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CMI BEIJING CONFERENCE AND 1989 SALVAGE CONVENTION

Estratto della Rivista

IL DIRITTO MARITTIMO
Fasc. II-IV – 2014
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ABSTRACT

The Paper discusses the proposed and rejected changes concerning the revision of 1989 Salvage Convention with regard the issue of environmental award, as envisaged by the International Salvage Union. The authors analyze the outcome of CMI Beijing 2012 discussions with regard the proposed revision. Following the examination of basics of traditional salvage award and no cure, no pay rule, the focus is placed on the concepts of liability salvage and environmental award. Further examination concentrates on the available and relevant case law concerning the aversion of salvee’s exposure to liability and its impact on the assessment of salvage award. A special focus is on a recent marine insurance case, where the aversion of insured peril has constituted a cover trigger. Finally, the Paper questions the current status quo, and poses questions with regard the possible insufficiencies of currently valid salvage award assessment mechanism.

Key words: Salvage Convention, environmental award, liability salvage, ISU, CMI

1. Introduction

Following the proposal submitted by the International Salvage Union (ISU) to amend the 1989 International Salvage Convention (SALVCON)¹ in 2008, the Comité Maritime International (CMI) prepared two questionnaires to be submitted to the national maritime associations in order to assess whether the interested stakeholders support the notion of international instrument revision. The issues pending consideration have included the following: whether the definition of environmental damage is adequate; whether the spatial application of SALVCON is adequate; whether the public authorities should be permitted a right to claim salvage award; whether the places of refuge should be regulated by the SALVCON; whether the security measures concerning the payment of salvage award are adequate; whether

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the special compensation instrument is adequate; whether the life salvage should play a more significant role in the assessment of salvage award; whether the arbitral decisions should be made publicly available; whether the so-called Brice Protocol concerning the underwater protected property (historic wrecks and cultural heritage) should be inserted into the SALVCON; and, whether the SALVCON should introduce the environmental award.

Following a number of CMI meetings, panels and discussions attended by the concerned stakeholders, the CMI Assembly, gathered at the CMI 2012 Beijing Conference, rejected all but one proposal with regard the deletion of SALVCON’s definition of geographical scope of application, favoring a more broad spatial application as available in the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC).

Among the rejected proposals stands the most contested motion – the introduction of a new type of salvage award, the environmental award – which, in accordance with the ISU’s opinion, should be granted to a salvor who has successfully prevented damage to marine environment following accidents at sea, involving endangered vessels, cargo and other property (i.e., bunker oil). The ISU has contested that a successful environmental service merits a special consideration and, when applicable, a separate award that would be awarded irrespective of an earned standard salvage award. At the outcome of Beijing debate, the ISU proposal has failed to provide an adequate legal ground and supporting factual evidence affirming the need of a specialized legal instrument to be inserted into the SALVCON. At the same time, less consideration was devoted to the visible shift from the application of SALVCON’s special compensation instrument to the industry’s Special Compensation P&I Clause (SCOPIC) instrument. Drawing a parallel with the emergence of safety-net feature through a private law contract, as opposed to a no cure, no play model as present in the 1910 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, it can be argued that the CMI Assembly in Beijing decided not to act in accordance with what a similar assembly achieved in Montreal some thirty years ago.

