

FEATURE CASUALTY

The RENOS – should SCOPIC expenses be considered in Constructive Total Loss Calculations

This week's casualties overleaf ▶

The UK's Supreme Court recently overturned the Court of Appeal's decision in the *Renos*, (*Sveriges Angfartygs Assurans Forening* (The Swedish Club) and others v *Connect Shipping Inc* and another, [2019] UKSC 29), which had previously upheld a Commercial Court ruling that SCOPIC expenditure could be included in ascertaining whether a casualty was a constructive total loss. Whilst many of our readers will certainly be familiar with SCOPIC or the Special Compensation P&I Clause, we revisit the history and use of the SCOPIC clause below and explain why we consider the Supreme Court decision is correct.

It has long been a principle of salvage that a salvor's reward should not exceed the value of the property salvaged and a salvor's award is entirely dependent on the extent of their success. The LOF Salvage contract follows this No Cure No Pay principle. It has been modified over the years to try to address the fact that the No Cure No Pay principle does lead to problems. Salvors may be unwilling to engage in salvage operations where the prospects of being successful or receiving a reasonable reward, to at least cover their expenses, are limited. In these circumstances low value property could be left unassisted with potentially catastrophic consequences for the environment and the potential for significant pollution claims against the vessel's P&I Club. A financial incentive was clearly required.

In the 1980s various attempts were made to try encourage LOF salvors to assist vessels which posed an environmental threat despite the possibility that they may not be ultimately successful. Salvors were able to claim compensation to cover their expenses where they had assisted laden tankers which posed an environmental threat. However it was recognised that it was not just laden tankers which posed a threat to the environment. The International Salvage Convention 1989, which sets out the usual criteria for assessing the value of successful salvage services under Article 13, introduced a mechanism under Article 14 whereby salvors could look to recover their expenses even if they had been unsuccessful, with a possible uplift to be applied if the salvors were shown to have actually prevented damage to the environment. The Article 14 compensation, which was based on a fair rate for the salvor's equipment, was payable by the vessel's P&I Club to the extent that it exceeded the traditional Article 13 salvage award which was payable by property owners and underwriters. It importantly applied to all vessels, not just laden tankers, which were a threat in coastal waters. However, Article 14 claims were not without problems often leading to lengthy arbitrations which required detailed

analyses on the nature and extent of the environmental threat as well as detailed information regarding the salvor's operating costs.

SCOPIC was designed to replace Article 14 claims and remove the problems experienced with Article 14 claims. The SCOPIC clause, can be incorporated into the LOF contract and, if incorporated, can be invoked by the salvors at any stage during a salvage operation. It is designed to ensure that salvors have a mechanism whereby they can receive at least a minimum reward for any services they render under the LOF contract. Notably it applies regardless of whether there is a threat to the environment, and as such has eliminated the requirement for salvors to directly prove a threat to the environment in order to receive a payment. It also applies to vessels in all waters, not just coastal waters. It also introduced SCOPIC compensation based on a fixed tariff for every man, piece of equipment and craft employed in the service and a fixed uplift of 25% thereby avoiding detailed analysis of a salvor's operating costs which could be required to claim their Article 14 expenses. To be able to be in a position to claim SCOPIC, the salvor must invoke the clause by written notice to the Shipowner. This can be done at any time during the services although any services rendered before the notice will not be remunerated under SCOPIC.

An LOF Salvage Contract may have SCOPIC is incorporated but it may be that the salvors have no need to invoke it. In these circumstances their salvage reward will be assessed by reference to the International Salvage Convention 1989 Article 13 criteria. The criteria, which derive from salvage case law over the years, require consideration of what was salvaged, its value; the measure of success; the dangers facing the property; actions taken to prevent pollution; the time taken and any expenses incurred; the promptness of the services; the skill demonstrated, possible liabilities the salvors may incur in performing the operation and the experience of the salvors and their overall involvement, investment and commitment to salvage. The result Article 13 award is paid by the property owners/underwriters who have benefited from the service, pro-rata to salvaged values. Where SCOPIC is invoked and the salvors are unable to salvage any property they receive their SCOPIC expenses based on the tariff rates and uplift. These expenses will be paid by the vessel's P&I Club.

More often than not with SCOPIC cases, there is ultimately some property of value salvaged. This is good news for property underwriters since in years gone by

these vessels may have been left unassisted and the property ultimately lost. Where some property of value has been salvaged, the resulting salvage service is assessed in two ways: by reference to the Article 13 criteria (above) and also by reference to the published SCOPIC tariff rates (plus 25% uplift). If the Article 13 award (payable by property underwriters) is less than the SCOPIC remuneration (payable by the P&I Clubs), the property underwriters will pay the Article 13 award in full. The balance of the SCOPIC expenses, after deducting the amount of Article 13 award, will be payable by the P&I Club. For example if the SCOPIC expenses are USD2million but there is property salvaged and the resulting Article 13 award is USD1million, the property underwriters would pay the Article 13 award of USD1million and the balance of USD1million is payable by the P&I Club.

