MARITIME LAW ASSOCIATION

OF

AUSTRALIA AND NEW ZEALAND

THIRTEENTH ANNUAL CONFERENCE

MAUI

15-22 November 1986

SALVAGE AND THE ENVIRONMENT

A COMMENTARY ON THE CMI REVISION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RESPECTING ASSISTANCE AND SALVAGE AT SEA, SIGNED AT BRUSSELS, 23 SEPTEMBER 1910 WITH REFERENCE TO ITS CONSIDERATION BY THE IMO LEGAL COMMITTEE

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AUTHORS' NOTE

The Authors have prepared this reference paper as a contribution to the body of literature that is emerging from the revision by CMI and currently by IMO of the 1910 Salvage Convention.

As this is a reference paper the Authors will not read it at the Conference Session. Rather they will discuss the environmental aspects of salvage in the context of the relevant provisions of the CMI Draft Convention and will comment on those provisions that are prompted by environmental considerations.

It is intended that the presentation at the Conference Session will take the form of a panel discussion, with maximum participation from the floor being encouraged. To this end and by way of background, delegates are invited to read the Introduction to the paper and the Commentary on the following Articles which in particular bear upon environmental aspects.

	IMO Art No.	Subject
	1.	Definitions
	2.	Scope of application
	3.	Salvage operations controlled by Public Authorities
	4.	Salvage contracts
	6.	Duty of the owner and master.
	7.	Duties of the salvor.
	9.	Co-operation of contracting States.
*	10.	Conditions for reward.
*	11.	The amount of the reward.
*	12.	Special compensation.
	19.	Duty to provide security.

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PART I - INTRODUCTION

Until the early 20th Century, no attempt was made to unify internationally the principles of salvage law which had developed over a number of centuries in both the common law Courts of Admiralty and in the courts of civil law countries (a). The first attempt at unification occurred at a meeting of the International Maritime Committee (CMI) in 1905 which led to the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, signed at Brussels on 23 September 1910 (1910 Convention).

The essence of the 1910 Convention is that a service undertaken to save property in danger at sea gives a right to salvage remuneration if, and only if, the service has had a beneficial result. The remuneration, which is not fixed as a compensation for the labour expended but which is usually more generous, must not exceed the value of the property salved (b). It is worthy of note that the 1910 Convention, which was the first international convention in the field of maritime law and which embodied the then established rules of salvage law, has been almost universally accepted and has not been to date the subject of any substantial amendment (c).

A salvage service has been described by Lord Justice Kennedy (as he later became) in the classic treatise 'Civil Salvage' as:

> 'A service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salved property nor to the interest of self-preservation' (d).

Geoffrey Brice, Q.C., in 'The Maritime Law of Salvage', introduces the subject of salvage in the following terms:

> 'A right to salvage arises when a person, acting as a volunteer (that is without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger. In the absence of a binding agreement fixing the amount of remuneration, the salvor, upon the property being salved and brought to a place of safety is entitled to recover salvage remuneration not exceeding the value of the property salved assessed as at the date and place of determination of the salvage services' (e).

Each of these two descriptions is a distillation of the fundamental principles of the law of salvage as developed in the English Court of Admiralty. These principles were firmly established by the early part of the 19th Century and contain the following essential elements:

> Danger
>
> Danger to the property or life which is the subject of the salvage service is the very foundation of the claim for salvage (f). In The Charlotte, Dr. Lushington held that services rendered at sea to a vessel in danger or distress are salvage services but that 'it is not necessary ... that the distress should be actual or immediate or that the danger should be imminent and absolute' (g).

Voluntariness

Voluntariness is an essential element of salvage in the sense that if a service is rendered solely under a pre-existing contractual or official duty owed to the owner of the salved property, or solely in the interest of self-preservation, it is not a salvage service (h). Where life or property is in peril at sea, there is a universal moral obligation to render every possible assistance in its preservation: 'It is the duty of all ships to give succor to others in distress; none but a freebooter would withhold it' (i). The existence of this moral obligation does not prevent services from being voluntary (j). In The Neptune, Lord Stowell described a salvor in these terms: 'A person, who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship' (k).

Success

Success is necessary for a salvage award in the proper sense of the term. Some part of the property concerned - ship, cargo or freight - must ultimately be preserved (l). There must be some property saved to constitute the fund from which the payment of salvage can be made and to which can attach the salvor's maritime lien. Contributions to success, sometimes called meritorious contributions to that success, give a title to salvage reward but services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward (m).

Subjects of Salvage

Salvage remuneration is only recoverable if that which has been saved is recognised in law as a proper subject of salvage (n). In The Gas Float Whitton (No. 2) (a case decided before any statutory extension of the law of salvage to aircraft), Lord Esher M.R., after an exhaustive review of the Admiralty Law on the subject, concluded that the only subjects in respect of the saving of which a claim for salvage reward could have been maintained in the Court of Admiralty were 'a ship, her apparel and cargo, including flotsam, jetsam and lagan and the wreck of these and freight' (o). Lord Esher's analysis was upheld on appeal in the House of Lords and, aside from subsequent statutory extensions (notably life salvage and salvage to aircraft), his enumeration of the subjects of salvage remains valid today (p).

Technological and economic developments in international shipping, particularly since the 1960's, have pointed up the inadequacies of the 1910 Convention and have highlighted a pressing need for change in both the law and practice of salvage. Since formulation of the 1910 Convention, the shipping industry and systems of communication have become increasingly sophisticated and complex. The dangers to ship and cargo have been reduced but the dangers which ship and cargo present to third party interests and, in particular, to the environment have increased. Incidents such as the wreck of the 'Torrey Canyon' off the Scilly Isles in 1967 and the wreck of the 'Amoco Cadiz' off the coast of Brittany in 1978, both of which caused substantial oil pollution, brought about increased public awareness of the threat to the environment by pollution from oil and other hazardous cargoes

and the need for greater protective safeguards and preventive measures to be implemented. These catastrophies prompted the oil, shipping and insurance industries and governments to formulate a number of voluntary schemes and international conventions which went some way to improve the position (q).

The 'safety net' which was incorporated into cl.1(a) of the 1980 revision of Lloyd's Standard Form of Salvage Agreement (LOF 1980) brought about an entitlement to a new type of compensation. It gave the salvor an award of his reasonably incurred expenses and an increment not exceeding 15% of the expenses where such expenses plus the increment exceeded the salvage remuneration otherwise recoverable under that Form. However, it was limited to cases where the property being salved was a tanker laden or partly laden with a cargo of oil. The award was payable where the salvage services were not successful, were only partially successful or where the salvor had been prevented from completing the services. The safety net of LOF 1980 did not apply to vessels carrying cargoes other than oil or to vessels whose bunkers were a potential threat to the environment. Under LOF 1980, the shipowner was made responsible for the payment of this new type of compensation, the shipowner's liability in this regard being supported by certain special insurance arrangements.

In the last two decades, the values of ships and their cargoes and the potentially dangerous nature of those cargoes have increased dramatically thereby resulting in a greater concentration of risks on fewer vessels. Thus the professional salvor now has fewer, albeit more valuable, opportunities. Moreover, improved salvage techniques have become far more capital intensive, resulting in reduction of the availability of adequate salvage equipment. It was therefore felt necessary to create a new legal regime in which salvors would be given sufficient incentive to ensure their ability to develop and maintain proper skills and equipment which could be used promptly and effectively throughout the world to protect the environment from the consequences of a maritime casualty in situations where there was little chance of saving any property but where major salvage operations were required to prevent or minimise damage to the environment.

It was against this background that CMI, at its 32nd International Conference held at Montreal in May 1981, presented to the international maritime community the final draft of the CMI Draft International Convention on Salvage (Draft Convention). The Draft Convention was prepared by an international sub-committee of CMI under the chairmanship of Prof. Erling Selvig of Norway, in response to a request from IMCO, now the International Maritime Organisation (IMO), to review the private law principles of salvage in the light of the 'Amoco Cadiz' experience. It is a tribute to CMI and to the labours of its international sub-committee that the document was adopted at the Montreal Conference by the votes of 31 out of 32 national maritime law associations, one delegation abstaining (r).

The Draft Convention, in its revision of the 1910 Convention, contained in its original form five Chapters, each consisting of one Article with various paragraphs in each Article. They comprised general provisions (Chapter I), rules relating to the performance of salvage operations (Chapter II), to the rights of salvors (Chapter III), to claims and actions (Chapter IV), and to the limitation of liability of salvors (Chapter V).

The Draft Convention has been a principal item for consideration by the IMO Legal Committee at its bi-annual sessions since 1984 during which that Committee has been re-reading the Draft Convention It was decided at the Fifty-Fourth Session of the IMO Legal Committee (IMO) that the Draft Convention should be put into the form of a consolidated working text containing explanatory notes and bracketed words and expressions reflecting decisions and suggestions made at prior sessions. This resulted in a change in format so as to accord with the format previously issued by that Committee when preparing legal treaty instruments. This led to a renumbering of the provisions of the Draft Convention, namely Article 1 to Article 25, and such renumbering is used in this paper. A schedule showing the original CMI article numbers and the corresponding IMO numbers is attached.

The Legal Committee is currently undertaking its third reading of the Draft Convention. It is expected that a further reading will be concluded in 1987 and that the final Draft Convention will be put to a Diplomatic Conference in 1988.

Articles 1 to 5 contain definitions and other provisions allowing for an extended scope of international salvage law, including its application to structures other than vessels capable of navigation as well as property in danger in navigable and other waters. 'Damage to the environment' is defined so as to cover substantial physical damage to persons or property but not the economic consequences thereof.

Articles 6 to 9 provide rules relating to the duties imposed on the owners and master of a vessel in danger, on salvors and on public authorities, with the intent of ensuring co-operation between all these parties to enable efficient performance of salvage operations. The owners and master of the vessel in danger are required to take timely action to arrange for salvage operations and the salvor is to use his best endeavours to salve the vessel and property. All parties have a duty to use their best endeavours to prevent or minimise damage to the environment.

The Draft Convention seeks to improve the position of the salvor, inter alia, by making it the duty of owners to accept redelivery upon reasonable request, when the salved vessel has been brought to a place of safety; by giving the salvor the right to prevent the removal of the vessel from the place of safety until security is provided; by facilitating the provision of security for the salvage award; by giving a right to claim an interim payment on account of the salvage reward; by providing certain rules on jurisdiction intended to facilitate recovery of salvage rewards and by recommending that Contracting States give salvors the right of limitation of liability provided for in the 1976 Limitation Convention.

Articles 10 to 12 include provisions which fix the award with a view to encouraging salvage operations and taking into account certain specific considerations. These include the considerations set out in Article 8 of the 1910 Convention but introduce additional, explicit considerations directed to environmental protection. A new consideration - an extension of the safety net in LOF 1980 - is contained in Article 11.1(b) which allows the successful salvor of property an enhanced award for his skill and efforts in preventing or minimising damage to the environment. Like the 1910 Convention, the Draft Convention deliberately remains silent on the question of the person or persons liable to pay the salvage rewards due under Article 11.

By Article 12, special compensation is provided for salvors who, without success, attempt to salve a vessel and her cargo when these threaten damage to the environment. Where such damage is actually prevented or minimised, in addition to his expenses (which are defined), the salvor is also entitled to further compensation up to an amount not exceeding those expenses.

Any attempt in the Draft Convention to bring about total international uniformity in the rules of salvage law has been rejected by both CMI and IMO on the basis that the solutions adopted by the various national laws on a number of aspects differ widely; there was justifiable concern that international acceptance of the Draft Convention would be jeopardised. The provisions of the Draft Convention, other than those dealing with invalid contracts or contractual terms, may be excluded by agreement between the parties. Again, there was concern that international acceptance of the Draft Convention would be endangered if its provisions were made mandatory.

In the preparation of the Draft Convention, principles of existing salvage law have been preserved as far as possible in the reforms necessitated by both technical and economic developments in the shipping, salvage and marine insurance industries. The regime of the Draft Convention (which is not intended to set out exhaustively the rules of salvage law) is an attempt to encourage and maintain the incentive for salvors to provide adequate and efficient salvage services whilst still being a regime capable of acceptance and implementation by all relevant interests. Those interests are no longer ones only concerned with the commercial success of a salvage operation, namely those of salvor, vessel and cargo. In addition, considerations of public interest now dictate that the rights of third parties and the need to protect the environment must be recognised and effectively met. There is welcome evidence of an appreciation of the need for compromise by the various commercial and governmental interests, so as to ensure a solution and regime which is technically sound, commercially and economically feasible and politically acceptable (s).

The Draft Convention is by no means a total rejection of the prior regime embodied in the 1910 Convention. It is rather a judicious shaping of what is now required to meet the needs of modern and socially responsible international maritime, insurance and governmental interests. It is an example of how a legal regime which has been widely accepted internationally is being adapted in response to the changing requirements of the community which it serves.

PART II - COMMENTARY ON ARTICLES

CHAPTER 1 - GENERAL PROVISIONS

Art 1 Definitions (1-1)

Text:

Art 1(a) Salvage operations means any act or activity undertaken to assist a vessel or any property in danger in whatever waters the act or activity takes place.

Comments:

1. It is interesting to compare this definition with Kennedy's description of a salvage service quoted in the Introduction. Whilst the essential element of danger is common to both, success and voluntariness are noticeable omissions. The element of 'success' is the 'useful result' of Art 10, the first paragraph of which provides that: 'Salvage operations which have had a useful result give rise to a reward'. The rather complex concept of 'voluntariness' was considered 'ambiguous' and was excluded from the definition (1), the cases where salvage operations are carried out under a pre-existing contractual or official duty being covered elsewhere in the Draft Convention (2).

2. Underlying the Draft Convention, as a reminder of its genesis in the 'Amoco Cadiz' incident, is the innovative concept of extending the law of salvage to operations undertaken to avert or minimise danger to the environment. To this end, the definition of 'salvage operations' widens in two significant respects the traditional concept of salvage which grounds the rules embodied in the 1910 Convention. First, the property which may be the subject of salvage has been extended. Not only does it include ships and other structures capable of navigation but it now extends to 'any property in danger' in navigable and other waters. Thus oil rigs (at least those capable of navigation, if not also fixed rigs), floating docks, buoys and fishing gear would become proper subjects of salvage. Second, the definition recognises that the modern concept of salvage should not be limited to services rendered from vessels and contemplates that salvage operations may be conducted from the land or from the air (3). Within IMO, a number of delegations have expressed reservations about extending traditional salvage law concepts in this way; also the question of whether fixed oil rigs are to be proper subjects of salvage has yet to be decided (4).