2. Salvage Award

2.1 No Cure, No Pay

The general rule with regard the right to claim salvage award, the so-called no cure, no pay rule, has been recognized and codified in ancient times, reaffirmed by the relevant case practice in front of civil law and common law courts in 19th and 20th century (especially following the emergence of professional salvage industry and salvage service providers in the late 19th century), and codified by both the 1910 Salvage Convention and the SALVCON. In accordance with that rule, a salvor is permitted to claim salvage award provided that he has successfully salvaged all or a part of the endangered property. The volume of salvaged property forms the salvage fund, which serves as a basis to assess the amount of salvage award, taking into consideration a number of criteria relevant for the final assessment. A list of these
criteria is codified through Article 13 SALVCON\(^2\), based on the case practice adopted by courts and arbitral tribunals. The list should not be understood as a *numerus clausus*, taking into consideration that the majority of SALVCON’s provisions are *ius dispositivum*, allowing the parties to contract out of these provisions and formulate the salvage relationship in accordance with their separate preferences. Based on the data derived from arbitral practice of the Lloyd’s Salvage Arbitration Branch, the forum most commonly frequented by the parties involved in salvage disputes (due to the widespread use of the Lloyd’s Standard Form of Salvage Agreement (the Lloyd’s Open Form – LOF) that includes a clause on mandatory arbitration in London), an average salvage award stands at approximately 10% of the salved fund in the last 30 years, or 15% in the last five years\(^3\).

2.2 Special Compensation
Should a salvor fail to perform successfully and save at least some portion of the endangered property, the *no cure, no pay rule* will not allow any remuneration. The practice had, however, found such rule to be impractical in cases where the salvors have rendered services to the stricken tankers that posed a significant threat to marine environment, especially with regard the crude oil carried as cargo. Following a number of tanker disasters, where, in some cases, the salvors have spent considerable time, energy and funds attempting to prevent the sinking of vessels and leaking of oil into the marine environment, ultimately failing to achieve such a result, and, thus, failing to earn any reward, the salvage industry has realized that such a business model is unsustainable. The maritime community has quickly reacted by amending the *no cure, no pay rule* with a private law *safety-net instrument* clause, allowing the salvors who have at least attempted to prevent the damage to marine environment a right to retrieve the costs of such service. The instrument has first appeared in the 1980 LOF edition, and proved so successful that the incentive was brought to codify such practice within the SALVCON. This has led to the formulation of *special compensation instrument* present in Article 14 SALVCON, rewarding the efforts to protect marine environment by securing, under certain conditions\(^4\), the payment of costs resulting from a salvage service failing to achieve a useful result in terms of salving endangered property.

\(^2\) Article 13, paragraph 1 SALVCON: “The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below: (a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of the danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor’s equipment and the value thereof.”

For more data, visit the Lloyd’s Agency Department portal, Salvage Arbitration Branch section, www.lloyds.com, last accessed on 22\(^{nd}\) May 2015.

\(^4\) Article 14, paragraph 1 SALVCON: “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
2.3 SCOPIC Clause

Article 14 SALVCON, proved, however, to be a difficult measure to be applied in practice, due to the uncertainty of its financial span and implementation before courts and arbitration tribunals, especially having in mind the House of Lords decision in the Nagasaki Spirit⁵, where it was held that the special compensation should not contain any elements of profit. This has led the salvage industry to propose a different model of compensation, the SCOPIC model, specifying the remuneration measures and easing the conditions necessary to invoke this method. In practice, the SCOPIC model is frequently used, rendering the SALVCON’s model increasingly ineffectual and possibly redundant⁶.

3. Liability Salvage and Environmental Award

3.1 ISU Proposal

During the discussions leading to the adoption of SALVCON, the ISU has proposed a new method of rewarding salvors, having in mind a very particular sort of useful result enjoyed by the salvee. Through successfully salving endangered property a salvor not only protects the endangered property (i.e., vessel and cargo), but also prevents the actualization of salvee’s (shipowner, cargo owner) liability to third parties (i.e., spill of oil, blocking of a port or a canal, damage to third parties’ property). The ISU has contended that the averted potential third party liabilities might, in certain occasions, be quite significant, thus necessitating a special approach in assessing a reasonable salvage award based on the premises of such aversion. The interested stakeholders have rejected such a notion, seeing the liability salvage concept as too vague, not amounting to any concrete or measurable mechanism. Instead, the environmental service was recognized as one of the criteria present in Article 13 SALVCON, and a special arrangement (the so-called Montreal Compromise) was concluded with regard the responsibility for payment of traditional salvage award (Article 13 SALVCON, to be covered by the Hull and Machinery insurers (H&M) and the Cargo insurers) and the payment of special compensation award (Article 14, to be covered by the P&I Clubs)⁷. The willingness of the insurers

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to participate in the compensation of costs was duly recognized by all the concerned stakeholders as a confirmation of a joint effort to provide best possible means of mitigating the danger to marine environment, equally shared by all the maritime-related enterprises and equally impacting all the maritime-related communities.

