therefore sunk should be deleted. In the end "sunk" was retained, on the basis that the differentiation between a sunken vessel and a wreck could easily be made and although a recently sunken vessel might technically be a wreck it would still leave an enormous potential for pollution damage.

4. The Scope of the Convention Article 1-2

The aim of the Drafting Committee was to give the Convention the widest possible scope but to leave for separate regulation the problem of war ships and other state owned or operated vessels.

At the outset the Japanese pointed out that the drafted article 1-2-1 made little sense from the stand point of the private international law principle of choice of law. This was because it seems to adopt the principle of Lex Fori in its application to proceedings commenced in a contracting state but abandoned that principle when it went on to apply the convention; regardless of where the suit was brought; to situations where either the salvor or his vessel, or the vessel which he salved, had a connection with a contracting state. These words apparently sought to force a non-contracting state to apply the convention when it was not bound to do so by any recognized principle of international law. The article was in terms -

> "This convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this convention are brought in a contracting state, as well as when the salvor belongs to, or the salving vessel or the vessel salved is registered in a contracting state."

Such a defect (if it was a defect) did not seem to trouble any delegate least of all the Germans who wanted to extend it further by having the convention apply to vessels (whether salved or salving) flying the flag of a contracting State regardless of whether or not the State of registration of that vessel was a contracting party. Their stated reason for this proposal was to bring the terms of that article into line with paragraph 1 of Article 5 of the High Seas Convention 1958. This proposal did not find favour with the rest of the delegates and the draft remained unchanged despite the Japanese criticism.

5. Public Authorities Article 1-3

Article 1-3 of the draft dealing with salvage operations controlled by public authorities provoked no discussion and was accepted in its drafted form. It is to be remembered (as the Drafting Committee pointed out) that this article does not deal directly with questions relating to salvage operations by or under the control of public authorities, nor to payment

from such authorities, but only with the salvors rights and remedies under the convention where he does deal with public authorities. Its provisions are to be compared with Article 13 of the 1910 Salvage Convention which also laid down that its provisions should have no affect on salvage by or under the control of public authorities and by its silence conveyed none of the 1910 Convention Rights on salvors engaged in such work.

6. Application of the Convention to Salvage Contracts Article 1-4.

Article 1-4-1 which allows for contracting out of the convention provisions produced some of the most emotional and eloquent rhetoric of the whole conference-notably from the French delegation. The French wished to prevent any parties to a salvage contract being able to contract out of the Convention Provisions. The high degree of need for this was explained in terms of ensuring that adequate protection was achieved by making the provisions mandatory. The force of this argument completely escaped the assembled company but only the leader of the Dutch delegation had the courage to challenge the lack of lucidity in the French explanation by innocently asking precisely who it was that the French intended to be protected by making the convention provisions mandatory. The resultant tirade (which lost nothing in the translation) left us in no doubt that it was to protect the poor Bretonese fisherfolk who had suffered more greatly from the Amoco Cadiz disaster because the thoroughly commercially motivated gentlemen (whom the rest of the delegates represented) had failed to act quickly enough to check the inexorable spread of the oil slick which destroyed their livelihood. Our masters being otherwise occupied bickering over the financial arrangements which might have paid for the fisherman's salvation. So moving was this oration that the delegates responded with a resounding ovation. Perhaps the delivery of that ovation gave the delegates pause to reflect on the incongruity of praising the indictment of our combined moral turptitude. In any event it was followed by a period of embarrassed silence. Fortuitously or otherwise being closest to the microphone it fell to the Australian and New Zealand delegate to clear the air. Biting back all reference to French perfidy in the Pacific by way of nuclear testing the point was made (and later roundly supported by the British delegate) that making the provisions of the Convention mandatory would not help the Bretonese (or any other beach dwelling people of the world) if that was seen by a salvor as an unacceptable form of coercion forcing him into an agreement upon terms that did not suit him. In short, it had the potential of discouraging prospective salvors from taking action in some circumstances. The salvors themselves did not want the Convention Provisions to be mandatory. The whole agreement was a compromise and it would be wise of the French not to persist with the risk of destroying that compromise. With typical Gallic sensitivity both to the mood of the

../8

meeting and the issues involved, the French delegate persisted until the bitter end. Defeated on the major issue in committee he was driven to his second position in plenary session. This was to attempt to pursuade us to make some of the more important Convention Provisions mandatory namely those contained in chapter 2 and 3 of the Convention. His lack of success was due to some extent no doubt to an unfortunate allusion requiring the various interests to divorce themselves from commercial considerations and to be in a loving, caring relationship with the third parties who needed their protection, closely akin to what I interpreted as some sort of menage a trois. This drew the witty retort from Sir John Donaldson that he did not know about the French but for his part he wanted the distinguished delegates assembled to be assured that the British were just not that promiscuous. The French proposals therefore failed.

