Developments in Marine Salvage

1. LOF 95

The 1989 International Salvage Convention entered into force on 14th July 1996. The main effect of this Convention is to move beyond the simple “no cure, no pay” principle and make provision for an enhanced salvage award to reward action taken in attempting to prevent or minimise damage to the environment. The Convention thus allows the salvor to be awarded special compensation - the so-called “Article 14” award - in the event that the salvaged fund is insufficient to properly reward the salvor, following a casualty involving the risk of damage to the environment.

These particular provisions were already incorporated in LOF 90 pending the introduction of the Convention. The provisions of LOF 90 were highlighted in Vol 13 of "Sea Venture" on page 58. Following the coming into force of the Convention, these provisions now apply even in the absence of contractual agreement between the parties in all actions brought in those countries which are signatories to this Convention.

The Convention is currently in force in:

- Australia
- Canada
- China
- Denmark
- Egypt
- Georgia
- Greece
- India
- Iran
- Ireland
- Italy
- Marshall Islands
- Mexico
- Nigeria
- Norway
- Oman
- Saudi Arabia
- Sweden
- Switzerland
- United Arab Emirates
- United Kingdom
- U.S.A

Whilst LOF 90 incorporated the main provisions of the Salvage Convention, it did not apply the whole Convention, because there are some parts which are not appropriate for contractual agreement. For example, the Salvage Convention provides the master with wider authority to contract on behalf of cargo interests than existed before the Convention became part of English law. In theory at least, the master's authority to contract on behalf of cargo interests is more limited under LOF 90. In order to avoid these and other potential conflicts between LOF 90 and the Salvage Convention (now incorporated into English law under the Merchant Shipping (Salvage and Pollution) Act 1994), LOF has been further amended to incorporate all provisions of the Convention. A copy of the latest revision - LOF 95 - is enclosed with this edition of "Sea Venture".

A number of other minor amendments to the earlier version have been included in LOF 95, such as a 2 year time limit for demanding security for special compensation, the right to recover the costs of providing such security, if unreasonably demanded and a provision for interest to be charged on the costs of a Lloyd's arbitration.

2. Salvors' remuneration

Under Article 14 of the Lloyd's form (and now the 1969 Salvage Convention), special compensation is defined as the salvors' "out-of-pocket" expenses reasonably incurred 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, paragraphs 1(h), (i) and (j) i.e. promptness, availability and state of readiness. The definition of "fair rate", as referred to in this article has long been the subject of dispute, salvors arguing that it should include an element of profit, and shipowners that it should not. This argument has recently been resolved by the House of Lords in their 6th February 1997 decision in the case of the "Nagasaki Spirit". They decided that a fair rate means "a rate of expense, which is to be comprehensive of indirect or overhead expenses and takes into account the additional cost of having resources instantly available", but not any element of profit. It was held that any incentive to the salvor should be taken into account in the "fair rate" provided for in Article 14.2, and not in the "fair rate" separately determined under Article 14.3. However, it still remains to be seen how, in practice, a "fair rate" for salvor's equipment and personnel will be calculated.

3. The Fund

Discussions have taken place recently to decide the extent to which amounts paid for services under LOF should be allowed against the International Oil Pollution Compensation Fund - the "Fund" - given that most salvage operations have a dual purpose of (i) salvaging property and (ii) protection of the environment. The agreement between property and liability insurers is that all Article 13 costs should be covered by property insurers, and all Article 14 costs by liability insurers.

Special compensation under Article 14 was specifically designed to encourage salvors to take action to prevent or minimise damage to the environment. The International Group and other bodies representing shipowners thus suggested that, regardless of circumstances, all Article 13 costs should be excluded from the Fund, and all Article 14 costs allowed to the extent that such costs exceeded the vessel's CLC limits. This suggestion would have involved a change in the Fund Committee's approach to such matters.

Historically, the Fund has applied the "primary purpose" test in order to determine whether salvage operations fall within the definition of "preventive measures" and thus qualify for recovery from the Fund. Under this test, if the "primary purpose" is to prevent pollution damage, then costs in excess of the vessel's CLC limit are recoverable from the Fund. In cases where the activities have a "dual purpose" - i.e., both preventing pollution, and salvaging ship and cargo, then the so-called "dual purpose" test is employed. Thus, if it is not possible to establish the "primary purpose" of the salvors' activities, or if the salvage operations could have been undertaken more cheaply without any attempt to prevent pollution, then the costs are apportioned (according to the facts) between salvage on the one hand, and pollution prevention on the other, only the latter being recoverable from the Fund.
In February 1997, the Fund Committee decided to maintain its historical approach, and not to adopt the alternative proposals put forward. Thus, each case will continue to be examined on its merits, and the "primary purpose" or "dual purpose" tests, as outlined above, will still be employed. It remains the case, therefore, that Article 14 expenses in excess of the vessel's CLC limit may not be fully recoverable from the Fund, unless the "primary purpose" of the operation has been to prevent pollution damage.

4. Code of Practice

The following Code of Practice has been agreed between the International Group of P&I Clubs and the International Salvage Union following the entry into force of the 1989 Salvage Convention:-

"In the spirit of co-operation, the following Code of Practice is agreed between the ISU and the International Group of P&I Clubs in relation to future salvage services to which Article 14 of the 1989 Salvage Convention may be applicable.

The salvor will advise the relevant P&I Club at the commencement of the salvage services, or as soon thereafter as is practical, if they consider that there is a possibility of a Special Compensation claim arising.

The P&I Club may appoint an observer to attend the salvage and the salvors agree to keep him and/or the P&I Club fully informed of the salvage activities and their plans. However, any decision on the conduct of the salvage services remains with the salvors.

The P&I Club, when reasonably requested by the salvor, will immediately advise the salvor whether the particular Member is covered, subject to the Rules of the P&I Club, for any liability which he may have for Special Compensation.

The P&I Clubs confirm that whilst a Club Letter will generally be provided, it is not automatic. The P&I Clubs will reply to any request by the salvors regarding security as quickly as reasonably possible.

The salvors will accept security for Special Compensation by way of a P&I Club letter of undertaking in the attached form and they will not insist on the provision of security to Lloyd’s as required under LOF 95.

This is a Code of Practice which the ISU and the International Group of P&I Clubs will recommend to their Members and it is not intended that it should have any legal effect."

5.

The following flow chart shows when Article 13 and 14 awards may be made under the Salvage Convention.