Recognizing the successful environmental services performed by the ISU members in the recent years, and the clear environmental benefit received by the salvors through the successful rendering of such services, the ISU, as stated in the introduction, has renewed the call for liability salvage, this time under the heading of *environmental award*, proposing to remove the environmental services as one of the criteria present in Article 13 SALVCON, and to set up a separate award model for cases where a salvor has clearly averted significant third party liability during the rendering of environmental services. The response from the interested stakeholders has equaled the previously described outcome of the liability salvage debate, and the initiative was finally declined at the CMI Beijing Conference.

### 3.1.1 Amendments to Article 13 SALVCON

In accordance with the ISU proposal, the environmental award was to become a separate model of compensation, aimed at rewarding those salvage services that successfully negate the salvors’ exposure to third-party liability in connection to the damage on marine environment. This requires the deletion of Article 13/1(b) SALVCON, thus allowing for a separate constitution of the environmental award. Another novelty is the proposed Article 13/1(j), whereby the salvage award is to be assessed by taking into account the environmental award as assessed through the proposed (revised) Article 14. That particular proposal lacks clarity due to the fact that the environmental award covers all aspects of liability salvage, and, thus, creates uncertainty when considering how the already assessed factor should correspond to an element relevant for the assessment of salvage award. It could be argued that the proposal serves as a reminder to the respectful court or arbitration tribunal, when assessing the traditional award, that the environmental award is due as well, thus, to a certain extent, exercising a proportional decreasing effect on the amount of salvage award.

### 3.1.2 Amendments to Article 14 SALVCON

The ISU proposal strikes the special compensation instrument out of the SALVCON and inserts the environmental award instead (retaining, at the same time, Article 14/5 and 14/6 SALVCON provisions in the revised Article 14). The salvor is granted the right to seek both the salvage award and environmental award at the

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9 As restated in the (proposed) amended Article 13/4.
same time. The assessment of environmental award is not limited by the ascertained costs of salvage services, but left open for consideration by the court or arbitration tribunal in accordance with similar criteria as present in the revised Article 13, taking into consideration the amount of salvage award as assessed through the revised Article 13. This should be understood as one of the negative criteria with a decreasing effect on the amount of environmental award. The assessment of environmental award may, however, revert to the actual costs (as per Article 14 SALVCON) should the salvage service fail to achieve a useful result with regard the protection of marine environment. The proposal introduces a separate limitation of liability system with regard the shipowner’s duty to bear the costs of environmental award, with the maximum cap in place. The concrete limits were not set in the proposal, but left for further consideration by the interested stakeholders.

The ISU proposal does not, however, provide details on what the salved fund, for the purpose of calculating the environmental award, should consists of. Unlike the salvage award and the special compensation, where the salved fund and actual costs can be easily calculated and displayed through a monetary equivalent, the environmental salved fund lacks that clarity, and is, in accordance with the ISU proposal, resolved through the adoption of a special limitation system. The ISU has anticipated that, through the introduction of limitation of liability, the exercise of calculating damage that had never resulted is rendered irrelevant.

Nevertheless, it remains unclear under what circumstances the court or arbitration tribunal would be required to even consider the assessment of environmental award. Whereas the assessment of salvage award, based on the salved fund (Article 13 SALVCON) and the assessment of special compensation (based on the actual costs with a possible increase, Article 14 SALVCON) are left to the discretionary decision of the court or arbitration tribunal, the ISU proposal significantly revises the international system by placing the discretionary right on whether a specific salvage remuneration (the environmental award) is to be considered in the first place. At the same time, as there are no clear criteria on whether and when the salvor is to be given right to seek, parallel to the salvage award, the environmental award, it could be argued that the salvors could use any given opportunity to do so. The lack of clear criteria could produce a result whereby any individual action that could be described as an effort to protect the marine environment, may, in effect, constitute a right to seek the environmental award.

