CASUALTY RESPONSE IN THE U.S.

WRECK REMOVAL

A CLUB PERSPECTIVE

Wreck Removal and the MLA

Why wreck removal, I asked myself? After all the subject was very well addressed at your 2003 forum in Boca Raton by Gard's Kim Jeffries, albeit she looked at the subject from the point of view of salvage and particularly SCOPIC. I plan to adopt a different approach viewing the subject from a practical P and I aspect.

So what's so special about wreck removal per se in the context of owners' P&I liabilities as a whole? I sat back and thought and my conclusion prior to research was probably not much of an impact at all in terms of claims numbers and costs, and I think Kim's speech bore out that assertion too. However it is true that individual claims such as Gard's "TRICOLOR" wreck removal can be very costly indeed. That of course was an incident which occurred in European waters. For today, I plan to focus on the U.S.

CONTINGENCY PLANNING: WEST OF ENGLAND

I looked at our P&I planned response to a major casualty in the United States and looked for evidence in that strategy for a defined approach to problems involving wreck removal. Look at this illustration. Or organigram as I call it, laying out on a single piece of paper what we in conjunction with our Members and others concerned to protect the owners' interests seek to achieve pursuant to a major casualty.*[Appendix 1].

Note that we don't have the maritime response at the top of the tree any more. The fact is that its not always the most important area of response on its own. Over recent years the importance of a coordinated response, particularly in response to the risk and threat of pollution and damage to the environment, the impact of political risk, and even criminal exposure has to be catered for in the P&I Club response. Hence our movement to an approach involving a "coordinating counsel" which firm can cover all these aspects. The response to the maritime casualty will be important but it will be within the context of the overall response to the casualty. Equally important in our minds today is the impact of the owners' and the P&I underwriters' response to media interest, third party claims and liaison with a large variety of interested Governmental bodies.

There will always be a place for the maritime attorney but my point, perhaps rather sadly, is that it is not always the most important part of the response, albeit it will always have a very significant place in it.

SOME STATISTICS

I think this conclusion is backed up by a cursory review of this Club's, the West of England's, own experience over the last ten or fifteen years. Since 1990 worldwide we have had 136 odd cases involving an element of wreck removal. As an aside, that's not many in the context of this Club as just one Club, opening 8,000 files every policy year. Over the same period we have only dealt with 19 such wreck removal cases costing over half a million dollars, and only four of those 19 occurred in the United States.

Perhaps however that is too simplistic an approach. In dealing with wreck removal as I've indicated already, as did Kim Jeffries, one is also dealing with salvage and that may involve a Lloyds Open Form with or without SCOPIC, but perhaps even more importantly it would almost always impact on pollution, pollution prevention and damage to the environment. So a review of salvage related casualties and indeed pollution related casualties is also necessary. Continuing my research over the same 15 year period I noted that there were just 2165 incidents worldwide involving some element of pollution for the West of England. Of those, approximately 610 cost the Club over half a million dollars. So when they happen they are often pretty expensive! Strangely perhaps only 18 of those occurred in the United States, and yet only four of these pollution cases also involved a wreck removal aspect. Some curious numbers, perhaps from the US geographical aspect. A positive result from the threat of O.P.A. '90?

INTERIM CONCLUSIONS

What does all this add up to? Two conclusions in my judgment:

1. The financial impact alone of the wreck removal event whilst individually of some significance is not so important in the context of P&I losses as a whole, worldwide and

2. If a casualty occurs involving wreck removal it is far more likely to be costly not only in the area of wreck removal but more particularly in the area of oil pollution, clean-up, bunker removal and damage the environment (NRD). This will be particularly true in the United States.

Hence I believe our own focus on the Club's statistics tends to bear out and justify our approach to dealing with major casualties as I've outlined already today.

SOME EXAMPLES

Review of "SELENDANG AYU" total loss off Alaska.

c/f "MILOS REEFER" TOTAL LOSS OFF Alaska 1989. Pre OPA '90 approach.

The impact of the EEZ: "BOW MARINER": TOTAL LOSS OFF Norfolk VA 2004.

Impact of ROV and other modern technological aids.

CONTRAST THE EUROPEAN EXPERIENCE: Parallels and Differences in approach.