7. Invalid Contracts or Contractural Terms Article 1.5

The working party draft of this article was intended to repeat article 7 of the 1910 Convention by providing for the vitiation or amendment of a salvage contract concluded when the will of one of the parties was overborne by his perception of impending doom or where with the wisdom of hindsight it could be seen that the amount of contract renumeration was in fact clearly excessive or too small having regard to the services actually rendered. The draft survived its failure to include the exact wording of the 1910 concept of fraud or concealment vitiating one party's consent (presumably because that concept was included by use of the term "inequitable" to descibe the contract complained of). It also survived a Japanese attempt to delete sub- paragraph (b) (permitting amendment or annulment where the contract price was disproportionate to the service rendered). The reasons for wanting this deleted was the Japanese belief that such a wide provision totally defeated any concept of certainty in the parties contract.

8. Performance of Salvage Operations Chapter 2.

The Provisions of the whole of this part of the draft convention were new, except for article 2.3 which purports to attempt a concise restatement of articles 11 and 12 of the 1910 Convention imposing a duty on the masters of all vessels to render assistance to vessels and persons in danger, insofar as that assistance can be rendered without risk to his own vessel. No-one adverted to the significant omission of the requirement appearing in the 1910 Convention which imposed such a duty on masters even where the vessel or persons in danger were enemies. Perhaps a more realistic outlook has been produced by the advent of unrestricted submarine warfare, Q-ships and other more modern trends in the conduct of war at sea (or even peace for that matter where American submersibles can sink Japanese ships by surfacing in the area already occupied by their bottoms

../9

and then disappear without rendering assistance).

The purpose of this part of the new Convention and particularly articles 2-1, 2-2 and 2-4 imposing duties on the various participants in salvage operations is to ensure the utmost cooperation between them so that operations are conducted swiftly and efficiently.

9. Duties of the Owner and Master Article 2.1

In the draft form only paragraphs 1 and 3 of this article appeared. Article 1 required the owner and master of an endangered vessel to take timely and reasonable action in the arrangement for salvage operations; the full cooperation of both with the salvor during the conduct of such operations and their best endeavours to avoid or minimize damage to the environment. Article 3 (then article 2 in the draft) imposed a duty on owners to accept the redelivery of salved property when requested by the salvor so soon as the vessel had been brought to a place of safety. This latter Provision when coupled with the provisions of article 2-4 imposing a duty on contracting states "regulating or deciding upon matters... such as admittance to ports of vessels in distress or the provision of facilities to salvors..." to at least consider the need for cooperation between salvors and public authorities; goes about as far as is possible to meet the problem of salvors with salved vessels which are still potential pollution risks being treated like modern day flying Dutchman and denied access to a safe port.

Apart from arguments about the suitability of the use of the word "prevent" instead of "avoid" and "minimise" in relation to damage to the environment in article 2.1, the significant change in the draft was brought about by the inclusion of a new article 2.1.2 instigated by the Italians. This imposed on the owner and master of an endangered vessel the obligation to require or accept assistance from other salvors where it becomes apparent that the first salvor cannot complete his task within a reasonable time or his capabilities and facilities for its completion are inadequate. The stated reasons for the adoption of this paragraph were clear and sensible. Under the draft the responsibilities and effects of failure were somewhat onesided resting entirely on the salvor. There was a need in the interests of securing a rapid commencement and completion of any particular salvage operation to involve the owner and master in the decision making process as much as possible so long as this did not unduly interfere with the salvor in his ultimate task of protecting the environment and salving the vessel. For the same reason the owners and masters needed to be given the right to intervene where they could see that delay due to the salvor's inability, incompetence or lack of facilities would prejudice a successful conclusion of the operation. As was pointed out, most masters are very competent seaman and are able to judge for themselves the effectiveness of the

../10

salvor's efforts. The corollary is that this would not be an attractive argument to the salvor, but rather one which if used as justification for the interference of the master in salvage operations has the potential of causing consideration dissension.

A French proposal to compel the ship owner to act as the prospective salvor's surrogate in the matter of guarantees or indemnities required by public authorities as a condition for the carrying out of the salvage operation, was defeated on the grounds that the proposal smacked of being a public law type of interference inappropriate to a private law treaty. Moreover without any effective sanctions on the ship owner for failing to comply with such a provision it would prove to be a mere brutum fulmen.

10. The Duties of the Salvor Article 2.2

In its draft form this article was objected to by the I.S.U. as being unnecessarily wide. It imposed two separate obligations on the salvor. The one to use his best endeavours and due care to save the vessel and property; the other to use his best endeavours to avoid or minimise damage to the environment. The I.S.U. were fearful that the requirement to avoid or minimise damage to the environment might impose a duty on the salvor to get involved in activities which were really unconnected with the salvage operation, for example, clean up operations. The difficulty was resolved by a drafting amendment which made the second obligation dependant on the first so that it became clear that it was only during the conduct of the salvage operations that the salvor had to use his best endeavours to "prevent" (as it became instead of "avoid") or minimise damage to the environment.