3.2 Partial Support

It is to be noted that a number of coastal states involved in the environmental award discussion exhibited (some) understanding and support to the ISU’s proposal (namely: Malta, Ireland, Brazil, South Africa and Belgium)\(^{10}\). The coastal states’

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\(^{10}\) For more details on the comments made by the named coastal states, see: HETHERINGTON, S., CHAMI, D., *supra note 6*, at 243-245.
capacity to respond to dire situations at sea differs, with only a small number of states being capable of sustaining a coastal guard or similar entity properly equipped, trained and financed to be ready to meet all the possible threats to marine environment.

Most maritime communities depend on the services of professional salvage companies when accidents at sea threaten the coast and marine environment. Therefore, these states are genuinely interested in encouraging salvage services and sustaining the availability of professional salvage assistance when required. Such state of affairs was duly recognized by the drafters of SALVCON, having in mind that one of the rare *ius cogens* provisions in the SALVCON is directed towards the salvor’s duty to take due care during the performance of environmental services (Article 8(1b) SALVCON), at the same time taking into consideration that the drafters have accepted the practice and codified the previously examined safety-net feature.

Some coastal states have even promoted standard salvage contract forms according to which a salvor would be granted a right to remuneration of costs based on the successful aversion of salvée’s exposure to third party liability, even in the absence of a useful result in terms of saving all or some of the endangered property. One such example is the “*Standard Form 84*”, issued by the Croatia d.d. Zagreb insurance company (not in use any more), which has incorporated the following clause: “Exceptionally, the salvor earns a right to seek compensation for actual costs derived from undertaking reasonable measures in order to prevent or minimize the shipowner’s liability, even when no property has been salved”. Such a concept is, however, rare, as most frequently utilized standard salvage contract forms in contemporary use avoid utilizing such a remedy.

4. Recognizing Aversion of Salvée’s Third Party Liability

4.1 Relevant Case Law

The ISU argumentation has relied on the claim that the salvage arbitrators (the Lloyd’s Salvage Branch predominantly) possess adequate skill and knowledge to successfully handle necessary calculations required to assess the value of environmental service successfully avoiding salvée’s exposure to (third party) liability. The opponents of the proposed concept have stressed the fact that such knowledge is unbeknownst to the general public, due to the confidentiality of the Lloyd’s arbitration proceedings and arbitration awards.

The publication of salvage arbitration awards would most certainly foster the development of Law of Salvage and make an important impact on the regular courts’ practice. It would also serve to support the ISU’s claim should it prove to be convincing. However, no tangible progress has been made in that direction and the

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recent changes in several standard salvage contract forms with regard the publication of arbitration awards leave much to be desired for (i.e., the new LOF 2011 version allows the possibility of publishing salvage awards, but the parties to salvage contract reserve the right to request a non-publication).

Contrary to the ISU, one of the main counter arguments refuting the concept of environmental award is the hypothesis according to which it is impossible to properly ascertain the exact scope of benefit that is actually derived from a successful salvage performance. Such a view is reaffirmed by a number of courts in a number of jurisdictions, as examined in further text.

4.1.1 Australian Case Law

In the *La Pampa*[^12], the Australian court has rejected the salvor’s notion of a Worst-Case Scenario or a Global Failure, in accordance to which the adjudicator should calculate the worst possible outcome of an accident (i.e., the spill of oil resulting in significant marine and coastal pollution, leading to the maximum shipowner’s liability in accordance with the 1992 CLC). The principal salvor’s argument was based on the notion that a successful averison of shipowner’s exposure to the third party liability should be accepted as a separate factor of significant value for the purposes of assessing the amount of salvage award. The court has stated that the SALVCON is silent with regard the third party liability’s avoidance, not expressly rejecting it nor specifically referring to it. Thus, and in the absence of concrete case law, the court has reasoned that such an eventuality could be taken into account on a case-to-case basis. With regard the salvor’s activities aimed at the protection of marine environment, the court has readily accepted plausible risks in connection to the possible spill of oil, break-up of the stranded vessel, damage on the shore facilities or blocking of a channel route. The breaking-up of the vessel risk had constituted the salvor’s contended Worst Case scenario that, on the basis of expert opinion, has proved to be of little probability. The court has found no concrete evidence that such an eventuality would occur even in the absence of a salvage service, thus having recognized the environmental service not as a separate entity, but as one of criteria to be utilized for the assessment of salvage award (in line with Article 13 SALVCON).

