Report of the International Working Group on Review of the Salvage Convention

For consideration by delegates to the CMI Conference: Beijing 2012

The following documents are attached to this Report:

1 Specific questions for the meeting, including texts of relevant provisions under the Salvage Convention 1989, Brice Protocol and Proposals for Reform.

2 Salvage Convention.

3 First Questionnaire[1].

4 Summary of Responses to First Questionnaire.

5 Second Questionnaire.

6 Summary of Responses to Second Questionnaire.

7 Extracts from judgment of Tamberlin J in *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* (2006) 163 FCR 151. [2]

8 List of Ratifications of UNESCO Convention on The Protection of the Underwater Cultural Heritage.[3]

9 Report of ISC Meeting of May 2010.

10 Amendments to Lloyd's Standard Form of Salvage Agreement (LOF) and Lloyd's Standard Salvage and Arbitration (LSSA) clauses.

11 SCOPIC Clause and Tariff

[1] CMI Yearbook 2010 P.418

[2] CMI Yearbook 2010 P.451

[3] CMI Yearbook 2000 P.412

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Section A - Introduction

In December 2008, the International Salvage Union (**ISU**) wrote to the Comite Maritime International (**CMI**) pointing out that the Salvage Convention 1989 (**the Convention**) was nearly 20 years old and it was over 30 years since work had first begun on its drafting. It suggested that there was a need for review of certain aspects of the Convention and invited CMI to undertake such a review.

The CMI set up an International Working Group (**IWG**) in 2009 and a Questionnaire was sent to National Marine Law Associations (**NMLA**) in July 2009. Questions were asked concerning various matters identified by the ISU in relation to eight articles in the Convention, they being Articles 1, 5, 11, 13, 14, 16, 20 and 27. There have been 25 responses received, and they have been summarised.

A second Questionnaire was sent to NMLAs in 2010 in order to ascertain whether there was any empirical evidence which could be obtained in support of the ISU's complaints concerning the Convention. A synopsis of the responses has also been prepared.

An International Subcommittee (ISC) meeting took place in London on 12 May 2010. A report of that meeting was prepared. There have also been two IWG meetings, and a Colloquium at Buenos Aires in October 2010, which is referred to below.

An earlier version of this report took the form of the Discussion Paper which was prepared for the benefit of the ISC meeting in May 2010.[4] (Whilst this report contains some material which featured in that report readers are referred to the Discussion Paper for a more complete history of developments in the law of salvage. It can be found on the CMI website as well as the CMI Yearbook).

Section B - Background

Salvage of property at sea has historically been rendered on a “no cure – no pay” basis with the award being assessed by reference to the property at risk and saved, usually the ship, freight and cargo - if there is no success in salving property, the salvor earns no reward.

Prior to the present 1989 Salvage Convention, under the 1910 Salvage Convention, there was no provision that entitled the salvor to any remuneration for taking steps to prevent pollution independently of any action taken to save property. Thus there was little incentive for the salvor to take on such operations. As environmental concerns came increasingly to the fore in salvage operations towards the end of the last century, the commercial parties to the salvage contract addressed this difficult issue through the contractual provisions of LOF 80. This introduced some new concepts such as an enhanced award, and a “safety net”. These provisions, agreed by the

[4] CMI Yearbook 2010 P.384

various parties and their insurers, were designed to provide financial remuneration to the salvor even if there was no cure (hence the term “safety net”) when the salvor provided services to a laden tanker which posed a threat to the environment. The remuneration would be in the form of expenses plus a supplement dependent upon the value of the result of the salvor’s efforts.

Alongside this development in LOF 80 the CMI (September 1979) established an International Subcommittee under the chairmanship of Professor Erling Selvig to study the subject of salvage and prepare a report for the Montreal Conference to be held in 1981. An IWG was set up which drafted a new Salvage Convention to replace the 1910 Salvage Convention (which CMI had also prepared). At the 1981 Montreal Conference a draft text was approved by the Assembly and forwarded to IMCO (which changed its name in 1982).

- **Liability Salvage**

As a first step in the work done by CMI, following on a request from IMCO, Professor Selvig prepared a "Report on the Revision of the Law of Salvage" in April 1980, which is to be found in the Travaux Preparatoires of the Convention on Salvage 1989. That report is as relevant today as it was then. In discussing salvage operations Professor Selvig made the following comments:

> "In the overall context of international shipping State - organised machineries established at the national level, cannot be regarded as a viable alternative to an internationally active private salvage industry. National machineries will probably be tailor-made to the needs of the coastal state concerned and primarily for use in the waters adjacent to that State. However, most States will not be in a position to establish or maintain on its own or on a regional level a salvage machinery with the overall capacity required. Consequently, the role of national machineries can be expected to be only a supplementary one, mainly limited to the area within their respective jurisdictions.
>
> The overall cost of such a combined system under which the private salvage industry retains a main role will probably be less than the system based only on State organised salvage. The capital intensive character of modern salvage techniques suggest that at a given cost level, the combined system will make available to international shipping and States affected thereby, a higher and permanent overall salvage capacity....
>
> The income of the salvage industry must be sufficient to maintain an internationally adequate salvage capacity. It is probably required that total compensations reach a higher level than at present. Moreover, the risk of incurring expenses without compensation or of incurring liabilities in connection with salvage operations, should not be such that salvors are discouraged from intervening in particular cases".

Professor Selvig then went on to introduce the concept of "liability salvage". He said as follows:

> "Nevertheless, the concept of salvage should be extended so as to take account of the fact that damage to third party interests has been prevented. Since the ship which created

> the danger, will have a duty to take preventive measures in order to avoid such damage, this will mean that salvage should refer not to ship and cargo, but also to the ship's interest in avoiding third party liabilities (liability - salvage). Thus, the ship's liability insurers should be involved in the salvage settlement and pay for benefits obtained by the salvage operation.
>
> In the long run the law of salvage cannot neglect to recognise that compensation for salvage is nearly always actually paid by insurers. Moreover, insurers of ship and cargo cannot reasonably be required to cover fully the expenses for salvage operations from which another group of insurers - the liability insurers - regularly benefit.
>
> Inclusion of the liability interest within the concept of salvage will undoubtedly provide a more equitable distribution of the overall cost of salvage. It may also provide a beneficial encouragement to salvors to engage in salvage operations when third party interests outside the ship are in danger, particularly in cases where the chance of saving ship and cargo is rather remote. Finally, contributions from new sources may enable the international salvage capacity to remain at an adequate level".

Later on in his report Professor Selvig also made the following comments:

> "The salvor should be entitled to a reward on the ground that liability for damage to third party interests outside the ship has been prevented or minimised. This should be considered to be "a useful result" within the meaning of the principles of "no cure and no pay" of the 1910 Convention Article 2. ...
>
> Some particular rules may be required to determine how the reward for liability - salvage shall be fixed. The values in danger as well as the salvaged values will as a rule have to be determined with regard to applicable limits of liabilities. In the case of oil pollution, for instance, depending upon the circumstances, both the 1969 and the 1971 limits may be relevant, also with the consequence that the liability insurer and the fund each will have to cover a proportionate part of the reward.
>
> In cases where the salvors have prevented damage for which the ship owner would not have been liable, the salvors may only recover the cost of preventive measures...
>
> In cases of liability - salvage as well as salvage of ship and/or cargo, the reward may be fixed in two stages, first the total amount and subsequently the apportionment determining for which amount each of the respective interests shall be responsible."

- **CMI - Montreal Conference**

It is also worth quoting from the report of Professor Selvig, which accompanied the text of the IWG draft Convention with the papers for the CMI Montreal Conference [CMI Yearbook Montreal 1]. He said as follows:

> "The main differences of view in the sub-committee related to the question of whether salvors should be entitled to payments on the ground that salvage operations have been carried out also in order to prevent damage to the environment or that by the endeavours of the salvors such damage has actually been avoided. One approach to these problems was suggested in the chairman's initial report, another in the LOF 1980 and the draft prepared by the British MLA. The compromise, now contained in the draft Convention Articles 3.2 and 3.3, reflects the "safety net" idea of the LOF 1980 as well as certain other notions having emerged during the discussion, and assumes that, in accordance with the draft Convention Article 1.5, these articles may be departed from by contract."

Professor Selvig's initial report of April 1980 did not receive unanimous agreement and a compromise solution was ultimately achieved at the CMI Conference and eventually the IMO. In essence what was approved at the Montreal Conference was what had been drafted by the IWG and presented for debate at the Conference.