The original drafting of Clause 2.2.2 raised more serious objections from the Italian, Russian and French delegates. It required the first salvor to obtain assistance from other salvors: "whenever the circumstances reasonbly required it" but gave the salvor the right to reject such offers when he could expect to complete the task unaided or was of the view that the capabilities of the offeror were inadequate. The I.S.U. objected to this Clause on the grounds that it might prejudice the first salvor's award when the circumstances were looked at in hindsight and imposed too heavy a burden and responsibility on the Salvor, having regard to the ship owner's existing right to engage other salvors if they wished. The Italians and the Russians rightly objected to the article being in a form which tended to suggest that the salvage operations were at the absolute direction of the first salvor on the scene rather than the master or shipowner of the disabled vessel. From the French point of view of course, the drafted form had the advantage of providing another regulating factor in relations between the salvor and the owners or master which tended to clarify obligations,

../11

speed up reaching a conclusion and hence the completion of the operation. From a practical point of view the advantage of the clear expression of an obligation falling on the salvor to accept assistance helps to remove one of the causes of dissesion previous mentioned as being likely to arise between a master and the first salvor on the scene, because the latter has at least to curtail some of his umbrage in acknowledging the right of the former to call in aid other salvors.

In the end a very satisfactory and obvious synthesis of these views was reached corresponding to the concept embodied in article 2.1.2. The final draft article obliges the salvor to obtain assistance whenever the circumstances reasonably require him to accept the intervention of other salvors or when requested to do so by the owner or master, but with the proviso that his award will not be depleted if it is later found that the intervention instigated by the request was unnecessary. The whole thrust of article 2.1.2 and 2.2.2 is to foster a legal view that other salvors able to intervene in the operation should be seen as assistants not competitors.

11. Duty to Render Assistance Article 2.3

This re-statement of Article 11 of the 1910 Convention attracted little discussion except for the adoption of the French proposal to complete the re-statement by repeating in the final draft (as paragraph 2.3.3) the previous condition that if a Master sheds the duty to render assistance then the ship owner should not be liable.

12. Co-Operation of Contracting States Article 2.4

Recognition of the fact that some salvage operations could not be successfully carried out at all, except with the co-operation of the public authorities of the coastal state insured that there was little interference with this far-reaching provision requiring a contracting state to take into account the need for co-operation between salvors, other interested parties and public authorities when regulating or deciding matters relating to salvage operations directed to saving life or property and preventing damage to the environment; such as admittance to ports of vessels in distress or the provision of facilities to salvors. The words: "other interested parties" were inserted in the final draft at the instigation of the Norwegians despite other views that we could well do without the intervention of "conservationists" who might see themselves as properly described as "interested parties".

13. The Rights of Salvors Chapter 3

14. Conditions for Reward Article 3.1

The provisions of Article 3.1 simply repeat the provisions of

../12

the 1910 Convention Articles 2 and 5; limiting salvage reward to acts of assistance which have a useful result and granting a right to salve even where both the salvor's vessel and the salved vessel have a common owner.

15. The Amount of the Reward Article 3.2

Draft Article 3.2 is a re-statement of Article 8(1) of the 1910 Convention. Its significant features are that in dealing with the matters to be taken into account in fixing the salvage award the Article:

(a) Continues to refrain from nominating the person responsible for satisfying payment of the award,

(b) Introduces a requirement that the award should be made with a view to encouraging salvage operations,

(c) Introduces new matters to be taken into account in fixing the award for example sub-paragraph (g) the promptness of the service rendered and (i) the state of readiness and efficiency of the salvors equipment and the value thereof,

(d) Introduces the entirely new concept that account is to be taken of the skill and efforts of the salvor in preventing or minimising damage to the environment.

The order in which the factors to be taken into account in fixing the award specified in Article 3-2-1 sub-paragraphs (a) to (i) are not intended to be an indication of either the relevance or the weight to be attached to any particular consideration. Apart from a successful proposal from ISU to ensure that the availability as well as the use of vessels should be included in Article 3.2.1(h) as one of the relevant consideration for fixing the amount of the award, no other significant amendments were proposed. We were happy to support this amendment as part of a general policy argument that the geographical remoteness of this part of the world discouraged salvors from maintaining specialist equipment solely for salvage purposes. To remain financially viable many salvage operators used their equipment on other tasks such as pile driving, marine surveys, oil rig supply etc. This meant that available salvage vessels had to travel long distances to reach the scene of local operations. Any proposal which would encourage local salvors to meet the need was therefore worthwhile. [At the time of the debate our New Zealand members had kindly supplied a ready made example to support this contention by making timely arrangements for the "Pacific Charger" to run aground on Baring Head in Wellington Harbour on her maiden voyage from Yokahama. They also ensured that no local salvor interefered with the re-floating operations subsequently undertaken by SELCO Salvage a Singapore operator].

