

## **HOW THE SALVOR CAN REDUCE THE SHIPOWNER'S RISK EXPOSURE AND LIABILITIES**

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### **INTRODUCTION**

The marine salvor reduces the shipowner's risk exposure and liabilities by providing a 24/7 casualty response service with a particular focus on pollution prevention. The salvor shares the owner's desire for a successful outcome, although some factors – such as politics and the weather – are beyond the control of even the most resourceful Salvage Master. This paper identifies issues and initiatives which have an influence on the salvor's ability to recover property and prevent costly and destructive pollution events.

One factor promoting an effective response is the use of an appropriate contract. Lloyd's Form, no cure – no pay, is not appropriate for all salvage work, but it is exactly what is needed when a serious casualty arises and poses a major pollution threat.

Lloyd's Form has been in use for nearly a century. It has been revised many times to ensure it remains fit for purpose. Lloyd's Form is an unusual contract, designed specifically for emergency situations at sea. When Lloyd's Form is agreed (and this may be done verbally) all commercial issues are set aside, in the interests of confronting the emergency and bringing it under control without delay. Commercial matters are addressed later, when the parties may settle amicably or go to arbitration, using a system in which Salvage Awards are made by impartial and highly experienced arbitrators.

Lloyd's Form has great relevance in a world displaying zero tolerance of pollution. This contract is the ideal basis for immediate intervention whenever a spill threat arises. There is now no margin for prevarication or delay; the salvor's role is to respond immediately and decisively.

The International Salvage Union's 52 members are responsible for over 90 per cent of all marine salvage activities worldwide. The ISU's annual statistical survey began in 1978. These statistics show that Lloyd's Form remains the most frequently used marine salvage contract. In the period 1978 to 2004, ISU salvors responded to 4,987 casualties. Over half the services (2,644) were performed under Lloyd's Form.

Lloyd's Form requires the salvor to use his best endeavours to recover property (ship and cargo) and prevent pollution. This latter task is now the salvor's primary role. When Lloyd's Form is agreed, the responsibility for a successful outcome passes to the salvage contractor. The Salvage Master has command of the operation but he will work closely with many other parties, including the authorities ashore.

The vessel owner also has obligations under Lloyd's Form. He is expected to furnish the salvor with a range of essential information, including the ship's plans and cargo manifest.

In promoting a timely response, Lloyd's Form is a contract that serves the public interest. It recognises the concerns of governments responsible for the protection of coastal and inshore waters.

### **The last line of defence**

Vessel owners, liability insurers, property underwriters, governments and the public at large now recognise the salvage contractor as the last line of defence when things go wrong. The shipping industry's successes in improving safety and reducing pollution are rarely acknowledged, but these improvements are both real and substantial. Applying the International Tanker Owners' Pollution Federation benchmark of 5,000 barrels as a "significant spill", the number of major pollution incidents has fallen dramatically in recent decades (from an average of 24 a year during the 1970s to four or five annually in the present decade).

This improvement is confirmed in the ISU's spill prevention statistics. The ISU introduced its annual Pollution Prevention Survey in 1994. During the first five years the annual tonnage of pollutants recovered exceeded one million tonnes – in some years approaching two million tonnes. Subsequently, the total fell back to around half a million tonnes annually. This is due, in the main, to the absence of laden VLCCs in the salvage workload.

Nevertheless, over the past 11 years ISU salvors assisted 2,354 vessels and recovered 11.7 million tonnes of oils, chemicals and other pollutants. This comprises 9,371,088 tonnes of crude oil, 658,969 tonnes of chemicals and 741,835 tonnes of bunkers. The total volume of recovered oil is equivalent to more than 130 spills of Prestige magnitude – a single event that cost over one billion dollars. Typically, ISU salvors perform over 20 tanker salvage operations every year (24 in 2004).

The latest ISU Pollution Prevention Survey, for 2004, recorded 266 salvage services following fires, collisions, groundings, structural failures and other marine accidents. These ships were laden with 734,582 tonnes of oils, hazchems and other pollutants.

Today, the salvor's ability to keep the pollutant in the ship is seen as crucial. It is widely understood that, even in the most favourable circumstances, it is rare to recover 10 per cent of a spill during a subsequent clean-up.