- **Salvage Convention 1989**

The Salvage Convention came into force internationally on 1 July 1995. The entry into force provisions required 15 States to agree to it (Article 29) and in Article 32 enabled the Secretary General to convene a Conference of the State parties for revising or amending the Convention at the request of eight parties, or one-fourth of the State parties, whichever is the higher figure. IMO Resolution A.777(18) provides that the Legal Committee will only entertain proposals for amending existing Conventions on the basis of "a clear and well-documented compelling need" to do so, as prescribed by Resolution A.500 (XII).

- **"Nagasaki Spirit"**

The next development in the story is, perhaps, the decision of "*Nagasaki Spirit"* (1997) 1 Lloyds Rep 323, described by some as the straw that broke the camel's back. The House of Lords held that "fair rate for equipment, personnel actually and reasonably used in the salvage operation" in Article 14.3 meant a fair rate of expenditure and did not include any element of profit. As Lord Mustill said in his judgment at page 332:

> "...the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purposes of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of "salvage operations" which ... are defined by article 1(a) as operations to assist a vessel in distress. Thus although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award."

- **SCOPIC**

The problems of interpreting Article 14 led to uncertainty and dissatisfaction. Among the many problems it is understood that it was found that claims for an uplift over actual cost brought under Article 14.2 necessitated proof that the damage to the environment would have resulted but for the salvor's intervention but also the extent of the damage had the operation been unsuccessful. A variety of experts were needed, such as naval architects, drift experts and environmental experts. In addition the accounting exercise referred to by the House of Lords in the "*Nagasaki Spirit"* was found to be a time consuming and expensive one. As a result the SCOPIC clause was negotiated.

The ISU has said that: SCOPIC is, in essence, a safety net and is not a method of remuneration; it is also not an international solution but only one for LOF; there would be problems if it were sought to apply it as a matter of law rather than contract, eg. who would negotiate rates, and how would they be determined; the present rates have only been changed twice in 10 years; and there is no currency fluctuation cause, which has caused concerns to the salvage industry.

The ICS, on the other hand, suggest that:

- SCOPIC is more than just a safety net (as that term was used to describe the changes made in LOF80 to provide compensation to a salvor who, because of "no cure no pay" principles might not receive an award although it had taken steps to prevent oil pollution), and

- Positively encourages salvors to intervene where they might otherwise not do so and therefore represents an improvement over Article 14.

The ICS also points out that LOF contracts are entered into in many countries around the world so SCOPIC does have the potential to be used internationally. The ICS believes that SCOPIC rewards salvors generously, whilst those who represent the ISU believe that was the original intention but inflation and currency changes over recent years have diminished the generosity.

Section C - Changes Since 1989

- **Bureau Veritas Report**

Possibly the most significant developments are those referred to in the Bureau Veritas investigation into the salvage industry in the early 1990s, where it was concluded that international salvage resources were in serious decline as a result of a reduction in casualty rates, falling levels of remuneration and competition created by the availability of offshore support vessels and other ancillary craft leading to the withdrawal of professional salvors from the market, the reduction of dedicated salvage craft and the closure of additional salvage stations. This report emphasised an important point made by ISU – international salvage is in the hands of comparatively few companies. As the ISU points out those companies have shareholders seeking

profit. If generous awards are made they will be encouraged to stick with it and accept the risk but if they are not or if they are not paid for what they actually do, they might well move their assets to a less risk orientated business. If this were to happen, with so few international players, it could be a problem for the shipping and insurance industry - and the environment.

The ICS contends, to the contrary, that the salvage industry is not in decline and points to the existence of new entrants to the market. It has identified a number of new entrants who perform salvage and wreck removal work as well as pure wreck removal services. The ISC also suggests that any reduction in the number of salvage companies may be a reflection of mergers and the greater range of operations being performed. The ICS does not consider that the Bureau Veritas report adds anything to this debate. It notes that it pre-dates the entry into force of the Convention.

It is regrettable that the industry has not seen fit to commission a more up to date report.

At a combined meeting of the United States, Canadian and Australian New Zealand Maritime Law Associations in Hawaii in 2011, the Chairman of the IWG urged the NMLAs prior to the Beijing Conference to ascertain answers to the following questions:

1 Has there been an increase or a decrease in the number of salvors operating around your shores?

2 Has there been an increase or decrease in the number of employees and amount of equipment employed and owned in the salvage industry operating around your shores?

3 Do the salvors have the capacity to deal with major incidents around your shores, both in terms of personnel, skills and equipment?

4 Are salvors satisfactorily rewarded so as to encourage them to:

   4.1 remain in the industry

   4.2 retain and train sufficient employees and acquire and maintain appropriate equipment to cope with major casualties in sensitive areas?

- **ETVs**

Some countries have invested in providing alternative salvage resources. For example, in Australia, the National Maritime Emergency Response Arrangement (**NMERA**) was entered into in February 2008. Pursuant to these arrangements, the NMERA has undertaken to provide an appropriate level of emergency towage capability around the Australian coastline funded through the *Protection of the Sea (Shipping Levy) Act 1981*. Interestingly, clause 5.1.9 in this agreement provides as follows:

"Subject to the right to recover costs and expenses under existing international and domestic laws and to the right to enter into commercial arrangements relating to the use of ETV assets where appropriate, **including arrangements to allow for the sharing of salvage awards**, the Australian government will fund the ongoing costs of the NMERA through the Protection of the Sea Levy …". (Emphasis added. It is expressly provided in s.329C of the Navigation Act 1912 that governments may participate in salvage awards).

In 2006 the Australian Government announced a $137M eight year contract for the ETV "*Pacific Responder*". Further regional contracts were announced costing additional amounts of $1.8M for a 5 year contract and $15M. Under the Oil Pollution Levy Scheme, a rate per tonne of the tonnage of a ship which is in an Australian port which had on board a quantity of oil in bulk weighing not less than 10 tonnes (whether as fuel or cargo) is liable to pay the levy. Clearly the major share of contributions is made by tanker owners. It is important to stress that this is an industry funded scheme.

There may be similar arrangements which have been made by other countries since 1989. It is understood France supports the industry and the Australian House of Representatives standing committee on transport and regional services, in June 2004, referred to the fact that the United Kingdom has four ETVs to cover its coastline of about 17,820 kilometres, excluding the larger islands. They had a value of around £44 million and cost the United Kingdom government approximately AUD$25 million per annum to maintain and operate. In late 2010 there was an announcement by the British Government that its funding of the ETVs would cease.

The Second Questionnaire sought information on ETV's. It is apparent that some countries do own and operate ETV's which are available for salvage and towage, which are financed generally, through State revenue. Very few private salvage companies keep tugs on standby for such eventualities.

Section D

- **Amendments to Lloyds Standard Form of Salvage Agreement (LOF) and Lloyds Standard Salvage and Arbitration (LSSA) Clauses**

  - **LOF 2011**

Two new clauses have been added to LOF. Pursuant to clause 3: Awards, Appeal Awards and Reasons are to be placed on the Lloyd's website, subject to the conditions set out in clause 12 of the LSSA clauses to which reference will be made below.

Clause 4 requires contractors within 14 days of their engagement to render services under the agreement to notify the Council of Lloyd's of their engagement and forward the original agreement to the Council as soon as possible.

  - **LSSA Clauses**

Pursuant to clause 12: it is provided that the Council will publish Awards, Appeal Awards and Reasons on the Lloyd's Agency website "except where the Arbitrator or Appeal Arbitrator has ordered, in response to representations by any party to the Award or Appeal Award, that there is a good reason for deferring or withholding them."

There are also special provisions which have now been introduced dealing with container vessel cases. Under the new clause 13 it is provided that "any correspondence or notices in respect of salved property, which is not the subject of representation in accordance with clause 7" of the Rules may be sent to the party or parties who have provided salvage security in respect of that property. Clause 14 provides that subject to the express approval of the Arbitrator where an agreement is reached between the contractors and the owners of salved cargo comprising at least 75% by value of salved cargo represented in accordance with clause 7 of the Rules, the same agreement shall be binding on the owners of all salved cargo who were not represented at the time of the said approval.

Finally, the new clause 15 provides that subject to the express approval of the Arbitrator any salved cargo with a value below an agreed figure may be omitted from the salved fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage.

Section E

- **Buenos Aires Colloquium - October 2010**

Papers were presented at this Colloquium by key stakeholders in this debate. Todd Busch[5], the President of the ISU, commenced his paper by saying:

> "ISU has been concerned for a number of years that its members are not always fairly rewarded for the benefit they confer in protecting the environment."

He identified the significant problem which salvors face when he said:

> "Let me say straight away that we recognise that salvors are in many cases rewarded for protecting the environment by virtue of the Salvage Convention's Article 13.1(b). However, all too often the tribunal is unable to give full effect to this provision because of the low value of the salved property."