../13

15. Entitlement to a Special Award Article 3-3

Debate on this particular Article seriously threatened the prospect of a final consensus on the whole Convention because its provisions were significantly wider than those of LOF80 and raised issues which threatened the agreements reached in debate on LOF80. This was particularly apparent in relation to a financial arrangement made between the various insurance interests which could be expected to be called in aid to finance the new proposals.

In short LOF80 provides that an additional award equal to the salvors expenses and an increment of up to 15% of those expenses (which were defined as out of pockets, the cost of tugs, craft, personnel and equipment) should be paid to a salvor who through no negligence on his part in respect of the salvage of a laden or partially laden oil tanker was unsuccessful, partially unsuccessful or prevented from completing the operation. This amount and a 15% increment was payable when, and only when, the expenses and the increment exceeded the amount recoverable under the general salvage award. The proposals of the draft broadened this concept by extending the entitlement to such payments to salvage operations conducted in respect of all vessels carrying cargo potentially threatening to the environment not just oil tankers, and increasing the size of the increment from 15% to a range up to double the salvors expenses. The draft proposal immediately raised five distinct and important issues.

(a) Firstly, what form should the incentive payment take and in what circumstances should such payment be made? The concept of extending payments to vessels other than oil tankers caused little difficulty - that argument having taken place at an earlier stage in relation to the issue of what type of damage to the environment the Convention should cover. There was some debate about whether the safety net award should be dependent on the success of the salvage operation in general or the preservation of the environment in particular. There was no doubt payment of the enhanced safety net or special reward was predicated on the success of the salvor in minimising or avoiding damage to the environment. What seemed to cause dissension was the proposal to increase this reward beyond the 15% increment provided by LOF80. As with the LOF80 provisions neither payment was to be made unless in combination their value exceeded the award for general salvage and then only to the extent that it did so. The initial drafting of Article 3-3 left these issues unclear. Similarly both LOF and the draft failed to clarify whether the negligence on the part of the salvor which is likely to defeat or reduce his special reward as provided by the Article was negligence related to the measures taken specifically to prevent damage to the

../14

environment or negligence in relation to salving the ship and cargo. The obligation and task pursued in relation to each objective may not necessariy be synonomous.

The final draft clarifies some of these issues. Article 3-3-1 clearly establishes that the special reward is only payable when the salvor has carried out general salvage operations directly referable to a vessel threatening damage to the environment and has failed to earn an award in the course of those operations, then he will at least be paid compensation equivalent to his expenses. In line with the overriding intention to encourage salvage of vessels threatening the environment such a reward is not dependent on the salvor specifically showing the taking of measures directed to preventing damage to the environment although under Article 3-3-5 his negligence in failing to prevent or minimise damage to the environment may deprive him of some or all of his award. Nothing is said about any negligence which may result in him losing the vessel which he is attempted to salve presumably because it was thought that the negligence causing the latter loss would also cause damage to the environment and is caught by the relevant words - this may not be the case.

(b) The second issue was to fix the amount of the special reward. The proposal in the draft article 3.3.2. to limit this amount to twice the salvors expenses was finally adopted as appears by the last sentence of 3.2.2. of the final draft. But the adoption of this absolute limit is done in a way which makes it perfectly clear that the Tribunal assessing the reward was to work within that range in increasing the award to the extent that it considered it fair and just to do so; rather than as the original draft tended to suggest simply to make a hand out of up to twice the salvors expenses. (Compare article 3.2.2. of the draft and 3.2.2. of the final draft). Moreover there was an enormous range of opinion amongst delegates as to the amount by which the special reward should exceed the salvor's expenses. On the one hand it was not surprising to find ICS as the representatives of the ship owning groups likely to have to meet the cost of Awards suggesting that the lower figure of a 15% increment of the salvor's expenses was ample. They were supported by the Japanese. At the other end of the scale the Canadians and the ISU were suggesting the appropriate figure to be 3 to 4 times the salvor's expenses on the basis that the proposal of up to double the salvor's expenses was far too low when the service rendered was for a short duration but the commitment of equipment and personnal to the task was large. In the end after a powerful and an emotional argument from the P & I club representative and the leader of the British delegation the assembly accepted the proposed figure

../15

having been very much swayed by the proposition that this amount represented a delicate balance of consensus wrung out of the competing commercial interests which must not be changed.