3. Once the decision is taken to extend the concept of salvage, the question 'how far' falls to be decided. When the rationale for the extension is protection of the environment, the decision is not easy. Thus, it was suggested by a number of delegations to the IMO Legal Committee that no limitation should be placed on where salvage operations could be undertaken and that such operations should be recognised on land or in the air (5). Some delegations wanted to include protection of the marine environment as an independent element in the definition of 'salvage operations' (6). In considering the question 'how far', a helpful guiding principle might be that salvage and salvage operations should retain the essential and primary objective of assisting vessels and other property in danger in whatever waters; the element of environmental protection being regarded as incidental to the main purpose of salvage and not as constituting a separate and independant objective of

salvage operations. Within IMO, it would appear that such a principle would be acceptable to most delegations and observers (7).

Text:

Art 1(b) Vessel means any ship, craft or structure capable of navigation, including any vessel which is stranded, left by its crew or sunk.

Comments:

4. Whilst assistance to abandoned or derelict vessels is governed by the Draft Convention, the removal of wrecks is specifically excluded by Art 2.2(d) and is thus left for regulation under national law.

5. In The Gas Float Whitton (No.2), Lord Esher M.R. held that the wreck of a ship, her apparel or cargo was within the common law jurisdiction as to salvage of the High Court of Admiralty (8). The meaning of wreck was considered in R (In his Office of Admiralty) v. Forty Nine Casks of Brandy by Sir John Nicoll who turned for guidance to Blackstone's Commentaries: 'In order to consitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the uncouth appellations of jetsam, flotsam and ligan' (sic)(9). In R v. Two Casks of Tallow, it was held that 'things floating (though between high and low water mark) which have not touched the ground cannot be wreck of the sea. However, if fixed to the land between high and low water marks (though with some water around them) they are wreck of the sea' (10). In Australia, this esoteric subject is dealt with in Division 2 of Part VII of the Australian Navigation Act, 1912 (Navigation Act, 1912), sec.294 of which defines 'wreck' as including 'jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water, and any articles or goods of whatever kind which belonged to or came from any ship wrecked, stranded, or in distress, or any portion of the hull machinery or equipment of any such ship. Sec. 317 makes it clear that, currently in Australia, wreck may be the subject of salvage.

6. Within CMI and IMO, much of the debate on this definition centred on the distinction between removal of wreck, which would not be covered by the Convention and salvage services to sunken ships, to which the Convention would apply. It was argued on the one hand that the principal feature in salvage was assistance to a vessel in danger and that where a vessel had sunk there could be no danger to that vessel (although the vessel might pose a danger to other vessels or to the environment); accordingly action taken in respect of the sunken vessel could not be considered as salvage. On the other hand it was noted that sunken ships could themselves continue to be in danger and that they could have value to their owners and could also be of interest to the coastal State in respect of safety to navigation or protection of the environment; on this basis the raising of such ships should be regarded as salvage (11). The IMO Legal Committee also considered whether the definition of 'vessel' should extend to a vessel which had sunk and which was incapable of navigation after a salvage operation. It was pointed out that, in many salvage operations, it would be difficult if not impossible to determine in advance whether or not a vessel which had sunk could be reinstated as a navigable craft. These two issues require resolution. A prime objective of the

Draft Convention is the encouragement of salvors. It is considered that a salvor's entitlement to a salvage reward should not be allowed to turn on the sunken ship being capable of navigation after being raised.

7. An approach to resolution is suggested by the decision in Pelton Steamship Co. Ltd. v. The North of England Protection and Indemnity Association. In that case salvors agreed to salve a sunken vessel and the question arose as to whether, for purposes of the defendant P & I Club's rules, the sunken vessel was a ship or vessel or whether she was a fixed or moveable thing other than a ship or vessel. It was held that navigability as a test of whether the thing in question was or was not a ship or vessel was not an absolute test nor was whether the thing would be navigable immediately upon coming to the surface. The better test was whether or not any reasonably minded owner would continue salvage operations in the hope of completely recovering the vessel by those operations and by subsequent repair (12). On this approach, it would be immaterial whether the property was under water, abandoned or incapable of floating at the time of salvage.

Text:

Art 1(c) Property includes freight for the carriage of the cargo, whether such freight be at the risk of the owner of the goods, the shipowner or the charterer.

Comments:

8. The traditional view is that salvage is only recoverable if the property salved is recognised in law as a proper subject of salvage. As mentioned above, aside from certain statutory exceptions, the only recognised subjects of salvage, at least in English law, are 'a ship, her apparel and cargo, including flotsam, jetsam and lagan and the wreck of these and freight' (13). The 1910 Convention reflects the traditional position but it is interesting to note that the cases decided under American law do not adopt such a narrow approach. There, the property must be on water or ashore but it need not be 'maritime' in nature - that is, it need not be a ship or cargo or part thereof (14).

9. Within CMI, the prevailing view was that considerations of environmental protection coupled with the need to encourage salvors dictated that a wide approach should be taken in defining 'property' for purposes of the Draft Convention. In the draft prepared for consideration at the Montreal Conference, 'property' was defined as: 'any property in danger in whatever waters the salvage operations take place, but including freight for the carriage of the cargo, whether such freight be at the risk of the owner of the goods, the shipowner or the charterer' (15). However, it was pointed out that the phrase 'any property in danger in whatever waters the salvage operations take place' was superfluous, as it was merely a repetition of the provision in Art 1(a) (16).

Thus the offending phrase was omitted leaving what at first blush seems a rather strange definition; one that has been the subject of criticism within IMO from several quarters, including both the International Salvage Union (ISU) and the International Chamber of Shipping (ICS). The IMO Legal Committee has agreed that the definition of 'property' should now be amended to read:

'Property' (means any property not permanently and intentionally attached to the shoreline which is in danger and) includes freight for the carriage of the cargo, whether such freight be at risk of the owner of the goods, the shipowner or the charterer.

The words in brackets are to be the subject of IMO's further consideration. The Legal Committee is also to consider whether 'passage money' should be expressly included in the definition.

10. The definition of 'property' in the form proposed by CMI is merely an attempt to make clear how freight is to be treated under the Draft Convention. In practice, the term 'freight' is used to refer to two concepts - the remuneration paid to the carrier for the carriage of goods on the one hand and on the other, the sum payable for the use of the ship (17). The second usage is more properly 'charter hire'. It is CMI's intention that 'freight' should not include charter hire (18). The definition refers to 'freight for the carriage of goods'; 'freight' in the second sense of a sum payable for hire of a ship is excluded only by implication. It may yet be that contrary to intention, 'property', a very wide term, would be held to include charter hire.

11. Brice points out that there are two classes of freight in the sense of remuneration for carriage of cargo - prepaid or advance freight (which is non-returnable even if ship or cargo are lost) and freight due on delivery of the cargo at destination. The general principle is that freight is due only on delivery of the cargo, unless the contract of carriage expressly provides for pre-paid or advance freight. Freight due on delivery is usually referred to as 'freight at risk' (to the carrier) and the traditional view is that it is only with this class of freight that a salvage award is concerned. Probably by way of an incentive to encourage the salvor, the Draft Convention seeks to alter this position by expressly providing that pre-paid freight at the risk of the owner of the goods may be a proper subject of salvage (19). Similar considerations may be applied to the treatment of passage money which is customarily paid in advance.

Text:

Art 1(d) 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, explosion, contamination, fire or similar major incidents.

Comments:

12. As mentioned above, a most important aspect of the Draft Convention is the extension of the law of salvage to operations undertaken to protect the environment. 'Damage to the environment' as here defined, is a fundamental concept which is central to Art 11.1(b) and Art 12. These Articles are concerned with the endeavours of salvors to prevent or minimise such damage or the extent to which this has been done. In these provisions, it is not the damage itself that is relevant, but the fact that a risk of damage exists emanating from a ship in danger (20).

13. There are several features of the definition on which brief comment might be made. First, the definition is concerned with physical damage of a substantial and general nature; it is not

concerned with economic loss or with damage to a particular person or installation. Second, the phrase 'to human health or to marine life or resources' was added at the Montreal Conference in order 'to exclude further from the concept cases where there may only be a risk of substantial physical damage to other property such as warehouses or other buildings ashore' (21). Third, the words 'coastal or inland waters' operate to exclude damage to the environment on the high seas. Fourth, the damage extends beyond pollution to cover explosion, contamination, fire or other major incidents.

14. It is CMI's intention to restrict the coverage of the Convention to salvage to avert damage in coastal or inland waters (22). Within IMO, however, there was wide opinion that there should be an incentive to protect the marine environment generally and that the Convention should therefore extend to damage to the environment in the exclusive economic zone or on the high seas (23). This would seem to be going too far and, as has been pointed out by the CMI observer to IMO, could lead to speculative and inflated claims for ecological damage or damage to other areas (24). The IMO Legal Committee is to further consider the definition with regard to its geographical limitation and to a suggestion that damage to the environment caused by explosion or fire should not be included.

Text:

Art 1(e) Payment means any reward, remuneration, compensation or reimbursement due under the provisions of this Convention.

Comment:

15. The CMI Report notes that the purpose of the definition is to introduce a general word covering payment in respect of expenses as well as payment of a property award (25). Within IMO, doubt has been expressed as to the need for this definition (26).

Text:

Art 2 (1-2) Scope of Application

1. 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.

2. However, the Convention does not apply:
   (a) when all vessels are vessels of inland nagivation.
   (b) when all interested parties are nationals of the State where the proceedings are brought.
   (c) to warships or to other vessels owned or operated by a State and being used at the time of the salvage operations exclusively on governmental non-commercial services.
   (d) to removal of wrecks.

Comments:

16. The exclusion in Art 2.2(a) follows the 1910 Convention and reflects the philosophy that rules intended for application to seagoing vessels should not be imposed on inland water craft. In like manner, 'inland waterways vessels' are excluded from the operation of the Navigation Act, 1912 (30).

17. This Article is based on the principles in Article 15.1 of the Convention on Limitation of Liability for Maritime Claims, 1976 (1976 Limitation Convention), the intention being to make the scope of application of the Convention as wide as possible. Application of the 1910 Convention is limited to cases where either the salved vessel or the salving vessel is registered in a contracting State. The Draft Convention provides for its application also if proceedings are brought in a contracting State and if the salvor belongs to a contracting State. It has been suggested that the lex fori rule is sufficient and that the remainder of the text - 'as well as ... contracting State' - is superfluous (27). The CMI Report acknowledged that this will be so in most jursidictions, but added that in a few countries the addition of the connecting factors could give the Convention a broader application and was included for this reason (28). Within IMO, one delegation argued that Art 2.1 was unacceptable in its present form because it does not provide that the substantive law should be determined at the outset of any issue. The IMO Legal Committee agreed to give further consideration to this aspect (29).

18. The exclusion in Art 2.2(b) is also taken from the 1910 Convention and is based on the principle, adopted in the early Brussels conventions, that there should be a 'foreign' element in the situations to which uniform international laws were to be applied, otherwise the matter is best left for determination under national law (31). In practice, in the case of salvage of ship and cargo (particularly a container ship), it might be difficult to establish who were the 'interested parties', much less their nationalities.

19. When ships or cargo owned by a foreign State are salved, questions of state or sovereign immunity may arise. The common law position was explained in The Cristina by Lord Atkin, who held that there were two principles which are well established and beyond dispute: 'The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control' (32). So far as salvage was concerned foreign state immunity presented a problem in that a salvor might refuse to render salvage services once he was aware that the immunity could be claimed. Warships and other similar state-owned ships were excluded from the 1910 Convention but by an amending Protocol in 1967 that position was reversed and the 1910 Convention was made applicable to such vessels. However, the 1967 Protocol received limited acceptance and it was considered inappropriate to include warships and governmental non-commercial vessels in the Draft Convention. By Article 22.2 contracting States waive any claim to sovereign immunity in respect of their commercial vessels. Within IMO there was a difference of opinion on whether the exclusion of warships and other government vessels under

sub-paragraph (c) should apply only to government vessels when such vessels were the object of salvage or when they were undertaking salvage operations. The subparagraph is being re-examined to determine whether the problem could be resolved by a provision giving discretion to States to apply or exclude the Convention for government vessels. Several delegations have prepared proposals for treatment of subparagraph (c) and these will be further considered by IMO (33).

20. The exclusion of wreck removal by Art 2.2(d) is intended to ensure that the definition of vessel in Art 1(b) is not extended to wrecks. The definition of 'vessel' includes the concept of a sunken vessel. Within IMO there was debate as to whether such vessels should be included in the application of the Draft Convention and it was suggested that it might be left to States to apply the convention to sunken vessels, if they so wished, in their national legislation (34).

21. The Exploration and Production Forum, an observer in IMO, suggested that fixed platforms permanently attached to the sea-bed for hydrocarbon production, storage and transportation systems should also be excluded from the application of the Convention.

Text:

Art 3 (1-3) Salvage operations controlled by Public Authorities

1. This Convention shall not affect any provisions of national law or international convention relating to salvage operations by or under the control of public authorities.
2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.
3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

Comments:

22. The Draft Convention does not deal directly with salvage operations performed by or under the control of public authorities, nor with the salvors rights to remuneration from the authority concerned. These matters are left to be dealt with under national law. Within IMO, it was originally suggested by some delegations that a coastal State should have a power of 'mandatory salvage' whereby the coastal State could direct a vessel to go to a maritime casualty and take salvage measures for the purpose of preventing damage to the environment of the coastal State. There was strong opposition to the concept of mandatory salvage and the proposal was abandoned (35).