### **Enhancing response efficiency**

The ISU seeks to raise awareness of measures which promote response efficiency. Many are concerned with cooperative working: salvor to salvor and between salvor and owner. Salvage contractors often join forces when responding to an emergency. Increasingly, this involves a major contractor working with a local salvor who is best placed to respond during the critical early hours of an emergency. This will ensure that the response is not delayed as the international salvor mobilises personnel and equipment to the scene.

Another form of cooperation centres on the relationship between salvor and owner. Timely provision of essential information is very important. This will relate to the casualty and its condition, together with the nature of the cargo – including advice on the presence or otherwise of hazchems.

A constructive dialogue between the Salvage Master and the Master of the casualty can contribute much to a successful outcome. The Salvage Master can offer guidance which may reduce consequential damage to the ship. He may also be able to advise the Master on steps which can be taken by the crew to prepare the casualty for salvage.

### **Casualty management and best practice**

During late 2003 the International Maritime Organization (IMO) introduced guidelines on places of refuge, in the aftermath of the catastrophic Prestige oil spill 12 months earlier. This tanker was denied refuge and the decision resulted in the total loss of ship and cargo.

The ISU welcomed the IMO initiative but felt it did not go far enough. Access to a refuge may be of fundamental importance when attempting to avoid a spill disaster, but many other aspects of successful marine emergency response deserve consideration. Accordingly, the

ISU has proposed the adoption of more comprehensive guidelines embracing the entire casualty management process.

The ISU plans to produce draft International Guidelines on Marine Casualty Management for the IMO's consideration. The maritime community needs a best practice model for the avoidance of total losses and spills which can cost billions. These broader guidelines would be structured in a way that assists in the early identification of the Best Environmental Option.

The new guidelines will stress the importance of including fully detailed salvage inventories in national marine casualty response plans. This will provide for prompt access to salvage assets held at local, regional, national and international level. An early inspection of the casualty is yet another vital issue. It is not unusual for salvage equipment to be held up in customs and it is often difficult to locate officials and obtain clearance to board the casualty.

These guidelines will also state that due weight should be given to the expertise of the Salvage Master. They will also deal with the important matter of casualty risk assessment and the interaction of many variables, including: ship type, cargo carried, casualty status and degree of damage, proximity to the coast, the availability of main engines and, of course, the position of the nearest tug. The guidelines will endorse the UK's highly effective SOSREP (Secretary of State's Representative) system as representing best practice in command and control.

The guidelines will underline the benefits of standby salvage arrangements, which reduce reliance on a "tug of opportunity" when an emergency occurs in busy and environmentally sensitive waters. The guidelines will also underline the inherent value of close cooperation between salvors and other response interests.

In the ISU's view, guidelines with comprehensive scope would do much to encourage the delivery of a fully integrated response, involving vessel owner, salvor, Coastal State and other parties.

### **Barriers to success**

Lack of responder immunity is a serious barrier to successful salvage and spill prevention. There is also the disturbing trend favouring the criminalisation of marine accidents. The ISU

was dismayed when the European Parliament backed criminalisation during its consideration of a new EU Directive. In doing so, Parliament ignored the fact that criminalisation conflicts with the existing obligations of EU Member States under IMO conventions.

Hardening attitudes require ISU salvors to be cautious when contemplating their involvement in emergency situations which could end in pollution. The new EU measures may force ISU salvors to back away from assisting "difficult" casualties in European waters. Such developments are highly undesirable. One option for the salvor is to demand immunity from prosecution from the Coastal State directly concerned and neighbouring Coastal States. The problem is that this means delay.

Any prosecution of a salvor using his best endeavours to solve someone else's problem would be enough to damage the confidence of salvors worldwide. As things stand, they already think twice before intervening in waters controlled by jurisdictions with a reputation for hostility towards seafarers and emergency responders. They think of the obvious examples: the harsh imprisonment of Prestige Master Captain Mangouras and the unjust detention of crew from the tanker Tasman Spirit and Salvage Master Nicolas Pappas.

Against this background, salvors meeting in September 2004 decided that the ISU would oppose working in any jurisdiction detaining salvage personnel without just cause. Unfortunately, criminalisation continues to spread. Canada, for example, recently introduced measures which criminalise marine accidents.

A number of unhelpful regulatory moves also concern the ISU. One unwelcome development concerns ship-to-ship (STS) transfers. The salvor's ability to perform the emergency transfer of cargo and bunkers is central to the task of protecting the marine environment. A single STS may involve the transfer of hundreds of thousands of tonnes of crude oil. During the period 1994-04 ISU salvors performed 232 STS operations. There were 36 in 2004, the largest involving the transfer of 80,000 tonnes of crude oil from a tanker involved in a collision in the Arabian Sea.