4.1.2 American Case Law

The same reasoning has been adopted by the American court in the *Trico Marine*[^13], where the environmental service was added to the so-called Blackwall List of criteria relevant for the assessment of salvage award (derived from the American jurisprudence, in line with the list present in Article 13 SALVCON). The court has been firm in its consideration that a salvage award must be limited to the value of salvaged property, and that any additional factors can only be taken into account with

[^12]: *United Salvage Pty Ltd v. Louis Dreyfus Armateurs SNC* [2006] FCA 1141.
a reference to the salvaged fund. A similar line of reasoning can be observed in the earlier cases, such as the *Hendricks v Gordon Gill*\(^\text{14}\) and the *Westar Marine Service v. Heerema Marine Contractors*\(^\text{15}\), where the concept of liability salvage has been firmly rejected.

It is to be noted that the earlier case practice, to a certain extent, differed, as it allowed for an independent evaluation of liability salvage. In the *Markakis v S S Veendam*\(^\text{16}\), the court had determined that the shipowner would have been liable for the loss of passengers’ baggage that has been successfully salvaged by the salvor, and, accordingly, has placed value on that particular service when assessing the amount of salvage award. In the *Allseas Maritime v Mimosa*\(^\text{17}\), the court has considered the value of salvor’s service in preventing the collision of salvaged object (abandoned vessel) with several oil platforms and supporting infrastructure. Having recognized the value of exhibited liability salvage by determining a successful salvage service as one not only protecting the salvee’s property but salvee’s other assets as well, including the avoided liability, the Court has, nevertheless, decided against enforcing the value of liability salvage as a basis for the assessment of salvage award, due to the perceived shipowner’s right to invoke the limitation of liability.

4.1.3 *English Case Law*

Despite the older English case practice – such as the *Whippingham*\(^\text{18}\), where the court has recognized the prevention of collision and subsequent damage as a sufficient ground for claiming a salvage award, or the *Buffalo*\(^\text{19}\), where the court has found the prevention of collision as a major factor upon which a salvage award is to be determined – the current English practice follows the reasoning adopted in the *Nagasaki Spirit*\(^\text{20}\), where the House of Lords has briefly touched upon the issue and denied any rationale behind allowing an environmental service serving as a separate ground for the assessment of salvage award. Thus, with regard to the provision of environmental salvage services, there is currently no clear line of adjudication suggesting a sufficient basis for a separate salvage (environmental) award.

4.2 *The Prevention of Insured Peril’s Occurrence*

In the recent decision of the *Málaga Court of Appeal* in the *Iolcos Celebrity*\(^\text{21}\), an insurer was held liable to compensate the damage in accordance with the stevedore’s liability insurance coverage. A bulk carrier has been docked in the port of *Málaga*, and has started unloading a cargo of wheat. It has soon become apparent

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\(^{17}\) *Allseas Maritime v Mimosa*, 820 F2d 129 (5th Cir 1987).