23. Under the general law, the owners of salved property (including the master) have discretion as to whether or not they will accept the offer of salvage services; governmental authorities are powerless to compel the casualty to accept salvage assistance. In the wake of 'Amoco Cadiz' and other environmental incidents, this situation has caused public disquiet. It has been suggested that there ought to be some form of control by a governmental authority with power to compel a casualty to accept salvage assistance. It may happen that the interests of a salvor in seeking to maximise his prospects for success and hence salvage reward may conflict with those of a coastal

State which is concerned with the protection of its coastal environment. With this in mind, the Australian delegation to IMO has contended that a coastal State should be able to direct a salvor undertaking salvage operations as to the conduct of those operations. To this end, Australia has proposed the inclusion in the Draft Convention of provisions which would enable a coastal State to give such directions to a salvor, allow the salvor to claim from the coastal State, as special compensation, any additional expense the salvor has incurred in complying with those directions and in turn enable the coastal State to obtain reimbursement from the shipowner. Australia has so far been unsuccessful in gaining acceptance for these proposals within IMO but is hopeful that in a more representative diplomatic conference the proposals may attract wider support (35). At present, the only specific treaty provisions which enable a governmental authority to direct a salvage operation are contained in the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969 (1969 Intervention Convention). However, it is felt in some quarters that these provisions may not be adequate (36).

24. As already mentioned, under traditional salvage law, it is an essential ingredient to a right to recover salvage that the salvor's services are rendered voluntarily - that is, without any pre-existing contract or official duty. Brice notes that, in England, there has been a long history of legislative change towards servants of the Crown and in particular members of the Royal Navy, to claim salvage (37). In Australia, salvage claims by and against the Crown are dealt with in Part VII, Division 7 of the Navigation Act, 1912. With certain exceptions (including notably the salvage of postal articles whilst being carried at sea) the salvage provisions of the Act apply against the Crown. Likewise, salvage services rendered by or on behalf of the Crown give entitlement to a claim for salvage (38).

25. Within IMO, it was suggested that paragraphs 2 and 3 be deleted and the Legal Committee decided that the two paragraphs should be considered for inclusion or deletion together. The underlying question is the extent to which salvage operations controlled by public authorities should be regulated by the new Convention or be left to be regulated by national law. The United Kingdom proposed a new text for this Article which would give greater prominence to national law in respect of salvage operations by or under the control of public authorities. On the other hand, some delegations preferred to have an international solution rather than leave the matter to national law which might not always be certain in its content or application (39). There will undoubtedly be occasions when public authorities will wish to intervene in salvage operations where they perceive an imminent danger to their interests. As a matter of principle, it is desirable that the new Convention should make clear the rights and remedies of the salvor on such occasions, otherwise there is the danger of delay to urgent salvage work.

Text:

Art 4 (1-4) Salvage contracts

1. This Convention shall apply to any salvage operations save to the extent that the contract otherwise provides expressly or by implication.

2. The master shall have authority to conclude contracts for salvage operations on behalf of the owner of the vessel and of property thereon.

3. Nothing in this article shall affect the application of the provisions of Article 5.

Comments:

26. In practice, most salvage services are performed pursuant to a contract, generally Lloyds Open Form. However, the existence of a contract is not a pre-requisite to recovery of salvage if salvage services have in fact been rendered without a contract. In The Five Steel Barges, Sir James Hannen P. said: 'The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject' (40). Salvage has, in fact, been awarded in cases where the services were not wanted or were refused (41).

27. Under Art 4.1 the Convention will apply to any salvage operations unless the parties contract out of its provisions, either expressly or by implication. Within CMI, some delegations argued that certain Articles of the Draft Convention should assume a mandatory character. However, the prevailing view favoured a non-mandatory approach, based on a recognition that there is a variety of contracts for salvage involving non-professional as well as professional salvors. Nevertheless, it should be noted however that by the operation of Art 4.3, the rules relating to invalid contracts or contractual terms in Art 5 are mandatory (42). Within IMO, the Australian delegation suggested that the duty to prevent or minimise damage to the environment should also override the provisions of private salvage contracts (43). The suggestion is to be further considered by the Legal Committee.

28. Art 4.2 relating to the authority of the master to conclude salvage contracts was considered desirable to remove all doubt about the master's right to contract for salvage in circumstances of urgency and danger and is one of several measures intended to facilitate the efficient carrying out of salvage operations (44). There is no provision in the 1910 Convention dealing with the authority of the master. Under the existing law, in the absence of express authority, the master may only bind cargo owners if he is acting as an 'agent of necessity'. In the context of salvage, for such a form of agency to arise the action taken in engaging the services of the salvors must first have been necessary for the protection of the interests of the principal and second, the services must have been engaged when it was not possible to communicate with the cargo owners (45). This situation is unsatisfactory and has been widely criticised. The criticism is well put by Brice: 'There has been criticism of a legal or commercial regime which requires a master to consult with others before entering into a binding salvage agreement. The existence of such a regime, it is said, may have the effect of undermining the confidence of masters in making a decision to accept salvage services. If in a shipowning company a climate exists which in practice requires a master to be or to feel subordinated to persons ashore in regard to ordinary commercial transactions and even in regard to the day-to-day management of the ship, then when an unusual event occurs he may

seek to follow the practice suggested by this climate as opposed to acting promptly on his own initiative. If for fear of criticism he seeks to consult with those in the shipowners office (and they in turn seek to consult their underwriter or the salvors) and if he further seeks to make contact with and obtain the approval of cargo owners to a salvage agreement, valuable time may be wasted which might have been better occupied in accepting the services of a salvor. This fear will in fact be well founded vis-a-vis cargo owners if, having entered into a salvage agreement, a point is later taken on behalf of those cargo owners (or in reality their underwriters) to the effect that they are not to be bound by the agreement because the master could and ought to have contacted them and sought their consent in accordance with the ordinary principles of the law of agency of necessity. If such a point succeeds, then the shipowners may find themselves bearing, at least in the first instance, the salvage remuneration due in respect of salvage of the cargo in the form of a successful claim for damages against them by the salvor's suing for breach of warranty of authority' (46).

29. Within IMO, it was suggested that the authority given by paragraph 2 to the master to conclude salvage contracts should also be given expressly to the shipowner and the question arose as to whether 'shipowner' should be defined (47). It is considered that the right of the shipowner to conclude salvage contracts should not be affected by the authority of the master to conclude such contracts and that the Draft Convention should be amended to give the shipowner (as well as the master) clear authority to enter into salvage contracts on behalf of cargo interests. It is important that the meaning of 'shipowner' under the Draft Convention should be clear. The insurance implications of extending the meaning of '(ship)owner' in Art 4 (and elsewhere) to include managing agents and other ship operators need to be considered. It may be desirable to confine the meaning to a shipowner proper and to a bareboat charterer who has effected hull insurance in the name of the shipowner.

30. The ISU proposed that the master (and the shipowner) should also have authority to terminate a salvage contract by accepting redelivery. Without this authority, said the ISU, a salvor may be placed in an untenable position where the shipowner agrees to accept redelivery because, in his view, the ship is in a place of safety, whereas the cargo does not agree. In these circumstances the master (or shipowner) cannot terminate on the basis of agent of necessity if the cargo owner has meanwhile been advised and is playing an active part in the proceedings, which will often be the case (48). The ISU proposal was not sufficiently supported within IMO and has been rejected. The reasons prompting rejection were that redelivery is a matter of fact and does not depend upon the subjective determination of the salvor or the master; that cargo owners might sometimes have a greater interest than the shipowner or the master in the question of whether redelivery should take place or not; and that the salvor would have a lien on the property salved and would also have a right to take proceedings against the person who signed the contract (49).

Text:

Art 5 (1-5) Invalid contracts or contractual terms

A contract or any terms thereof may be annulled or modified if:

(a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable.

(b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

Comments:

31. Art 5 reproduces in more modern language the principles of Article 7 of the 1910 Convention and reflects the position under the general law (50). The Article does not preclude the application of national law dealing with invalidity of contracts or contractual terms (51).

32. Within IMO, the Australian delegation proposed an amendment to this Article to provide for annulment or modification where the consent of one of the parties was vitiated by fraud or concealment. These aspects are expressly covered in the 1910 Convention. However, the Australian proposal was not adopted. The IMO Legal Committee took the view that sufficient guarantee against fraud or concealment was already provided in Art 5, in particular by the words 'undue influence' and by the general principle of law concerning annulment of fraudulent contracts (52). It will be appreciated that Art 5 does not seek to set out exhaustively the circumstances in which a salvage contract may be annulled or modified. As Kennedy states, the Admiralty Court has always been willing to set aside an agreement entered into as a result of fraudulent misrepresentation. Also, although there is no common law duty to disclose material facts in negotiating a contract, the Admiralty Court will not enforce an agreement if a material fact has not been disclosed before the bargain was concluded and if the result would be inequitable (53).

CHAPTER 11 - PERFORMANCE OF SALVAGE OPERATIONS

Text:

Art 6 (2-1) Duty of the owner and master

1. The owner and master of a vessel in danger shall take timely and reasonable action to arrange for salvage operations during which they shall co-operate fully with the salvor and shall use their best endeavours to prevent or minimise danger to the environment.
2. The owner and master of a vessel in danger shall require or accept other salvor's salvage services whenever it reasonably appears that the salvor already effecting salvage operations cannot complete them alone within a reasonable time or his capabilities are inadequate.
3. The owners of vessel or property salved and brought to a place of safety shall accept redelivery when reasonably requested by the salvors.

Comments:

33. Art 6 is new, as are the other provisions of Chapter II, with exception of Art 8 (which deals with the public law rule concerning the master's duty to save human lives in danger at sea and which was necessarily included because of its presence in the 1910 Convention). The lessons of the 'Amoco Cadiz' incident demonstrated that to ensure efficient salvage operations and to successfully avert or minimise danger to the environment requires close co-operation between all parties - the shipowner (and the master), the salvor and public authorities. In recognition of this, the Draft Convention seeks to define broad areas of responsibility and to impose corresponding duties on the parties both private and public (54).

34. The requirement of Art 6.1 that the owner and master of a vessel in danger shall 'co-operate fully' with the salvor during salvage operations prompted the ISU to submit that the security frequently required by a port before agreeing to allow the salved vessel to enter should be provided by the salved property, particularly as the security often covers liabilities and expenditure incurred long after the termination of the salvage service when the salvor no longer has control (55). This security typically includes such matters as indemnities for any damage caused to the port by the vessel or by oil pollution, guarantees to pay port dues, stevedoring charges and other expenses incurred by the vessel during her stay, and undertakings to remove the vessel from port when demanded. The ISU submission on the question of security was unacceptable to the ICS which argued that the security demanded by a port from a salvaged vessel is payable as part and parcel of the expenses of the salvage operation and, as such, should be provided by the salvor and considered as another part of his services for which he is rewarded. The ICS then suggested that, given the diversity of practice under national laws, it may be wise to avoid making any definite stand in the Convention, leaving the issue to be decided by national law (56). The ISU proposal regarding security was not adopted by CMI where, following extensive discussion, it was concluded that, as the salvor was the person in control when the request for security arose, it was appropriate that the salvor should be the one to provide that security. It was also felt within CMI that it was neither

reasonable nor practicable to impose on owners a duty to provide security as the consequences would 'seem to be unclear and may be very far reaching' (57).

35. In a note to IMO, one government has proposed an amendment to Art 6. In introducing the proposal to the IMO Legal Committee, the relevant delegation explained that its country's shipowners wanted the master to be the only person entitled to take action to arrange salvage operations. This was prompted by practical considerations which also accounted for the proposal to curtail the right of the shipowner to control the actions of the master when delay might increase the danger to a ship in distress. It was further proposed to free the salvor from control which might deny him the decision to engage another salvor's services (58). This model is interesting and is being examined further by the IMO Legal Committee. It is true that in the first hours after a casualty, communications are frequently poor and there is a dearth of reliable information on which owners and their expert landside advisers have to base important decisions. In such circumstances the master on the spot is frequently better placed than the owners to make decisions on the safety of his vessel, the well-being of those on board and matters of environmental protection. Against these considerations must be balanced the stress of the moment which might well impair the judgement of the strongest master, the inequality of bargaining power which arises from the circumstances in which many salvage agreements are made and economic considerations which often dictate that decisions on acceptance of salvage services must as a matter of commercial necessity be taken by the shipowner after consultation with hull underwriters and other specialists and, sometimes, cargo interests.

36. The phrase 'best endeavours' used in Art 6.1 and in Art 7.1 is not to be underestimated and, in the context of prevention or minimisation of danger to the environment, could constitute an onerous obligation involving considerable expense. In Sheffield Railway Co. v. Great Central Railway Co. it was held that 'best endeavours' mean what the words say; they do not mean 'second best endeavours' (59). Within IMO several delegations supported a proposal that the obligations under Art 6 to use 'best endeavours' should be tempered to a requirement to exercise 'due care' (60).

37. Art 6.2 contemplates the case where several salvors may be available to render assistance. In such cases it is provided that the owner and master may have a duty to obtain assistance from the other salvors. A similar duty is imposed on the salvor under Art 7.2. The philosophy underlying these provisions is that the law should encourage co-operation between the salvors available, rather than treat them as competitors (61).

38. Art 6.3 is one of several new provisions introduced to facilitate the work of and encourage the salvor. It raises the question: when is it reasonable for the salvor to request the owner of the salved vessel to accept redelivery. As the provision stands, this question is left to be answered under national law. The general rule is that salvage services terminate when the vessel has been salved and brought to an agreed place of termination or to a place of safety.

39. In its submission to IMO, the ISU voiced concern at problems experienced in having shipowners accept redelivery of their vessels following salvage operations. ISU asserted three main causes for these problems:

(i) The improvident shipowner refusing point blank to accept redelivery even though the salvage service has terminated, simply because he has lost interest in the vessel and it will be uneconomic for him to accept redelivery.

(ii) Owners deliberately delaying termination, whilst they try to resolve other problems resulting from the casualty, such as claims under their hull policies or claims by cargo interests.

(iii) Frequent, genuine disputes as to whether a vessel has been actually salved, thus permitting termination of the salvage services.

With regard to (iii), the ISU stated that owners are increasingly trying to insist on the vessel being put in dry-dock or being taken to a port where repairs can be effected. The ISU stressed the need for some clarification of what the condition of the ship should be at the termination of the salvage service. With this in mind, ISU proposed that the following additional sentence be added to Art 6.3: 'Such request shall not be made by the salvor until the vessel or property has been preserved from the danger from which it was required to be salved and has been brought to a place where a prudent owner would reasonably be expected to be able to preserve such vessel or property on a non-salvage basis' (62). The representations by ISU on this point were considered within IMO, where there was general agreement that a provision such as that suggested by ISU was desirable, as the clarification it provided would assist courts and arbitrators. The wording proposed by ISU has now been taken into the Draft Convention in square brackets for further consideration (63).