Where the Article 13 award exceeds the SCOPIC expenses, the full award is payable by the property underwriters and the P&I Club would not pay anything. In fact a penalty, being 25% of the difference between the Article 13 award and the SCOPIC expenses, is applied. For example if the Article 13 salvage award is USD2million and the SCOPIC expenses are USD1million, the salvors will actually receive USD1.75million (being the original Article 13 reward less the 25% penalty). This is to ensure SCOPIC is only invoked in appropriate cases, where there is a real risk of a limited or no award. LOF awards have historically been uplifted to reflect the No Cure No Pay terms and the risks the salvors take in contracting on these terms. If salvors invoke SCOPIC on every case, regardless of whether it is appropriate, the effect would be to change the LOF contract to a Non No Cure No Pay contract, and would inevitably lead to calls that the LOF awards should not be uplifted. At present, LOF Arbitrators are strictly forbidden by virtue of Clause D of the LOF contract, to allow the fact that SCOPIC has been invoked to influence their Article 13 award. It is therefore essential that the penalty remains to maintain the balance.

In the case of the *Renos*, on 23 August 2012 she suffered a serious fire whilst she was on a laden voyage in the Red Sea. The fire disabled the vessel and Five Ocean Salvage were appointed under an LOF 2011 contract with the SCOPIC clause incorporated. They then invoked SCOPIC. The vessel was successfully salvaged and her cargo was transhipped and forwarded to destination. In March 2013 the Article 13 salvage claim was privately settled without being referred to Arbitration. The total SCOPIC expenses were for the salvage operation were

USD4.72million but only USD1.42million was payable by the Club, with the remainder being paid by property interests in settlement of the Article 13 claim.

After the salvage services terminated, many surveys of the vessel were undertaken to determine repair requirements. Whilst there was no doubt regarding coverage, a dispute between the vessel owners and her H&M underwriters emerged on the scope of and estimated costs of repairs and ultimately whether the vessel was a constructive total loss (CTL). In February 2013 the owners issued a notice of abandonment (NOA) claiming the vessel was a CTL. The H&M underwriters denied the vessel was a CTL and also argued that the owners had lost their right to claim a CTL and abandon the vessel because the NOA was served too late. Both the High Court and Court of Appeal found in favour of the owners. H&M underwriters sought leave to appeal to the Supreme Court. Whilst they were refused leave to appeal the issue of the lateness of the owner's notice of abandonment, they were permitted to appeal two issues, whether costs incurred prior to the NOA should count towards the calculation of the CTL and whether SCOPIC expenses should be considered in the calculation. The hull insurers argued that the SCOPIC expenses should not be considered as costs within section 60(2)(ii) of the Marine Insurance Act 1906 or clauses 19.2 and 9.2 of the Institute Time clauses because the expenses were conceptually different from the Article 13 award.

The Supreme Court dismissed the appeal on the first issue, being the costs incurred prior to the NOA, determining that it did not make any difference when they were incurred. Damage for the purposes of the Marine Insurance Act was held to be the entire damage arising from the casualty from the moment that it happens and

the cost of repairing the damage for the purpose of determining a CTL included all the reasonable costs of salvaging and safeguarding the vessel from the time of the casualty onwards, together with the prospective cost of repairing her.

The Supreme Court allowed the appeal in relation to the SCOPIC expenses and held that the purpose of SCOPIC is not to enable the ship to be repaired, but to protect owners against their potential liability for environmental pollution, which is not relevant to the damage to the hull or any calculation which may be undertaken to determine whether to repair her. Additionally SCOPIC was designed to provide salvors with an economic incentive to engage with salvage operations when they might otherwise have been unwilling to gamble their efforts on No Cure No Pay. Lord Sumption commented that '...SCOPIC remuneration is intended to avoid environmental damage which would be a liability of the shipowner, in respect of which he will be insured not under the hull and machinery policy but by the owner's Protection and Indemnity insurer.'

The Supreme Court's decision has provided clarification in relation to costs leading to a CTL calculation and the separate issue of SCOPIC and will for the most part be welcomed by marine market. The lower courts' findings had the potential to further impact on insurers support of the LOF and SCOPIC concerned that they may face notional CTL claims where SCOPIC is used. The decision clearly separates salvage costs from SCOPIC. It has identified and supported the original intention of SCOPIC when it was conceived; to address the environmental threat posed by vessels of any kind trading on our seas and to incentivise salvors to assist these potentially polluting vessels and their cargoes regardless of whether they pose any direct or immediate threat to the environment.