He then referred to the fact that both Article 14 and SCOPIC are at best only a safety net for salvors, it is applicable in 25% of LOF cases and therefore in 25% of cases salvors are receiving what he described as the "bare minimum".

In his paper Todd Busch identified three principal reasons why the Salvage Convention needed to be amended. Firstly, he argued that much has changed since the Salvage Convention was first

[5] CMI Yearbook 2010 P.493

drafted in 1981. He pointed in particular to environmental issues which he said are now dominating every salvage case. Secondly, whilst salvors are rewarded for saving the ship and the cargo, they are not fully rewarded for the benefit they confer in protecting the environment. Thirdly, he argued that it is not fair that the traditional salvage reward which currently, but inadequately, reflects the salvor's efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurance without any contribution from the liability insurers who cover the shipowner's exposure to claims for pollution and environmental damage. The remainder of his paper elaborated on those principles.

Kiran Khosla, Director, [6]Legal Affairs at the International Chamber of Shipping and the International Shipping Federation, spoke on behalf of the shipping industry. In her presentation she outlined the history leading up to the 1989 Salvage Convention and stressed the significance of the "common understanding" of the diplomatic Conference which is attached to the Convention to the effect that courts are not required to fix an Article 13 award up to the maximum salved value of the property before assessing special compensation under Article 14. Courts are therefore entitled to calculate an award of special compensation in all cases where the Article 13 reward is lower than the appropriate Article 14 compensation. The second compromise that she stressed was the fact that the enhancement in the Article 13 award would be allowable in general average whereas the special compensation in Article 14 would not. This led to the amendment of the York Antwerp Rules in 1990 so that shipowners only would be liable for the Article 14 compensation.

Ms Khosla asserted that the SCOPIC tariff rates are both profitable and purposely generous for personnel, equipment and tugs and that the rates have been increased significantly in 2007. Further discussions were taking place at the time of the Colloquium which resulted in further changes to SCOPIC in 2010. She went on to say in relation to the SCOPIC clause that it has "effectively disposed of all the difficulties associated with Article 14 and when incorporated and called into use, it has resulted in an efficient and orderly provision of salvage services for the prevention of pollution to the environment and generally on an amicable basis".

Concerning the ISU's proposal for an environmental salvage award, Ms Khosla considered that it would:

> "alter the basis of salvage operations. The prime objection would be no longer to save property. the basis of the award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented. It hardly needs saying that this would entail a difficult and speculative enquiry into what damage might have occurred had pollution resulted from the casualty. There is moreover no guidance on what an appropriate award amount would be in any given incident. ...This would raise the bar significantly and the increased sums at stake would

[6] CMI Yearbook 2010 P.478

inevitably result in contentious expert evidence and speculative theorising. This would no doubt result in more litigation and serve no-one's interests".

In relation to the ISU's suggestions that the P&I Clubs, as the ultimate beneficiary, of the pollution preventions services provided by the salvors should be responsible for paying the environmental award. Ms Khosla emphasised that:

> "governments have recognised that there is a shared responsibility, by governments, by shipowners, by cargo and by the general public. They have done this through the mechanisms created in the CLC Liability Conventions (including the Fund Convention) and the HNS Fund Convention. The Funds provide for additional compensation which is contributed to by cargo interests, once the shipowner's liability has reached the agreed limits. By attributing the liability on to cargo interests, the governments explicitly recognise cargo's responsibility for the environment."

Ms Khosla also emphasised that:

> "governments are not asking the salvage industry to build up capacities for preventing damage to the environment. Rather, they are accepting that this is a task for governments as such. In Europe for example, EMSA has been entrusted with the task of pollution response, supplementing the resources and arrangements that have already been set up at national regional levels."

Ms Khosla was supported in her comments by Hugh Hurst[7] who represented the International Group of P&I Clubs. He stressed the element of risk sharing between property interests (and thus their insurers) and liability insurers. He argued that "Any environmental award would inevitably be subjective, speculative and hypothetical which would lead to a lack of consistency between awards. It would also severely delay any payment to salvors unlike the position under SCOPIC".

A paper was also presented by Nic Gooding[8] representing the London Market Marine Property Underwriters. He emphasised that the world of salvage has changed significantly since the Convention was formulated in Montreal in 1982. He referred to the fewer salvage operations performed, the reduction in the number of oil spills, the increase in the liabilities of salvors and shipowners, particularly concerning third party liabilities relating to pollution and wreck removal and far greater government interference in the conduct of salvage operations. He then said that:

> "Hull and cargo underwriters mainly cover damage to property but increasingly they are being asked to pay salvage which includes remuneration covering measures which do nothing to mitigate their potential physical losses but rather those of Governments and P&I liability insurers."

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[7] CMI Yearbook 2010 P.499

[8] CMI Yearbook 2010 P.470

Mr Gooding therefore proposed that there be three types of award -

(i) a marine property salvage award based on the present Article 13 criteria (excluding Article 13(1)(b))

(ii) an environmental liability salvage award - focusing on work done to avert or minimise environmental liabilities

(iii) SCOPIC or Article 14 only if it exceeded (i) and (ii).

The proposal made was that (ii) and (iii) were alternatives.

At the time this report is being concluded no replacement wording has been provided by the London Marine Property Underwriters. Should such a wording be forthcoming before the Conference it will be forwarded to NMLAs.

- **International Subcommittee meeting: May 2010**

This meeting was well attended by the members of the International Working Group, representatives from the International Salvage Union, the International Chamber of Shipping, the International Group of P&I Clubs, arbitrators, the insurance market, barristers and representatives from MLA's. There was a vigorous debate, in which many of the arguments already canvassed in this Report were discussed. Of significance were the comments made by a barrister, who has appeared in salvage cases and has sat as an arbitrator, Michael Howard QC:

> *"There is relatively little evidence in most cases of specific work done to prevent damage to the environment."*

He said further that:

> *"awards do not reflect work done in relation to environment protection by and large; Arbitrators tend to think in terms of physical benefits. Where a shipowner is saved from liabilities to third parties, that tends to be taken into account in the overall assessment of an award."*

Such an approach is consistent with that adopted by Tamberlin J in the Australian case of *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [9]. In that case his Honour concluded that:

> "consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration not some liability on the part of the vessel may have been awarded by the intervention of the, salvors. And, in appropriate circumstances, this may inform the fixing of the award as an enhancement without any determination, detailed investigation, consideration of detailed

[9] (2006) FCA 1141

evidence or attempt to form any definitive conclusion as to the amount of any such liability."

Another barrister Vesanti Salvaratnam QC identified from the discussion that salvors wanted greater transparency from awards and she did not see any reason why arbitrators could not address that. She queried why Article 14 could not be amended to overcome the House of the Lords' decision in the "Nagasarki Spirit" in order to make it clear that such awards should include a profit element.

Section F - First Questionnaire

- **Article 1 Salvage Convention**

Question:

1.2 Do you consider that the words contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?

1.3 Alternatively do you think words such as those used in the other Conventions (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?

1.4 Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?

1.4.1 If so, could you provide a copy of the decision?

1.4.2 If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?

1.4.3 If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?

1.5 Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?

1.5.1 If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?

1.5.2 If so, can you suggest any wording that you think might be appropriate?

Geographical Scope

The First Questionnaire sought to ascertain the views of NMLAs as to whether the words "in coastal or inland waters or areas adjacent thereto" should be deleted or whether words such as those found in other Conventions (CLC, HNS and Bunker Conventions) such as "wherever such may occur" or "the exclusive economic zone" or the "territorial sea" should replace those words. It is suggested by the ISU that the present wording is outdated and too imprecise. It has put forward an alternative wording. (See attachment "Specific questions for the meeting").

The Travaux Preparatoires of the 1989 Salvage Convention shows that the proposed wording gave rise to conflicting views as to what was intended by "adjacent waters" and also whether the words "substantial" or "major" in Article 1(d) were necessary.

The Italian MLA, in its response to the First Questionnaire, drew attention to the question asked by Chile, at page 114 of the Travaux Preparatoires, which enquired as to what was intended by the meaning of the words "areas adjacent thereto". The Italian MLA then quoted from the report of the Legal Committee of the IMO which had said:

> "It had been agreed to limit the concept of environmental damage to damage in areas adjacent to coastal states, specifically the definition would serve to make clear that cases involving only a risk of environmental damage on the high seas would be excluded."