40. Within IMO, the United Kingdom delegation argued that no clear need had been shown for the inclusion of public law provisions in Art 6 (and Art 7) regarding the performance of salvage operations and proposed an amended text covering both articles. The public law provisions in Art 6 are the obligation on the owner and master of a vessel in danger to take timely and reasonable action to arrange for salvage operations (Art 6.1) and the obligation on the owner and master to require or accept another salvor's salvage services in specified circumstances (Art 6.2). These obligations were omitted in the amended text proposed by the United Kingdom on the grounds, inter alia, that it was inappropriate to deal with public law issues of this kind in what was essentially a private law convention, that it was unclear as to how the obligations in Art 6 (and Art 7) were intended to be enforced and that, in any event, the public law obligations were already dealt with in MARPOL 73/78. Several delegations shared the United Kingdom delegation's view that the provisions of Art 6 (and Art 7) should deal only with contractual and quasi-contractual duties as between the salvor and the parties interested in the property to be salved. Other delegations expressed doubts as to whether MARPOL 73/78 dealt fully with all the problems covered in Art 6 (and Art 7) - in particular the applicability of that system to pollution arising from salvage operations - and considered that Art 6 (and Art 7) should be retained in present form. The IMO Legal Committee concluded that the United Kingdom proposal should be further examined as a possible alternative to Art 6 (and Art 7) (64).

Text:

Art 7 (2-2) Duties of the salvor

1. The salvor shall use his best endeavours to salve the vessel and property and shall carry out the salvage operations with due care. In so doing the salvor shall also use his best endeavours to prevent or minimise damage to the environment.

2. The salvor shall, whenever the circumstances reasonably require, obtain assistance from other available salvors and shall accept the intervention of other salvors when requested so to do by the owner or master pursuant to Art 6.2; provided, however, that the amount of his reward shall not be prejudiced should it be found that such intervention was not necessary.

Comments

41. Under Art 6.1 considered above, the owner and the master each has a duty, separately and independently, to use best endeavours to prevent or minimise damage to the environment. However, under Art 7.1, the salvor's duty to avoid damage to the environment exists in addition to the duty to salve and not independently from it. There is a close relationship between this new duty and the rule in Art 11.1(b) providing for an enhanced award in such cases as well as the rules in Art 1.2 providing for special compensation for salvage operations where the environment is in danger (65).

42. Within IMO, discussion on Art 7.1 centred mainly on the standard of care implied by the expressions 'best endeavours' and 'due care'. Some delegations felt that these requirements were unduly onerous and might act as a disincentive to salvors, particularly non-professional salvors, to undertake salvage operations (66). The nature and scope of the duty of care owed by the salvor to the owner of property to be salved, both in tort and contract is considered in The Tojo Maru in which salvage services were being rendered to a laden tanker under the then current Lloyd's Open Form. The salvor's chief diver attempted to bolt a plate into position with a bolt gun, contrary to instructions. In the ensuing explosion and fire the tanker was extensively damaged. It was contended for the salvors that there was a special rule in the law of salvage founded on the concept of whether or not the salvor had done 'more harm than good'. The House of Lords rejected this argument and held that the general principles of negligence should apply. The decision has been criticised (67). Brice states that a salvor, though a volunteer, owes in general a duty of care in tort and, where applicable, in contract to those the salvor is seeking to assist; if the salvor breaches that duty, liability for loss or damage flows in accordance with the ordinary principles of law. Brice notes, however, that the courts have customarily adopted for reasons of public policy an attitude of 'leniency' towards salvors (68).

43. The phrase 'best endeavours' was considered above under Art 6.1. It was observed that, in the environmental context, it could constitute an onerous obligation involving significant expense. 'Best endeavours' implies a standard of care higher than 'due care' and it has been pointed out that ship masters have in many cases to make quick decisions on whether to undertake salvage operations; to impose a standard of performance on them higher than due care might induce ship masters

(particularly casual salvors) to avoid getting involved in situations in which they might otherwise be able to render useful assistance (69).

44. Within IMO, there was debate as to whether Art 7.1 should be retained and, if so, whether it should be amended to require a less onerous standard of performance from the salvor (70). It is considered that the Article should be retained along with its corresponding Art 6. Given the philosophy underlying the Draft Convention (both as to salvage and environmental matters) and the obvious nexus between the second sentence in the Article and Arts 11.1(b) and 12.2 dealing with the salvor's reward and compensation for preventing or minimising damage to the environment, there would seem to be a certain lack of integrity in requiring of the salvor anything less than 'best endeavours', at least in the aspect of environmental protection. The Oil Companies International Marine Forum (OCIMF) proposed that Art 7.1 be further amended to stress the need for the salvor to act in consultation and co-operation with the owner or master during the salvage operations (71).

45. It will be noted that the discharge of the salvor's duties under Art 7.1 is not a pre-condition for payment of a salvage reward under Art 11.1(b) (72).

46. Art 7.2 deals with the duty of a salvor to obtain or, at the request of the owner or master pursuant to Art 6.2, to accept the assistance of other salvors. The provision is intended to ensure prompt assistance and prevent disputes arising as to who should conduct the salvage operation (73).

Text:

Art 8 (2-3) Duty to render assistance

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The contracting States shall adopt the measures necessary to enforce the duty set out in the preceding paragraph.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

Comments:

47. The duty of the master to render assistance to persons in danger at sea is a time-honoured obligation which is recognised in a number of international conventions as well as customary law. Art 8 corresponds in modernised language and form to the rules provided in Articles 11 and 12 of the 1910 Convention. These have been enacted into Australian law in sec.317A of the Navigation Act 1912, sub-section 3 of which expressly provides that compliance by the master with these provisions does not affect the right to salvage. The measures adopted by Australia to enforce the master's duty under the 1910 Convention (which is similar to that imposed by Art 8.1) are 'an indictable offence punishable on conviction by a fine not exceeding $20,000 or imprisonment for a period not exceeding 10 years, or both' (74).

48. Several international conventions besides the 1910 Convention contain provisions on the duty to provide assistance to persons in danger at sea. These include:

* The International Convention for Safety of Life at Sea, 1974 (Chapter V, regulation 10 of the Annex);
* The Geneva Convention on the High Seas, 1958 (Article 12);
* The International Convention on Maritime Search and Rescue (Chapter 2, paragraph 2.1.10 of Annex);
* The United Nations Convention on the Law of the Sea, 1982 (Article 98).

49. Within IMO, the question arose whether, in view of the more detailed provisions in the above conventions, a provision on the subject of the master's duty to render assistance to persons in danger at sea was needed in the Draft Convention - particularly since the provision deals with what is essentially a public law duty. Art 8 is, of course, linked with Art 14 which is concerned with life salvage, one of the 'new heirarchy of objectives' for salvage operations (75). Art 14.2 is to the effect that a salvor of human life is entitled to 'a fair share of the remuneration awarded to the salvor' for salving a vessel or other property or preventing or minimising damage to the environment. Given the nexus between Art 8 and Art 14 and the fact that the subject of the master's duty to render assistance featured prominently in the 1910 Convention, it is considered that Art 8 should be retained in the Draft Convention (76).

50. In relation to Art 8.3, one delegation to IMO suggested that the shipowner should not be relieved of liability if he contributed to the breach of duty by the master. In response, it was explained that the provision merely relieves the shipowner of vicarious liability but does not relieve the owner of liability where he himself was responsible for breach of duty by the master (77). Another delegation proposed that Art 8.3 be deleted and that the matter be left to national law (78).

51. Art 8 is to be further considered within IMO for possible redrafting to emphasise that it is not intended to effect any radical change to the 1910 Convention, Articles 11 and 12 (79).

Text:

Art 9 (2-4) Co-operation of contracting States

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

Comments:

52. In presenting to the Montreal Conference the Sub-Committee Report on the Revision of the 1910 Convention, the Chairman, Prof. Selvig, noted that the discussions in the Sub-Committee revealed

that co-operation from public authorities of coastal States would often be indispensable to the success of the salvage operations. On the other hand, it was recognised that the drafting of provisions on this subject was a most delicate matter. Art 9 should be read in this light (80). The delicacy arises from the inclusion of public law matters affecting State rights in a private law convention.

53. Within IMO, the debate continued and several proposals were put forward for the revision of the Article. One group of observers (including ICS) has suggested that governments should recognise an obligation to meet the needs of vessels in distress for prompt assistance and should develop appropriate contingency plans. It was suggested further that States should pre-designate ports of refuge for such vessels. The International Association of Ports and Harbors (IAPH) opposed pre-designated ports of refuge on the grounds firstly, that such a public law provision was inappropriate in a private law convention and secondly, that difficulties could arise if treaty obligations were imposed upon States to allow entry of vessels in distress to ports. The United States, whilst considering that it would be too onerous to oblige States to provide assistance to distressed vessels, proposed sound contingency planning by coastal States (including permitting vessels to enter ports of refuge on a case-by-case basis), as a realistic alternative to pre-designation of ports of refuge. Other delegations expressed concern with the proposal to include more specific and far-reaching obligations in the new Convention and stressed the importance of avoiding inclusion of any provisions which might delay its entry into force. After considering these competing views, the IMO Legal Committee has decided sensibly that the CMI text for the Article should remain undisturbed (81).

54. The discussion within IMO concerning the need for contingency planning by coastal States is worthy of note. Australia's first experience of threatened, massive oil pollution was in March 1970 when the motor tanker 'Oceanic Grandeur', laden with some 55,000 tons of crude oil and bound from Dumai in Sumatra to Brisbane, tore open her hull on a previously uncharted rock pinnacle in the Torres Strait, in proximity to the Great Barrier Reef. Those involved in the early days of that casualty understand the importance to a coastal State of adequate contingency planning, the need to establish quickly a communication network between the stricken vessel, its owners, the salvors and relevant public authorities, the importance of each party recognising and discharging its responsibilities (especially where, as in Australia, Commonwealth and State governments both become involved) and above all, the need for the closest co-operation and exchange of information between salvors, other interested parties and the public authorities (82).

CHAPTER III - RIGHTS OF SALVORS

Text:

Art 10 (3-1) Conditions for reward

1. Salvage operations which have had a useful result give right to a reward.
2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have no useful result.
3. This chapter shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owners.

Comments:

55. Arts 10.1 and 10.2 are taken from the 1910 Convention (Article 2) and establish the important principle of 'no cure - no pay'. The CMI Report states that salvors have shown a clear preference for rewards based on this principle rather than daily rate systems in normal cases of salvage and that there was strong conviction within CMI that the principle should be maintained (83).

56. In The Renpor, Brett M.R., referring to the element of success which is 'invariably required by Admiralty law in order to found an action for salvage' said 'there must be something salved more than life, which will form a fund from which the salvage may be paid, in other words, for the saving of life alone without the saving of ship, freight or cargo, salvage is not recoverable in the Admiralty Court' (84). The intrusion of environmental considerations into the traditional law of salvage has necessitated an important exception to the 'no cure - no pay' principle. In certain circumstances salvors may be entitled to remuneration even though there is no useful result and no property salved to form a fund from which the reward may be paid.

57. The exception was first seen in the so called 'safety net' provision introduced into LOF 1980. The exception there only applies where the property being salved is a tanker laden or partly laden with a cargo of oil. If, without negligence on the part of the salvor, the salvage services to such a tanker are not successful (or are only partially successful or the salvor is prevented from completing the services), cl.1(a) of LOF 1980 provides that the salvor 'shall nevertheless be awarded solely against the owner of such tanker his reasonably incurred expenses and an increment not exceeding 15 per cent of such expenses but only if and to the extent that such expenses together with the increment are greater than the amount otherwise recoverable under this Agreement'. As might be expected, the 'safety net' exception of LOF 1980 has found its way into the Draft Convention. Art 12.1 is discussed below. It is, however, important to note that the exception to the 'no cure - no pay' principle created by Art 12.1 is not confined to tankers and oil cargoes.

58. The fact that salvors under the 'no cure - no pay' system run the risk that they may not recover normal compensation for their services or may only recover part of that compensation, is a relevant factor to be taken into consideration in determining the payment for successful services under Art 11 or Art 12.2 (85).

59. Art 10.3 corresponds to Article 5 of the 1910 Convention. Under traditional salvage law, a shipowner has no right to salvage remuneration in respect of services rendered by him to his own vessel (86). The rule is relevant in apportioning a reward under national law (according to Art 13.2) between the owner, master and crew of the salving vessel. The rule also makes it clear that the owner of the salving vessel in such cases is entitled to receive payment of the cargo's share of the salvage reward and normally entitled to claim payment of the vessel's share from his own underwriters (87).

Art 11 The amount of the reward (3-2)

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following considerations without regard to the order in which presented below:
   a) the value of the property salved,
   b) the skill and efforts of the salvors in preventing or minimising damage to the environment,
   c) the measure of success obtained by the salvor,
   d) the nature and degree of the danger,
   e) the efforts of the salvors, including the time used and expenses and losses incurred by the salvors,
   f) the risk of liability and other risks run by the salvors or their equipment,
   g) the promptness of the service rendered,
   h) the availability and use of vessels or other equipment intended for salvage operations,
   i) the state of readiness and efficiency of the salvor's equipment and the value thereof.
2. The reward under paragraph 1 of this Article shall not exceed the value of the property salved at the time of the completion of the salvage operation.

Comments:

60. Catastrophies such as the 'Torrey Canyon' and the 'Amoco Cadiz' have demonstrated that, when such incidents occur (as they inevitably will from time to time), the public interest requires that salvage operations must be undertaken quickly and effectively and that those operations must be directed not only to securing the safety of the casualty and her crew but also to preventing or minimising damage to the environment. As Brice observes, there is no express provision in the 1910 Convention regarding the right of a salvor who has undertaken such environmental measures to claim salvage remuneration or any other compensation in respect of them (88). This is understandable as that Convention was based on the state of the art as it existed at that time. Indeed, it may be said that, until comparatively recently, the 1910 Convention has served the public interest and the international maritime community very well. However, in the 75 years since the 1910 Convention came into being, there have been significant developments in international shipping. Whilst dangers to ship and cargo have been reduced, the dangers which ship and cargo now represent to third party interests and in particular to the environment have substantially increased. Incidents such as the 'Amoco Cadiz' have shown that the approach underlying the 1910 Convention is no longer adequate to meet modern day requirements. In particular, the existing rules of salvage do not offer sufficient incentives to induce a salvor to undertake salvage operations in cases where there is little

prospect of success in saving property but where extensive salvage operations might be urgently needed to prevent or minimise damage to the environment (89).