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NEW CASUALTIES 326

Beks Halli

Bulk carrier, IMO 9625798, Built 2011, 57,381 dwt

Date of Casualty 15 June 2019 – Late Notification

Voyage San Lorenzo, Argentina to Damietta, Egypt

Cargo Soyabeans

Type of Casualty Ran aground on the river Paraná. The vessel was refloated with the assistance of the tug *Coapor Estibador I*.

Type of Claim Possible salvage claim and/or General Average declaration

P&I Standard Club



Ozean

Fishing vessel, Built 1986, 71 gt

Date of Casualty 18 June 2019 – Late Notification

Type of Casualty Disabled by a suspected fire and was towed to Büsum, Germany.

Type of Claim Possible salvage claim

Tío Antonio

Fishing vessel, No other details

Date of Casualty 19 June 2019



Type of Casualty Caught fire and sank whilst east of Oropesa, Spain. The crew abandoned the vessel and were picked up by another trawler.

Type of Claim Total loss claim

Eurocargo Napoli

Passenger ro-ro, IMO 9108568, Built 1995, 11,000 dwt

Date of Casualty 19 June 2019

Voyage Olbia to Livorno, Italy

Type of Casualty Suffered a blackout whilst departing the port of Olbia. The vessel was assisted by tugs to a safe anchorage

Type of Claim Possible tug claim

P&I Standard Club

Atlas

Self-propelled barge, 3,232 ts

Date of Casualty 20 June 2019

Type of Casualty A fire broke out in the engine room of the vessel which was berthed at the Ruitenberg Offshore at the Reenway in Raamsdonksveer undergoing conversion operations from a tank to cargo barge. Local fire-fighters attended.

Type of Claim Fire damage claim



Fast Sam

General cargo vessel with container capacity, IMO 9085455, Built 1994, 3,204 dwt

Date of Casualty 20 June 2019

Voyage Antwerp, Belgium to Næstved, Denmark

Cargo No details

Type of Casualty Ran aground on the Wester Scheldt. The vessel was refloated with tug assistance and berthed in Flushing the following day for investigations. She has since proceeded.

Type of Claim Possible hull damage, salvage claim and/or General Average declaration

P&I Standard Club

Misando

Self-propelled barge, Built 1961, 1,338 ts

Date of Casualty 20 June 2019

Voyage IJmuiden, Netherlands to Krems, Austria

Cargo 1,092 m³ of steel

Type of Casualty Became disabled after alliding with and damaging a fairway buoy and subsequently grounded on the river Danube near Straubing. The vessel was pushed perpendicular to the fairway. She was refloated in the evening and towed to Regensburg the following day for repairs.

Type of Claim Damage and salvage claims

Hae Yang/No.201 Daewon

Hae Yang – Grab Dredger, IMO 8630772, Built 1986, 2,746 dwt

No.201 Daewon – Fishing vessel, No other details

Date of Casualty 20 June 2019

Type of Casualty The vessels were in collision 23 miles off Gampo, South Korea. The fishing boat capsized but all the crew were rescued.

Type of Claim Collision claim

Rosaire A.Desgagnes/USS Billings

Rosaire A.Desgagnes – General cargo vessel with container capacity, IMO 9363534, Built 2007, 12,777 dwt

USS Billings – Freedom-class littoral combat ship, Built 2017

Date of Casualty 21 June 2019

Voyage At Montreal, Canada

Cargo no details

Type of Casualty The navy vessel collided with the *Rosaire A. Desgagnes* whilst manoeuvring in the port of Montreal.

Type of Claim Collision damage claim

Ocean Unicorn/CM 99596-TS

Ocean Unicorn – Crude oil tanker, IMO 9388780, Built 2009, 108,940 dwt

CM 99596-TS – Fishing vessel, No other details



Date of Casualty 22 June 2019

Voyage Sungai Linggi, Malaysia to Map Ta Put, Thailand and Singapore

Cargo No details

Type of Casualty The fishing vessel sank in the Eastern Gulf of Siam, 70 miles south west of Hon Khoai Island after a collision with the *Ocean Unicorn* which did not stop. All the crew of the fishing vessel were reported to be safe. They identified the *Ocean Unicorn* as the other vessel.

Type of Claim Collision damage claim

P&I UK Club

FOS Hamilton

Product tanker, IMO 9656890, Built 2013, 105,408

Date of Casualty 22 June 2019

Voyage Novorossiysk, Russia to unknown destination

Cargo No details

Type of Casualty Allided with a pier at the Novorossiysk Oil Terminal during mooring operations.