The Italian MLA says that that opinion still holds: "but the notion of high seas should apply beyond the EEZ to which all relevant Conventions (CLC, HNS and Bunker Convention) apply and that it might therefore be appropriate to replace the present definition of "damage to the environment" with one based on the scope of application of such Conventions, such as the following:

> "(d) damage to the environment means ... in territorial waters and in the exclusive economic zone of any State, established in accordance with international law, or if a State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State, determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured".

Hugh Hurst reminded us in Buenos Aires that there is no geographical limitation to the scope of SCOPIC.

Conclusion:

Of the 24 respondents to the First Questionnaire 16 have favoured replacement of those words with words which refer to the exclusive economic zone (or an area adjacent to the territorial sea equivalent to an exclusive economic zone). Two did not express an opinion, and of six who did not want to amend the present wording, four recognised that the wording could be improved. The South Africa MLAs has referred to its domestic legislation, which has extended the scope of "damage to the environment" to any place where such damage may occur.

- **"Substantial"**

Also, in relation to Article 1, the First Questionnaire enquired as to whether the word "substantial" had been interpreted in any cases in the jurisdiction of the NMLAs or alternatively sought an expression of opinion as to whether that word is likely to create difficulties of interpretation. Apart from one Australian case *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [10], there were no cases which explicitly discuss that word. The US MLA referred to *International Towing and Salvage Inc v F/V Lindsey Jeanette*[11] which found there to be a threat of damage to the environment, where a discharge of oil and other pollutants was threatened into the EEZ, (although there was no explicit discussion of the word "substantial").

It is worth recalling that the LOF Appeal Arbitrator decided in relation to the *"Castor"* that its 30,000 tons of gasoline and 100 tons of bunkers off the Spanish coast was not a substantial threat, despite it having been refused a place of refuge by at least six countries.

Respondents were ambivalent as to whether or not the word "substantial" should be amended, although many States recognised that the word could cause difficulties of interpretation. The Italian MLA, in answer to the First Questionnaire, pointed out that the CMI report to the IMO (Travaux Preparatoires page 111) contained the following explanation of the word "substantial":

> "By using the words 'substantial' and 'major' as well as the reference to 'pollution, explosion, contamination, fire' it is intended to make clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage."

The Italian MLA then went on to point out:

> "However, during the Diplomatic Conference concern was expressed in respect of the words 'substantial' and 'major' by the Advisory Committee On Pollution of the Sea (ACOPS) who suggested their deletion. The following statement was made by them:
>
> > "The ACOPS' proposal to Article 1(d) was fairly minor and a modest one. Its purpose was to remove the distinction between substantial and possibly non-substantial and more importantly, the distinction drawn by the use of major incident compared to any other incident. It is certainly the experience of many in environmental matters that the definition of major or minor or substantial or insubstantial are very difficult to define, are generally imprecise and generally lead to the opportunity to be able to do nothing where something should be done. So the amendment basically to remove substantial from physical damage and to

[10] (2006) 163 FCR 151; (2006) FCA 1141; and (2007) FCAFC 115.

[11] 1999 AMC 2465

remove major from similar incident in that Article. Additionally, there is a desire for completion to add to resources or property on the high seas."

A number of delegations supported that suggestion but the majority supported their retention (Travaux Preparatoires page 117).

Conclusion:

Two NMLAs did not express an opinion as to whether the word "substantial" should be deleted; seven supported deletion and the remaining 15, for the most part, considered that the courts or tribunals were well able to interpret the word satisfactorily. The Chinese MLA, for example, favoured deletion on the basis that its use is contrary to the trend of strengthening environment protection, fails to reward the ordinary, non-substantial physical damage, and finally because of the lack of clarity as to what was intended by use of the word "substantial". The Italian, Swedish and Slovenian MLAs suggested that both the words "substantial" and "major" be deleted. The Dutch MLA however thought the inclusion of "substantial" serves to filter out bagatelle cases. The South African MLA which suggested deletion, was uncertain whether it should be replaced and queried if it was whether words such as "not trifling nor insignificant" should qualify damage to the environment.

The British MLA pointed out the word "substantial" has had to be considered in a large number of salvage arbitrations, (and in the case of *R v Monopolies and Mergers Commission (1993) 1 WLR 23*) and attached extracts from some of them which were attached as a schedule to its response. The MLA of Australia and New Zealand referred to the discussion of this question in *United Salvage Pty Ltd v Louis Dreyfus,* which has already been referred to.

- **Loss of Containers**

The First Questionnaire also sought to ascertain whether the definition in Article 1(d) which refers to specific means by which such damage can be occasioned (ie pollution, contamination, fire, explosion or similar major incidents) would be likely to encompass an incident which gives rise to dangers to navigation, for example a loss of containers at sea. Once again, some NMLAs considered that it would be covered but others that it would not be covered.

The question arises therefore as to whether or not the definition should be widened to cover casualties which can give rise to a danger to navigation, particularly in the case of containers carrying dangerous or hazardous cargo. In short, is a danger to navigation also a threat to the environment? It is not difficult to envisage a submerged container puncturing the side of a ship and giving rise to the potential of damage to the environment. This was the scenario that took place off the Eastern Australian coast when the "Pacific Adventurer" lost containers overboard which holed two of its fuel tanks in March 2009, causing substantial oil pollution damage to Queensland beaches. As the Finnish MLA pointed out, a container's contents could constitute an environmental risk.

Conclusion:

Nine countries opposed any change to this provision; four suggested that it should be widened to refer to this type of situation; four did not express an opinion as to whether amendment was necessary; five expressed the opinion that it would not be covered without saying whether it should be amended, and two suggested that it would be covered without expressing a view that amendment was (or was not) necessary. A number of MLAs considered that if no present arrangements were altered they should be changed for all types of vessels.

- **Brice Protocol**

Another topic for debate at the Salvage Convention, raised by the French delegation, concerned the definition contained in Article 1(d) and whether it should make specific reference to "cultural heritage" (page 115 Travaux Preparatoires). Since then of course the UNESCO Convention on the Protection of the Underwater Cultural Heritage has been negotiated in 2001, which largely ignores the existence of salvage. It provides in Article 4 that:

> "Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:
>
> (a) is authorised by the competent authorities, and
>
> (b) is in full conformity with this Convention, and
>
> (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection."

Some 37 countries have adopted the UNESCO Convention, but many of the major Maritime countries have not adopted the Convention and show no signs of having any inclination to do so.

It is worth recalling that Article 149 of UNCLOS provides as follows:

> "Archaeological and Historical Objects
>
> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or Country of Origin, or the State of Cultural Origin, or the State of Historical and Archaeological Origin. "

Also relevant is Article 303, which provides as follows:

> "Archaeological and Historical Objects found at sea
>
> 1. The States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. In order to control traffic in such objects, the Coastal State, may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that Article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Article.

3. Nothing in this Article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This Article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."

Article 33 of UNCLOS is the provision which identifies the contiguous zone, it being a zone which is contiguous to the territorial sea and permits States to exercise control to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations.

Article 30 of the Salvage Convention permits States to reserve the right not to apply the provisions of the Convention:

"(d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed."

Some countries, including Australia and Canada took advantage of this reservation.

The late Geoffrey Brice QC prepared a draft Protocol to the Salvage Convention. It is produced in the CMI Yearbook 2000[12].(See also attachment 1 "Specific questions for the meeting"). The Brice Protocol was discussed at the CMI Colloquium in Toledo in September 2000 and the Executive Council invited the IWG to consider the Protocol and report to the Singapore Conference on whether the Protocol was an appropriate way of dealing with the undoubted problem of protecting the cultural heritage without unreasonably restricting the rights of salvors.

An initial report was prepared by the IWG[13]. That report noted that the draft UNESCO Convention, as it was at that time, would have an impact on the law of salvage and finds as well as UNCLOS. In an important paragraph the IWG said as follows in that report:

> "Although we fully support the goal of protecting and preserving underwater cultural heritage which is of historical, cultural or archaeological significance, we disagree with the basic premise of the draft Convention which would abrogate the law of salvage. In our view, the law of salvage is not incompatible with the goals of protecting and preserving underwater cultural heritage. To ensure that this position gains international recognition on a uniform basis, we support adoption of the Brice Protocol to the 1989 Salvage Convention."

[12] CMI Yearbook 2000 P.412

[13] CMI Yearbook 2001 P.254

The report went on to comment on responses received to a questionnaire sent to MLA's by the IWG. It noted that many governments had already enacted local laws intended to protect and preserve underwater cultural heritage but there was no uniform international agreement or understanding on numerous critical issues such as:

> "(a) What underwater properties should be preserved and protected?
>
> (b) How should it be determined which underwater property should be preserved and protected?
>
> (c) Should underwater property be preserved in situ or should it instead be brought to the surface and taken to shore?
>
> (d) Who should decide these questions and many other related issues, especially with respect to property which is located in international waters?"

