Salvage Awards for Environmental Protection

By

Archie Bishop
of
Holman Fenwick & Willan

Today environmental issues play an important and integral part of almost any salvage operation but, aside from ensuring that there is bare minimum reward, they have not, in the main, increased overall salvage awards as much as one would expect. To begin to appreciate this, and understand why, it would be helpful to retrace a little history.

Firstly we need to appreciate exactly what salvage is:

1. It is a very ancient right, one which can be traced back almost 3,000 years. There are a number of varying judicial definitions but perhaps the best comes from the late Mr. Geoffrey Brice Q.C. who defined it as:

   "A right to salvage arises when a person, acting as a volunteer preserves or contributes to preserving at sea any vessel cargo freight or other recognised subject of salvage from danger"

2. It is a peculiarity of maritime law and there is nothing to in the ordinary law of the land to compare it with. If you come across an abandoned ship which is on fire in the middle of the ocean, you will be rewarded if you successfully put the fire out and the ship is saved. If your neighbour's empty house is on fire and you extinguish that fire thereby saving his property, you will not be legally entitled to anything. The reason for this difference is long standing and

historically a matter of public policy. Sailors in remote parts of the world were to be encouraged to go to the assistance of others – if only to avoid the temptation of piracy.

3. It is essentially a "no cure - no pay" regime. In short, if you save nothing you will get nothing and if you save something, you cannot receive as an Award more than the value of the salved property, no matter, how much expense has been incurred during the salvage operation. However, given those limitations a salvage Award should be generous thereby encouraging a potential salvor to act.

Environmental issues first began to impact on salvage operations as a result of legislation which followed the environmental disaster of the "TORREY CANYON", a tanker which ran aground off the Scilly Isles in 1967 resulting in pollution which caused immense damage to the holiday resorts of Cornwall and Devon. Many will remember the intervention of the government who ordered the RAF to bomb the ship in an attempt to set fire to her cargo of crude oil. Whilst some oil was burnt the operation was largely unsuccessful and there was extensive pollution. The casualty resulted in much international legislation. The Intervention Convention of 1969, the CLC Convention of 1971 and the Fund Convention of 1974. The first gave governments power to intervene when casualties threatened the environment and the others made provision for strict liability for damage caused.

Nothing was done following that particular casualty to encourage the salvor. But he was discouraged by the powers given to governments by the Intervention Convention which thereafter allowed them to direct ships, which were in the course of being salved, to be taken out into the ocean and sunk, thereby defeating the prime objective of the salvor to bring the casualty to a safe place and his claim for salvage which was dependent upon success.

The matter was brought to a head by another casualty, the "AMOCO CADIZ" which grounded off the coast of Brittany in late 1978 causing extensive pollution to the coastline of the north east corner of France. Following this casualty, both the industry and our international legislators recognised, for the first time, that something needed to be done to encourage the professional salvor to go to the assistance of ships which threatened damage to the environment.

IMO (or IMCO as it then was) requested the CMI to carry out a full review of the salvage law but this took time. Meanwhile industry realising a more rapid response was needed, came up with a temporary solution. An amendment was made to the worlds most popular salvage contract, Lloyds Open Form (LOF) making the first breach in the traditional salvage principle of 'no cure - no pay' LOF 80 provided that in the event of salvage services being rendered to a laden tanker, the salvor whether successful or only partially successful, should receive a minimum of his expenses plus an uplift of 15% of those expenses. This major change in salvage law which became known as the "safety net" was much welcomed and indeed encouraged the world's largest salvage companies to go to the assistance and successfully salvage many of the laden tankers trading in the Persian Gulf at the time of the Gulf war between Iraq and Iran in the 1980's.

LOF was only an interim measure for in due course the CMI completed its review of salvage law and presented its recommendations to IMO. The Legal Committee of IMO then took up and developed these recommendations which resulted in the Salvage Convention of 1989. This Convention made a fundamental change to salvage law, one which, to a degree had been pre-run by LOF 80. It made three important changes.

> Firstly it provided that salvors whilst rendering salvage services and ship owners whilst receiving them, should exercise due care to prevent or minimise damage to the environment. (Article 8)

Secondly, it added to the nine traditional criteria that had to be weighed in the balance when assessing a salvage award an additional factor. "The skill and efforts of the salvor in preventing or minimising damage to the environment" (Article 13)

Thirdly it provided that whenever there was a threat of damage to the environment, a salvor should be entitled, as a minimum, to his expenses and if he was successful in preventing damage to the environment, to an uplift of up to 100% of those expenses (Article 14)

These major changes in international salvage law were embraced by all sides of the industry, salvors, ship and property owners and their insurers. Despite the Convention not coming into force until 1995 its provisions were immediately adopted and incorporated into a new version of Lloyds Form, LOF 90. However, whilst all embraced the concept, it was not long before the lawyers found that the drafting of the Convention was not as ideal as was initially thought.