\(^{20}\) *The Nagasaki Spirit, supra note 4.*

\(^{21}\) *The Iolcos Celebrity*, Málaga Court of Appeal, 17th January 2013.
that one of the dock’s heavy cranes had been damaged, having started to lean over the vessel, being in danger of collapsing, and thus creating a potential danger to the vessel and cargo, as well as the dock facilities. The stevedore, in charge of the unloading operation, after having consulted the Port Authority, has ordered the vessel to undock, and, due to the fact that no other docks in the port could have accommodated a vessel of that size, to anchor outside of the port until the crane is repaired or secured. The vessel, with the aid of several tugs, has anchored outside of the port for the duration of five days, and the estimated costs resulting from such an activity (tugs, fuel consumption, increased charter costs) have amounted to euro 140,000.00. The stevedore has compensated the said amount to the hirer and proceeded to claim the compensation in accordance with his liability insurance cover, having demanded the same amount of the salvage costs (as stated above) that have been suffered in order to prevent the occurrence of or minimize the damage to third parties. The liability insurer has refused to pay the compensation, having claimed that the cover was not triggered due to the fact that no actual damage has occurred, and that the noted costs did not fall under the provisions of liability insurance coverage.

The similarity of the examined case and the ISU’s proposal with regard the environmental award is discernible. Had the stevedore failed to ensure that the vessel is undocked, the potential for the realization of damage would have been enhanced, as it would have been more difficult to secure the crane, at the same time having done nothing to prevent the highly possible occurrence of damage to the vessel, cargo and dock facilities. In cases where a vessel is on fire or sinking, there is a certain/high possibility that, absent of a salvage service, a damage would result on the vessel, cargo, and, possibly, the environment. The purpose of environmental services is, thus, focused on the prevention of undesirable circumstances from befalling in the first place, much like the insured’s efforts aimed at the prevention of insured peril’s occurrence.

In the *Iolcos Celebrity*, the First Instance Court has held the insurer responsible, having deemed the salvage costs justifiable and falling under the scope of coverage, as they have been undertaken to prevent the occurrence of damage on third persons’ property. The Court of Appeal has reaffirmed the finding of First Instance Court, having stated that simply awaiting the occurrence of damage, a moment having been suggested by the insurer as the “cover trigger” moment, is contrary to the common sense, as it would have created more costs than the noted salvage costs, and therefore, stands against interests of all the concerned parties, including the insurer. The Court has, therefore, recognized the aversion of liability to third parties as a solid ground for a successful claim of compensation, measured as the salvage costs suffered by the stevedore.

It is, however, important to note that neither the First nor the Second Instance Court have proceeded to make an estimation of the scope of damage based on the assumption that the crane has fallen on the vessel, and then assessed the size of (stevedore’s liability insurance) compensation based on the first amount. In line with
the ISU’s environmental award proposal, such estimation is the starting point of the
assessment of environmental award, due to the fact that the scope of damage
becomes the salvage fund on its own merits, forming the basis for the calculation of
environmental award. As stated earlier, this point was a sufficient ground for the
market insurers, P&I Clubs and shipowners to reject the idea altogether.

As the previously reported salvage case law suggests, the courts are, in most
cases, ready to accept the fact that an aversion of third party liability can play a factor
in the assessment of salvage award. Most available decisions reject the notion of such
a factor constituting a separate legal ground for claiming an award, based not on the
costs suffered, but a separate monetary value calculated on the basis as if the damage
has occurred, resulting in subsequent exposure to liability. According to the ISU
representatives, this stands in discrepancy with the arbitration practice, where such
model has been accepted, and accordingly, the said calculations have been made
(little was, however, done to release more information with regard that notion). The
rejection of environmental award concept clearly demonstrates that the logic of
Spanish courts with regard the issue of prevention of the insured peril’s occurrence,
when translated into a salvage context, clearly resides within the scope of Article 14
SALVCON or SCOPIC (if invoked by the salvor). The issue is, therefore, settled as
a status quo, but such a consideration bluntly rejects further reasoning, neglecting any
possibility of (a part of) salvors’ demands being reasonably assessed.

4.3 A Justifiable Remedy?

Having in mind the rejection of ISU’s proposal, the status quo remains in force,
and the only perspective remedy, with the environmental services in mind, is available
through the application of environmental services criteria as present in Article 13
SALVCON. This, however, may lead to an undesired consequence, as shown in the
following simplified hypothetical example.