In this report, the IWG suggested in relation to the Brice Protocol as follows:

> "An amendment of the Salvage Convention along these lines would appear to be consistent with Article 303 of UNCLOS. The Brice Protocol is intended to create financial incentives to those who are engaged in salvage operations to preserve and protect what it defines as "historic wrecks". Thus, in determining what award, if any, a salvor would be entitled to receive with respect to a historic wreck, the factors to be taken into account would include the extent to which the salvor has taken appropriate steps to preserve and/or protect the property in accordance with internationally recognised practices."

The IWG also said, in paragraph 19:

> "We can see no reason in principle why in situ preservation could not be the result under the Brice Protocol if widely accepted archaeological practices so dictated and appropriate financial incentives can be devised to reward salvors for locating, protecting and preserving the property underwater."

A critique of the UNESCO Convention is also contained in a subsequent CMI Yearbook[14]. John Kimball reported in that document on the last sessions of the fourth meeting of governmental experts, which he attended as a member of the United States delegation.

A further report of the IWG is contained in the 2002 CMI Yearbook[15]. This followed the adoption of the Convention on 2 November 2001. This report noted that at the CMI Assembly meeting in Singapore on 16 February 2001 a resolution was passed requesting the IWG to continue to monitor progress of the draft Convention and to seek ways of ensuring that the Convention in its

[14] CMI Yearbook 2001 P.615

[15] CMI Yearbook 2002 P.154

final form did not conflict with existing international salvage laws. The following paragraphs from that report are relevant.

> "5. The CMI supports the goal of the UCH Convention of protecting underwater cultural heritage. CMI recognises that there are certain shipwrecks which have great historical, archaeological, cultural or other importance and, if at all possible should be protected and preserved. In addition, the CMI agrees with the certain parts of the Annex to the Convention to the extent they set forth generally accepted archaeological principles which should be followed in protecting underwater cultural heritage. Nonetheless, there are several fundamental aspects of the Convention which cause us to be concerned and which should be given careful consideration by any country which may be considering whether to accept it.
>
> 6. The CMI questions Article 2 and Rule 1 of the Annex to the extent they state that in situ preservation shall be considered a first option. In situ preservation is only one of several options which should be considered and in some cases may be entirely inappropriate and lead to the destruction and loss of property which might have been preserved.
>
> 7. The CMI also questions Rule 2 of the Annex. In many instances, there should be no objection to the sale of property which is found underwater. Indeed, in our view, having the ability to sell some or all of the property may be the only viable way of obtaining adequate funding to protect UCH. This is a section of the Convention which conflicts with the law of salvage."

This report then went on to detail its primary objections to the Convention including the definition of "underwater cultural heritage" contained in Article 1(A), which it considered to be too broad; the fact the Convention appeared to be at variance with UNCLOS in creating greatly expanded coastal state jurisdiction over shipwrecks on the continental shelf; the fact that the Convention seeks to abrogate the law of salvage or finds, ("The CMI strongly encourages an interpretation of Article 4 which permits the application of the law of salvage in appropriate circumstances" and it "is explicitly recognised in Article 303 of UNCLOS" and "The Underwater Cultural Heritage Convention cannot "abrogate" the Salvage Convention: pursuant to Article 30 of the Vienna Convention, the Salvage Convention prevails over the new UCH Convention"; Article 9 was opposed because it is intended to expand the jurisdiction of Coastal States in a manner which conflicts with UNCLOS; Article 10 was opposed because, again, it expands the jurisdiction of Coastal States in a manner which conflicts with UNCLOS.

The Second Questionnaire which the Salvage Review IWG sent to NMLA's asked whether the Brice Protocol should be considered for inclusion in the Salvage Convention. Four NMLAs answered positively (and one agreed that it was worthy of consideration) and three answered negatively. The Canadian MLA expressed concern that the reservation which Canada made to

the Salvage Convention (which has no geographical limitation) may conflict with the Brice Protocol which suggests a more restricted right of reservation in Article 30 - that is where the property involved is historic wreck in the territorial sea, or inland waters. The UK MLA was unclear as to why the protection of wrecks should form part of a Salvage Convention.

It is worthy of note that the United States Court of Appeals for the Fourth Circuit in *RMS Titanic Incorporated v The Wrecked and Abandoned Vessel… believed to be the RMS Titanic*[16] had determined that the law of salvage did apply to wrecks. It is worth repeating aspects of that judgment which grappled with the issue as to whether the law of salvage, which historically took place with a view to providing prompt and ready assistance to human suffering and protect property, by saying:

> "Some courts have responded to the awkwardness of fit by attempting to treat historic wrecks under the law of finds. …. But when we recognise that a case in finds would award outright title to the finder and that the public interest in long-lost historic wrecks could not be served, we readily conclude that the salvage law is must better suited to supervise the salvage of a historic wreck."

The court went on to say:

> "While we have by default applied a traditional salvage law to historic wrecks, both earlier in this case and in prior cases, we now ratify this application as appropriate to a historically or culturally significant wreck. When no person has made a claim to a historical wreck's ownership and any insurance company that has paid a loss in connection with the wreck has relinquished its interest, the court may appoint the plaintiff to serve as salvor to further the public interest in the wreck's historical, archaeological, or cultural aspects and to protect the site through injunctive relief, installing the salvor as its exclusive trustee so long as the salvor continues the operation. The court may, in addition to the traditional salvage remedies, also enter such orders as to the title and use of the property retrieved as will promote the historical, archaeological, and cultural purposes of the salvage operation. Indeed, to that end the salvor might be able to obtain public or private funding. Finally, the court must include in its remedies a design to provide the salvor with an appropriate reward, which may include awards in specie, full or restricted ownership of artefacts, limitations on use of the artefacts, rights to income from display and shared research, and future rights to salvage. ….
>
> In recognising the applicability of salvage law to historic wrecks, we do not create a new cause of action or a new category of salvor. Rather we are explicitly acknowledging the application of salvage law to historic wrecks - an application that has been ongoing now for years - for the purpose of formalising the salvage trust of historic wrecks and better informing the appropriate participation in such a trust."

[16] 435 F.3d.521

A review of papers given at an Underwater Intervention Conference in New Orleans on 11 February 2010 is instructive. There is no doubt that in the past so called treasure hunters have caused damage to archaeological sites. Others would argue that significant damage is done to archaeological sites through trawl damage and environment degradation. One of the speakers said:

> "The UNESCO Convention contains some valid archaeological principles, but loses its way when it tries to dictate a one size fits all policy for State signatories. This flies in the face of the legal rights of countries that might choose to consider the sale of select duplicate artefacts as part of their deaccessioning and collections management policy, and creates problems for States, including Australia, France, Ireland and the UK that retain a reward system, either monetary or in kind."

The same commentator, Greg Stemm, Chief Executive Officer, Odyssey Marine Exploration of the USA continued:

> "The greatest weakness in the principles behind CPUCH is the blatant prejudice against private ownership and collectors as a viable cultural heritage and management tool. On land, and, in most countries a thriving and vital regime for managing historically and culturally significant property and buildings exists by allowing people to own culturally significant structures - and care for them as their own private property."

He continued later in his paper:

> "The purpose of salvage law has always been to reward individuals and groups for risking their capital, resources and even lives to return items lost in the sea to the benefit of society. Doing away with any reward system or private ownership will serve to de-incentivize anyone from taking this initiative, except using rare government resources. Based on my own observations this is not a use of public funds that is endorsed by the public, especially in today's economy. We can only hope that one day, faced with the reality of the benefits of private curation. UNESCO and CPUCH signatories will adjust their policies to redefine "cultural, historical or archaeological character" and "commercial exploitation" to develop a more rational policy for managing shipwrecks and collections - and give the public and the private sector their due for being responsible and able curators of our underwater cultural heritage."

In another paper James Sinclair of Sea Rex Inc said as follows:

> "One of the most outrageous statements that the UNESCO Convention advocates is that in situ preservation should be considered as a first option. This runs counter to what the overwhelming reality of shipwreck situations demand. If the working committees involved in the drafting and promulgation of this treaty had included any corrosion scientists in their

> fact - finding research, this idea would have been immediately discarded as a realistic first option for management."

He had earlier commented that:

> "Shipwrecks and lost cargoes are predominately man made objects that, with few exceptions, undergo rapid chemical and natural deterioration once lost in the sea. After an undetermined amount of time this process slows, but does not - as far as can be determined - cease completely. The oceans are enormous planetary engines of weather, biology and geology - the greatest recycling engine in the world. The action of the seas on cultural objects is an entire complex field within corrosion sciences."

