

Comité Maritime International

SALVAGE CONVENTION

RESPONSES OF THE ITALIAN MARITIME LAW ASSOCIATION
TO THE QUESTIONNAIRE TO MEMBER ASSOCIATIONS

1. Article 1 in the Salvage Convention 1989 contains the following definition:

“For the purpose of this Convention:

(d) Damage to the environment being substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.” (Emphasis added)

Question:

- 1.2 Do you consider that the words emphasised above in the definition 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 which have been quoted above (eg “where ever such may occur”/“exclusive economic zone”/“territorial sea”) should replace those words in Article 1(d) of the Salvage Convention?

Response:

In the CMI Report to IMO (document LEG 52/4, Annex 2¹) prepared by Bent Nielsen and approved by the CMI Assembly held on 6th April 1984 the following explanation of the such words was given :

The use of the words “coastal or inland waters” serves to make clear that cases where there is only a risk of damage to the environment on the high seas are excluded. This is felt to be important since there would often be a possibility of speculative and inflated claims based on loose assertions that general environment damage to fishing or other ecology was involved. It must be stressed, however, that damage in coastal waters emanating from a ship in danger on the high seas is not excluded.

It must be pointed out that at that time the 1984 Protocol to the CLC 1969, by which the scope of application of the CLC had been extended so to include also the EEZ, had not yet been adopted (it was adopted on 25th May 1984). However its adoption, even if the Protocol had not entered into force (it never did, and was replaced by the 1992 Protocol), was not considered by the Salvage Conference in 1989, when a question as to the meaning of the words “areas adjacent thereto” was asked by Chile². On the invitation of the Chairman, Dr. Mensah explained that that wording had been adopted

¹ See also “The Travaux Préparatoires of the 1989 Salvage Convention”, p. 111

² The question was as follows (Travaux, p. 114):

“Can thus be territorial waters, Exclusive Economic Zone or what? I don't know what happens in the open sea but I don't consider the open sea to be an adjacent area”.

pursuant to a decision of the Legal Committee at its 11th session and quoted the following from the report:

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.

It is the view of the Italian MLA 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 an extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured.

Questions:

- 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?

Response:

There are no Italian reported cases in which the word “substantial” has been interpreted. In the CMI Report to IMO (document LEG 52/4, Annex 2³) the following explanation of the such word was given :

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.

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 them⁴:

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

³ See also “The Travaux Préparatoires of the 1989 Salvage Convention”, p. 111.

⁴ “The Travaux Préparatoires of the 1989 Salvage Convention”, p. 117.

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 people to do nothing where something should be done.

That suggestion was supported by DDR, Australia, Zaire and Kuwait, but the majority of the delegations, including USSR, Greece, United Kingdom and Italy, were in favour of the retention of those words without giving any clear explanation of their opinion.

It is the view of the Italian MLA that, besides the difficulty of distinguishing between damage that is substantial and damage that is not substantial or incident that is major and incident that is not major, and the difficulty of finding words that would enable to draw a clear border line between various categories of damage or incidents, the very basis of any such distinction is disputable. In fact the same damage may be considered to be substantial in one country and not in another in view of the different economies and the same holds for incidents. In addition no such distinction is made in the CLC, nor is it made in the HNS and in the Bunker Conventions.

Question:

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?

Response:

For the reasons stated, it is suggested to delete the words “substantial” and “major”. An additional argument in support of such deletion is that no parallel distinction is made in respect of the notion of danger.

Question:

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”)?

Response:

We have some difficulties in understanding this question. If we take the example of loss of containers at sea, what would the subject matter of the services be? The action to prevent the loss? The action of collecting the containers? What effect would such action have on the right to a reward? Would that justify an enhancement of the reward on account of the increased importance of the criterion set out in paragraph (1) (b) of article 13? Would such action justify the application of article 14? If so, would the Montreal compromise survive? We are afraid that by attempting to widen the notion of damage to the environment to events that have nothing to do with the environment we would trespass into very dangerous grounds.

It is thought that by allowing the relevance of a danger external to the vessel or the property in whose favour the services are rendered the very notion of salvage would become uncertain. For example, if such an extension were allowed, the removal of a wreck causing danger to navigations might be treated as a salvage operation in favour of all vessels that might navigate in the waters close to the wreck.

Coming to the last part of the question, we do not think that events that could constitute dangers to navigation (this would be the case for a wreck) would come within the

meaning of “similar major incidents”, for those words are related to damage to the environment, and therefore the major incidents that are similar to fire and explosion are incidents that are of prejudice to the environment and not to the navigation.

Question:

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?

Response:

We do not think so and are of the view that any attempt to widen the definition would endanger the survival of the Montreal Compromise and would give rise to unpredictable consequences and a great increase in litigation.