61. The studies undertaken by CMI and IMO in the wake of the 'Amoco Cadiz' incident clearly point up the need to create a legal regime under which salvors with the requisite skills and equipment will be encouraged to take prompt and effective action to protect the environment. To date, public concern has focused mainly on the threat of oil pollution. International conventions, national legislation, voluntary agreements like TOVALOP and CRISTAL and amendments to salvage agreements culminating in LOF 1980 are almost all directed to this aspect. However CMI, in putting forward its Draft Convention has recognised that other cargoes, such as dangerous chemicals and liquified natural gas, may also be a grave source of danger to life and property and may threaten damage to the environment - of which the 'Mont Louis' casualty in 1984 was a timely reminder (90).

62. Arts 11 and 12 are the foundation of the revised legal regime set up by the Draft Convention. In formulating this regime, CMI has sought to strike a delicate balance between the old and the new. On the one hand there has been minimal disturbance to the traditional rules of salvage law, a great many of the provisions of the 1910 Convention being carried over into the Draft Convention. On the other hand there is the judicious introduction of new material, made necessary by pressing considerations of environmental protection and public interest.

63. Art 11 is concerned with the principles on which an award is to be assessed in normal circumstances, without regard to special compensation. It lays down two principles, both of which are well established in salvage law. The first is that the reward shall be fixed 'with a view to encouraging salvage operations' (and taking into account nine specified considerations). The CMI Report notes that, although this principle was generally followed under the 1910 Convention, it was felt important to stress in the Convention itself that 'the encouragement of salvors is the basic consideration, which must always be in the minds of the tribunals when salvage rewards are fixed' (91). The second principle, embodied in Art 11.2, is that the salvage reward shall not exceed the value of the property salved at the time of the completion of the salvage operation (92).

64. Art 11.1 introduces important considerations which are additional to those set out in Article 8 of the 1910 Convention. These additional considerations, which the tribunal is to take into account, are: the skill and efforts of the salvors in preventing or minimising damage to the environment (sub-para (b)); the promptness of the services rendered (g); the availability and use of salvage vessels or other related equipment (h) and the state of readiness and efficiency of the salvor's equipment and its value (i). The new considerations are intended as an incentive to salvors to suitably equip themselves and to be in a position to act promptly and effectively in the event of a casualty threatening damage to the environment. It should be noted that Art 11.1 allows for enhancement of a salvage reward; it does not contemplate separate quantification of the amount (93).

65. Art 11.1(b) provides for the successful salvor of property to be given an enhanced award in recognition of his skill and efforts in preventing or minimising damage to the environment. In the practice of many countries, this consideration is already a factor resulting in enhancement of the

salvage reward. CMI felt, however, that it was important in the Draft Convention to highlight this consideration and to leave it to the tribunal to decide the weight to be given to it (94).

66. Arts 11.1(h) and (i) are directed primarily to the professional salvor whose investment in salvage tugs and other capital equipment is substantial. Although in modern economic conditions, few professional salvors devote their resources solely to salvage, this is usually an important and priority part of their activities (95). The use of the word 'availability' in this context indicates that consideration is to be given to the salvor's positioning of his tugs and other equipment.

67. On the general philosophy underlying the salvage reward, Carver says: 'The rule of rewarding salvors is grounded on public policy. It is desirable to encourage those who chance to be in a position to help vessels in distress to use their best exertions, to risk if necessary their own lives and property, and to delay their own adventures for that purpose. The prospect of a reward, which is generally assessed liberally, brings out a readiness and strenuousness which cannot always be expected without that motive, and both lives and property at sea are thus made more safe' (96). In The City of Chester, William Brett M.R. said: 'There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of the salvage reward' (97). Theoretically, the only limit fixed as to the amount of a salvage reward is the value of the salved property, assessed at the date and place of termination of the salvage services (98). In practice, however, the courts will seek to ensure that the quantum of the award is not disproportionate, having regard to the salvage operations performed. In The Amerique, the Privy Council, dealing with the case of a valuable passenger ship which was in danger of sinking and abandoned by her master and crew, held that: 'The rule seems to be that though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered' (99).

68. Under the traditional law of salvage the rule is that every interest in the property benefited by the salvage service contributes to the salvage reward and then rateably according to its salved value (100). Referring to payment of an enhanced award, Kennedy states that the practice is that the owners of 'all the property salved - the ship, the freight and the cargo - should contribute to such increased rate of salvage, each in proportion to its value' (101). The concept is that all the salved property is looked on as participating in a common maritime adventure and no distinction is made between one part of the property and any other.

69. The Draft Convention, like the 1910 Convention, is deliberately silent on the question of the persons liable to pay salvage rewards due under Art 11.1, and in particular also any enhancement awarded according to sub-para (b), these matters being left to be determined under national law. It was considered by CMI that this was desirable, as the solutions adopted under the various national laws differ to such an extent that acceptability of the Draft Convention might be reduced if an attempt was made for uniformity on this aspect. Another reason lies in the special insurance

arrangements underpinning the safety net rule in LOF 1980 and the efforts within CMI and IMO to reach a similar compromise in relation to the distribution of payments under the Draft Convention. Under the LOF 1980 insurance arrangements, the ship's liability insurers (generally the P & I Clubs) fund the special compensation payable under the safety net while the property underwriters, hull and cargo, fund the total reward for property salvage, including any enhanced award (102).

70. Payment of enhanced awards was considered recently in an article written by Geoffrey Brice Q.C. There, after a thorough analysis of the background and the competing views, Brice concluded that: 'In the ordinary non-safety net case, the award of salvage ought to be borne pro rata to salved values by the owners of all the salved property irrespective of liabilities in tort ... Any attempt to assess remuneration on the basis of who would or would not be liable for loss and damage in tort would give rise to numerous difficulties and might discourage salvors from undertaking this class of case ... Many awards have been made containing an element of 'enhancement', such awards being borne pro rata to salved values (as with salvage awards) and it is submitted there is no reason either of principle or of policy to change this well established practice' (103).

71. Within IMO, the ICS argued that the question of who should pay salvage awards under Art 11 should not be left open, otherwise the burden might fall entirely on the shipowner who would then be responsible both for the normal award (Art 11) and for the special compensation (Art 12). This is not in accordance with CMI's intention. Accordingly, ICS has proposed that Art 11 be amended to make clear that the reward under paragraph 1 is to be paid by the respective property interests in proportion to the value of the property salved at the time of the completion of the salvage operation and is not to exceed such value. However, the IMO Legal Committee decided that, at least for the time being, the text of Art 11.1 should remain unchanged.

72. The ISU observed that Art 11.1(b) refers to 'the skill and efforts of the salvor in preventing or minimising damage to the environment' but does not refer to such 'skill and efforts' in respect of the saving of life or the salving of property (104). In this regard, it will be noted that 'the efforts of the salvors' are mentioned in sub-para (g). Skill is not referred to in Article 8 of the 1910 Convention and is probably intended to be taken into account under one of the other considerations, such as 'efforts' in (e) or 'success' in (c). Nevertheless, the use of the phrase 'skill and efforts' in the new sub-para (b) does suggest that skill should be expressly included, at least in the context of property salvage (and as a separate consideration from (b)). It is well established that salvage of life will result in enhancement of the property salvor's award (105) and it is clearly not CMI's intention to change this. However, as has been pointed out within IMO, there are issues of public policy raised by the suggestion that the salvage of life is subject to reward and the 1910 Convention does not include such a provision (106). Life salvage is dealt with in Article 9 of the 1910 Convention and in Art 14 of the Draft Convention and, it is considered, should not be specifically mentioned in Art 11.1.

73. Within IMO, the question arose as to whether the list of considerations in Art 11.1 was exhaustive or merely illustrative (107). The CMI observer advised that there was no consensus in 1910 on this aspect and that it was similarly left open in the Draft Convention. He added that it

was a comprehensive list, so little was omitted, but no firm decision had been taken that it was or was not open ended (108). As noted above, the ISU has observed that Art 11.1 makes no mention of the skill of the salvor in salving property or life; also life salvage will enhance the property salvor's award. These facts, coupled with the further fact that the Draft Convention is not intended to be an exhaustive code on the subject of salvage (109), suggest that the list of considerations in Art 11.1 should be taken as illustrative. It is, however, desirable that the point be clarified in the Draft Convention and this is to be further considered by the IMO Legal Committee.

74. Within IMO, ISU proposed that in Art 11.2, it should be made clear that the reward would be exclusive of interest and recoverable legal costs, otherwise there might be no incentive to the salved property to conclude the assessment of the award (110). This proposal was supported by a number of delegations. It has been held that the entitlement of a party to interest is governed by the proper law but the amount of interest falls to be decided by the lex fori (111). The IMO Legal Committee agreed to the ISU proposal but on the basis that the draft would be further reviewed to ensure that matters of interest and costs to be awarded would be left to the lex fori (112).

75. There is a practical aspect concerning the amount of the reward which is relevant to Australia. It is generally recognised that salvage awards made in Australia are low. To take but one example; the $6000 apportioned to the master, first officer and second officer in The Oceanic Grandeur (113) would probably not have covered the shortfall between their solicitor-client costs and their party-party costs received from the defendant shipowner. It certainly would do little to 'encourage salvage operations'. Australia, with its long coastline (and Great Barrier Reef) is vulnerable to environmental damage from persistent oil cargoes and other dangerous chemicals. Australia will no doubt need salvors from time to time in the future and it should not assume that they will necessarily be able to work under a LOF contract providing for arbitration in London.

Text:

Art 12 (3-3) Special compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and failed to earn a reward under Article 11 at least equivalent to the compensation assessable in accordance with Article 12, he shall be entitled to compensation from the owner of that vessel equivalent to his expenses as herein defined.
2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimised damage to the environment, the compensation payable by the owner to the salvor thereunder may be increased, if and to the extent that the tribunal considers it fair and just to do so, bearing in mind the relevant criteria set out in Article 11.1 above, but in no event shall it be more than doubled.
3. 'Salvor's expenses' for the purpose of paragraphs 1 and 2 of this Article 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 operations, taking into consideration the criteria set out in Article 11.1(g), (h) and (i).

4. Provided always that the total 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 11.

5. If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any payment due under this Article.

6. Nothing in this Article shall affect any rights of recourse on the part of the owner of the vessel.

Comments:

76. Art 12 gives the salvor important new remedies in cases where salvage operations in respect of a vessel or cargo are carried out also in order to avert damage to the environment. Two conditions must be satisfied before the Article comes into operation: first, the salvor must have carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and second, the salvor must have failed to earn a reward under Art 11 at least equivalent to the compensation assessable in accordance with Art 12 (114). In such cases, the salvor is entitled to recover from the shipowner his expenses as defined in Art 12.3, together with additional compensation contingent upon actual avoidance of such damage. The additional compensation is to be fixed taking into account as applicable the considerations set out in Art 11.1 but is not to exceed the salvor's expenses. Thus the total compensation under Arts 12.1 and 12.2 may be up to twice the salvor's expenses (115). Under LOF 1980, the increment does not exceed 15% of expenses. Views were expressed within IMO that an upper limit of twice the salvor's expenses was too high and that, at this stage, the word 'doubled' should be maintained in square brackets. However, the observer for CMI advised that this level was set at Montreal after lengthy discussion and that it forms an essential part of the commercial compromise embodied in Arts 11 and 12 (116). Within IMO it was decided to leave this aspect to the diplomatic conference.

77. The nature of the compromise is outlined in the CMI Report, where it is stated that: 'Art 3-3 (now Art 12) together with Art 3-2.1(b) (Art 11.1(b)) must be considered as part of a compromise. The shipowners' willingness to accept the funding of the compensation and to accept the broad definition of salvor's expenses in Art 3-3.3 (Art 12.3) is clearly connected with the salvor's acceptance of the limit in Art 3-3.2 (Art 12.2) and his acceptance that he will not insist on any rules in the new convention as to who should be liable for the rewards payable under Art 3-2 (Art 11). Equally, the fact that these provisions should not be made mandatory was an important part of the compromise' (117).

78. It will be noted that the salvor is entitled to compensation under Art 12 only from the owner of the vessel. The CMI Report comments that where no or insufficient property has been salved so as to allow adequate recovery under Art 11 and the provisions of Art 12 come into play, it is important for the salvor that the person liable is one against whom the claim is easily enforceable - the

shipowner (118). As Brice points out, if the owner were insolvent or uninsured, then the salvor would not recover his compensation unless he had obtained other security (119). In this respect it is relevant to note that Art 12.1 seems to contemplate that the salvor will have only an action in personam against the owner as opposed to a right in rem against the vessel (120).

79. In making the owner of the vessel liable for the special compensation payable under Art 12, the Draft Convention is seeking to adopt the safety net solution of LOF 1980. This necessarily assumes that special insurance arrangements similar to those underpinning the LOF 1980 safety net will be concluded with the P & I Clubs and with hull and cargo underwriters to fund the shipowner's liability under Art 12. This is critical for the success of the Draft Convention. Both CMI and IMO are conscious of the importance of all interested parties reaching firm agreement on this point and have actively worked to this end. It now seems assured that these endeavours will be successful (121). Article 12 was accepted at the CMI Montreal Conference as a sensible compromise by the ISU representing most of the world's professional salvors, by underwriters and by other shipping interests. Moreover, the prevailing view of the delegations to the IMO Legal Committee seems to favour the approach taken by CMI in Arts 11 and 12 which is generally seen within IMO as a sound, well-balanced commercial compromise (122).

80. The definition of 'salvors expenses' is broad and comes very close to the definition proposed by the salvor's representatives. It covers the salvor's out of pockets as well as a fair rate of compensation for the use of the salvor's own equipment and personnel. The reference to the criteria set out in Arts 11.1 (g), (h) and (i) makes clear that due account is to be taken of the salvor's standing costs, overheads etc. when determining what is a fair rate in the particular case (123). Brice suggests that 'out of pocket expenses' should be taken to mean those expenses reasonably incurred by the salvor in the salvage operation over and above those which he would have incurred in any event (124).