Conclusion:

The question for delegates is whether specific provisions dealing with underwater cultural heritage should be included in the Salvage Convention, at least for the benefit of those nations who do not wish to become party to the Underwater Cultural Heritage Convention but consider that it would be appropriate to make some provision in the Salvage Convention to deal with this topic. One solution is the Brice Protocol.

- **Article 5 Salvage Convention**

Question:

2.1 Can public authorities pursue claims for salvage in your jurisdiction?

2.2 If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?

Article 5 paragraph 3 reads:

> "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."

The First Questionnaire sought to ascertain whether public authorities can pursue claims for salvage in their jurisdiction. This was not an issue raised by the ISU but was raised in the debate within CMI on Places of Refuge. 18 countries answered to the effect that public authorities can pursue claims for salvage; The Chinese MLA considered that the provision should be deleted, although it recognised that other States might oppose the deletions, in which case it would support the creation of a right to a reservation over the deleted provision. Seven did not support any change. A number of MLAs considered that this is a matter which should be left to national law.

The British MLA identified the general rule of English law as being that a person or body that performs a pre-existing duty to a casualty is not entitled to claim a salvage reward and where, however, it performs services beyond its pre-existing duties it may be able to claim a salvage award. The South African MLA referred to *Transnet Limited t/as National Ports Authority* and the "*Cleopatra Dream*"[17] where a public authority failed in its attempt to claim a salvage reward. This appears to be the position in a large number of countries.

Conclusion:

There is therefore minimal desire to effect change to this provision, at least in so far as the answers in the First Questionnaire are concerned. The Slovenian MLA suggested that each country should be left to determine the rights and duties of public authorities, but perhaps model rules could be prepared to assist in delivering uniformity.

- **Article 11 Salvage Convention**

Question:

3.2 Has your country ratified the Salvage Convention 1989?

3.2.1 If so, has it enacted any legislation or regulation to give effect to Article 11?

3.2.2 If so, please supply a copy, if possible with a translation into English or French.

3.2.3 Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) adopted in December 2003.

This question sought to ascertain which countries had ratified the Salvage Convention, whether any specific legislation or regulation had been made to give effect to Article 11 and whether NMLAs thought it would be appropriate to make express reference to the IMO Guidelines on Places of Refuge in Article 11. Of the 24 countries who have responded to the First Questionnaire 20 countries, had either accepted or ratified the Convention; only two countries had made any express provision in relation to Article 11, some suggest that their legislation has dealt with this issue indirectly and only a couple of respondents thought that an express reference should be made to the IMO Guidelines on Places of Refuge or the new CMI Draft Convention on Places of Refuge. (It was suggested by some that the EU had taken steps to integrate the IMO Guidelines into domestic legislation by amendments to Directive 2002/59 which refers to the IMO Resolution.) The US MLA referred to the US Coast Guard Commandant Instruction entitled US Coast Guard Places of Refuge Policy of July 17, 2007 and the multi agency National Response Team Guidelines for Places of Refuge Decision Making dated July 26, 2007.

[17] (Unreported Supreme Court of Appeal of South Africa, 11 March 2011)

Interestingly, at the Salvage Convention 1989, the International Chamber of Shipping had recommended a stronger provision which required States to provide "ports of refuge". One delegation had noted:

> "that such a provision would be undesirable, but that the problem of obtaining port access could be addressed, at least partially, by having States adopt contingency plans which would establish a mechanism for informed decision-making." (page 283 Travaux Preparatoires)

thus presaging the OPRC Convention 1990 and IMO Guidelines on Places of Refuge. The Canadian MLA, in supporting the inclusion of the IMO Guidelines in the Salvage Convention regarded that support as being consistent with its support of the CMI Instrument on Places of Refuge. The Chinese and Japanese MLAs, on the other hand, considered that the Salvage Convention is, essentially, dealing with private law matters and it would not be appropriate to add material that is of a public law nature. Sweden considered that the issues raised by Article II would be better dealt with in a stand alone Convention, hence its support of the CMI Instrument on Places of Refuge.

Conclusion:

Whilst a few countries think that the Salvage Convention could be improved by amendment the overriding sentiment appears to be that such matters are best left to stand alone instruments.

- **Article 13 Salvage Convention**

Question:

4.2 Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?

4.3 Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?

Article 13 paragraph 2 provides that:

> *"Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence."*

The ISU has identified problems in recent years in the salvage of container ships, which are becoming larger and larger, and which has given rise to problems in collecting security from cargo interests. Sometimes it is not obtained at all or, when it is provided, the cargo often remains unrepresented and has to be given notice of pending arbitration, an award and an appeal award, all causing considerable expense and delay. In one case 6,000 TEU containers were involved comprising 4,486 individual interests. Only 3,066 were involved in the arbitration and of those 1,055 were unrepresented.

Reference has been made in Section D above to the 2001 amendments to the LOF and LSSA clauses which go some way to meeting the ISU's concerns.

Archie Bishop says that changes in LOF 2011 only partly address the consequences of the present legal position. Obtaining security from cargo in container ship cases, he says, is a problem which increases year by year as ships get bigger. In modern ships over 10,000 cargo interests can be involved. Under current law each property interest is responsible for itself. No party is liable for the other. Each has a duty to provide security and each is entitled to be represented in subsequent legal proceedings. In large container ship cases it is impossible for a salvor to identify and obtain security from each interest within any reasonable period of time and his only remedy, detainment of the property concerned, is very often impracticable or impossible. Further, even when security is received the cost of giving to each property interest appropriate notice of arbitration and awards is not only time consuming but expensive – a cost that is ultimately born by the salved property. Currently under Article 21.2 the ship owner has an obligation to assist the salvor in obtaining security but no obligation to provide it if he fails to do so. Archie Bishop suggests that in the interest of all, ship, cargo and salvor, the law needs to be tightened to overcome this problem.

Some countries already have a system in place to overcome it (Netherlands and Belgium) but the vast majority do not. The Italian MLA, in its response to a general question as to whether there were any other issues or problems that needed to be considered in the first questionnaire, suggested that in relation to Article 21 the law could be amended by providing that if cargo is released before it has provided salvage security, the shipowner will be liable for that cargo's contribution to the overall salvage award. Such a change would maintain the current position of each party being principally liable for its own proportion of the award, yet protects the salvor.

A proposed amendment which adds a sentence to Article 21 paragraph 2 might be as follows:

Article 21 - Duty to provide security

1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

2. Without prejudice to paragraph 1, 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. *If any such cargo is released without the cargo interest(s) having provided satisfactory security to the salvor, then the owner of the salved vessel shall be liable to provide such security to the salvor on behalf of the said cargo interest(s).*

3. The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property."

Conclusion:

Three NMLAs reported that in their countries there is a provision in their legislation which has channelled liability to the shipowners. Four NMLAs thought it would be of benefit for the Convention to identify the ship owner as being the party who should primarily be responsible for the payment of claims and the provision of security in container cases. The remainder did not consider it necessary to make special provision for container ships. The Chinese MLA, however, suggested that "Further work needs to be done to explore solutions in relation to the provision of security and handling of unrepresented cargo, both in relation to container and general cargo ships". Finland pointed out that whether the ship or the salvor had the liability for administration or the ship had the liability for payment/security the burden could be unreasonable on both. The German MLA considered that the availability of its lien put the salvor in a better position than the shipowner. The Italian, Slovenian and Dutch MLAs favoured identifying all ships and not just containerships if change was to be made.

- **Article 14 Salvage Convention**

Question:

5.2 Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).

This is clearly the most contentious area of potential reform in relation to the Salvage Convention 1989 and relates to what is now being termed "environmental salvage". A broad question was posed to NMLAs as to whether they would be in favour of an investigation by CMI as to whether Article 14 should be amended to create entitlement to an environmental award.

The ISU has suggested that increasing activity by regulatory authorities has resulted in the environment being a factor in almost every salvage case, such that authorities almost always now

require bunkers to be removed before any salvage work can be done, even though their removal may not be necessary for the success of the operation or even necessary to protect the environment. Such work, it is said, inevitably increases the Article 13 award to the detriment of property underwriters.

