THE CASE FOR A NEW INTERNATIONAL CONVENTION ON MAJOR CASUALTY MANAGEMENT

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DISCUSSION

During the early 1970s the urgent need to curb operational pollution from vessels, particularly oil tankers, led to the adoption of the International Maritime Organization's Marine Pollution Convention. MARPOL, with its various technical annexes, is a comprehensive regulatory instrument. Over the past 30 years, however, there has been no IMO initiative to develop parallel measures to harmonise the international community's handling of major marine casualties. There are no comprehensive, holistic international provisions which specifically address the many complex factors surrounding the management of marine accidents.

A great many IMO Conventions, Codes and Resolutions address issues relevant to the *prevention* of marine accidents and spills. These are too numerous to mention but they include MARPOL's double hull rules, the Safety of Life at Sea Convention's provisions on fire-related issues, the Convention on Oil Pollution Preparedness and Response and, in the human area, the Convention on Standards of Training, Certification and Watchkeeping and the safety management systems set out in the International Safety Management Code. There are also IMO initiatives dealing with some specific aspects of accident response, including the recently adopted guidelines on places of refuge for ships in need of assistance. There is, however, no IMO instrument providing a comprehensive model for the entire casualty response process.

Given recent severe spills in North West European waters, together with the ever-present risk of further major incidents throughout the world, the time is now ripe to address this need. A new international agreement, setting out best practice for casualty management, should be an IMO priority. A Casualty Management Convention would fill a rather obvious gap in the IMO's otherwise comprehensive family of international instruments.

This issue is of direct relevance to the membership of the International Salvage Union (ISU), responsible for over 90 per cent of all salvage activity worldwide. A Casualty Management Convention could avoid overlap with existing IMO instruments by focusing on the implementation of emergency response. The main aim would be to promote well-organised, timely intervention by salvors, coastguards and other response agencies. This would maximise the possibility of spill prevention—or mitigation, should the initiating accident event immediately produce a spill. The Casualty Management Convention *would not address clean-up*, as this is already the subject of various IMO instruments.

The Casualty Management Convention's main theme would be provisions encouraging the delivery of a fully integrated response involving vessel owner, salvor, Coastal State and various response organisations. Salvage has the central role as the salvor already has defined responsibilities, under Lloyd's Form and the Salvage Convention 1989, to recover property and protect the environment.

This initiative would provide a model framework for more efficient casualty response. In promoting an integrated approach, it would address important issues such as command and control, casualty risk assessment, responder immunity and, of course, places of refuge.

The adoption of a Casualty Management Convention is very much a long-term prospect. At this time it is more realistic to think in terms of an interim phase: the development of IMO guidelines on casualty management. These guidelines would incorporate and replace the recently-adopted guidelines on places of refuge. While the places of refuge guidelines are an important advance, they are concerned with only a part of the casualty management process.

There are some important advantages in taking the guidelines route. They include:

- **Time:** the number of major casualties resulting in severe spills has much reduced in recent decades. In the 1970s significant oil spills (involving 5,000 barrels and over) averaged around 24 per year. In the first four years of the current decade the annual average is less than five. Nevertheless, while major spills are increasingly rare events, they do continue to occur. In most cases, including the Prestige spill, questions arise concerning response efficiency and casualty management. It would take years to develop and adopt a Casualty Management Convention (and more years for it to enter into force). In contrast, guidelines on casualty management can be "fast-tracked". This was achieved in the case of the IMO's places of refuge guidelines. The advantage of a fast-track solution is important to all who seek to avoid a repeat of the Prestige disaster, which resulted in damage costing over 1 billion.
- **Precedent:** guidelines on places of refuge were adopted by the IMO Assembly in December 2003 (Resolution A.949 (23)). These guidelines are an important precedent. The IMO wisely adopted a pragmatic approach during the drafting. Highly complex legal and financial issues were set aside, for future consideration by the IMO's Legal Committee. In this way, the IMO was able to move forward and respond promptly to the urgent need for guidance in this difficult area, following the traumatic loss of the Prestige.
- **Experience:** the adoption of IMO casualty management guidelines would meet the urgent need for a fully com-

prehensive emergency response model. Experience in the use of the guidelines might eventually provide a basis for a viable convention, reflecting the operational realities of casualty management.

Barriers to response efficiency

Most IMO conventions and other instruments are concerned, in the final analysis, with accident prevention. The salvor, in contrast, is concerned with limiting the consequences of accidents when they occur. Effective casualty response requires rapid, decisive intervention. Naturally, factors which impede response efficiency are of great concern to the marine salvage community.

The salvor is often the last defence against potentially catastrophic pollution. Over the past 10 years, ISU salvors have recovered over 11 million tonnes of oils, chemicals and other pollutants from more than 2,000 casualties. This total includes nearly nine million tonnes of crude oil.