81. Art 12.4 provides that the payment under Art 12.1 and 12.2 is to be made only if the award under Art 11 is insufficient to meet the expenses of the salvor under Art 12.1 and any increased compensation under Art 12.1. This Article would seem superfluous, in view of, first, the pre-condition in Art 12.1 that the salvor should have failed to earn an award under Article 11 at least equivalent to the compensation assessable in accordance with Art 12 and second, the opening words in Art 12.2: 'If, in the circumstances set out in paragraph 1 of Article 12 hereof ...'.

82. By Art 12.5 negligence by the salvor in relation to the environment is given a strict effect, similar to that under the voluntary industry agreements and international conventions relating to oil pollution. Brice notes that the negligence referred to must be negligence by which the salvor fails to prevent or minimise damage to the environment and that the power to deprive the salvor of the whole or part of his special compensation is discretionary (125). The CMI Report states that it is expected that Art 12.5 will increase the level of caution of the salvors in relation to damage to the environment (126). On the other hand, Brice warns that too harsh an operation of Art 12.5 might lead to discouragement of salvors and that it is clearly in the public interest that a sensible and balanced view be taken of each case (127).

83. Art 12.6 preserves any right of recourse that the owner of the vessel who has paid special compensation under Art 12 may have against other parties, in particular cargo owners and charterers.

84. Within IMO, there was discussion on the possibility of a salvor entitled to special compensation under Art 12 (or an enhanced award under Art 11.1(b)) also claiming compensation for measures to prevent environmental damage under another convention, such as the 1969 Civil Liability Convention (CLC) in the form of 'preventive measures' under that treaty. It was widely accepted that, if the possibility of double recovery of expenses existed, it should be prohibited. The CMI observer agreed that double recovery should not be permitted but expressed the opinion that this was made sufficiently clear in the text of the Draft Convention (128). Under Articles 1.6 and 1.7 of the CLC, any person may recover the costs of any reasonable measure taken after an incident has occurred to prevent or minimise oil pollution damage. An examination of Art 12 does not readily disclose anything in the Article that would prohibit an attempted double recovery in the circumstances contemplated. This aspect should be reviewed closely within IMO and, if necessary, appropriate amendment should be made to prevent this possibility. One approach might be to amend the definition of 'salvor's expenses' in Art 12.5 to provide for the reduction of such expenses by the amount of any recovery made by the salvor (or which the salvor may be entitled to recover) from any other source in respect of 'preventive measures'.

85. Several delegations to the IMO Legal Committee put forward proposals to amend Art 12. However, there was a marked disinclination to accept any substantial amendment.

Text:

Art 13 (3-4) Apportionment between salvors

1. The apportionment of a reward between salvors shall be made on the basis of the criteria contained in Art 11.
2. The apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel the apportionment shall be determined by the law governing the contract between the salvor and his employees.

Comments:

86. Art 13.1 is a restatement of the rules of the 1910 Convention, Articles 6 and 8. Arts 6.2 and 7.2 of the Draft Convention impose on the owner and master of a vessel in danger as well as on the salvor, when this is reasonable, a duty to obtain assistance from other available salvors. Thus, the rule as to apportionment of a reward between salvors becomes important under the regime of the new Convention (129). Art 13.2 is based in part on Article 6 of the 1910 Convention. The last sentence in paragraph 2 is new and recognises the increasing number of cases where salvage is not carried out from a vessel (130).

87. The law concerning apportionment of salvage reward between owners, master and crew varies from ate to State. CMI did not think it appropriate to attempt unification of the rules on this

subject which it saw as 'rather controversial' (131). Under English law there is no fixed rule of apportionment as between owners, master and crew, each case depending on its own facts (132). Brice notes that the laws of some maritime countries provide for specific apportionments, for example, one-half to the owners, a quarter to the master and a quarter to the crew. In proceedings under English law, after establishing the shares of the owners, the master and any responsible officer such as the chief officer and chief engineer, it is not uncommon to apportion the balance to other crew members in accordance with their monthly rates of pay, if no special award is called for (133).

88. The ISU suggested the inclusion in the Draft Convention of a provision that would ensure that any agreement made by a salvor would bind all his servants and agents and sub-contractors and their servants and agents and that claims by these for a share in the reward would be made direct to the salvor or to the sub-contractor as appropriate (134). The ISU proposal was intended to concentrate all claims against salved property in one court, thus avoiding a multiplicity of actions in different courts in different countries. Within IMO, some delegations expressed sympathy with this concept but a number of modifications were suggested and the French delegation undertook to produce a new text for further consideration (135). One difficulty with the approach suggested by ISU is ensuring the equitable apportionment of the reward between the salvor, his servants, agents and sub-contractors. The approach offers no safeguard that the reward will be apportioned equitably or that especially meritorious contributions will be suitably recognised. At least in the event of a dispute as to apportionment, there needs to be some procedure for having the matter determined independently by a court or other tribunal.

89. Apportionment is dealt with in Australia in secs. 325-327 of the Navigation Act 1912. In respect of amounts in dispute not exceeding $2,000 there is provision in sec. 325 for the amount to be paid to the receiver of wreck who is then required to distribute it among the persons entitled 'on such evidence and in such proportions as he thinks fit'. Sec. 326 is concerned with amounts in excess of $2,000 and provides that, if delay or dispute arises as to apportionment, a court of competent jurisdiction may apportion the amount amongst the persons entitled 'in such manner as it thinks just'. Sec. 327 provides for disputes as to apportionment amongst owners, master, pilot, crew and other persons in the service of (in effect) a foreign ship to be determined by the court or person making the apportionment 'in accordance with the law of the country to which the ship belongs'.

Text:

Art 14 (3-5) Salvage of persons

1. No remuneration is due from the persons whose lives are saved, but nothing in this Article shall affect the provisions of national law on this subject.
2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the remuneration awarded to the salvor for salving the vessel or other property or preventing or minimising damage to the environment.

Comments:

90. Art 14.1 restates the similar rule in Article 9 of the 1910 Convention. It must be read with Art 8.1 imposing a duty on every master to render assistance to persons in danger at sea. Art 14.2 is also taken from the 1910 Convention, with an additional provision to make it clear that the life salvor is entitled to a fair share of any remuneration awarded to the 'property' salvor for preventing or minimising damage to the environment. From Art 14.2 it follows that if there was no property salved, there would be no reward and hence no share for the life salvor; however, if there was danger to the environment and the 'safety net' provisions of Art 12 came into effect so that the principal salvor was paid special compensation the life salvor would then be entitled to share.

91. As mentioned previously, aside from certain statutory exceptions, salvage remuneration is not payable in respect of saving life alone. To recover salvage remuneration for saving life it is necessary also to have salved property which is itself a recognised subject of salvage and which may constitute a fund from which the reward can be paid (136). The principle was graphically applied in The Fusilier where one set of salvors exclusively saved life and another distinct salvor or set of salvors saved the ship and cargo. In finding that the life salvors had no right to reward, Dr. Lushington held that one reason for the court having no power to award salvage where life alone had been saved was that there could be no proceeding in rem and no arrest of property applicable to that purpose (137). Where both life and property are saved, the award is enhanced to reflect the element of life salvage (138).

92. In Australia, salvage rewards for life salvage are provided for in sec. 315 of the Navigation Act 1912, and are made payable in priority to all other claims for salvage. Where no property has been salved or where the fund is otherwise insufficient, the Minister is given discretion to pay the life salvor 'out of moneys appropriated by the Parliament for the purpose' a fitting sum in whole or part satisfaction of the amount of salvage reward left unpaid.

93. Brice speaks strongly on the treatment of life salvage in the Draft Convention: 'Article 3-5 (Art 14) of the CMI Draft Convention deals with life salvage but takes the matter no further than Article 9 of the 1910 Salvage Convention - despite strong views held in well-respected quarters that it ought to. It may be thought that this is an area of the law requiring the particular attention of maritime nations and their governments; that it is a difficult topic to resolve satisfactorily cannot be doubted for, as in the case of the 'boat people', the magnitude of the problem may be very great and the question of who should pay for the saving of life and on what basis is not an easy one to answer. Fortunately, mariners and shipowners are habitually prepared to act to save life without any remuneration and at great commercial inconvenience' (139).

94. The meaning of Art 14.2 (with its new reference to environmental damage) is unclear. However, it seems certain that the Article does not intend that a life salvor should be paid salvage remuneration if there is no 'fund' from which the reward may be paid. It seems certain also that the Article contemplates a situation where life salvor and property salvor are different parties. The Article appears to be directed to the case of a salvor who, like the life salvors in The Fusilier

has participated in salvage operations and has salved life but not property, although property has been salved or damage to the environment minimised or prevented by another salvor. The life salvor in this case is to be remunerated if there is a 'fund' from which he can be paid. Where property is salved there is such a fund. However, where there is no property salved but damage to the environment has been prevented the 'fund' becomes the remuneration awarded to the salvor under the 'safety net' of Article 12. In that case the life salvor must necessarily look to the other salvor for his entitlement to a fair share of that other salvor's remuneration. It is considered that, even when property has been salved by the other salvor, the life salvor's claim should be against the other salvor in personam and that the life salvor should have no action in rem against the salved property.

Text:

Art 15 (3-6) Services rendered under existing contracts

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

Comments:

95. Art 15 forms part of the important principle that a salvage service must be voluntary to give a right to remuneration under the Draft Convention. In this respect, it compliments Art 3.3 which is concerned with salvage operations performed by public authorities under an official duty. Art 15 is much wider in scope than Article 4 in the 1910 Convention (which is limited to towage contracts) and would cover not only devices other than tugs but also claims by others bound to due performance of a contract such as a contract of employment entered into before the danger arose (140).

96. On the question of voluntariness and the seaman's contract of employment, the Judicial Committee of the Privy Council said in The Sappho: 'The true rule appears to their Lordships to be, to consider, whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the seaman originally enters into, so that he receives remuneration for them by his ordinary wages' (141). The general rule is that, where a person discharges a contractual or official duty in providing services which would normally justify a salvage reward, he will only be disentitled from claiming a reward on that ground if the duty was one owed directly to the defendant (142). In The Oceanic Grandeur it was held that the members of the crew of the salving ship are not precluded from claiming because they are ordered to provide the salvage service, even though the service was one which their owners contracted with the owners of the salved ship to provide (143).

97. In The North Goodwin No. 16, Sheen J. held that seamen were not volunteers when performing their ordinary duties as servants of the tug owner on board a tug performing a towage contract (143A). This principle was applied by the Court of Appeal of NSW in The Texaco Southampton in the case of the master and crew of a tug performing services under a sub-contract, having no direct contractual relationship with the owners of the salved property (144).

Text:

Art 16 (3-7) The effect of salvor's misconduct

A salvor may be deprived of the whole or a part of the payment due under the provisions of this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

Comments:

98. Art 16 is similar to the rule in Article 8 of the 1910 Convention. The salvor's negligence in failing to prevent or minimise damage to the environment is the subject of a special rule in Art 12.5.

99. Brice states: 'In the present context the type of misconduct referred to includes such matters as theft by a salvor of property on board the casualty, preventing of the owner, master or crew from coming on board the casualty for no adequate reason, or wrongfully preventing them engaging other salvors. Theft of valuable property will usually lead to forfeiture of salvage by those who commit the theft or who connive at it'. By way of illustration, Brice then cites The Kenora, a case in which the crew were guilty of theft and the master was privy to it; all forfeited their right to salvage. However, in that case Hill J. neither forfeited nor diminished the award of the owners who had not participated in the theft, were not privy to it, and who did not by any negligence enable it to be done or to go undetected (145).

100. Within IMO, the ISU proposed that Art 16 be redrafted to omit the phrase 'to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part'. The ISU argued that this is unnecessary in Art 16, in that adequate provisions have already been made in the Draft Convention. In this regard, the ISU noted that the criteria for assessing a salvage award (Art 11.1) enable a court or tribunal to take into account the salvor's level of competence in performing the salvage operation. Although one delegation supported the proposal, others preferred the CMI wording and, of these, one delegation observed that the insurance industry considered the phrase 'or more difficult' an important one since there were cases of salvors making salvage operations more difficult rather than less. Be that as it may, the CMI observer stated that Art 11 was not regarded as sufficient to serve the purpose of Art 16 and added that it was important to stress that some actions amounted to misconduct. It is considered that the statements of the CMI observer are correct and that the CMI wording should stand (146).

Text:

Art 17 (3-8) Prohibition by the owners or master

Services rendered notwithstanding the express and reasonable prohibition of the owner or the master shall not give rise to payment under the provisions of this Convention.

Comments:

101. Art 17 is a restatement of Article 9 of the 1910 Convention which reflects the position under the general law. It has been held that where the master's prohibition is unreasonable a salvage reward might yet be earned provided the other elements of salvage are present (147).

102. Under the regime of the Draft Convention, Art 17 must be read with Art 6.1, by which the owner and master of the casualty are required to take timely and reasonable action to arrange for salvage operations (148).

103. The ISU has proposed that the word 'owner' should be changed to 'owner of the vessel'. It is considered however that 'owner' in Art 17 is to be taken as meaning owner of the vessel or owner of property as the context requires. As mentioned above, salvage under the Draft Convention is not confined to vessels (their cargo and freight) and it seems appropriate that the rule relating to prohibition should extend also to property other than vessels.

CHAPTER IV - CLAIMS AND ACTIONS

Text:

Art 18 (4-1) Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.
2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.
3. The salved property shall not without the consent of the salvor be removed from the port or place at which the property first arrives after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim.

Comments:

104. English and Australian courts exercising Admiralty jurisdiction allow the salvor to enforce his rights in a simple and effective way. He is given a maritime lien, a privileged claim upon the salved property which has priority over all other liens which have attached before the salvage services were rendered and which may be enforced by an action in rem by which the salved property may be arrested and later sold, if necessary, in order to satisfy the salvor's claim (149). The maritime lien attaches immediately upon the performance of the salvage services and is unaffected by any change of ownership or possession of the property. The effectiveness of the salvor's right to proceed in rem is dependent upon his being able to serve a writ upon and arrest the salved property. In practice, actual arrest is usually avoided by the giving of security and entry of an appearance by the person liable or his insurer. Whilst the procedure in rem is the salvor's usual and most effective remedy, it is not his only remedy; concurrently with the action in rem, the salvor has a qualified right of action in personam against the owner of the salved property. However, the effectiveness of the salvor's right to proceed in personam is conditional upon his being able to serve a writ on the defendant or the defendant's accepting service and upon the prospects of effectively levying execution if necessary (150).