Question:

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

Response:

The only change that in our opinion might be considered in case an amendment to the Salvage Convention (by way of a Protocol?) were deemed worthy of consideration (we suggest this would require very careful thoughts) is that referred to under paragraphs 1.2-1.4 above.

2. Article 5 in the Salvage Convention 1989 provides as follows:

“Salvage operations controlled by public authorities

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

Question:

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

Response:

There is no provision in Italian law that prevents public authorities that perform or organise the performance of salvage operations to claim a salvage reward but to our knowledge this has never happened. The Italian Navy has always considered salvage services as services rendered for a public interest and never claimed any reward. There has been only an old case concerning a claim for salvage reward of an Admiral of the Italian Navy whose warship had rendered salvage services to a merchant vessel. His

claim was rejected by the courts of first and second instance (Tribunal of Rome 6 June 1938, 1938 Dir. Mar. 324 and Court of Appeal of Rome 5 July 1939, 1939 Dir. Mar. 551) and finally by the Court of Cassation (with judgment of 17 May 1941, 1941 Dir. Mar. 362) on the ground that an officer of the Navy who with his vessel renders salvage services performs a public activity and is not entitled to any remuneration.

Question:

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

Response:

We consider this provision to be appropriate and we are of the view that it should be left unaltered.

3. **Article 11 in the Salvage Convention 1989 provides as follows:**

Co-Operation

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

Question:

- 3.2 Has your country ratified the Salvage Convention 1989?

Response:

Italy has ratified the Convention on 14 July 1996.

Question:

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

Response:

No.

Question:

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

Response:

Not applicable.

Question:

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.

Response:

In our opinion that is neither necessary nor advisable. Article 11 is drafted in general terms and therefore would at any time be applied on the basis of the laws or the practice in force. If it were amended so to include a reference the IMO Guidelines, it would then be superseded if a different instrument were adopted, for example a convention.

4. **Article 13 of the Salvage Convention 1989 establishes the “Criteria for Fixing the Reward”. Paragraph 2 of Article 13 provides as follows:**

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 salvaged 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.

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?

Response:

There is no provision in this respect in Italian law. Italian jurisprudence has been generally of the view, under the 1910 Salvage Convention, that the owner of the salvaged vessel is bound to pay the whole of the salvage reward, and has a recourse action against the owners of the cargo. But that cannot be the case anymore under the Salvage Convention 1989.

Question:

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?

Response:

Why for a containership? Is the specification suggested for a possible difficulty in identifying cargo property interests on a containership? If bills of lading are issued the problem should not arise otherwise the question may also extend to vessels carrying general cargo or to ro-ro ferries.

The practice is for the average adjusters to approach cargo insurers in order to obtain guarantees and for salvors not to release the vessel and cargo until security is obtained.

In any event, if it will be decided to change the present rule, that it should be done in respect of all vessels.

5. **Article 14 in the Salvage Convention 1989 provides as follows:**

“Special Compensation

1. *If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.*
2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.*
3. *Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).*
4. *The total special compensation under this article shall be paid only if and to the extent that such compensation is granted than any reward recoverable by the salvor under article 13.*
5. *If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.*
6. *Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.”*

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).

Response:

We are concerned that a possible radical change of article 14 might give rise to a great many problems and that, if adopted, might give rise to difformity, certain Sates adopting the Protocol and others keeping the original text. If really this provision has given rise to problems (we believe that the House of Lords is responsible for some of them) we would rather favour a simplified wording of that article, without adopting such a revolutionary alternative as that of an environmental award.

As regards the “environmental award” , the Italian MLA agrees with the comments made by its President in his paper “Places of Refuge and certain issues relating to salvage, financial security and authorities of the coastal State” delivered at the XII Congress on Maritime Law-XX Anniversary of the Instituto Iberoamericano de Derecho Marítimo (Sevilla 13-16 November 2007) quoted below:

Probably because of the potential liability of salvors vis-à-vis Coastal States in case the casualty must be taken to a place of refuge, a proposal was recently made on behalf of the International Salvage Union to replace the special compensation of art. 14 of the Salvage Convention with what is described as an “environmental award” which is due in the same situations in which the special compensation is payable, but is due in addition to the reward payable under art. 13, apparently irrespective of whether or not the amount of the art. 13 reward is lower of the salvor’s expenses.

The “environmental award” thus becomes a second reward, payable by the shipowner only and, according to the proposal, becomes due irrespective of the salvage operations having prevented or minimized damage to the environment. If that happens, it will become only one of the criteria for the assessment of the environmental award.

