

**NEDERLANDSE VERENIGING VOOR ZEE- EN VERVOERSRECHT (NVZV)
(DUTCH MARITIME AND TRANSPORT LAW ASSOCIATION)**

**REPLY TO THE CMI QUESTIONNAIRE 9 JULY 2009 ON THE POSSIBLE REFORM OF
THE INTERNATIONAL CONVENTION ON SALVAGE, 1989**

1. Article 1 Salvage Convention 1989

- 1.2. *Do you consider that the words emphasised above in the definition contained in Article 1(d) of the Salvage Convention ("in coastal or inland waters or areas adjacent thereto") should be deleted?*

Netherlands: No. The *Commissie Scheepsongevallen* (Ships' Casualty Committee) of the Dutch MLA is of the opinion that there needs to be a limit to the geographical scope of the Salvage Convention which is based on the principles of public international law adopted since the Torrey Canyon incident. This means that the rules may only apply where the areas under the sovereignty or functional jurisdiction of the coastal state are likely to be affected.

- 1.3. *Alternatively do you think words such as those used in the other Conventions which have been quoted above (eg "where ever such may occur"/"exclusive economic zone"/"territorial sea") should replace those words in Article 1(d) of the Salvage Convention?*

Netherlands: Yes. The current wording is vague, which may be due to a lack of consensus at the time of the preparation and the conclusion of the Salvage Convention 1989 regarding coastal state jurisdiction: the 1982 Law of the Sea Convention (Montego-Bay) had only recently been concluded and had not yet received worldwide approval. The Ships' Casualty Committee of the Dutch MLA is of the opinion that the concept of Exclusive Economic Zone is sufficiently defined and appropriate to replace the wording 'in coastal or inland waters or areas adjacent thereto'.

- 1.4. *Have there been any reported cases in your jurisdiction in which the word "substantial" (which is contained in Article 1(d) of the Salvage Convention), as used in that definition, have been interpreted?*

Netherlands: We are not aware of any such case in our jurisdiction.

- 1.4.1. *If so, could you provide a copy of the decision?*

Netherlands: Not applicable.

- 1.4.2. *If there have been no such cases in your jurisdiction do you think it likely that the word "substantial" could create difficulties of interpretation?*

Netherlands: It is a vague term which indeed need to be interpreted by the courts. It serves to filter out bagatelle cases and should thus remain in place.

- 1.4.3. *If so, do you consider that there is any other word or group of words that could better identify what is intended by the definition?*

Netherlands: No.

- 1.5. *Do you think that where an incident occurs that could give rise to dangers to navigation (for example a loss of containers at sea) would be covered by the definition in Article 1(d) (ie do you think it would be held in your jurisdiction to come within the meaning of the words "or similar major incidents")?*

Netherlands: It is submitted that 'or similar major incidents' seems to refer in a "such like" manner to the words 'pollution, contamination, fire, explosion'. Article 1(d), however, requires 'substantial physical damage to human health or to marine life'. In our view a loss of containers which do not pose a threat to the environment (within the meaning of Article 14) as such (e.g. where there are no hazardous or noxious contents), but merely pose a navigational hazard, would not come under the definition of Article 1(d), but only under Article 1(a).

- 1.5.1. *If you think there is a risk that such incidents may not be covered by the definition in Article 1(d), do you think that the definition should be widened?*

Netherlands: No. A floating container is not an environmental hazard, for which Article 1(d) and Article 14 were introduced.

- 1.5.2. *If so, can you suggest any wording that you think might be appropriate?*

Netherlands: Not applicable

2. Article 5 Salvage Convention 1989

- 2.2. *Can public authorities pursue claims for salvage in your jurisdiction?*

Netherlands: Yes, unless the salvage consists of fire fighting by the official fire departments regulated by the Brandweerwet 1985 (Fire Fighting Act 1985) which rules out the recovery of fire fighting costs (Hoge Raad 11 December 1992, *Schip & Schade* 1993, 35 'Rize K'). It is furthermore suggested in case law that competition law may forbid a public authority to be involved in salvage activities (for free) in direct competition with private companies offering similar services (against payment).

- 2.3. *If they cannot, do you think it would improve their position if Article 5 paragraph 3 was deleted or amended?*

Netherlands: Under the current circumstances we do not see a need for amendment.

3. Article 11 Salvage Convention 1989

- 3.2. *Has your country ratified the Salvage Convention 1989?*

Netherlands: Yes.

- 3.2.1. *If so, has it enacted any legislation or regulation to give effect to Article 11?*

Netherlands: We are not aware of any such legislation or regulation.

- 3.2.2. *If so, please supply a copy, if possible with a translation into English or French.*

Netherlands: Not applicable.

- 3.2.3. *Do you think this Article should be amended to refer to the IMO Guidelines on Places of Refuge (Resolution A.949(23)) Adopted in December 2003.*

Netherlands: No. The Ships' Casualty Committee of the Dutch MLA does not consider it necessary nor appropriate to cover this aspect in the Convention.

