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Re.: IWG for the Review of the Salvage Convention 1989

Sub-re: ICS Position Paper

In the background:

- Definition of environmental damage: the word "substantial" (Art. 1(d) of the 1989 Salvage Convention).

- Creating an environmental salvage award (Art. 14 of the 1989 Salvage Convention).

(Report Assembly 2011).

COMMENTARY

1. The word "substantial" in matters of damage to the marine environment can be hard to quantify with a view to excluding minor cases. The damage to the environment may evolve and become greater precisely where prevention and/or anti-pollution measures are not taken at the appropriate time. Thence, salvors should be encouraged to act by way of special compensation under Article 14 of the 1989 Convention, regardless of the size of the damage, whether actual or foreseeable. The word "substantial" should be deleted.

2. The ISU's proposal for a separate award is a sensible one because the proposal shall mean one step further in the protection of the environment but always provided that a benefit results from the actions of the salvors.

From such perspective, it will not be difficult to understand that the Shipowners (ICS) may not see any direct benefit to the vessel's interests from environmental salvage operations (but to Liability Insurers and Coastal States). ICS is satisfied that the current SCOPIC tariffs do sufficiently pay the salving endeavours in respect of threat to the marine environment. The Owners do not wish to pay more than the SCOPIC 2010 rates. The view is reasonably taken (under the 1989 Convention) because:

(i) the additional environmental award is not based on success alone, (14.1 – A. Bishop amending proposal), and

(ii) such new environmental award is to be borne entirely by the shipowner (14.4 – A. Bishop amending proposal).

However, a different approach might be made in support of a separate award to salvors, who must be always seen to pay a major role in the struggle against marine pollution.

A "compromise solution" was reached over Article 14 after long hard work in Montreal. The ICS wishes to stick to it. However the important step towards the protection of the marine environment it must be acknowledged that more than 30 years have elapsed since LOF 1980 and the Montreal draft of 1981 and numerous pollution casualties have since occurred to mention the least the "Prestige" in November 2002, thence the circumstances have changed and the risks of damage to the marine environment have not diminished but increased to a level of top international context within which the ISU's proposal is made will certainly appear to be different and worse than it was in the early eighties.

By the new Article 14 on "Special Compensation" under the London Convention 1989 the salvors received:

- a "safety net" for salving services rendered to a laden tanker even if there was no cure, then having failed to earn a reward under Article 13.

- the "compensation" was payable by the vessel's Owner by way of the expenses incurred in the salvage operations.

- If the salvage operations had been successful in preventing or minimizing damage to the environment, the above "special compensation" could be increased up to a maximum of 30% of the expenses incurred by the salvor.

- The above enhanced award could be further increased up to the 100% of the expenses.

- The total special compensation was payable under Article 14 provided that it is, and to the extent is only, greater than any reward for property salvage payable to the salvor under Article 13 (by the vessel and other property interests).

Therefore, the salvors obtained the following:

- a remuneration even in no cure cases for the first time. That was an important new incentive. The remuneration consisted in recovery of the salvor's expenses: out-of-pocket expenses reasonably incurred by him in the salvage operations and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, but taking into consideration the criteria set out in Article 13, para 1(h), (i) and (j) for deciding what was

"reasonably incurred" and "fair rate", that is, the promptness of the services rendered, the availability and use of vessels and other equipment and the state of readiness and efficiency of the salvor's equipment and its value.

Then, the salvor would not get his expenses back as and how incurred under any circumstance of service, but only on bearing and consideration of the availability for use of the vessel and the equipment in full state of readiness and efficiency, the value invested in the equipment and the promptness of the service. While these criteria might always benefit "professional salvors" (though no reference is made to "the skill and effort of the salvors in preventing or minimizing damage to the environment", or indeed "attempting to" rather), these may seem redundant as they relate one to another for the purpose of performance of the services and, after all, no success was achieved. It therefore seems that salvors were thereby invited to enter into lengthy and tough negotiations with the Owner of the salved vessel, otherwise to make a case out before the Salvage Tribunal according to criteria that were partly required for granting property salvage reward. The expenses recoverable from the Owner in the event of work but no cure were at least doubtful and not always warranted (unless to "professional salvors"). However, salvors did not receive a right of lien for the "special compensation" under Article 14 pursuant to the Geneva MLM 1993 Convention.

- salvors were also entitled to receive between 30% and 100% of the "assessable" compensation (as above, under Article 14(1)), that is, up to twice the sum of recovery obtainable by way of expenses (as such may be assessable). Through this additional enhancement, a professional salvor could be rewarded up to double the amount of expenses paid through the salvage operations. That kind of special reward, though appreciably sufficient, would be subject to and assessable taking into account all of the criteria set out by Article 13 for property salvage awards. Then, it would not seem to be fair that salvors could not receive reward according to the salved value of the vessel and other property" (Art. 13, 1(a) where their services succeeded "in preventing or minimizing damage to the environment" (Article 14 (2)) but only up to twice the sum incurred as expenses and always provided that such a sum would not be payable in addition to any reward collected for salving property but after deducting the latter.

  It can be said that the "safety net" allowed in Montreal 1981 was an incentive to salvors but it was a minor one and not really compensatory as in 2012. The consequences appear to be self-evident, namely, the marine environment will be the loser and the shipowners could not agree to bear alone any increase over the compensation agreed in Montreal.

- Why and how the "Montreal compromise" should be updated?