Review of "FU SHAN HAI": Sinking and wreck removal incident in Danish waters 2003.

WRECK REMOVAL: THE PRACTICAL RESPONSE. CASE STUDIES

Lets now move on to a Club's perspective of how to respond, practically to a salvage and wreck removal incident. I propose to examine this, in the United States, from two angles. Firstly a response involving a shore line and second a river based response. There may be different approaches involving as we have noticed the US Coast Guard on the one hand and the Army Corps of Engineers on the other. There again the differences may be more imaginary than real – lets look at a couple of examples.

COASTAL INCIDENT: CASE STUDY 1

Review of grounding case off Cape Disappointment Columbia 2005.

Casualties on the rivers, in the United States at least, are as likely to involve barges and river traffic generally as ocean-going ships. Indeed Katrina seemed to have very little impact on large ocean-going ships – I can only recall one salvage service effected to one vessel following the hurricane. However it emerged after Katrina that dozens and dozens of barges owned by several different entities were scattered across vast areas of land, sometimes hundreds of yards away from their safe mooring on a river. Sometimes they ended up sunk at their berths. But a multitude of problems faced owners and the Army Corps of Engineers. We'll look at one such case later, but first, perhaps, or more routine river related incident.

RED RIVER INCIDENT: CASE STUDY 2

Review of removal of barges and damage to dam incident: Red River 2004.

WRECK REMOVAL: THE PRACTICAL RESPONSE: CLUB CONSIDERATIONS

What issues do we habitually review on a case by case basis involving wreck removal in the States. We have alluded to several already:

Question: When does a ship become a wreck?

Answer: 1. Total Loss

Answer: 2. Constructive Total Loss: When costs of repair exceed the vessel's value.

Conditions: Hull Underwriters must accept TL and CTL, and must abandon the vessel to the shipowner.

The alternative: (Wreck) Removal is the Hull Underwriters concern.

Question: What does a Club consider when reviewing a wreck removal order?

Here are some of the questions we ask ourselves.

- Is the wreck located within territorial waters?
- Was the order issued by a competent authority?
- Does the order cite the legal basis?
- Does the cited law apply to the facts?
- Is full or only part removal needed to comply with the order?
- Is it an order in the true sense or subject to negotiation?
- Can the order be challenged in court: are any defences available such as Act of God?
- If so, what are the odds of getting a fair hearing?

Question: Is a defence available? If not is limitation available?

CASE STUDY 3

This Oil Response barge, luckily clean of all fuels was picked up by Hurricane Katrina from her safe mooring on the Mobile River and deposited several hundred yards away in a salt marsh to the west of the river across a railroad track owned and operated by CSX. This case is interesting because it may well involve Act of God defences under State and Federal laws and under OPA 90 (if relevant). The Club's and Owners lawyers are studying the position presently, and the initial view is that there is a dearth of relevant authority on the point in the State itself. But for the most part Act of God is not available and strict liability is involved. So apart from the interaction of salvage and wreck removal which we have dealt with already we will pretty often be looking at the impact if any of the US general law of limitation (if available) and/or limitation under OPA 90 again if available. As of right limitation should be available being as it is the value of the res in its "wrecked" state. In many cases this is nil or the scrap value of the wreck. But is limitation in fact available? The short answer in most cases no and from the public policy point of view limitation virtually never available anyway in the US or in many, many jurisdictions now. But review the law in each case we must and make an individual assessment as to how far if at all to press limitation. In the second case study mentioned above limitation suit has been filed in the appropriate US District Court but that is probably more for tactical reasons to consolidate claims into the District Court rather than have to deal with claims such as third party claims in a multitude of local jurisdictions involving either State or District Courts along the river as that case may be. But the outcome of the limitation case itself is

perhaps of secondary nature to the importance of coordinating all the litigation into a District Court rather than to allow a multitude of decisions emerging in different State Courts.

Bids/SCR/Wreck Removal Contract – Wreck removal – who does what.