It is thought that this proposal would disrupt the Montreal compromise, that was the condition for a consensus on the text of articles 13 and 14 of the Salvage Convention since it made possible the inclusion among the criteria for the assessment of the reward under art. 13, payable by the vessel and her cargo, whether dangerous or not, of the skill and efforts in preventing or minimizing damage to the environment and of the separate allowance to the salvor, when the art. 13 reward is insufficient to cover its costs, of the special compensation, payable by the shipowner only. In fact under the new proposal the shipowner and its P&I Club would have to pay a much greater compensation, while at the same time the criterion under art. 13(1)(b) would disappear.

6. Article 16 of the Salvage Convention 1989 provides as follows:

“Salvage of persons

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

Question:

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

Response:

We are not so sure that under the 1910 Convention claims for life salvage should be made against the owners of the property salvaged. Article 9 of that Convention had in fact in its paragraph 2 a provision almost identical to that of article 16.2 of the 1989 Salvage

Convention. In any event we are of the view that this provision is sound, and has an important moral justification: in fact the hope of a salvage reward may induce salvors to salvage property rather than life and for the salvor saving lives and not property it may be quite a problem to recover something from the owners of the cargo, in particular when the owners of the cargo are many. In any event that would not be anymore a share of the salvage reward that has been paid or is payable to the salvors of the property, but rather an additional sum.

7. Article 20 of the Salvage Convention 1989 provides as follows:

“Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.”

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?

Response:

As previously stated, we are not of the opinion that article 14 should be radically changed, nor are we of the opinion to create any special lien under the 1989 Convention.

8. Article 27 of the Salvage Convention 1989 provides as follows:

“Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.”

Question:

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

Response:

We do not think this to be required. We suggest that unnecessary changes to a Convention that has been very successful ought to be avoided. It should also be considered that although London is the centre of the shipping world and salvage companies operating internationally refer to arbitration in London, quite many salvage operations are made by local tug companies, most of them operating in ports. Such salvage companies either institute judicial proceedings before their Courts or, if the salvaged property agrees, local arbitration proceedings. It should therefore be kept in mind that an international convention must be tailored for all jurisdictions.

9. General – Question:

9.1 Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

Response:

Our general opinion is that it is too early for a possible review of the 1989 Salvage Convention and that the Convention should be tested for a longer time before deciding whether any change might be convenient. So far a provision that in our opinion might deserve particular attention and a thorough exchange of views on possible improvements is article 14.

Another provision that ought to be the subject of consideration by the CMI is article 21

Pursuant to paragraph (1) the owner of each property salvaged is bound to provide security for the share of the reward due by it.

Pursuant to paragraph 2 the owner of the salvaged vessel has only the obligation to use his best endeavours to ensure that the owners of the cargo provide satisfactory security. If, for example, the owner of the vessel is also the carrier, it is likely that such best endeavours entail his obligation to refuse delivery of the cargo unless the owners thereof provide such satisfactory security. But it is unclear in what such best endeavours should consist in case he is not the carrier: the vessel may have been bareboat chartered and then time chartered and the carrier may be the bareboat charterer or even the time charterer. In such cases the owner of the vessel has no control over the cargo. It is submitted that the only thing he can do is to intimate the bareboat charterer or the time charterer to refrain from delivering the cargo unless satisfactory security is provided. But the bareboat charterer or time charterer may not take proper action. What would be the position of the salvor in such case? Under the Convention he would have no claim against the owner if it will be found out that he did use its best endeavours. Nor would he under the Convention have any claim against the bareboat or time charterer. It is submitted that a better protection of the salvor should be ensured. One way of doing that would be to provide that the owner of the vessel has the obligation not to deliver the cargo or to cause that the cargo be not delivered unless satisfactory security is provided otherwise he would be bound to pay the entire salvage reward.

Question:

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

Response:

The success of the 1989 Convention is also proved by a significant reduction of litigation.

Salvage cases decided by Italian Courts after the entry into force of the 1989 Salvage Convention (14th July 1996) and reported have been four:

- *SE.MAR.PO. v. Finagen S.p.A. – The “Tebro”, The “Ariete” and The “Gold”* (Tribunal of Rome 23 January 2003, 2004 Dir. Mar., 252)
- *Rimorchiatori Napoletani S.r.l. v. Trevi – The “Fittone”* (Tribunal of Taranto 10 January 2003, 2005 Dir. Mar., 1353)

- *Rimorchiatori Riuniti Porto di Genova S.r.l. v. Fincantieri Cantieri Navali Italiani S.p.A. – The “Knossos Palace”* (Tribunal of Genoa 8 November 2005, 2007 Dir. Mar., 501)
- *Moby S.p.A. v. D’Amico Società di Navigazione S.p.A. - The “Zohra”* (Tribunal of Cagliari 17 December 2008, 2009 Dir. Mar., 524).