A tanker STS is a significant undertaking. It requires big ship expertise, a range of specialised equipment and enough time to complete the task in a safe and efficient manner. The availability of a sheltered location reduces risk. An STS can be performed in open sea conditions, given good weather, but the risks are greater in the absence of shelter.

Obtaining permission to take a casualty to a place of refuge is never easy, especially when there is an active threat of pollution. The Spanish denied shelter to the Prestige and ordered the ship out. Within a few days this laden tanker broke up, resulting in the loss of 77,000 tonnes of cargo and a pollution catastrophe.

It may be no coincidence that Spain is co-sponsoring proposed new controls over STS operations. These are now being considered by the IMO's Marine Environment Protection Committee. Ironically the proposals – from Spain and Mexico – could be used to stop a salvor preventing the next Prestige.

IMO has now set a deadline of 2007 for the completion of work on MARPOL amendments which would provide new powers for Coastal States to control STS activities beyond the territorial sea. The main thrust of this initiative appears to be the desire for more control over routine, rather than emergency, STS activities. The ISU is concerned, however, that these new powers might be abused. They could be used to justify the rejection of a legitimate request for shelter, in order to perform an emergency STS in conditions of relative safety.

Spain and Mexico want to use the new powers to restrict or ban STS operations in Special or Particularly Sensitive Sea Areas. Yet these are the areas most vulnerable to accidental pollution! The salvor's freedom to perform an STS on a laden tanker at a sheltered location is fundamental to the protection of these areas. In the ISU's view, these powers, if introduced, would almost certainly be used to legitimise the denial of safe havens for ship casualties.

Salvors are also concerned that new STS controls could be used to restrict efforts to pump bunkers from casualties. Most salvage operations now begin with the removal of bunkers. The application of new STS restrictions to bunker transfers could create serious problems and put the marine environment at greater risk.

Salvage contractors are uneasy as they lack responder immunity under the IMO's Bunker Spills Convention, which was adopted in 2001. They are at risk of prosecution if a bunker spill occurs during a salvage.

Another negative concerns the IMO's Legal Committee. The IMO introduced its refuge guidelines quickly by excluding the difficult and highly complex issues surrounding liability and security guarantees. These outstanding matters were referred to the Legal Committee. In mid-2005, however, this Committee refused to grant priority to these issues (as proposed

in an expert report from the Comité Maritime Internationale). This is why the ISU's work to develop Casualty Management Guidelines has now taken on a new significance.

Meanwhile, salvors struggle with the problem of "paying for preparedness". It is expensive to maintain a 24/7 response capability. The salvage workload continues to shrink as shipping's safety and environmental record improves. During the past 10 years the number of Lloyd's Form contracts has fallen from more than 300 annually to the current level of fewer than 100.

Accidents and spills still occur, albeit less frequently. Public and political expectations have never been greater. Salvors are expected to be ready to respond, at any time and at any location, even if the financial risks are too great under a traditional no cure – no pay contract.

The salvor's remuneration is still capped by its historic relationship to "salved value", the value of property recovered. Pollution prevention is considered when a Salvage Award is fixed, but this element ("the skill and effort of the salvor in preventing damage to the environment") is only one of 10 criteria considered by the arbitrator. It has no significant impact on the financial outcome, despite the fact that pollution defence is now the salvor's main mission.

This has prompted the ISU to develop a new concept: parallel remuneration. Under this system, Lloyd's Form would continue to reward property recovery, but with a distinct Environmental Award for pollution prevention. Many problems surround this concept, including the question of funding. Salvors and liability insurers would like to see the ultimate beneficiaries of pollution defence – Coastal States – assume responsibility for funding, but they are likely to be very reluctant to do so. Yet existing pollution compensation funds may find a secondary role: rewarding salvors who successfully complete operations which prevent pollution and, therefore, reduce the funds' liabilities.

A second stream of income from Environmental Awards would revitalise salvage. This industry earns less than USD 100 million annually from casualty salvage. Extra income would help to maintain emergency services and allow investment in improved operational capability.

To conclude, fresh regulatory initiatives are unlikely to further reduce the small number of major marine emergencies which continue to occur year by year. No amount of regulation can eradicate human error and the natural perils of ocean transportation. The main scope for

further reduction of risk is the reinforcement of the last line of defence – the cover provided by marine salvors.

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