  The recommendations made by Prof. Erling Selvig regarding "liability salvage" in 1981 are still standing (see "Preliminary Report to the ISC of the CMI", Documentation Montreal 1981: Salvage 1, II-80, 4 et seq.). The concept of "liability salvage" was admitted into the 1989 Convention but in strict relation to the risk of "damage to the environment" by granting salvor a "special compensation" but limited to double the expenses sustained in the salvage operations. Today, 30 years later, the liability for damage to the marine environment

has been developed by several Conventions (CLC, BUNKERS and HNS), so placing the exposure of the polluter rather highly up to a regime of strict liability. It is therefore, a sizeable liability risk than can be saved or diminished by the action of salvors, whose efforts must be rewarded properly. Because of the "cargo sharing" in the liability system under the BUNKERS and HNS Conventions (only CLC holds to the "channelling" rule against the vessel's Owner alone), the salvage operations nowadays, if such are successful in protecting the environment, will benefit not only Property Insurers but also, rather, Liability Insurers.

The statement made by the ICS that "the Salvage Convention 1989 is not designed to address the adequacy of a system of salvage or pollution response" was probably correct 30 years ago, but it is no longer standing because salvage must be framed today as a response anti-pollution and not only traditionally as an institution addressing the preservation of property rights. Very few would dispute the new reality sustained by the threats to the environment in the world of today.

Then, how the ISU's proposal for a freestanding reward in cases of successfully preventing or minimizing damage to the marine environment could be best tackled? I can possibly identify five lines of investigation, namely, as follows:

(1) A salvage reward in the event of success (cure) should be assessed according to the same criteria as outlined by Article 13 of the 1989 Convention, though upranking to the first place (b), (i) and (j), being consolidated into one to be called "the services rendered by professional salvors". Such criteria for fixing the reward would apply to cases of environmental salvage only.

(2) the "special compensation" under circumstances of "no cure" (Art. 14(1)) should remain as it stands in the 1989 Convention but payable by both ship and cargo interests. The increase envisaged at para 2 of Art. 14 (enhanced award) should be removed entirely, unless salvors have obtained reward for property salvage in the same accident to the extent that such compensation is greater than any reward recoverable by the salvor under such property salvage.

(3) The separate environmental salvage award shall be payable by all those becoming beneficiaries of the salvage operations, namely, property interests and liability insurers. In the event that the reward should be made payable, or security put up in relation thereto, by the vessel's Owner in the first place, such a payment or security bailment would entitle the Owner to a right of subrogation against the other parties concerned and would be made without prejudice of recovery of any of the award sums paid from the ultimate responsible party for the threat, or the extent of liability saved, to the marine environment under and as may be provided in the international Conventions or by domestic legislation, whether in contrast or in tort. The principle of "the polluter pays" will not be thereby affected. The same subrogation and recovery rules would operate in favour of any front-payee of the reward to the salvors (e.g. a Government). The salving company should have a right of claim addressable against any and every of the other beneficial parties and not against the vessel's Owner alone. Any funding requirement to which Owners may be forced to enter

according to national laws (e.g., 33 CFR Part 155 Salvage and Marine Firefighting Requirements, applicable to all tank vessels as from February 2011), should be taken into account at the time of assessing an environmental reward.

(4) Salvors should have a right to a "maritime lien" both in connection with environmental awards and also in connection with "special compensation".

(5) The concept of "environmental salvage" should be made allowable in General Average, inasmuch as was the case of the enhancing award in Article 13 of the 1989 Convention (the Y/A Rules were amended accordingly in 1990).

Since payment of the "environmental reward" shall be made by all of the vessel and other property or liability interests in proportion to their respective salved values, the formula set out by Article 13(2) shall prevail without amendment. However, a General Average act will be only binding upon the parties having agreed to a G.A. covenant.

Then, wherever the environmental salvage reward gives rise to a G.A. act and always subject to the boundaries of such contractual scheme, the contributing parties should pay only in reference of their interests as these may have been salved and in proportion to the values of the property so salved. Then the doctrine of General Average, which is in fact assimilable to the sharing principle introduced by Article 13 of the Salvage Convention may not conflict with the new approach to "environmental salvage award" and can live with it and irrespectively of it.

The foregoing suggestions are avenues of investigation and study only and would nonetheless imply necessary reforms in the maritime legislation, at least to mention as follows:

- An obligation to promote "environmental salvage" should be imposed neatly on the States parties and national of States parties under the London Salvage Convention 1989. Beyond the scenarios of salvage operations controlled by public authorities and cooperation, under Article 5 and 11 respectively.

- The Maritime Liens and Mortgages Convention 1993 should be amended accordingly.

- Articles 13 and 14 of the Salvage Convention 1989 to be amended accordingly.

SUMMARY

- The ISU Proposal for Environmental Salvage Awards should receive support because it would improve salvage response to the benefit of all, including shipowners, their liability insurers and the general public. It will update the legal response to the environmental risks and exposure in 2012 (30 years later).

- It is now time for reviewing the salvage law by providing more protection to the Marine Environment in a way of cost-effective fairness to Shipowners and on basis of sharing of liability. The reform will take years to come into existence but the works must commence now.

- "The income of the salvage industry must be sufficient to maintain an internationally adequate salvage capacity. It is probably required that total compensation reaches a higher level than at present. Moreover, the risk of incurring expenses without compensation or that of incurring liabilities in connection with salvage operations should not be such that the salvors are discouraged from intervening in particular cases". The words of E. Selvig in 1981 turn to be wise and accurate today some 30 years later.

Respectfully submitted by:

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26 June 2012