105. In most States the salvor is given a maritime lien or other similar right over the salved property. With respect to a salved vessel, this is provided for in the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926. In Australia, rights of detention and sale of the salved property are given by secs.322 and 323 of the Navigation Act, 1912.

106. Art 18.1 proceeds on the assumption that the claims of the salvors will be secured by maritime liens. However, from the practical point of view, Art 18.2 recognises that of greater importance to the salvor is the provision by the person liable (or the insurer) of satisfactory security for the salvor's claim (including interest and costs). Upon such security being given, the salvor may not enforce his maritime lien. In most jurisdictions, maritime liens cannot be enforced if satisfactory security has been provided, however CMI considered it desirable to have an express rule to this effect in the Draft Convention (151).

107. Within CMI, consideration was given to whether a rule conferring a maritime lien should be included in the Draft Convention. However, it was decided not to do so because such rules were felt to have their proper place in other conventions and because the advantage would be limited in view of the already widespread acceptance of such a right (152).

108. Within IMO, the question arose as to whether a maritime lien was intended in respect of special compensation awarded under Art 12. The CMI observer advised that Art 18 was a statement that the Draft Convention would not have any effect on a maritime lien for salvage (153).

109. Art 18.3 is based on cl.5 of LOF 1980. The underlying thinking is that where there is no maritime lien or where it is not practicable to obtain the authorities' assistance to enforce a maritime lien in time, it is necessary for the protection of the salvor's interest to provide that the salved property will not be removed until satisfactory security has been provided.

Text:

Art 19 (4-2) Duty to provide security

1. Upon the request of the salvor a person liable for a payment due under the provisions of this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.
2. Without prejudice to paragraph 1 of this Article, the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

Comments:

110. The practical importance to the salvor of satisfactory security for his claim has been noted above. Art 19.1 imposes a duty on the person liable to provide security upon request. By Art 19.2 (which is in similar terms to a provision in cl.5 of LOF 1980), a duty is imposed on the shipowner, in cases where he has no liability for payments by cargo interests, to use his best endeavours to ensure that satisfactory security is provided by the owners of the cargo. The Draft Convention is deliberately silent on who shall pay salvage awards according to Art 11, the matter being left for determination by national law. However, once a person is liable under national law (or under Art 12) that person has a duty under Art 19.1 to provide security. Whether 'a person liable' includes a cargo owner is a matter for national law.

111. An important issue in relation to security arose between ISU and ICS. In its submission to IMO, the ISU noted that the Draft Convention leaves it to the national law as to who provides security. The ISU observed that, whereas the liability of the shipowner to provide security for all interests has long been the law in many countries, such as France, Belgium, Holland, Germany and Scandinavia, in other countries - and notably in England where most salvage claims are determined - the owner of each individual piece of property has to provide security. The ISU contended that it would be in the interests of all if the individual national laws could be standardised and that the situation would be greatly improved and long delays avoided if the ship were to be responsible for the provision of security on behalf of all interests (154).

112. The ICS advised that the proposal by ISU was unacceptable and that it supported the scheme of the Draft Convention in leaving it to national law as to who is to provide security. The ICS contended that there was no justification for placing the duty of obtaining security for cargo on the shipowner; the shipowner has no such financial responsibility to cargo interests and the duty to assist the salvor in his efforts to obtain security under LOF 1980 should suffice (155). Another consideration, said ICS, is the relative value of cargo; why should the owner of an almost worthless, damaged hull be expected to provide security for the valuable cargo.

113. The IMO Legal Committee considered that, given that Art 19.2 reflects the position under LOF 1980 and given the diversity of national law and practice on the point, it may be prudent to accept the Draft Convention position leaving the question as to who provides security to national law (156). To do otherwise might jeopardise ultimate acceptance of the Draft Convention.

Text:

Art 20 (4-3) Interim payment

The court or arbitral tribunal having jurisdiction over the claim of the salvor may by interim decision order that the salvor shall be paid such amount on account as seems fair and just and on such terms including terms as to security where appropriate as may be fair and just according to the circumstances of the case. In the event of an interim payment the security provided under Article 19 shall be reduced accordingly.

Comments:

114. Art 20 is based on cl.10 of LOF 1980 and reflects the practice of arbitral tribunals. The purpose in giving power to an arbitrator to make an interim award is to prevent apparent injustices in cases including commercial cases. The provision is new, there being no corresponding rule in the 1910 Convention. It is intended to improve the salvor's cash flow and is seen as an important incentive to salvors. LOF 1980, in cl.15(a) contains an express provision for reimbursement to the extent that the final award is less than the interim award. There is no such provision in the Draft Convention, although it may be contemplated that reimbursement would be a 'term' imposed by the court or arbitral tribunal attaching to the interim payment. It would seem desirable, however, to follow LOF 1980 and to include in the Draft Convention a specific provision for reimbursement.

115. It has been suggested that an interim payment may not be appropriate in cases of special compensation under Art 12, particularly where no property had been salved and hence no funds were available in respect of environmental damage. However, as has been pointed out, a shipowner might be obliged to pay special compensation even in the case of the total loss of the vessel and, accordingly, such an interim payment should not be considered inappropriate (157).

Text:

Art 21 (4-4) Limitation of actions

1. Any action relating to payment under the provisions of this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

The limitation period commences on the day on which the salvage operations are terminated.

2. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. The period may in the like manner be further extended.

3. An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted. However the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been first adjudged liable in the action against himself.

4. Without prejudice to the preceding paragraphs all matters relating to limitation of action under this Article are governed by the law of the State where the action is brought.

Comments:

116. Art 21.1 retains the two year time-bar of the 1910 Convention (Article 10). As in the earlier Convention, suspension and interruption of the limitation period are left to be determined under national law.

117. Paragraphs 2, 3 and 4 of Article 21 are modelled on corresponding provisions in modern maritime law conventions - e.g. the 1968 Visby Protocol to the 1924 Bills of Lading Convention (158). By paragraph 2 it is made clear that the limitation period may be extended by the respondent, this being widespread practice. As any such extension is in the interest of the claimant there is no need to provide for mutual agreement in respect of the extension. Paragraph 3 sets down a practical rule with regard to actions for indemnity. Paragraph 4 states that limitation of action under the Article is governed by the law of the State where the action is brought, a rule which corresponds with Art 2.1 dealing with the scope of application of the Draft Convention (159).

Text:

Art 22 (4-5) Jurisdiction

1. Unless the parties have agreed to the jurisdiction of another court or to arbitration, an action for payment under the provisions of this Convention may, at the option of the plaintiff, be brought in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

   a) the principal place of business of the defendant,

   b) the port to which the property salved has been brought,

   c) the place where the property salved has been arrested,

   d) the place where security for the payment has been given,

   e) the place where the salvage operations took place.

2. With respect to vessels owned by a contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdiction set forth in paragraph 1 of this article

and shall waive all defences based on its status as a sovereign State. In the case of a vessel owned by a State and operated by a company which in that State is registered as the ship's operator, owner shall for the purpose of this paragraph mean such company.

3. Nothing in this article constitutes an obstacle to the jurisdiction of a contracting State for provisional or protective measures. The exercise by the salvor of his maritime lien whether by arrest or otherwise against the property salved shall not be treated as a waiver by the salvor of his rights, including the right to have his claim for salvage remuneration adjudicated by court or arbitral proceedings in another jurisdiction.

Comments:

118. Within CMI, there were competing views on whether a jurisdiction provision should be included in the Draft Convention. However, it was recognised that such provisions are included in most modern conventions. It was also felt that the salvor's rights should be protected by providing for jurisdiction where this is most suitable for the salvor (160).

119. Under Art 22.1 the rules of jurisdiction only have application in cases where the parties have not agreed to the jurisdiction of another court or to arbitration. CMI encourages the continued, widespread use of salvage contracts in which arbitration or jurisdiction clauses are essential elements. However, the list of jurisdictions in paragraphs (a) to (e) is otherwise intended to be exhaustive. Within IMO, this resulted in some criticism, a number of delegations arguing that broadening of jurisdiction should be allowed if local laws so permit. The ISU and some delegations proposed that the 'place of arrest of a sister ship' should be included in the list of places on which jurisdiction is conferred (161).

120. There was also a divergence of views on the need for Art 22.2 which adopts the language of the 1969 Convention on Civil Liability for Oil Pollution Damage (162). Some delegations proposed deletion of the provision on the ground that questions of State immunity should be dealt with by a convention specifically covering the subject or left to the laws of individual States (163). On the other hand, CMI, ISU and other delegations favoured retaining the provision, on the grounds that it protects salvors, that it broadens the salvage regime and that, although there is an international convention on the immunity of State-owned vessels in commercial service, few States are party to it (164). It is considered that, for these reasons, the provision should stand.

121. Art 22.3 was proposed by the ISU at the Montreal Conference and accepted with little debate (165). The provision is not intended to vary the jurisidictions provided in Art 22.1 but rather to secure the right of a litigant to acquire security over property located in one State when the cause was to be litigated in another State.

Text:

Art 23 (4-6) Interest

1. The right of the salvor to interest on any payment due under this Convention shall be determined according to the law of the State in which the court or arbitral tribunal seized of the case is situated.

Comments:

122. In the 1910 Convention, there is no express provision for interest. Art 23 leaves the matter to the lex fori. The CMI Sub-Committee proposed to the Montreal Conference a further provision that interest should commence to run upon the request for security made under Art 19 but the proposal was not adopted (166). The European Tugowners' Association suggested that interest should run from the date when the salvage services were completed (167).

123. In The Aldora, Brandon J. held that the court had power under the Law Reform (Miscellaneous Provisions) Act 1934 (UK) and under its inherent jurisdiction to award interest on a claim for salvage. In that case, interest was awarded from the date of termination of the salvage services at the short term investment rates prevailing to date of judgment (168).

124. In The Rilland, Sheen J. affirmed that the court had power to grant interest on a salvage award but held that, although the award was earned at the moment when the services were successfully terminated, it was 'absurd and unreal' to think that the salvor should be paid at that moment. One of the principal factors to consider in determining the award was the value of the salved property which could take weeks or months to assess. Interest was awarded effective six months after the termination of the service (169). Brice notes that in most arbitrations under LOF 1980, a similar practice is followed on the basis that, in most cases, six months is a reasonable period for the parties to negotiate the remuneration (170).

Text:

Art 24 (4-7) Publication of arbitral awards

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.

Comments:

125. Most decisions on matters of salvage are arbitral awards. The awards are generally not made public. In practice it is therefore sometimes difficult for the parties to ascertain the actual legal position. Moreover the extent to which international uniformity is achieved cannot be appreciated. The need for adequate information on arbitral practice was recognised by CMI. However, at the Montreal Conference it was decided not to impose a duty to make arbitral awards public, mainly on the ground that privacy is often an important part of the advantages of arbitration.

126. Within the IMO Legal Committee, as within CMI, there was a division of opinion concerning this Article. On the one hand it was argued that such a provision should not be included in the Convention on the grounds that it is irrelevant, that arbitration is often resorted to because of the secrecy of the proceedings and the results and that the provision will have little effect on the present practice regarding publication of arbitral awards as the Contracting State has no interest in encouraging or discouraging their publication. On the other hand it was recognised that much

useful information can be derived from arbitral awards, that the more salvage moves into the public domain the more interest there will be in the claims and the awards made and that by promoting international uniformity publication might assist in the settlement of many claims (171). On balance, it is considered that the Article does serve a useful purpose in stressing the desirability of making arbitral awards public whenever possible but that there should be no publication over the objection of either party to the award.

CHAPTER V - LIABILITY OF SALVORS

Text:

Art 25 (5-1) Limitation of Liability

1. A contracting State may give salvors a right to limitation equivalent in manner and extent to the right provided for by the 1976 Convention on the Limitation for Maritime Claims.

Comments:

127. This Article has an interesting history. In an increasing number of cases salvors do not perform their services from vessels (or with close relation to vessels). Previously in such cases, salvors did not have the right to limitation (172). The 1976 Limitation Convention has solved the problem by providing that such salvors have a right of limitation as if they worked from a tug of 1500 tons (173).

128. Within CMI, it was generally recognised that salvors ought to be able to engage in difficult salvage operations without fears of subsequently being held liable without limitation. The system of the 1976 Limitation Convention was considered to provide a suitable solution to the problem. Thus, at the Montreal Conference, the CMI Sub-Committee proposed that there should be a duty - not merely a discretion - on Contracting States in the new Convention concerning limitation for salvors. In the draft submitted for consideration at Montreal the word 'may' in the first line of the Article read 'shall', the mandatory approach and the incorporation by reference of the 1976 Limitation Convention being modelled on cl.21 of LOF 1980. The issue was debated at length within CMI and the prevailing view at the Conference was in favour of the discretionary 'may' because it was feared that a rule imposing a duty in this respect might prove a serious obstacle to the acceptance of the new Convention by major maritime States. Hence the provision was formulated as a non-mandatory Article (174).

129. CMI's intention was that the provision should be seen by the salvors as a benefit. Within the IMO Legal Committee, the ISU has pressed its argument that the Article should be made mandatory by the substitution of the word 'shall' for 'may'. The ISU has pointed out that unless the Article has mandatory application, salvors will be faced with the possibility of large claims against them in States where the 1976 Limitation Convention is not in force (175). Whilst recognising the strength of the ISU argument, the IMO Legal Committee nevertheless shared CMI's concern that mandatory application may jeopardise acceptance of the new Convention. The Committee decided to delete the provision. Clearly, the provision is of only limited benefit to salvors unless it can be made mandatory (176).

130. The 1910 Convention is silent on the matter of limitation. In Australia the provisions of the 1957 Limitation Convention (other than sub-paragraph 1(c) of Article 1) are given the force of law as part of the law of the Commonwealth by sec.333 of the Navigation Act, 1912. Australia currently has under active consideration the possible adoption of the 1976 Limitation Convention.