A Post-Panamax merchant cargo carrier, size 13,000 TEU22, is lost (sunken). The
salvor managed to secure the vessel’s bunker oil, worth 300,000 SDR23, that has just
begun to leak out of the vessel. The bunker oil, having being the only tangible object
of salvage actually salvaged, represents the salved fund. Had there been no salvage
service, the bunker oil would have certainly created damage to the marine
environment24 and the salvee would have been liable in accordance with the 2001

22 The abbreviation “TEU” stands for a twenty-foot equivalent unit, used to measure the ca-
pacity of containers and terminal storage capabilities.
23 The abbreviation “SDR” stands for a special drawing right, supplementary foreign ex-
change reserve assets, created by the International Monetary Fund.
24 In reality, such an estimate is difficult to be obtained; for more on difficulties present with
regard the marine damage assessment, see: De LA RUE, C., ANDERSON, C.B., “Environmental Salvage
– Plus ça change . . . ?”, October 2012, prepared for the purpose of CMI Beijing Conference, at 10-
12. A contrario, stating expert opinion with regard the modern technology significantly improving
the chances of a fair estimate, see: SHIRLEY, J.T.Jr., “Environmental and Liability Salvage in 2010”,
Bunker Convention (up to the limits as set by the 1976 LLMC Convention). The salvor's salvage costs amount to 10,000 SDR. The average size of salvage award amounts to 10-15% of the salvaged fund, allowing the court or an arbitration tribunal to set the salvage award to the amount of 30,000 SDR (in this example, the special compensation would, in theory, reach 20,000 SDR, thus being irrelevant).

The obvious question, restated by the ISU and several coastal states on many occasions, is the following: how is the figure of several million SDR, related to the averted third party liability, reflected in the figure of 30,000 SDR of fixed salvage award that should be assessed as a proper, just and fair salvage award? Even if a judge or an arbitrator could ascertain a fair likelihood of the mentioned damage actually occurring, to what extent would their discretionary power allow them to increase afore stated salvage award? In recent salvage and/or wreck removal cases, especially involving complex types of vessels or cargo (i.e. Rena and Costa Concordia), the costs of such services have evidently skyrocketed, reaching unprecedented earnings for the involved salvage companies. This, in part, reflects the value of expected and/or reached salvaged fund. But what sort of policy should a court or an arbitration tribunal uphold in cases where the salvaged fund is small and the service is considerable, especially taking into consideration the aversion of (third party) liability? The public policy of encouraging salvage services (encouraging the courts and arbitration tribunals to enhance the amount of salvage award) should certainly continue to be employed, but this policy has its limits, such as is the salvaged funds' cap, to name just one. Rather than focusing on the environmental award, clearly having been rejected 30 years ago, the ISU should have placed more effort on examining other avenues, possibly linking the salvage services to the other available international and/or national instruments, and seeking potential remedies to address the noted cases where the current salvage award system simply does not allocate enough tools for an appropriate assessment.

In a number of salvage operations that have been performed prior to the implementation of the safety-net and special compensations features, the salvors have exerted great efforts in attempting to save a vessel, failed to do so due to the difficult circumstances surrounding the operation, and thus failed to earn a right to claim an award. In some of these cases, the salvors have received an ex gratia payment, based not on a legal ground, but sentiment. The sentiment is the last thing that comes to mind when examining the proceedings from the CMI Beijing Conference, as restated by a number of involved stakeholders’ representatives. This is further supported by the fact that the available salvage statistics approve the positive balance of industry's profit earnings, especially with regard the utilization of SCOPIC (total earnings in the period 2011-2012 are estimated at US$ 135 million\(^25\), with singular SCOPIC expenses in the last few years often reaching an average of US$ 20 million, plus the uplift, often turning into a wreck removal where the costs multiply\(^26\)), as well as the

\(^{25}\) See: HETHERINGTON, S., CHAMI, D., supra note 6, at 241.
\(^{26}\) For more data, see: DE LA RUE, C., ANDERSON, C.B., supra note 23, at 14.
Having the noted financial data in mind, it becomes difficult to properly understand the drive towards the proposed change in the SALVCON. The noted difficulty is further complicated by the fact that no clear guidelines were given with regard the method of calculation, despite the claim (never actually proven) that there are several (arbitration) decisions that could shed some light on how the averted third party liability could be estimated and incorporated into the assessment of salvage award. In the opinion of the present authors, a public/expert discourse on an appropriate method/public policy to be utilized when deciding upon such cases would have been a far better suited approach towards developing yet another private law model of assessing the value of salvage services. This, however, to a great extent, depends on the issue of publication of arbitration awards.

