

# Environmental concern not enough

Regular columnist Simon Tatham looks at why tackling pollution at sea may not bring the lucrative rewards that international salvage companies may have been hoping for



► Simon Tatham

**Salvors can get very excited about the prospects of a high reward where a salvaged vessel was carrying potentially polluting substances. However, the place that the environment holds in salvage law has had a particularly difficult history and in practice there are a number of restraining factors.**

The ISU's focus in recent times has certainly been to emphasise its members' contribution to preserving the environment, but it does not follow that they are being paid a lot for it.

The ISU's recently published *2017 Pollution Prevention Survey* (see page 51) does contain some impressive statistics for the year. For example, 3.4m tonnes of potentially polluting cargoes were the subject of services by its members. Of this, oil – including bunkers, generally perceived as some of the nastier pollutants – together with oil products made up about 30 per cent, but the majority were containers and bulk products reflecting what coastal states nowadays would regard as of a polluting or hazardous nature pursuant to the IMDG Code or MARPOL.

Quite telling is that of the 252 services recorded, less than 25 per cent were on salvage terms, the majority being on commercial or towage terms suggesting that few of these substances were at imminent risk of going into the sea. With the exception of contracts for the removal of bunkers from wrecks, which are very sensibly always done on fixed rate terms which might include SCOPIC rates, very few salvage operations and virtually no towage operations actually involve active pollution avoidance measures.

For that minority of cases where the reward was not fixed but assessed in accordance with the 1989 Salvage Convention, we need to recognise that historically salvage has been about saving property in peril at sea from loss or damage – ship, cargo and freight at risk are the recognised categories of property the subject of salvage. Salvage is all about benefit. The reward is there to reflect the benefit conferred.

If oil cargo is leaking from a ship damaged close to shore, a benefit would include the avoidance of third party claims arising from oil pollution or criminal liability in the shape of a heavy fine or detention of an offending vessel. The prospect of third party claims may therefore be an enhancing feature. However, it is important to maintain a perspective.

What if the oil is leaking in mid-ocean? Irrespective of damage to the environment caused by a spill at sea, if there is no prospect that the oil will get ashore, this will have little

impact upon the award. The 1989 Convention makes specific provision in Art13.1.b. requiring efforts of salvors in preventing or minimising damage to the environment to be taken into account.

Damage to the environment is defined in Article 1(d): “Damage to the environment means 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.”

*“What if the oil is leaking in mid-ocean? Irrespective of damage to the environment caused by a spill at sea, if there is no prospect that the oil will get ashore, this will have little impact upon the award”*

First the damage must be physical, therefore excluding economic losses. Secondly it must be substantial and confined to coastal or inland waters. It is not confined to oil pollution. Where such a claim is brought before an arbitrator tasked with assessing the award, it would be unusual for the parties to produce evidence from expert witnesses.

The arbitrator is likely to be invited to use his common sense: if a spill or contamination might have occurred in the absence of salvage assistance, it is fairly obvious that the consequences will be dire, depending on the precise factors at play. Nonetheless evidence will frequently be submitted in relation to the presence of fish-farms or nature reserves for example, which might find themselves in the path of a slick. Similarly, a potential release

of cargo gases near to a centre of population will threaten human health. A rotting cereal cargo may be considered a food source for aquatic life but equally the de-oxygenation of water might have the reverse effect.

There is very real difficulty, however, in striking a balance because how can one express pollution prevention in money terms? Moreover, salvage is paid by ship and cargo and there is a limited appetite for exposing their property underwriters to compensating for the risk of damage to third parties inhabiting the shoreline and a corresponding liability that usually falls just on ship and is insured in the P&I market.

Ten tons of fuel oil on the beaches of the South of France may be unpleasant, but can be dealt with. The inconvenience would be a temporary matter. Nonetheless, the commercial impact and political consequences will be that much greater than 1,000 tons threatening a remote section of coastline.

In short, there has been a tendency to give limited weight in salvage to something that is of obvious great public and governmental concern, because if no special measures are needed to avoid pollution there is a limit to how far a tribunal can realistically go in ratcheting up the award because pollution has been avoided, the liability for which may far exceed the value of ship and cargo.

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## Salvors in search for five victims

**Salvors were due to turn the wrecked hull of the stricken South Korean ferry *Sewol* upright to continue the search for the remains of five victims who are still unaccounted for.**

As *IT&O* went to press, more than 30 steel beams had been installed under the 6,800 ton vessel, and the salvage team was waiting for optimal weather conditions to start the operation.

They were planning to use a floating crane alongside the pier where *Sewol* lies to complete the lift, secure the hull in place and remove the beams. They were

hoping the process could be completed in one day.

When *Sewol* sank in April 2014, 304 students, passengers and crewmembers died. Many victims had been told to stay in their cabins. The remains of 299 have been found, including three recovered from the ferry after an unprecedented US\$130m effort to raise the vessel and transfer it onto the dock at Mokpo.

The wreck was raised from the bottom on its side, the position it came to rest on the seabed, and was transferred to shore without righting.