Disputes began to arise. Pollution which threatened damage to the environment was restricted to "coastal waters or waters adjacent thereto" but what were coastal waters – 6 miles, 12 miles, economic zone, continental shelf? How far was adjacent? What was a threat – did it have to be actual or reasonably envisaged? How did one determine the percentage of uplift and what degree of proof was needed to show that pollution would have occurred but for the services? Finally, expenses included a "fair rate" for equipment - what did we mean by fair rate, did it include an element of profit? Did the assessment begin to clock up as soon as the need for services arose or only when the threat of damage to the environment began? When did the assessment stop, when the threat had been overcome or at the end of the salvage services? These issues were complex and effected many cases. In one case, the "NAGASAKI SPIRIT", it necessitated the case going through 5 tribunals until it reached the House of Lords. In that case, and another, the overall legal expense exceeded US$1 million

for each party. Whilst large sums were involved, these costs were disproportionate, particularly bearing in mind it was not a dispute which arose from a wrong done by one party to another but simply one arising from the method by which a Contractor's remuneration was being assessed. Certainly salvors did not feel encouraged – which was the principle intention of the Salvage Convention - and neither were the owners or the property or indemnity underwriters.

To resolve the problem all sides of the industry got together and came up with a solution to resolve the problems that arose under Article 14. Following discussions within the industry, a new voluntary agreement emerged. The SCOPIC Clause (Special Compensation P&I Club Clause). This clause (the word "Clause" is perhaps a misnomer – for there are 15 sub clauses and three appendices of almost equal length) has been accepted by all sides of the industry and is now widely used by professional salvors as an additional clause to LOF 2000, the latest version of Lloyds Open Form.

The SCOPIC Clause, when used, replaces Article 14 of the Salvage Convention and provides a more easily calculable safety net of a minimum payment without many of the uncertainties associated with Article 14. Indeed it can be calculated on a day to day basis. Whilst no specific mention is made of it, its provisions are such that it will largely only be used when there is an actual threat of damage to the environment for if no such threat exists, the owner is able to withdraw from its provisions. A number of other checks and balances, which are too complex to describe in this paper, are built into to protect the interests of everybody, whilst ensuring there is an adequate safety net to protect the salvor and encourage him to go to the assistance of ships of low value which actually threaten damage to the environment.

The SCOPIC clause is comparatively new having only been introduced in August 1999. It has, however, to date worked well and whilst there were initially a few

glitches which result in an amendment in September this year - entitled SCOPIC 2000 - all sides of the industry are hopeful it will resolve the problems. Time will tell.

That is the position today. To summarise – whilst the traditional salvage principle of "no cure - no pay" has whenever there is a threat of danger to the environment been ameliorated by Article 14 and the SCOPIC clause, these do no more than provide a minimum reward or safety net. They are encouraging to the Salvor by reason of their ensuring a minimum payment which will not result in a loss. They are not encouraging, like traditional salvage, by the prospect of a pot of gold. Salvors still look to earn their living from traditional salvage awards which are still assessed as in years past save for the additional new factor mentioned above – the skill and efforts of the Salvor in preventing or minimising damage to the environment. As proved to be the case in the "NAGASAKI SPIRIT" this is an important new element but the Salvors reward is still restricted by the value of the property salved. By preventing damage to the environment the Salvor may save millions but his reward is based on a much lesser sum – the value salved.

For hundreds, if not thousands of years salvage has been encouraged by high rewards whenever there is a success. By contrast, whenever the salvor protects the environment, whilst he is guaranteed a minimum sum for his effort, unlike salvage, he is not encouraged by generous awards. There is no real incentive for professional salvors to gear up with the appropriate equipment for dealing with environmental threats. Such encouragement lies where it has always lain - with the traditional salvage award. For many, including the writer, this seems strange bearing in mind the value placed today upon the environment.

It is important to note that the Salvage Convention of 1989 and nearly all standard salvage contracts such as Lloyds Open Form only impose a duty on the salvor (and the ship owner) to prevent or minimise damage to the environment in performing the salvage operations. It does not impose any duty to clean up pollutants once they have

been spilt. Salvage can be the single most effective way of preventing damage to the environment because in the normal course of events it seeks to keep the oil in the ship, thus avoiding the clean up operations which are far more difficult and expensive, but it must be recognised that once the oil has been spilt and nothing more of value can be obtained from it, it ceases to be salvable within the meaning of the salvage contract. Thus a professional salvor engaged on a salvage contract can be expected to use his best endeavours to prevent the escape of oil from the ship – which will probably include the provision of an oil broom around the casualty – but is not concerned with the oil which escapes from the immediate area of the casualty. That is for other contractors or other contracts.