Salvors are accustomed to responding at great speed. They understand that important decisions may have to be taken on the basis of incomplete information. The salvor is required to use his best endeavours to perform salvage and protect the environment. In doing so, he interacts with many other parties—many of whom are less accustomed to the rigours of casualty response. This factor may well slow down the response. The Salvage Master always carries the burden of operational command, yet many of the critical issues influencing the eventual outcome remain beyond his control.

Reaching the casualty is often difficult. The salvor may be ready to fly out his team and equipment within a few hours of the emergency arising, but his progress may be frustrated upon arrival. It is not unusual for desperately needed salvage equipment to be held up in Customs. It is often difficult to locate officials and obtain permission to board the casualty. Valuable time is wasted and lost opportunities for early intervention may lead to a failure to prevent pollution.

Other common difficulties include unreasonable demands for huge financial guarantees. In addition, political influence may well intrude and impede the salvage effort. Such pressures place a premium on the Salvage Master's communications skills. He must instil confidence and present a comprehensive salvage plan as soon as possible. This plan should include a full set of contingencies.

The IMO's guidelines on places of refuge are designed to help decision-makers facing a major pollution threat. The places of refuge issue, however, is just one aspect of casualty response. Indeed, the question of refuge never arises in many salvage operations.

The ISU favours a more holistic approach, based around the earliest possible identification of the best environmental option in the given casualty situation. This may (or may not) involve a place of refuge. In the case of the Prestige, of course, the issue of shelter—specifically, its refusal—was central to the eventual outcome. The salvor needed a refuge from the weather, to take action to stop the loss of oil, stabilise the tanker, perform temporary repairs and ready the vessel for the ship-to-ship transfer of cargo and bunkers. Unfortunately, the Prestige was ordered out and broke up six days later, with the loss of her entire cargo.

I have some sympathy for an Administration confronted with a request for shelter when a laden tanker is damaged and actively leaking oil. Yet the use of a response "template", to find the best environmental option, might have rapidly identified shelter as the best course of action in the circumstances. It would have meant accepting some degree of pollution damage. Yet the combined cost of salvage and limited clean-up/compensation would not have exceeded 50 million. Turning the ship away resulted in a catastrophic spill, with costs of 1 billion plus.

The Prestige made the case for wider IMO guidelines addressing all main aspects of casualty management. The IMO, however, focused on refuge, as this factor was central to the loss of the tanker.

Promoting more efficient response

Casualty management is a difficult area, with an ever-increasing level of political content. The preamble to the December 2003 IMO guidelines on refuge recognises the difficulties, but states: *..."the provision of a common framework to assist Coastal States to determine places of refuge for ships in need of assistance and respond effectively to requests for such places of refuge would materially enhance maritime safety and protection of the marine environment."*

In the ISU's view, however, these guidelines should be replaced by a more comprehensive framework. Wider-ranging casualty management guidelines would include matters such as:

- **Contingency planning/training:** guidance on producing response inventories which focus on timely access to salvage resources held at local, regional, national and international level, for inclusion in National Marine Casualty Response Plans. This section would also include guidance on joint training and drills involving commercial salvors and response agencies.
- **Facilitation:** guidelines on maximising response efficiency, including special arrangements to ensure prompt entry for salvage teams and their equipment and giving priority for the earliest possible physical inspection of the casualty by the Salvage Master.
- **Casualty risk assessment:** a subject already covered, to some extent, by the existing IMO guidelines on refuge. These provisions would benefit from more emphasis on salvage considerations when weighing up the risks associated with variables such as: ship type, cargo carried, casualty status and degree of damage, proximity to the coast, availability of main engines and, of course, the position of the nearest tug. A structured assessment is required, based on physical inspection of the casualty and the expert opinion of the Salvage Master.
- **Command and control:** the conduct of a number of casualty-related operations has exposed serious command and control deficiencies. The grounding of the Sea Empress at Milford Haven in 1996 led to a searching examination of this issue by Lord Donaldson. The result was the adoption of a new UK command and control structure headed by the SOSREP, or Secretary of State's Representative. This is a highly successful system. The SOSREP combines an understanding of casualty response with a high level of delegated political authority. In fact, under this system politicians may *not* intervene while a salvage is in progress. The SOSREP approach has one great advantage. The decision-making is focused on just two individuals: the SOSREP and the Salvage Master. They speak the same language and share a common aim: implementation of the plan offering the best chance of a successful outcome, with pollution prevention the priority. While such a sweeping delegation of political power might deter many governments from adopting the SOSREP system wholesale, new IMO casualty management guidelines should urge Administrations to recognise at least some elements of this system as best practice.
- **Standby arrangements:** many governments responsible for busy coastal waters and vulnerable coastlines are reluctant to rely entirely on the availability of a "tug of opportunity" should an emergency arise. One solution is to

enter into arrangements with salvors which *guarantee* the availability of tugs and other salvage resources.