(c) Since the amount of the special reward was directly referable to the salvor's expenses it became imperative to define the content and limit of such expenses before proceeding to determine the size of the multiple by which they should be increased to establish the amount of the special reward. The two issues could not be separated. If the term salvor's expenses included only operational expenses such as a daily rate fixed for wages, fuel, stores, insurance and the like expenses, then a special reward of twice this figure was clearly too small an amount to satisify the salvors. But if the salvage expenses were to include capital items such as the capital costs of the salvage vessel, depreciation charges and establishment charges then when doubled salvage expenses referrable to this criteria might be too high. As the distinguished delegate for Ireland pointed out, salvor's could not expect to have their cake and eat it as well by receiving high awards on a no cure no pay basis when successful, and at the same time have an indemnity for their costs when they were not successful. The final draft tightened up to some extent the definition of salvor's expenses being "a fair rate for equipment and personnel actually used... and expenses incurred" by introducing the requirements that both the out of pocket expenses incurred and the use of the equipment and personnel must have been reasonable in accordance with some of the criteria expressed for fixing the amount of the award for general (hull and cargo) salvage. (Namely in accordance with sub-paragraph (g), (h), and (i) of Article 3.2.1. These criteria were the promptness of the service, the availability and use of the salvor's vessels and equiment and the state of efficiency and value of such equipment.)

(d) Before any of these issues were discussed the Dutch delegate raised a serious and well argued suggestion that the general salvage award and a safety net and special reward payments be separate awards. This argument was based on the propositions that the general average provisions of rule vi of the York-Antwerp Rules allows the ship owner who pays for a general salvage award of hull and cargo to obtain reimbursement from cargo interests. However payment for prevention of damage to the environment does not form part of the general average since prevention of damage to the environment is not a general average act (it not being an extrodinary sacrifice or expenditure intentionally and reasonably made to or incurred for the common safety for the purpose of preserving from harm the property involved in a common maritime adventure). Accordingly,

../16

average adjustors would require to establish exactly how much of the reward is directly referrable to salvage of the hull and cargo and how much to damage to the environment. Acceptance of this proposition by many delegates again seriously threatned the consensus on the whole article. The arguments raised against it were unconvincing and lacked ostensible rationality. Nonetheless in rejecting the proposal the majority of delegates were unprepared to go behind the fierce and emotional plea made by the British delegate and insurance interests suggestive of the view that the Dutch proposal would render nugatory the delicate balance of insurance adjustments previously worked out on the basis that the salvage award would be sought and expressed as a total figure.

However, part of the point of the Dutch argument was taken, by the introduction in article 3.2.6. of the provision to the effect that nothing in article 3.3. should affect any rights of recourse on the part of the owner of the vessel.

(e) The final issue raised was the question whether the convention should specifiy who pays for the general award, the safety net and the enhanced award.? ICS wanted these details specified in the convention. They suggested that it seemed to be unclear who paid for the special reward and the general award although it might have been implicit in article 3.2.2 that it was the owner of the property salved who paid for the latter. Because the article deals with the general award and talks in terms of "the property salved" which would, within the meaning of those words, include the hull and cargo. ICS argued that the failure to specifiy any specific payor might prove a fruitful source of litigation. Moreover this was not just an academic point because the provision of LOF80 were based on the view that hull and cargo interests should pay for the special reward and the ship owners the safety net. In effect this point of view raised the same considerations as related to the issue of whether there should be separate awards for general salvage on the one hand and the safety net and the special reward on the other. As ICS pointed out if the balance worked out in support of the LOF80 principles was changed by some decision of a tribunal, for example a decision which tended to suggest that the ship owner should not pay for the safety net this might distort the arrangements previously worked out by making one interest liable for the increased costs involved which that interest had not anticipated. This sort of objection was absorbed in the arguments advanced against splitting the awards and providing rights of recourse to the owner.

The whole of the form of the final draft of Article 3.3

../17

paragraphs 1 - 6 inclusive represents a redrafting carried out by the British Delegation in consultation with others in an effort to obtain a solution which retained the flavour of the original agreement but which tightened up on the drafting points and other apparent objections raised in debate. This was done quite pointedly when it was seen that by dealing with the article in sequence as had been done up to that point of time in committee debate, would seriously prejudice the chances of reaching agreement, unless the debate on that particular article was deferred while an acceptable compromise was found behind the scenes.

The only remaining significant alteration not yet discussed relates to paragraph 1 of article 3.3. It incorporates the difference in wording alluded to by the ISU in its objection to the original draft focusing attention on the nature of the salvage service rendered rather than as it should, on the type of ship/cargo involved in threatening the environment.

16. Apportionment between Salvors Article 3.4

It is important to distinguish the two types of apportionment with which this article deals in purporting to be a simple restatement of the 1910 Salvage Convention provisions on the subject. The first type of apportionment relates to the splitting of the reward between several different salvors who have taken part in the operation; governed under the 1910 Convention by article 6 paragraph 1 by agreement between those salvors, or failing agreement, by the court according to the same criteria as would regulate a single salvor's entitlement to an award. (See article 8, 1910 convention and compare it with article 3.2 of the draft convention). In the context of this type of apportionment both the draft and the final draft (perhaps significantly) omit any reference to the salvors being permitted to agree between themselves as to the division of an award. Nevertheless a proposal by the Italian delegation to render any such agreement between salvors concluded prior to the completion of the salvage operation null and void was defeated. Presumably this proposal was put in furtherance of the general Italian line of argument that the first salvor on the scene should not be entrusted with the direction and control of the salvage operation, to the exclusion of all others.