The ISU points to the "*Prestige*" as highlighting the inadequacies of the present regime. It suggests that had the ship and her cargo been provided with a place of refuge, they could probably have been salved. The resultant salvage award would have been restricted by the value of property salved (about $20 million) and probably have been in the region of $10 - 12 million. Although the award would be limited the salved fund would probably have just been sufficient to avoid the need to dig into the safety net of the SCOPIC clause. The cargo of oil remaining on board would have been contained and the cost of the cleanup of the spill would have been in the region of $40 - 50 million. In the event the salvors were unable to salve the ship and cargo because a place of refuge was denied, leading to claims estimated to be in the region of $1 billion. The ISU has pointed out that very little would have been paid for protecting the environment had it been permitted to proceed with the salvage. Any enhanced award would have been capped by the salved value and thus would have been minimal, compared with the benefit conferred.

The ISU has suggested that whilst salvors are currently rewarded for protecting the environment under 13.1 (b) they are inadequately rewarded for what they do, because of the limit to any salvage award imposed by article 13.3 – the value of the salved property. As an illustration of this inadequacy they point out that like Article 14, SCOPIC is a safety net which provides for a minimum payment and that statistically SCOPIC is involved in approximately 20% of cases. Thus in 20% of all cases salvors are receiving the bare minimum. Further, whilst in the remaining cases the award may not be the bare minimum, the restriction imposed by property value means they are probably not fully rewarded for what they do in those cases.

Aside from this, it notes that such enhancement for preventing damage to the environment as is paid, is paid by property underwriters who do not insure this liability, even when Article 14, or SCOPIC, is involved. Article 14 or SCOPIC is only paid to the extent that their assessment exceeds the traditional salvage award under Article 13. Most Article 14 and SCOPIC cases also involve an Article 13 award and statistically approximately only 50% of the assessment is actually paid under either Article 14 or SCOPIC. The balance is paid as a traditional salvage award under Article 13.

The ISU's suggested solution to this is to amend Article 13 by deleting Article 13.1 (b) (the skill and effort of the salvor in preventing or minimising damage to the environment) and reintroducing it in an amended Article 14.

The ISU has explained its suggestion for reform as follows:

- under such a proposed Article 14.1, an arbitrator could make an environmental award whenever there is a threat of damage to the environment. The salvor does not have to actually prevent damage to the environment, which is the position under the existing Article 14. The major difference is that under the Convention, the recovery is limited to expenses. In circumstances in which the services do not prevent damage to the environment, the ISU anticipates that a salvor would at least be awarded the cost of the operation. Where there is success achieved, it is anticipated that a more generous reward will be available subject to the overall cap. However, in this draft it has been left to the discretion of the tribunal.

- the proposal in effect avoids the vexed problem of liability salvage. There is no need to prove a liability though its possibility would be relevant to Article 14.1(c).

- if its proposals for environmental salvage are accepted, there would need to be a statutory lien created against the ship for such a claim or a clarification made that environmental salvage should be considered part of the existing salvage lien. Geoffrey Brice pointed out in an LMCLQ article[18] that the Arrest Convention 1952 does not include "Special Compensation" (under Article 14) as a maritime or statutory lien. The more recent Arrest Convention 1999 remedies this in Article 1.1(c) where maritime claim includes one arising from: "salvage operations or any salvage agreement, including if applicable, any special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment". This Convention is not yet in force.

- under the CLC 1992, the Fund Convention 1992 and the HNS Convention, an owner and its insurer may have taken into account the cost to it of any preventive measures. An environmental award would, it is thought, be a reasonable preventive measure when valid claims under those Conventions are made, Thus an owner should be able to have it taken into account when faced with other claims under the CLC or be able to reclaim it from the 1992 Fund if the CLC is exceeded.

  The ISU suggests that there may be circumstances in which a ship owner could participate in its own pollution limitation fund with other claimants under either the CLC or Fund Conventions, depending on whether limits are reached on the basis that an environmental salvage award was a result of its entering into a reasonable contract to prevent and/or mitigate damage to the environment. To date it seems that claims for damage caused to eco-systems are not admissible by the IOPC Fund and thus preventive measures relating to their avoidance would not be covered. (The same concepts of pollution damage and preventive measures apply under the 1992 CLC and Fund

[18] Lloyds Maritime and Commercial Law Quarterly (1990) at p.45

Conventions. For a discussion on these topics see the 1992 Funds Claims Manual, December 2008 edition, paragraph 3.1.15.)

It will be noted that the ISU does not suggest that SCOPIC or any similar scheme be adopted in any new Convention. The amended texts for Articles 13 and 14, put forward by the ISU is in Attachment 1 "Specific questions for the meeting".

In the First Questionnaire NMLAs were asked whether there were any other issues or problems which they considered should be looked at. The MLA of Australia and New Zealand suggested that Article 13 should be amended to expressly exclude from consideration the issue of whether a salvage reward should take account of potential liability to third parties. Geoffrey Brice QC in his book "Maritime Law of Salvage" at paragraph 2.127 expressed the opinion that this did not form part of the considerations to be taken into account when assessing the nature of the damage faced by the salvor. He said:

"'Danger' and threat of claims or litigation

However, to take into consideration the removal by the salvor of the prospect of pure legal claims against the owners of the salved property as such is probably not warranted by the Convention whether as part of the services or as a danger. Such a consideration goes beyond considering threats to life or property. It might involve consideration of matters of legal responsibility (where for example shipbuilding sub-contractors could be involved in the case of a mechanical breakdown), of questions of limitation of liability and numerous other extraneous matters: it is submitted that these are not proper subjects for investigation in a salvage suit."

Geoffrey Brice QC did however consider that prevention of third party claims arising from the casualty will be reflected in the application of criterion (c) of Article 13.1. In his book he went on to say:

"Success, benefit and third party claims

2.127A As indicated above, in most cases where the question arises prevention of third party claims will be a feature of the services and a part of the "useful result" thereby achieved. The sum of the service is the benefit that the salved property and its owners derive from it. The benefit conferred is likewise a measure of the success of the salvage service and its merits. Thus in most cases prevention of third party claims arising from the casualty will be reflected in the application of criterion (c) of Article 13.1.

2.127B The following are examples of services averting potential liability which it is submitted enhance the merits of a service:

(a) Preventing fire spread to other vessels and shore installations;

(b) Taking in tow a vessel drifting in a crowded anchorage;

(c) Preventing a vessel from grounding and blocking the entrance to a port thereby affecting the commercial interests of the port and its users;

(d) Preventing a casualty grounding on a coral reef which forms part of coastal resources; and

(e) Avoiding an escape of oil likely to affect the operation of a nearby power station.

It will be noted that all of the above involve either potential physical damage to property or interference with its legitimate use as a direct result of the casualty."

Conclusion:

Ten NMLAs expressed support for considering the issue of environmental salvage and seven were opposed. Of the remainder two expressed no opinion and four recognised that some change may be necessary and one was open to persuasion. The German, MLA whilst recognising and supporting the need for a reconsideration of Article 14 hoped that the competing interested parties would first negotiate a resolution. The Norwegian MLA recognised that the increased focus on the environmental side of casualties suggested that Article 14 needed to be drafted to encourage professional salvors to maintain vessels and equipment dedicated to prevent environmental damage. A number of NMLAs pointed to the fact that SCOPIC has been introduced as indicative that Article 14 had not worked. As has been seen in Section D opposing views were expressed by the shipowners and their liability insurers (the P&I Clubs) on the one hand and the ISU and London market property underwriters on the other hand. The arguments in favour of change are based on the changing face of salvage, and the inability for salvors to be appropriately remunerated in cases where there are low salved values. The arguments against change focus on the unpredictability of an environmental award and the need to share with the property owners and their insurers the liability for any such award.

- **Article 16 Salvage Convention**

Question:

6.2 Do you consider that the wording of this Article should be amended to ensure that any life salvage claims are made directly against a property owner rather than the salvor?

This question asked whether NMLAs considered that Article 16 should be amended to ensure that life salvage claims should be made against the owners of property salved rather than the salvor. Article 16 currently provides that "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 payment awarded to the salvor for salving the vessel or other property or preventing or minimising damage to the environment".

The ISU has pointed out that prior to the 1989 Convention, claims for life salvage would have been made directly against the owners of the property but as a result of the language used in the Convention, such claims now can be made against the salvor. It points out that this could create a problem for the property salvor if it was not involved in the life salvage, which is often the case. The salvage claim under Article 13 and special compensation under Article 14 would under normal circumstances be restricted to the work that has been carried out and the expense incurred and not include the effort of a third party over which it had no control. So whilst liable to the life salvor, the property salvor will have received nothing for the work done in saving life. This, it is suggested, would be an injustice to the property salvor. The ISU therefore suggests a correction to the wording to ensure that any life salvage claims are made directly against property rather than the salvor.

