

## **The mystery of SCOPIC unravelled**

**By Archie Bishop, Former Legal Adviser to International Salvage Union**

The ancient salvage principle of “no cure – no pay” became a problem in the second half of the 20<sup>th</sup> Century as the transportation of oil increased and we discovered the extent of the damage pollution could cause. The salvage of such tankers was usually expensive to carry out and the residual value low, making many operations uneconomic, but all too often the problem was exacerbated by government intervention preventing the completion of the service by a refusal to grant a place of refuge. This meant ‘no cure’ was effected, which in turn meant ‘no pay’ – despite any high salvaging expense. To encourage the salvor to go to the assistance of such ships the 1989 Salvage Convention ameliorated the harshness of this age old ‘no cure – no pay’ principal, by introducing in Article 14, a new concept – Special Compensation.

Article 14 was designed to apply whenever salvors went to the assistance of ships that threatened damage to the environment within coastal waters. In such circumstance the salvor was to at least recover his expenses, and perhaps an uplift of up to 100% of those expenses, if he actually prevented damage. However such assessment was only to be paid to the extent that it exceeded the traditional salvage award. In short it was a safety net, one that that ensured he did not actually lose money.

Article 14 was well-intentioned but in practice it turned out to be cumbersome, contentious and expensive to operate and had the wholly unintended consequence of discouraging salvors from attending casualties where there was the threat of environmental damage. Traditional salvage awards were always paid by property underwriters (ship and cargo) but under Article 14 it was the liability insurers, the P&I Clubs, who were to pay compensation. They were also unhappy with the new provisions which involved them in salvage for the first time.

In response to the problems, the shipping industry worked cooperatively to devise the SCOPIC clause – the “Special Compensation P and I Club” Clause, which was specifically designed to replace, and have the same effect, as Article 14, but avoid the legal problems that the assessment of Special Compensation under Article 14 caused. SCOPIC is a very large clause, one made up of 16 sub-clauses, three Appendices and two codes of conduct. While effective, it is not easy to digest.

Due to its complexity there are many misunderstandings about SCOPIC. One is that it is part of every Lloyd’s Open Form (LOF) salvage contract. It is not. It is an optional addendum which is only included into a LOF if the parties specifically record on the contract that SCOPIC is incorporated. If SCOPIC is not incorporated then Article 14 will apply if relevant.

If SCOPIC is incorporated then it replaces Article 14 which will no longer apply. This is a crucial point for the salvor, for if SCOPIC is included but not invoked (or is later terminated), the salvor will not be covered by either Article 14 or SCOPIC.

If the parties do incorporate SCOPIC, its financial provisions will only kick-in if the salvor specifically invokes the clause in writing. He has the power to do so at any time and in any circumstances. The idea behind giving this power to the salvor is to avoid the difficulty of trying to codify the variables around the definition of a “threat of damage to the environment”. However, the point is not given away, for that objective is still achieved by two other provisions in the clause to which I will later refer – discount and termination of the SCOPIC agreement.

It was recognised that a balance needed to be introduced so as to prevent salvors from invoking the clause every time. Firstly there is a mechanism to give a discount if the traditional salvage award should exceed the SCOPIC remuneration (which is discussed later). Secondly the ship owner is given the right to withdraw from SCOPIC at any time with five days notice provided shore authorities permit it to do so. The thinking behind this was that the shore authorities would not agree if there was still a threat of damage to the environment. Both measures discourage a salvor from invoking the clause unless there is a real need for its protection.

SCOPIC remuneration that a salvor receives for a service is paid by the shipowner or his P&I insurer but only the sum that is over and above the traditional salvage award made against salvaged property under Article 13 of the Salvage Convention. The shipowner or his insurers must pay \$3 million in security within two days of the clause being invoked. The remuneration due is assessed by reference to an agreed tariff for day rates for equipment and personnel. The rates apply throughout the world and will thus be more generous to some than to others but as SCOPIC is a safety net, rough justice was considered sufficient.

Under Article 14 salvors were entitled to a bonus whenever they actually prevented damage to the environment. There were expensive legal difficulties in establishing the extent of the bonus in individual cases so SCOPIC decided to take a broad brush and provide for a bonus in every case. Under Article 14 the uplift averaged out at 26%. To keep matters simple it was agreed that in SCOPIC such an uplift should be 25% of the tariff rate remuneration – it is accepted that in some circumstances this may be a “generous” bonus and in others less so.

Given this seemingly favourable framework, what is to stop salvors invoking SCOPIC in every case? It would seem they have nothing to lose by doing so. To prevent this there is a clever mechanism. If the traditional salvage award is higher than the assessed SCOPIC remuneration then not only is no SCOPIC award payable but the traditional property based award is reduced by 25% of the difference between it and the SCOPIC remuneration.

So, for example, in a case where SCOPIC has been invoked and the assessed SCOPIC remuneration is \$1 million and the property based salvage award was \$1.5 million then no SCOPIC money would be paid and the Article 13 award would be reduced to \$1.35 million ( $25\% \times \$0.5 \text{ million} = \$125,000$ ).

This mechanism has been effective in preventing the salvors from over using SCOPIC – it is only invoked in some 30% of cases.

The owner may not escape from the LOF contract once it is signed but is entitled to terminate the SCOPIC clause on giving five days notice if the shore based authorities permit it. This is unlikely if there is actually a threat to the environment. However the salvor may withdraw from the entire LOF contract if SCOPIC is withdrawn by the owner and the salvage operation is no longer financially viable.

One of the key features of SCOPIC is that the owner may appoint a Special Casualty Representative (SCR) who attends the casualty and reports on activity. The salvage master retains full control of the operation but the SCR's voice is influential. If he does not agree with the salvage master's daily report the SCR must send a dissenting report. The presence of the SCR ensures that the owners and their insurers are kept fully informed and comforted and may keep a tally of costs as they build up.

Has SCOPIC worked? In the period since its inception in 1999 to July 2010 date there have been 1008 LOF cases reported to Lloyd's. SCOPIC was incorporated into the contract in 327 of those cases (32% of cases) and invoked on 240 occasions (24% of cases). In same period there were only seven SCOPIC-related arbitrations. The figures speak for themselves. SCOPIC is indeed working well.

The SCOPIC clause is not perfect but it is an excellent replacement for Article 14. However it should be recognised that it is only a safety net, one to ensure a minimum payment in difficult cases thereby ameliorating the harsh salvage principle of "no cure no pay". It is not a method of remuneration. In recent times, environmental issues have dominated almost every salvage operation leading salvors to claim they should be entitled to be properly remunerated on salvage terms by a separate environmental award whenever they have minimised or prevented damage to the environment. But that's another story.

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