So the Club is then left with reviewing the terms of the contract. Bimco has tried to help us with standard term contracts eg "Wreckfixed", "Wreckstage" and "Wreckhire" but the Club will always lean to try to fix the price at the outset with the salvor/wreck removal contractor so that there is certainty and a "No Cure, No Pay term". Contract terms involving the review of weather working days and the equipment will be carefully reviewed and in most casualties the Club will involve an expert surveyor or as we would call them outside the United States SCR – Shipowners Casualty Representative – to act on behalf of the Club in liaison with the maritime attorneys to make sure that the wreck removal contract terms are agreed to best protect the shipowner interests. These SCRs are of great assistance to the Club, often being as they are ex salvors or poachers turned gamekeepers. They keep salvors on their toes and really do provide a valuable role to the Club, underwriter and the shipowner. Indeed the old rogue Phil Birkenhead, who this Club have used on very many occasions over the years, was always one to poo-poo standard wreck removal contracts. Given the opportunity he would always tear up whatever was presented to him and draw up a contract on a plain piece of paper doing his very best to ensure that the owners was best protected from all and any incidental liabilities thrown up during a wreck removal operation. Perhaps those halcyon days, are gone, however!

Additionally, and in line with the Club Rules on wreck removal, care will be taken to ensure that the value of the wreck will accrue to the benefit of the Club, if at all possible. West of England's Rule 2 S.14 Wreck Liabilities is appended to this paper.*[Appendix 2].

How can I draw all this together?

Conclusion 1

I think some buzz words are appropriate: speed, decisiveness of action and development of a coherent strategy. These concepts are paramount. To let the casualty situation drift is invariably the wrong option, to take the matter or "the bull by the horns", is in our experience, much the preferred option not only to steer the casualty to the best interests of the shipowner but as important to control the liaison with the interested authorities such as the Coast Guard and the Corps of Engineers. If you don't, the initiative is lost and the case will be driven by the authorities with very different agendas in mind.

Transparency of the strategy is important too, to bring the relevant authorities on board as to the reasonableness of the actions being taken by and for the owners at all times so that the impact to third parties, the public and any lingering media interests is minimised, at least the negative impact. This we will always seek to do in liaison with Members, their lawyers and their media consultants, if they have some. It is not beyond the realms of possibility for the Club to recommend to Members to appoint media consultants at the outset of any casualty involving potential pollution and wreck removal to ensure that a coherent strategy is evolved and conveyed through the media to interested parties. It also helps very much with the handling of third party claims that may emerge as a result of any incident involving wreck removal.

Conclusion 2

Wreck removal will be on the up worldwide mainly as a result of concerns with damage and potential damage to the environment. Modern machines are making it much easier to physically comply with wreck removal orders no matter how unreasonable they may appear. We have

already reviewed one example today, in the "BOW MARINER" case. Another example is the "IVEOLI SUN", a casualty which occurred in the English Channel. Modern remote operated vehicles (ROVs) and related deep water equipment are now capable of getting to great depths to "assist" in wreck removal operations and indeed bunker removal operations. If the science is there, the orders will follow from the relevant authorities. So the financial impact to Clubs will rise as, one would assume, as will the number of cases involving wreck removal as well as salvage and pollution be it clean-up or work to prevent the likelihood of a spill.

Conclusion 3

And then there is the impact of the political push towards compulsory insurance for wreck removal. This is being strenuously resisted by the International Group through its observer presence at IMO but the impact of this resistance will erode over time. Several Nations for example Greece and Brazil are already looking very closely at trying to force underwriters past and present to deal with wrecks left on their shores irrespective of whether they present hazards to navigation or not simply to cope with local public policy objectives. IMO does not move very speedily and so the evolving nature of a convention on wreck removal involving as it will some element of financial responsibility and compulsory insurance may take several years but it will come, it is inevitable. Although this issue may seem academic so far as the US is concerned, with its rather haphazard track record of actually signing up to International Conventions put together through IMO's processes, it is important to note the key issues that are cropping up in relation to the draft Wreck Removal Convention.

- Strict liability for wreck removal on the registered owner for the costs of locating, marking and removing a wreck, but with the comfort of the availability of certain

defences including "Act of God" currently available as "a natural phenomenon of an exceptional, inevitable and irresistible character" (Article 11.1 (a)

- Preservation of the right to limit liability "under the applicable national or international regime such as the International Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) as amended" (Article 11.2).