- **Responder immunity:** while salvors do enjoy a measure of immunity under some IMO conventions, this protection was not extended when the IMO adopted the Bunker Spills Convention. Vigorous lobbying on the part of many leading industry organisations was ignored. At that time, some IMO delegations openly declared their opposition to responder immunity, adding that they wished to retain the freedom to prosecute the salvor. The Bunker Spills Convention has an associated Resolution which urges governments to provide salvors and other responders with immunity, but there appears to be little interest in pursuing this option. In the UK, for example, the government pledged to review the law following the strict liability prosecution of Milford Haven Port Authority following the 1996 Sea Empress grounding and spill. No action was taken. IMO casualty management guidelines should highlight the true significance of responder immunity and emphasise the negative consequences of any prosecution of salvors. The guidelines should also highlight the dangers of criminalisation. The growing trend of criminalising those who are unfortunate enough to be caught up in marine accidents and spills, together with those who attempt to limit the damage, does nothing to promote efficient casualty response.

Places of refuge

To return to the controversial issue of places of refuge, the sovereign rights of coastal states must be respected. This includes the right to refuse shelter for a casualty. Beyond coastal states' clear obligations in the area of "life salvage", Article 11 of the Salvage Convention imposes only modest duties on Administrations:

"A state party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for cooperation between salvors, other interested parties and public authorities, in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger, as well as preventing damage to the environment in general."

The use of the word "port" in this text gave rise to significant problems. It gave a false impression. In most instances, the requirement is for *sheltered waters*, rather than entry into a port—a consideration of some importance in terms of risk assessment. For this reason the phrase "place of refuge" was adopted.

The political difficulties surrounding places of refuge are acknowledged in the introduction to the IMO's 2003 guidelines:

"The issue of places of refuge is not a purely theoretical or doctrinal debate but the solution to a practical problem: what to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved? Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?

"When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers and to repair the damage. Such an operation is best carried out in a place of refuge.

"However, to bring such a ship into a place of refuge near a coast may endanger the Coastal State both economically and from an environmental point of view, and local authorities and populations may strongly object to the operation.

"While Coastal States may be reluctant to accept damaged or disabled ships into their area of responsibility, due primarily to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions. In some circumstances, the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel's condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard.

"Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis, with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast."

In situations of this type there are no easy choices. Today, after the Prestige, ordering a ship out is no longer an "easy choice" as it may lead to catastrophe. In these circumstances, the best hope of a favourable outcome is structured risk assessment, to identify the best environmental option, coupled with the political courage to do what is right, to deliver that option.

The Assembly Resolution that introduces the places of refuge guidelines called on the IMO's Legal Committee, as "a matter of priority", to consider the difficult issue of financial security, to cover Coastal State expenses and compensation. There are many problems associated with this issue. Governments, not surprisingly, are reluctant to discuss arrangements for compensating coastal communities providing places of refuge for the wider benefit of society. In this context, it could be argued that compensation is not enough and that these communities should be *rewarded*, as well as compensated. The solution to at least some political problems will require financial incentives for these coastal communities.

CONCLUSION

Guidelines as a "binding agent"

To conclude, casualty management guidelines need to be comprehensive and focused on practical measures making a real contribution to effective emergency response. In the absence of this initiative, the level and quality of the casualty response service now available to shipowners, insurers and governments will almost certainly degrade over time, due to financial pressures and other negatives such as criminalisation and lack of responder immunity.

Salvors now have no illusions following the unwarranted detention of Tasman Spirit Salvage Master Nicolas Pappas by the Pakistani authorities. The salvor needs freedom of action to respond swiftly. The salvor must be confident that his personnel and equipment will be free to leave once the service is completed. If confidence is further shaken, the withdrawal of salvage services from some jurisdictions may result.

On the other hand, if the concept of casualty management guidelines is taken forward as a new IMO initiative, it would bring important benefits within a relatively short period of time. These guidelines would act as a "binding agent", integrating salvors and response agencies who share a clear goal: prompt action to deliver the best environmental option.

BIOGRAPHY

Hans van Rooij was elected President of the International Salvage Union in 2004. He became Managing Director of SMIT Salvage B.V. in 2002. Hans van Rooij joined Smit Tak in 1978 and became Operations Manager in 1986. In 1991, he left the Smit Group to join Greenpeace Netherlands as Executive Director. In 1997, he returned to Smit.