Type of Claim Allision damage claim

P&I UK Club

Siberin 1

General cargo vessel with container capacity, IMO 7811020, Built 1980, 4,763 dwt

Further casualties overleaf

Date of Casualty 24 June 2019

Voyage Kavkaz, Russia to unknown destination

Cargo 4,300 m³ of coal

Type of Casualty Ran aground departing Kavkaz. The vessel was refloated yesterday and towed into Kavkaz for inspection.

Type of Claim Possible hull damage and salvage claim



Sarwaguna Lima

Landing craft, IMO 7428897, Built 1974, 300 dwt

Date of Casualty 24 June 2019

Type of Casualty Sank off East Kalimantan, Indonesia. The Master is missing but three other crew members were rescued.

Type of Claim Total loss and loss of life claim



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NEW CASUALTIES - Continued - edition (326)



Spirit of Discovery ▣

Passenger cruise ship, IMO 9802683, Built 2019, 55,900 gt

Date of Casualty 24 June 2019

Type of Casualty Allided with bollards at the Great Sea Lock whilst departing the port of Emden. The vessel was due to start her maiden voyage on 10 July 2019.

Type of Claim Allision damage claim

P&I West of England



Norval ▣

Charter fishing vessel, no other details

Date of Casualty 24 June 2019

Type of Casualty Caught fire whilst 20 km north east of Gladstone, Australia. The 14 people on board abandoned the vessel into a life-raft.

Type of Claim Total loss claim



UM7 ▣

Charter yacht, No other details

Date of Casualty 24 June 2019

Type of Casualty A fire broke out in the engine room whilst the yacht was off the coast of Majorca. Local fire-fighters attended and extinguished the fire but it reignited whilst the vessel was being towed to Port Adriano. The boxer Wladimir Klitschko and his family were on board.

Type of Claim Fire damage and salvage claim

Eva Mary Grace ▣

General cargo vessel, Built 1979, No other details

Date of Casualty 25 June 2019

Voyage San Fernando, Philippines

Cargo Automotive diesel oil

Type of Casualty Suffered a loss of stability whilst berthed at San Fernando port. The crew were rescued. Booms were placed around the vessel.

Type of Claim Salvage claim



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Tirta Amarta

General cargo vessel, IMO 8631166, Built 1987

Date of Casualty 25 June 2019

Voyage Gresik, Indonesia to Kendawangan in West-Kalimantan, Indonesia

Cargo Fertiliser

Type of Casualty Suffered water ingress and sank north of Tuban, East Java, Indonesia. The crew of 16 abandoned the vessel into a life-raft and were picked up by the container vessel *Seaspan Fraser* which diverted to assist.

Type of Claim Total loss claim

Keoyoung Star 3

Chemical tanker, IMO 9798090, Built 2017, 2,818 dwt

Date of Casualty 25 June 2019

Voyage Mizushima, Japan to order

Cargo In ballast

Type of Casualty Ran aground whilst departing the JXTG Nippon Oil & Energy Corporation facility in Mizushima, Japan. The vessel was refloated earlier today and anchored for inspection.

Type of Claim Possible hull damage and salvage claim

P&I Japan Shipowners

CASUALTY FOLLOW-UP



James Robert – editions 303, 306, 309 & 314 – the Municipality of Fanø has issued an urgent request for the removal of the wreck to the vessel's insurers and the owner's administrators following their bankruptcy. The request must be complied with before 18 July 2019 failing which the Fanø Municipality will demand DKK 300,000 to cover the costs of getting the remains of the smashed hull removed.

Ems Carrier – edition 309 – the vessel's Russian Master who was in charge of the vessel when it ran aground off Langeland on 21 February 2019 has been convicted of being under the influence of alcohol at the court in Svendborg. A fine of DKK20,000 and a suspension of his Master's licence for a year was issued.

Hablány – editions 323 & 324 – the body of another victim of the sinking of the river cruise vessel was located in the evening of 22 June 2019. Three people remain missing and the search for them continues.

No. 5 Elbe ▣ – editions 325 – the damaged wreck has been raised and was towed to Wewelsfleth where it will undergo repairs at the Peters Yard.

Front Altair ▣ – editions 325 – human error or mechanical issues as being a potential

cause of the explosion and fire have been ruled out. Investigations into the incident continue.

Bonita ▣ – edition 325 – the vessel was refloated from its grounding position in the Luro archipelago yesterday after her lightering and de-ballasting operations. She was towed to Hällekis, Sweden.