The second type of apportionment regulated by article 8 sub-paragraph 2 of the 1910 Convention and article 3.4.2 of the Draft, relates to the distribution of the reward between the owner, master and other persons in the service of each individual salvor. This is to be apportioned according to the law of the flag of the salvage vessel or, if a vessel is not used, by the law governing the contract between the salvor and his employees. The proposal by the ISU to insert a new clause permitting the salvor to make an agreement relating to salvage reward binding upon all his

../18

servants, agents, sub-contractors (including the crews of his vessels employed in salvage operations) was rejected as an unnecessary fetter on the freedom to contract despite its laudable intentions. The proposal was designed to solve the problem of the salvor having to give and obtain a series of indemnities or to make or receive a multiplicity of claims where that salvor was using crews not bound by salvage articles regulating the share of their entitlement, or sub-contractors in a similar position.

17. Salvage of Persons Article 3.5

Article 9 of the 1910 Salvage Convention had simply provided that subject to the national law on the subject, no renumeration was due for persons whose lives had been saved at sea, but that salvors who had saved human life were entitled to a fair share of the renumeration awarded to the salvors of the vessel. The provisions of the draft restated the right of a salvor of human life to share in the general award but also went much further; avowedly on the basis that the principles on which payment under the safety net and the special reward were granted to the salvor, should also be applied to the salvage of human life. The details of the draft provisions need not be examined because the commerciality of the proposal horrified many delegates who subscribed to the view that it was the common duty of all seaman to come to the aid of those whose lives were in peril on the sea. This produced an immediately consensus that any new convention should not go beyond the provisions of the 1910 Convention. As the German (DDR) delegation pointed out the draft proposal in article 3.5.5 in requiring payment for salvage to be made by the owner of the vessel in danger might actually endanger human life if the master of such a vessel, conscious of such an obligation, declined to request assistance to save his passengers or crew.

18. Services Rendered under Existing Contract Article 3.6

The draft provision here was designed as a wider restatement of Article 4 of the 1910 convention which speaks specifically about towage contracts and the restriction on the right of a tug to salvage, in respect of a vessel she is towing, unless she has rendered exceptional services to that vessel going beyond the terms of the towage contract. The use of more general language in both drafts seems to recognize that contracts other than towage contracts could raise the same vexed question which has plagued the area of "tug-tow" for some time - namely when can it be said that the services rendered by the tug are so far outside the terms of the towage contract as to become salvage or the like type of service? The wording of the drafts makes no attempt to solve that difficulty and remained unchanged despite a Belgium request that the words be referred back to the Drafting Committee to consider incorporation of a form of wording which would contain a clearer and more specific reference to

../19

towage contracts.

19. The effect of the salvor's misconduct Article 3.7

This article which has its counterpart in article 8 paragraph 3 of the 1910 convention provides for the deprivation or reduction of the salvor's award where his conduct has made it necessary that the salvage operation be carried out or has made the conduct of those operations more difficult. A Canadian proposal (supported by the Germans and Russians) to delete the reference to the second criteria of the salvor making conduct of the operation more difficult was not adopted. The Germans suggested that where the salvor's conduct had made the operations more difficult it would be better to adjust his award according to the criteria of its making under article 3.2.1.

20. Prohibition by the Master or Owner Article 3.8

Article 3 of the 1910 Convention denies salvage renumeration to a salvor who has performed salvage services when those responsible for the vessel concerned have expressely and reasonably rejected those services. The drafted article 3.8 sought to extend this refusal of renumeration to the situation where "an appropriate public authority" had also rejected those services. As can be seen by the words of the final draft delegates rejected this proposition. It is not entirely clear why they did so. Probably they had in mind a situation which could arise where the appropriate public authority might wish to forbid the salvage operation or part of it because of the immediate threat to the environment and this would bring them into immediate conflict with a master or owner who did wish such a salvage operation to take place. (See The Government of the Netherlands v. B.V. Bergins en Transpostbedrijf den Akker and Union Remorguage et de Sauvetage unreported 4th February, 1981 a decision of the Netherlands Court of first instance at Middelburg for a recent example of a ship in distress seeking entry to a safe port contrary to the instructions of the local port authorities).

21. Claims and Actions Chapter 4.

Except for the provisions of time limits the Articles of this chapter have no counterpart in the 1910 Salvage Convention and are intended to facilitate the enforcement of the salvor's rights pursuant to the draft convention.