SCHEDULE COMPARING IMO AND CMI ARTICLE NUMBERS

IMO NO.	CMI NO.	Title of Article
1	1-1	Definitions
2	1-2	Scope of application
3	1-3	Salvage operations controlled by public authorities.
4	1-4	Salvage contracts.
5	1-5	Invalid contracts or contractual terms.
6	2-1	Duty of the owner and master.
7	2-2	Duties of the salvor.
8	2-3	Duty to render assistance.
9	2-4	Co-operation of Contracting States.
10	3-1	Conditions for reward.
11	3-2	The amount of the reward.
12	3-3	Special compensation.
13	3-4	Apportionment between salvors.
14	3-5	Salvage of persons.
15	3-6	Services rendered under existing contracts.
16	3-7	The effect of salvor's misconduct.
17	3-8	Prohibition by the owners or master.
18	4-1	Maritime lien.
19	4-2	Duty to provide security.
20	4-3	Interim payment.
21	4-4	Limitation of actions.
22	4-5	Jurisdiction
23	4-6	Interest
24	4-7	Publication of arbitral awards.
25	5-1	Limitation of liability.

MAJOR SOURCES

AND ABBREVIATIONS

1. Report and Documents from 32nd International Conference of the International Maritime Committee (CMI) held at Montreal, May 1981, Volumes I and II.

   Abbr: CMI Montreal Documents.

2. CMI Report to IMO on the Draft International Convention on Salvage, approved by the General Assembly of CMI on 6 April 1984. IMO Ref. LEG 52/4.

   Abbr: CMI Report.

3. Report of the IMO Legal Committee on the work of its 53rd session, December 1984. IMO Ref. LEG 53/8.

   Abbr: IMO Report 53.

4. Report of the IMO Legal Committee on the work of its 54th session, March 1985. IMO Ref. LEG 54/7.

   Abbr: IMO Report 54.

5. Report of the IMO Legal Committee on the work of its 55th session, October 1985. IMO Ref. LEG 55/11.

   Abbr: IMO Report 55.

6. Report of the IMO Legal Committee on the work of its 56th session, April 1986. IMO Ref. LEG 56/9.

   Abbr: IMO Report 56.

7. Submission by the International Salvage Union (ISU).

   Abbr: ISU Submission.

8. Submission by the International Chamber of Shipping (ICS).

   Abbr: ICS Submission.

9. Submission by the European Tugowners' Association (ETA).

   Abbr: ETA Submission.

10. Kennedy 'Law of Salvage', 5th Edn. 1985.

    Abbr: Kennedy.

11. Maritime Law of Salvage, Geoffrey Brice Q.C., 1983.

    Abbr: Brice.

12. Carver on Carriage of Goods by Sea, 13th Edn. 1982 (Colinvaux).

    Abbr: Carver.

PART I - FOOTNOTES

(a) Brice pp. 3-4.

(b) CMI Report p. 2-3.

(c) CMI Report p. 2.

(d) The reference is from Kennedy "Civil Salvage", 4th Edition.

(e) Brice p. 1.

(f) Kennedy p. 129.

(g) (1848) 3 Wm. Rob. 68, 71.

(h) Kennedy p. 181.

(i) Kennedy p. 183. The Waterloo (1820) 2 Dods. 433.

(j) Kennedy p. 183.

(k) (1824) 1 Hagg. 227, 236.

(l) Kennedy p. 269.

(m) Kennedy p. 269. The Melanie (Owners) v. The San Onofre (Owners) 1925 A.C. 246.

(n) Brice p. 103.

(o) 1896 P. 42, 63. In the Cargo ex Schiller (1837) 3 Hagg. 294, it was stated: 'Flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards the ship perishes, and such goods are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again.'

(p) Kennedy p. 64.

(q) Brice pp. 152-154 and 166-168.

(r) Brice pp. 4-5 and CMI Report p. 2-3.

(s) CMI Montreal Documents Vol. II, p. 38.

PART II : FOOTNOTES

1. CMI Report p.9.
2. Art 3 deals with salvage operations controlled by public authorities and Art 15 with services rendered under existing contracts.
3. CMI Report p.8.
4. IMO Report 55. See generally paras 70-81.
5. IMO Report 53 para. 22. The IMO Legal Committee has considered but not yet decided whether a production platform permanently attached to the sea bed should be excluded from the operation of the Draft Convention. Such platforms may require salvage services and this is another aspect on which traditional salvage rules may need to defer to the public interest in environmental considerations.
6. IMO Report 53 paras. 20 and 21.
7. IMO Report 53 para. 21.
8. 1896 P. 42. C.A.
9. (1836) 3 Hagg. 257, 277.
10. (1837) 3 Hagg. 294.
11. IMO Report 53 paras 25-29.
12. Brice pp. 105-106. (1925) 22 Ll.L Rep. 510.
13. Per Lord Esher in The Gas Float Whitton, No. 2. 1896, P. 42, 63.
14. Brice p. 103.
15. CMI Montreal Documents Vol.I, p.52.
16. CMI Report p. 10.
17. Brice p. 108.
18. IMO Report 53 para. 30.
19. Brice pp. 108-109.
20. CMI Report p. 10.
21. CMI Report p. 11.
22. IMO Report 53 para. 35.
23. IMO Report 55 para. 110.
24. IMO Report 55 para. 113.
25. CMI Report p. 11.
26. IMO Report 55 para. 115.
27. Government Submission LEG 53/3/4 p. 1.
28. CMI Report p. 12.
29. IMO Report 56 para. 13.
30. Sec. 2(1)(c).
31. IMO Report 53 para. 40.
32. 1938 A.C. 485, 490. H.L.
33. IMO Report 56 paras. 16-17.
34. IMO Report 56 paras. 19, 20, 24.
35. Adapted from a Report given by Ernst Willheim, Attorney-General's Department, Canberra to a Conference on International Law at Monash University, 1986.

36. The 1969 Intervention Convention was concluded at Brussels on 29 November, 1969, together with the Civil Liability Convention. Article 1 of the Intervention Convention provides that the parties to the Convention 'may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or act related to such casualty, which may reasonably be expected to result in major harmful consequences'. See also Australian Navigation Act, 1912 sec. 329E, enacted as an emergency measure at the time of the 'Oceanic Grandeur' casualty in Torres Strait in March, 1970.

37. Brice pp. 17-18.

38. Navigation Act, 1912 (Cth), secs. 329B., 329C.

39. IMO Report 56 paras. 27, 34, 35.

40. (1890) 15 P.D. 142, 146.

41. For example, The Auguste Legembre 1902 P. 123 and The Kangaroo 1918 P. 327, both referred at Brice p. 7.

42. CMI Report p. 15. It is difficult to see how the parties can contract out of Art 8 (Duty of master to render assistance to any person in danger of being lost at sea.) Also, it is considered inappropriate to allow contracting out of Art 6.1 (Duty of owner and master of vessel in danger to take timely and reasonable action to arrange salvage operations) and Art 7.1 (Salvor's duty to use his best endeavours to prevent or minimise damage to the environment.).

43. IMO Report 56 paras. 36-38.

44. IMO Report 53 para. 59.

45. Brice p. 195. China Pacific S.A. v. Food Corporation of India 1981 3 W.L.R. 860.

46. Brice p. 198.

47. IMO Report 56 paras. 39-47.

48. ISU Submission p. 6.

49. IMO Report 56 paras. 48-51.

50. Brice p. 219.

51. CMI Report p. 15.

52. IMO Report 56 para. 54.

53. Kennedy pp.335-338.

54. CMI Report p. 16.

55. ISU Submission pp. 8-9.

56. ICS Submission p. 3.

57. CMI Report p. 17.

58. IMO Report 53 para. 76.

59. Brice p. 246. (1911) 27 T.L.R. 451, 452.

60. IMO Report 56 paras. 55-57.

61. CMI Report p. 17.

62. ISU Submission pp. 6-11.

63. IMO Report 56 paras 70, 71.

64. IMO Report 56 paras 55-62.

65. CMI Report p. 18.

66. IMO Report 54 para. 24.

67. 1972 A.C. 242. Brice p. 280.

68. Brice p. 279.

69. IMO Report 54 para. 27.

70. IMO Report 54 para. 29.

71. IMO Report 56 para. 80.

72. IMO Report 54 para. 26. Though it might be expected to go to quantum.

73. Brice p. 100. In relation to dispossession of salvors see Brice pp. 95-101 and note The Unique Mariner (No. 2) 1979 1 Lloyd's Rep. 37.

74. Navigation Act, 1912 (Cth) sec. 317A(2).

75. IMO Report 54 para. 32. The new heirarchy of objectives referred to there is (i) the salvage of lives, (ii) the protection of the marine environment and, finally (iii) the salvage of property.

76. The prominence in the 1910 Convention, Article 11 arises from the fact that the master's obligation to render assistance extended to 'everybody, even though an enemy'.

77. IMO Report 54 para. 38.

78. IMO Report 56 para. 85.

79. IMO Report 54 para. 39.

80. CMI Montreal Documents Vol.I, p. 42.

81. IMO Report 56 paras. 87-95.

82. The Oceanic Grandeur 1972 2 Lloyd's Rep. 396.

83. CMI Report p. 20.

84. (1883) 8 P.D. 115 C.A.

85. CMI Report p. 20.

86. See Kennedy pp. 172-176. Brice p. 25.

87. CMI Report p. 21.

88. Brice p. 166.

89. CMI Report p. 3.

90. See generally Brice pp. 152-154 and 166-168. For TOVALOP, see Brice pp. 156-159. For CRISTAL, see Brice pp. 161-166.

91. CMI Report p. 4.

92. It has been said that Art 12 constitutes a limited exception to this second principle. It is considered that this is not strictly correct. The principle is concerned with salvage reward simpliciter. Art 12 is concerned with a statutory form of special compensation, paid to the salvor by the owner of the vessel.

93. Brice p. 169-170.

94. CMI Report p. 23.

95. Brice p. 80.

96. Carver p. 925.

97. (1884) 9P.D. 182, 187.

98. Brice p. 63.

99. 1874 L.R. 6 P.C. 468, 475 and see The Queen Elizabeth (1949) 82 Ll.L. Rep. 803.

100. Kennedy pp. 479, 487.

101. Kennedy p. 101.

102. CMI Report 54 paras. 90, 94 and 95.

103. Salvage and enhanced awards by Geoffrey Brice Q.C., Lloyds Maritime and Commercial Law, Feb. 1985, p. 40-41. The reference to assessment of remuneration on the basis of liability in tort relates to a new legal concept, encapsulated in the phrase 'liability salvage', which is concerned with salvage operations which prevent the escape of oil and the like which might have caused damage to the environment and thereby avoiding or minimising the liability of the other party for such damage. The salvor under this concept would be entitled to a reward against the shipowner not exceeding an amount to be calculated by reference to the ship's tonnage. Brice notes that, whilst the concept has found favour in some quarters, there are practical difficulties in the way of its introduction. Brice p. 167, 168. See also Brice pp. 145-147.

104. ISU Submission p. 12.

105. Kennedy pp. 99, 100.

106. IMO Report 54 para. 81.

107. IMO Report 54 para. 82.

108. IMO Report 54 para. 83.

109. CMI Report pp. 5-6.

110. ISU Submission p. 12.

111. Miliangos v. George Frank (Textiles) Ltd. (No.2). 1976 2 Lloyd's Rep. 434.

112. IMO Report 56 paras. 129, 130.

113. 1972 2 Lloyd's Rep. 396.

114. The second condition will be satisfied where, for example, the salvor has been unsuccessful in his efforts to salve property or where the value of the property salved (the fund) is insufficient.

115. CMI Report p. 26 and Brice p. 170.

116. IMO Report 54 paras 68, 76 and 88.

117. CMI Report p. 26.

118. CMI Report p. 26.

119. Brice p. 171.

120. Brice p. 171.

121. IMO Report 56 paras. 105-111.

122. IMO Report 54 paras. 70, 74.

123. CMI Report p. 27.

124. Brice p. 172.

125. Brice p. 173.

126. CMI Report p. 28.

127. Brice p. 173.

128. IMO Report 54 paras. 49, 50 and 61.

129. CMI Report p. 29.

130. CMI Report p. 29.

131. CMI Report p. 29.

132. Brice p. 89. The Mungana (1936) 56 Ll.L. Rep. 87.

133. Brice p. 91.

134. ISU Submission pp. 14-15.

135. IMO Report 56 paras. 162, 166.

136. Brice p. 83. The Renpor (1883) 8 P.D. 115 C.A.

137. (1865) Br. & Lush. 341.

138. Kennedy p. 100. Brice p. 84.

139. Brice p. 88.

140. Brice p. 36.

141. 1871 L.R. 3 P.C. 690, 695.

142. Kennedy p. 184.

143. 1972 2 Lloyd's Rep. 396.

143A. 1980 1 Lloyd's Rep. 71.

144. 1983 1 Lloyd's Rep. 94.

145. Brice p. 69. 1921 P. 90.

146. IMO Report 54 paras. 106-110.

147. The August Legembre 1902 P. 123 and The Kangaroo 1918 P. 327.

148. CMI Report p. 32.

149. Such priority will not be given if the result is manifestly unjust. The Lyrma (No.2) 1978 2 Lloyd's Rep. 30.

150. Kennedy pp. 515-517.

151. CMI Report p. 33.

152. CMI Report p. 32. In a submission to IMO, the European Tugowners' Association (ETA) made representations for the conferral in the Draft Convention of a maritime lien. The ETA's submission generally supports that of the ISU.

153. IMO Report 54 p. 114.

154. ISU Submission pp. 18-21.

155. ICS Submission p. 3. See also LOF 1980, cl. 5.

156. IMO Report 55 para. 16.

157. IMO Report 55 paras. 24, 26.

158. CMI Report p. 35.

159. CMI Report p. 36.

160. CMI Report p. 36.

161. IMO Report 55 paras. 39, 40, 42, 44.

162. IMO Report 55 para. 47.

163. IMO Report 55 para. 49.

164. IMO Report 55 para. 50.

165. CMI Report p. 37.

166. CMI Report p. 38.

167. ETA Submission p. 2.

168. 1975 Q.B. 748. Previously it was considered that salvors were not entitled to any allowance for interest on the amount of loss or damage. If however, through no fault of the salvors there had been a long interval between the date when the services terminated and the date when the award is made, such delay would be a matter to be taken into account: The De Bay (1883) 8 App. Cas. 559.

169. 1979 1 Lloyd's Rep. 455.

170. Brice p. 82.

171. IMO Report 55 paras. 59, 60.

172. The Tojo Moru 1972 A.C. 242.

173. IMO Report 55 para. 66.

174. CMI Report p. 39.

175. IMO Report 55 para. 65.

176. IMO Report 55 paras. 63, 68.