This matter was debated at the 1989 Convention. The ISU (Travaux Preparatoires, page 425) had expressed the opinion that a salvor of life, unless he was a servant, agent or subcontractor of the property salvor, should pursue his claim directly against the property and not the salvor who salved the property. Since life salvage was not an element in assessing the reward under Article 13, it would be unfair if the property salvor had to pay the life salvor when that salvage was not considered in assessing the property salvor's reward.

The Norwegian delegation (Travaux Preparatoires, page 426) had proposed a provision to the following effect:

> "Nothing in this Convention shall prevent a contracting State from introducing national regulation in respect of salvage of persons, granting life salvors rights and remedies in addition to those granted by the Convention."

Whilst there was some support for that proposal, many delegations opposed it. The draft prepared by the CMI for the Montreal Conference provided for an entitlement being given to a salvor of human life to a fair share of any payment due under the Convention. Furthermore a salvor who, at the request of any party concerned or a public authority, has salved or undertaken to save any persons from a vessel in danger was to be entitled to compensation equivalent to his expenses under the equivalent provision of Article 14. Left in square brackets was a possibility that a salvor who has actually salved any person from the vessel is entitled to a special reward, taking into account the criteria in the equivalent provision of Article 13 but not exceeding twice the salvor's expenses. Under those two extensions it was also provided that any recovery would not exceed any sum payable under paragraph 1 of the article. And it was also provided that any of the extended payments were to be payable by the owner of the vessel in danger or the State in which that vessel was registered. During the Conference such provisions were jettisoned and the provision which is now contained in Article 16.2 was agreed.

In New Zealand and the Netherlands, domestic legislation places the liability for the payment of life salvage on the shipowner. The South African MLA has also dealt with this by providing in its domestic legislation that the owner of a ship or wreck is liable for life salvage. The Canadian MLA suggested that consideration should be given to revising the wording to ensure that life salvage claims are made directly against the vessel or other property owner, rather than the salvor, and that they would be a separate reward, not a part of the property salvage award. The German MLA, on the other hand, whilst supporting a change so that claims are directed to the respective property owners, but, noted that the award would reduce the salvor's property salvage award. The Greek MLA supported change but also said that if no change is made a time limit should be imposed on claims by life salvors of more than two years (because property salvors, in practice, do not inform life salvors of the award which it has obtained).

Archie Bishop has provided the following example and proposed re-wording for this Article:

> A passenger liner catches fire off the coast of East Africa. She is abandoned and over 800 people are in lifeboats. They are picked up by three ships which deviate to save them. One is a VLCC with large deck space. They are taken to an island in the Seychelles. The VLCC is engaged for 5 days and incurs an off hire loss of over $100.000. She plays no part in the property salvage. If the casualty is salved the property salvor may not recover anything in respect of life salvage because he played no part in it, yet under this article he would be liable to pay the life salvor say $100,000 plus. Equally if there was a claim for special compensation under Article 14.1 alone, which basically gave the salvor his expenses and nothing else, those expenses would not include the expenses of the life salvor for they were not incurred by the property salvor. He would only get the expenses he incurred. Yet, under Article 16, he would have to share the recovery with the life salvor. In either case, it would be unjust for the property salvor to have to pay the life salvor. It should be made clear that any award to a life salvor is to be paid by the property interests.
>
> The ISU's proposed amended provision is also contained in Attachment 1.

The First Questionnaire asked NMLAs whether there were other issues or problems which they considered should be looked at. The German MLA suggested that the salvor's misconduct (Article 18) should not affect the claim of a third party salvor of human life for a share of the salvage award pursuant to Article 16(2).

Conclusion:

Ten NMLAs answered in the affirmative, including China which expressed the view that life salvage should be kept entirely separate from property and does not consider that the present provision is conducive to the encouragement of property and environmental salvage, (The Chinese MLA considered that a separate lifesaving fund should be established), and eleven NMLAs considered that no change was necessary. (Two NMLAs did not express an opinion and

the South African MLA pointed out that its legislation makes the shipowner liable to pay salvage in respect of life salvage to the salvor.

- **Article 20 Salvage Convention**

Question:

7.1 If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?

Conclusion:

Seven countries thought this was appropriate; twelve considered that it was not necessary, for example, as it would be a maritime lien within its jurisdiction in any event, and five NMLAs did not express a final position. The Dutch and Norwegian MLAs suggested that such matters should be dealt with in the Mortgages and Liens Conventions or National law. (The Netherlands is considering amending its national law so as to extend it to Article 14 awards).

- **Article 27 Salvage Convention**

Question:

8.2 Do you consider that Article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?

Article 27 provides: "State Parties shall encourage, as far as possible, and with the consent of the parties, the publication of arbitral awards made in salvage cases."

This question to NMLAs enquired as to whether NMLAs considered that Article 27 should be amended to reflect the position achieved by the Lloyd Salvage Group, namely the publication of awards unless any party objects. As has been seen in Section D both LOF an LSSA clauses have been amended since the Questionnaire was sent out so that Awards are now more likely to be published.

The draft presented to the CMI Montreal Conference contained this provision:

> "Contracting States shall take the measures necessary to make public arbitral awards made in any salvage case."

This was in square brackets, suggesting that there was not unanimity in the drafting committee on that provision. The Montreal Conference Draft Convention which was approved contained the following provision:

"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"

ie much the same as the Convention but with the words "if need be" deleted. There was considerable debate on this provision (Travaux Preparatoires pages 499-513). That debate principally concerned whether the words "with the consent of the parties" should remain in the text.

The ISU is in favour of awards being published. As has been seen, the LSSA clauses have been amended and the changes have been identified above.

Conclusion:

Seven respondents agreed that Article 27 should be amended, 13 did not agree. The Danish MLA supported the publication of awards provided parties agreed but considered that it should be left to national law and the parties to determine this issue and not the Convention. Two NMLAs did not express an opinion. The French MLA also supported the publication of a summary of an award without names of the parties, as happens in France already. The Greek MLA believed tribunals should have the power to publish awards where they may be of interest to others. A number of MLAs referred to the basic right of parties to retain the confidentiality of their chosen mode of dispute resolution should they wish, ie the sanctity of the arbitration process.

- **General**

(1) ***Question:***

9.2 How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Enquiries were also made of NMLAs as to the number of cases which had been decided in their jurisdiction under the 1989 Salvage Convention. No more than 30 were identified, although that does not include arbitrations. The British MLA identified 675 awards since 1990, of which 282 resulted in awards following appeals. The US MLA speculated that there may have been "dozens, perhaps even hundreds of arbitrations".

(2) In response to the general question as to whether there were any other issues which needed to be considered:

- As mentioned earlier the Italian MLA referred to Article 21 and the duty to provide security. (See the commentary above concerning Articles 13 and 21).

- The German MLA suggested that the definitions of "ship" and "property" might need to be reconsidered in light of the definition of "wreck" in the Wreck Removal Convention.

- The German MLA also queried whether there needs to be a definition of "shipowner" so as to ensure that an owner "pro hac vice" (such as bareboat charterer) would be liable to meet any salvage award, as well as any owner.

Section G - Second Questionnaire

Information was sought in the Second Questionnaire with a view to seeking to ascertain how much empirical data was available to support the concerns raised by salvors. In particular data was sought as to the number of salvage claims that had resulted in a modest reward by reason of the low value of the salved fund. None of the eleven responses thus far received from NMLA's has identified an example of an instance where this has occurred. No examples have been cited of circumstances in which a salvor declined to be involved because of the low value of the property to be salved. Similarly there were no recent examples of cases in which authorities had prevented the completion of a salvage operation and thus deprived the salvor of a possible award. Responses also suggested that it is only in the UK (and possibly China) where tribunals adopt a rule of thumb principle so that a salvor is unlikely to recover more than half the salved value by way of a reward. Responses to date also suggest that Article 14 awards do not permit a profit element to be incorporated and there are no examples of any uplift being applied to an Article 14 award.

Section H - Conclusion

If the Conference believes that there is merit in recommending that some matters should be put forward to the IMO as amendments worthy of consideration to the Salvage Convention the options available include:

- Forwarding a draft Protocol to the Salvage Convention to the IMO (bearing in mind IMO Resolutions A500(XII) and A777(18) (see page 6 above)).

- Forwarding a report to the IMO identifying the issues which have been debated and the conclusions reached.

Alternatively the Conference may wish CMI to suggest that in the light of the debate at the Conference, consideration needs to be given to amending the LOF to take account of these discussions.

The Conference may on the other hand consider that no further action should be taken by CMI on the issue of salvage at the present time.

Stuart Hetherington
Chairman: IWG & ISC Review of Salvage Convention 1989
1 May 2012