22. Maritime Liens Article 4.1

The Drafting Committee assumed that salvage claims would be secured by maritime liens and recognized that from the practical point of view it would be more efficient if security be provided by those liable for the award or their insurers. It was well that they did so for it rapidly became

apparent in debate that the legal systems of some countries did not recognize such a chose in action as a maritime lien. To put that matter beyond doubt the U.S. delegation proposed an amendment to the draft granting the salvor a specific right to a maritime lien in terms:

> "the salvor shall have a maritime lien on the vessel or property salved for the liabilities of the respective owners to pay any reward pursuant to article 3.2".

The proposal was adopted in committee but on the motion of the Belgium delegation rejected by the delegates in plenary session because of the difficulties which the concept of the lien in the common law sense would cause, when considered by Continental courts which had no such concept.

Paragraph 4.1.3 entered the draft on the motion of the Swedish delegation. It provides that the property salved may not be removed from the place where the salvor deposited it until a satisfactory security has been put up for the salvor's claim. The proposal was accepted as a very useful attempt to solve the practical problem of the basis of the lien disappearing so soon as the property to which the lien attached was salved. The problem had earlier been recognized by similar words in LOF80 (See Clause 5).

23. Duty to Provide Security Article 4.2

Articles 4.2.1 requiring the person liable for the salvage award to provide satisfactory security to the salvor on request; remained unchanged in the final draft. So did article 4.2.2 requiring the owner of the salved vessel to use his "best endeavours" to ensure that cargo interests also provided security before the cargo was released. This provision is designed to help alleviate the problem (to which previous reference has been made) of salvors being unable to identify multifarious cargo interests. The article reflects the fact that salvors seeking separate cargo security merely duplicate what the ship owner does already when he collects general average bonds and guarantees from cargo interests, he having a lien on cargo, pending provision of such general average security and the right under the York-Antwerp rules to recover salvage expenses from cargo interests. It is fruitless for the salvor to undertake the same task as has already been performed by the ship owner.

Nevertheless the proposed article 4.2.3 was roundly opposed by several delegations, including our own, and its deletion from the final draft was never certain. In essence this provision would have enabled a salvor who had not been provided with satisfactory security within a reasonable time after his request therefor, to bring any claim for payment due under the convention provisions directly against the insurer of the person liable. Despite provisions restricting the liability of the insurer to the liability of the person

../21

subrogated pursuant to the terms of the insurance contract between them, and the retention of all defences which the insurer would have had under the contract of insurance between itself and the person subrogated, the proposal is inherently objectionable to the common lawyer because it dramatically changes the risk, for which the insurer has never contracted.

The Drafting Committee claimed as its justification for this proposal that it would be of particular value where the amount of the award would exceed the value of the property salved and its arrest would therefore be of little value.

The Australian Committee objected to the proposal in draft in no uncertain terms as an unwarranted compulsorily transposition of terms under a freely negotiated contract between the original parties, from a party with whom the insurer was voluntarily prepared to conclude negotiations on a particular basis of liability, compulsorily to another, whom the insurer had never considered on any contractual basis at all. Moreover the proposal could have allowed a change in the whole basis of the contract of insurance where the person liable for the award was not a citizen of a country acceding to the convention, but the salvor and the insurer both were. Conversely it might have fostered evasion of the convention provisions by members who could insure in countries which had not acceded to the convention. These objections were pushed in debate. The Dutch delegation was also opposed to the provisions on principal and on the basis that even if desirable the clauses drafted failed to deal adequately with all the legal implications of the situation. The United Kingdom delegate argued that the provision had nothing to do with providing security and would not help the salvor in any event, if all the relevant defences were available to the insurer. Moreover the proposal was impractical because it would be possible to draft an insurance policy to exclude the right of direct action by the salvor. In the result the proposal was not adopted.

24. Interim Payment Article 4.3

This provision enabling a court to order payment of "such amount on account" to a salvor as seems fair and just and to adjust or reduce the security provided in accordance with the payments made; attracted little debate and remained unchanged in the final draft. It was described by the Drafting Committee as having been "inspired by present arbitral practice". The ISU regarded the provision as essential in the maintenance of cash flow when inflation and money costs were high.

25. Limitation of Actions Article 4.4

Again these provisions attracted little comment. The 2 year time bar established by article 10 of the 1910 Convention is

../22

repeated in article 4.4.1. Article 4.4.2, 4.4.3 and 4.4.4 respectively providing for: an extension of that period by the person liable, time limits in respect of indemnification proceedings by the person liable of not less than 90 days from judgment of liability and the time allowed by the State in which such proceedings are brought; as well as all matters relating to limitation of action under the article to be govered by the lex fori; were all modelled on similar provisions (for example the 1968 Visby Protocol to the 1924 Bussels Bill of Lading Convention).