5. Conclusions

Following the CMI Beijing Conference, it is unlikely that the issue of 1989 Salvage Convention revision will be discussed again in the foreseeable future. It is unfortunate that the entire process, which has ended in an impasse and led to the unnecessary animosity between the main stakeholders (the salvage companies, represented by the ISU, and the shipping industry, represented by the ICS-ISF and with the support of the International Group of the P&I Clubs), was not conceived in a way that would allow the gradual alleviation of seemingly insurmountable differences in perspectives, which thus would have slowly paved the way towards reaching some compromise solutions. Only after having reached such potential compromise with regard the basic principles of potential change, it was advisable to initiate the revision procedure within the CMI and deal with the details, in terms of designing the precise proposals of amendments to certain SALVCON provisions.

With regard the rejected proposal to introduce the concept of environmental award in the text of SALVCON, the best approach would have been to postpone any amendments until the industry practice has confirmed the need for revision. It was and will be essential to reach a consensus of all the stakeholders with regard the fundamental issues of the merits, appropriateness and efficiency of the new concept that had never been entirely recognized by the courts prior to initiating discussions with regard the change of such an important instrument of international maritime law. It is hard to understand the premature efforts on behalf of the ISU to launch the review of SALVCON before having thoroughly analyzed all the basic components of the concept and having provided a convincing legal explanation of the numerous ambiguities and points of disagreement that had their roots planted back in the period of preparatory discussions for the CMI Conference in Montreal, more than 30 years ago.

At the same time, the refusal of any further discussion with respect to the SALVCON amendments essentially hinders joint consideration of those appearances that indicate the unjust solutions present in the current international framework of Law of Salvage, as well as of those situations where the practice has been obviously
circumventing the SALVCON provisions through agreements containing completely different legal means of regulating certain aspects of salvage services. It may well be assumed that this quickly drafted and certainly premature attempt to revise the SALVCON had as an indirect consequence the delay of the already announced changes of LOF, which would have achieved far greater practical effect.

Despite the fact that quite a clear position was established during the debate within the CMI that the salvage services of environmental character fall under the exclusive domain of criteria that serve as an aid in the assessment of salvage award, the available case law indicates the willingness of courts to consider the broader significance of such services and to give them greater weight when calculating the salvage expenses. The analysis of the relevant case law points to the necessity of establishing clear conditions that must be met in order to have the environmental services significantly influence salvage awards, having in mind that the modality of evaluating such services can substantially affect the final amount of salvage award.

However, it is to expect that all the participants in this three-year unsuccessful process of reviewing the SALVCON, primarily shipowners and salvors but also the liability and property insurers, as partners in the global maritime economy, will be able to draw useful lessons, and find the strength, objectivity and good faith to continue negotiating the future development of international Law of Salvage, pursuing the best way to protect not only their particular economic interests but also the need to protect the marine environment. Only after the resumption of such negotiations, that should definitely include the representatives of cargo, who are also indirectly involved in the settlement of possible environmental damages due to the threat of marine environment pollution during transport, and only upon the gradual development of the practice, will the stakeholders be able to reach a consensus. The consensus is a conditio sine qua non for laying the firm foundations of procedure to revise the Convention, and only after this has been achieved will the involved stakeholders be able to continue the work in the non-governmental international organizations such as the Comité Maritime International and, after having secured the support of significant number of maritime countries, in the intergovernmental organizations, primarily in the International Maritime Organization.