Finally, I would like to say something about Responder Immunity insofar as it effects the salvage industry. The salvor, like many others here today, only becomes involved when someone else is in trouble. They are one of the emergency services available in the event of a casualty. Most people recognise that Salvors, like others involved in marine emergency services, often have to work in very difficult circumstances in bad weather with a resultant threat to life and limb and are required to make quick, sometimes instant, decisions without having the opportunity to investigate all the circumstances or given the fullest consideration to the consequences. Instant action is frequently required and as a result most recognise that in these circumstances it is only right to give the Salvor, or anyone involved in rescue services, some protection from potential liability. This is recognised in the CLC Convention and the Hazardous and Noxious Substances Convention which impose strict liability on the ship owner but whilst preserving the ship owners right of recourse in the event of negligence on the part of the rescuers, protect those rescuers from any action by third parties. However, there are two matters which deviate from this principle and which are currently of concern to professional Salvors and no doubt others involved in the "rescue business".

The first is in respect of the Water Resources Act which gained international fame following the prosecution of the Milford Haven Harbour Authorities after the "SEA

EMPRESS" casualty in 1998. Salvors had not appreciated the relevance of this Act to their business until the successful criminal prosecution of the Milford Haven Harbour Authority under the terms of the Act. They were then horrified to find that anyone who had caused or even contributed to pollution, regardless of whether or not there was any fault, could be criminally liable for a fine of substantial sums. Professional salvors saw themselves right in the firing line for there were many circumstances which could arise and result in prosecution under the Act. If, for instance, a tug placed a tow line aboard a casualty which was drifting to the shore and the severe sea conditions, without any fault on the part of the tug, caused that tow line to break, the Salvors, could have imposed on them a criminal liability. To take another example, to refloat ships, oil cargoes are frequently transferred to another ship via a pipe line provided by the salvors. If a sudden storm blew up and the pipe line broke causing pollution, they would have been a cause of the pollution and thus liable under the Act.

Fortunately, the British Government were quick to realise that any such prosecution would be a positive disincentive to any salvor to proceed to the assistance of another, with the result that the Shipping Minister publicly gave an undertaking that the government would not prosecute a salvor under the Act and would ensure that appropriate changes were made to protect the Salvor and other rescuers. So far as I am aware, no changes have yet been made to the Water Resources Act but hopefully the promise of the Shipping Minister still holds good.

On another front, a matter which should concern any professional involved in any rescue operations, is a new Convention which is currently wending its way through the legal committee of IMO and which comes up for discussion at a full diplomatic conference in March next year. The Bunker Convention seeks to emulate the CLC and HNS Conventions by imposing strict liability on a ship owner for damage caused by the leakage of bunker fuel oil, which, perhaps surprisingly, has to date avoided the eagle eye of the international legislators despite fuel oil being one of the most insidious forms of pollution. The first draft of the new Convention contain the same protections enjoyed by rescuers under the CLC and HNS Conventions protection from

claims from third parties whilst retaining the Shipowners' right of recourse in the event of negligence. However during the course of its work the legal committee struck out this protective provision and, so far, have steadfastly refused to re-instate it, despite protests from industry. The matter is of considerable concern, not only to professional salvors but to other bodies including the International P&I Group, ITOPF Intertanko Ports and Harbour Authorities and others.

The salvage industry is firmly of the view that its omission will be a positive disincentive to any salvor involving himself in any casualty resulting in extensive bunker oil pollution. The incentives for going to the assistance of such casualties are already marginal because of the potential low value, which limits the generosity of the award and are only ameliorated, to a degree, by the safety net of Article 14 or the SCOPIC clause which si9mply makes sure they do not make a loss. The thought of third party claims will be a positive disincentive. People who have suffered damage as a result of oil pollution are naturally angry, and very often do not know a lot about the whys and wherefores of how it occurred. Their first line of attack is against the ship owner but when ever this is repulsed, seems doubtful, or there appears to be insufficient funds available to pay all claimants, perhaps due to limitation, it would be natural for them to hit out at anyone who happen to be present - including the Salvor or any other rescue. The salvor may well have a good defence to such a claim but he simply does not want to get involved. Not only because of the high expense of litigation but also because of the time and trouble to his employees in resisting any claim. It is to be hoped that good sense will prevail at the diplomatic conference and that the limited protection afforded by the CLC and HNS Conventions will be reintroduced in the Bunker Draft Convention but it is clear that a lot of noise will have to be made before it is.