- Compulsory Insurance or evidence of financial security (Article 13). This is and will be the subject of much debate: currently the wording before the Legal Committee of the IMO requires the registered owner to "maintain insurance in an amount at least equal to the limits of liability for the ship calculated in accordance with LLMC 1976 as amended". (Article 13.1).

- The availability of direct action against "the insured" or other person providing evidence of financial security for the registered owner's liability (Article 13.11). We shall have to wait and see what evolves out of the discussions at IMO, but I will hazard a guess that it will not ultimately affect the position in the US one little bit.

Appendix 1

Section 14 ***Wreck liabilities***

(A) Costs or expenses arising out of the raising, removal, destruction, lighting or marking of the wreck of the insured vessel and of any cargo or other property which is or was carried on board such wreck, when such raising, removal, destruction, lighting or marking is compulsory by law or the costs thereof are legally recoverable from the Member.

(B) Liability incurred by the Member arising out of any such raising, removal or destruction of the wreck of the insured vessel (or of such cargo or other property) as is referred to in paragraph (A) of this Section, or any attempt thereat.

(C) Liabilities incurred by the Member arising out of the presence or involuntary shifting of the wreck of the insured vessel (or of any cargo or other property which is or was carried on board such wreck), or arising out of his failure to raise, remove, destroy, light or mark such wreck (or such cargo or other property), including liability arising from the discharge or escape from such wreck (or such cargo or other property) of oil or any other substance.

(D) Liabilities, costs and expenses arising out of any law compelling the raising, removal, destruction, lighting or marking of any cargo or other property including equipment of the insured vessel which is or was carried on board the insured vessel, or as a result of any failure to raise, remove, destroy, light or mark such cargo or other property.

PROVIDED THAT:-

(a) There is no cover in respect of claims under paragraphs (A), (B) or (C) of this Section unless the insured vessel became a wreck as the result of a casualty or event occurring during the vessel's period of insurance; but in this case the Association shall continue to be liable for the claim notwithstanding that in other respects the liability of the Association shall have terminated pursuant to Rule 40 (2)(i)-(vii) (cesser upon sale, loss etc.).

(b) In respect of any claim under this Section, the following items (so far as applicable) shall first be deducted from or set off against such costs, expenses and liabilities, and only the balance thereof, if any, shall be recoverable from the Association, namely,

(i) the value of all vessel's stores and materials saved,

(ii) the value of the wreck itself,

(iii) the value of all cargo or other property saved which accrues to the Member,

(iv) any salvage remuneration received by the Member.

(c) In respect of a claim under paragraph (D) of this Section, there is no cover for liabilities, loss, damage, costs and expenses set out in Rule 2, Section 11.

(d) There is no cover under this Section if the Member shall, without the consent of the Managers in writing, have transferred his interest in the wreck (otherwise than by abandonment to his Hull and Machinery Underwriters or in accordance with Rule 29 (recommendation to abandon)) prior to the raising, removal, destruction, lighting or marking of the wreck or prior to the incident giving rise to liability.

(e) Where the liability arises, or the costs or expenses are incurred, under the terms of any contract or indemnity and would not have arisen but for those terms, that liability or those costs or expenses are only covered if and to the extent that:-

(i) those terms have previously been approved in writing by the Managers and cover for such liability, costs or expenses has been agreed in writing between the Member and the Managers on such terms as the Managers may require, or

(ii) the Committee determines that the Member should be reimbursed.

Section 14 Wreck liabilities

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(B) Liability incurred by the Member arising out of any such raising, removal or destruction of the wreck of the insured vessel (or of such cargo or other property) as is referred to in paragraph (A) of this Section, or any attempt thereat.

(C) Liabilities incurred by the Member arising out of the presence or involuntary shifting of the wreck of the insured vessel (or of any cargo or other property which is or was carried on board such wreck), or arising out of his failure to raise, remove, destroy, light or mark such wreck (or such cargo or other property), including liability arising from the discharge or escape from such wreck (or such cargo or other property) of oil or any other substance.

(D) Liabilities, costs and expenses arising out of any law compelling the raising, removal, destruction, lighting or marking of any cargo or other property including equipment of the insured vessel which is or was carried on board the insured vessel, or as a result of any failure to raise, remove, destroy, light or mark such cargo or other property.

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