26. Jurisdiction Article 4.5

The comprehensive provisions of this article were subject to considerable scrutiny and argument. Some delegations (such as our own and the Russian) questioned the need for any provision at all on jurisdiction because salvage contracts inevitably make that provision and the drafted suggestions were in the ultimate too limiting in any event. Paragraph 4.5.1 of the draft, intended to operate in the absence of other agreements between the parties, permitted action for payment by the salvor to be brought in a court of competent jurisdiction (according to the lex fori) situated in any of the following places:

> "the principal place of the defendant's business, the port where the salved property has been brought or directed, the place where security for payment has been given or the place where the salvage operations took place."

This provision was eventually retained in that form in the final draft.

Paragraph 2 of the draft deals with state owned vessels of a contracting state being bound by the convention and waiver of claims of sovereign immunity. It appears as paragraph 3 in the final draft because of the insertion of a provision proposed in committee, to compel all salvage actions instituted after any initial action had been brought to be instituted in the same court. Fortunately the futility of such a proposal (and in particular its contradiction to the proposal in paragraph 4.5.4) became apparent to a sufficient number of delegates to enable its deletion in plenary session. Similarly the provisions of draft paragraph 4.5.3 appear as paragraph 4.5.4 in the final draft extended for clarification by the last sentence. The provision makes it clear that nothing in the article fetters the jurisdiction of a contracting state exercised for provisional or protective measures in relation to any claim or salved property. And further, that nothing done by a salvor such as exercising a lien or right of arrest of property using the facilities of any particular state will later prevent such salvor from bringing proceedings in another jurisdiction. This latter provision is designed to alleviate the problem alleged by the ISU to frequently recur, where the salvor is obliged to

../23

arrest salved property in one jurisdiction as security for his claim which perforce by the terms of the salvage contract is required to be litigated in another jurisdiction.

27. Interest Article 4-6.

The draft articles on interest provided for both the adjudication of the right to interest payments to be decided by the lex fori and for interest commencing to run in any event from the time of the initial request by the salvor for security for the claim, interest, and costs pursuant to Article 4.2.1. The ISU described this original proposal as "representing a valuable contribution in the present world economic climate" because it is essential for salvors to receive compensation for the time lapse between the completion of the salvage operation and the time of payment. They thought that interes payments at commercial rates would t also tend to hasten court and arbitral proceedings. Regretably for the salvors the delegates saw the basic inconsistency between the two articles as well as foreseeing the possibility that this latter provision would have the effect of forcing the salvor to ask for security pursuant to Article 4.2.1. at an earlier stage to ensure that the right to interest commenced to run from that time rather than as it would in the normal course of events when payment was due under the salvage contract or when that contract was completed. Thus in the final draft Article 4.6.2. is deleted. However, this does not solve the problem (to which no doubt John Emmerson will later refer) created by the lack of a provision of any definitive statement in the draft about the salvor's rights between the time when he seeks security under Article 4.2.1. and when security is duly tendered or provided but it is not "satisfactory" to the salvor who wishes that issue adjudicated.

28. Publication of Arbitral Awards Article 4-7.

This provision designed to enforce the publication of arbitral awards was strongly contested by our delegation (and others including the British) on the principal ground that one of the very real motivations for parties to seek arbitration as opposed to court actions is a desire for privacy both in the conduct and the resolution of their dispute. This stance was maintained despite the frequent assaults by the distinguished delegate from the United State of America who contended that publication would tend to bring certainty and consistency to awards thereby reducing litigation and that arbitrations should be open with the arbitrants having as little to hide as any other litigant. The compromise appears in the final draft as article 4.7.1. "contracting states shall encourage, as far as possible and if need be with the consent of the parties, the publication of arbitral awards made in salvage cases." These words were obviously designed and accepted to by me, on the basis that they enabled the parties to decline publication of the award

../24

if they did not desire it. Upon reflection their real effect seems to be to enable a contracting state to "publish and be dammed" as it were, providing there is no municipal legislation requiring the parties consent to that course.

29. Limitation of Liability Article 5-1.

This article gives the salvors of a contracting state the ability to limit their liability to the extent and in the manner provided by the provisions of the 1976 Convention on the Limitation of Liability for Marine Claims. In doing so it recognises the desirability of encouraging salvors to engage fully in difficult operations without fear of subsequent full liability. It also recognises the fact that as yet many states have not ratified that ccnvention or implemented it in municipal legislation; which was the precisely the reason that the Soviets opposed the inclusionof the article in this convention. If States have a valid reason for not ratifying or implementing the 1976 provisions the same reason may prevent them ratifying or implementing this draft convention which contains a similar provision.

30. Damage caused during salvage operations Article 5-2

The corresponding draft article providing for a contracting state to enact legislation relieving salvors from all liability for damage caused during salvage operations for which the ship owner would be liable, was rejected as being too wide and a matter for solution as between the ship owner and the salvor.

31. Conclusion.

In plenary session each article in the draft was put to the vote of every delegation in turn. Despite the justification of the criticism which John Emmerson is now bound to heap on our combined efforts, it was no small achievement to obtain agreement on every single article-in most cases on a unanimous basis.