4. Article 13 Salvage Convention 1989

- 4.2. *Has your jurisdiction made any provision, as provided for in Article 13 paragraph 2 for the payment of a reward by one of the interests referred to in the opening sentence of this paragraph?*

Netherlands: Yes. Liability for the salvage reward is channelled to the shipowner under Article 8:563 paragraph 3 of the Dutch Civil Code¹:

“For salvage to a vessel and the things on board, the remuneration shall be due exclusively by the owner of the vessel, on the understanding that the shipowner will have a right of recourse against other interested parties for their respective share. For salvage rendered to other things, the remuneration shall be due by the person entitled thereto.”

Article 8:565 Dutch Civil Code provides further:

“1. No remuneration shall be due by any person whose life was saved.
2. Notwithstanding the provision of paragraph 1, remuneration shall be due by the shipowner for the separate salvage of persons on board of the vessel.
(...)”

- 4.3. *Do you think it would be appropriate to specify in this Article that in containership cases the vessel only is responsible for the payment of claims (and therefore would be responsible for the provision of security) subject to a right of recourse against the other interests for their respective shares?*

Netherlands: The Ships' Casualty Committee of the Dutch MLA supports the proposed amendment which is in line with Dutch law. It may eliminate difficult questions of private international law/conflict of laws in respect of agency (whether or not agency of necessity), negotiorum gestio/non-contractual salvage and contractual salvage in determining who may or who may not be considered the debtor of a salvage reward. However, we do not understand why it is proposed that the amendment only applies to containerships. We also foresee difficulties with regard to the proposed limiting the proposed amendment to containerships only.

5. Article 14 Salvage Convention 1989

- 5.2. *Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognised that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognised that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20).*

Netherlands: No. The Ships' Casualty Committee of the Dutch MLA is of the view that there is no need to investigate the possibilities for an environmental award. However, it appears that Article 14 Salvage Convention 1989 does not (always) satisfy the needs of the industry. The Ships' Casualty Committee of the Dutch MLA would therefore welcome an investigation to amendment Article 14 along the lines of

¹ Translations from H. Warendorf et al., *The Civil Code of the Netherlands*, Deventer: Kluwer 2009

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6. Article 16 Salvage Convention 1989

- 6.2. *Do you consider that the wording of this Article should be amended to ensure that any life salvage claims against property are made directly against a property owner rather than the salvor?*

Netherlands: It is submitted that the words 'Prior to the Convention' in paragraph 6.1 of the Questionnaire must refer to the Brussels Salvage Convention 1910. It is our view that Article 9 Brussels Salvage Convention 1910 contained wording almost identical to that of Article 16 Salvage Convention 1989.

Both provisions State Parties to provide for specific rules of national law.

Article 8:565 Dutch Civil Code provides:

- “1. No remuneration shall be due by any person whose life was saved.
2. Notwithstanding the provision of paragraph 1, remuneration shall be due by the shipowner for the separate salvage of persons on board of the vessel.
3. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.”

We are unaware of any problems with claims for a fair share of the salvage reward being directed against the salvor. Such problems are also not expected in the Netherlands as a claim for life salvage is due from the shipowner and not from the salvor pursuant to Dutch law.

The Ships' Casualty Committee of the Dutch MLA supports the proposed amendment.

7. Article 20 Salvage Convention 1989

- 7.2. *If you are of the opinion that the suggestions made for reform of article 14 should be considered, do you also agree that article 20 should be amended to create a statutory lien against the ship for such a claim?*

Netherlands: No. Issues of maritime or statutory liens should be left to the Mortgages and Liens Conventions (1926, 1967 and 1993) or to national law.

Article 8:211 Dutch Civil Code provides:

- “The following claims have a privilege on a sea-going vessel in priority to all other claims to which thors or any other law grants a privilege, except Article 210:
(...)
(c.) The claims for salvage as well as for the contribution of the vessel to general average.
(...)”

It appears that the wording 'claims for salvage' refers to the salvage reward only, and not to the special compensation of Article 14. It has been suggested to amend the provision of Dutch national law so as to include the special compensation (Flach, *Scheepsvoorrechten*, Deventer: Kluwer 2001), but this has not yet been done.

8. Article 27 Salvage Convention 1989

8.2. *Do you consider that article 27 should be amended to reflect the position achieved by the Lloyds Salvage Group?*

Netherlands: The current situation in the Netherlands is that decisions in salvage cases by the courts are of course made available for publication in *Schip & Schade* whereas arbitration awards are confidential in principle. However, most arbitration rules of Dutch arbitration institutes have for a long time provided for a similar rule as now apparently introduced in the UK:

Tamara (www.tamara-arbitration.nl)

“XII Publication of award

TAMARA has the power to have an award published without the parties' names or any information that could disclose the parties' identities, unless a party has objected to TAMARA in writing to that publication within one month of receiving the award.

Netherlands Arbitration Institute (www.nai-nl.org)

“Unless a party communicates in writing to the Administrator his objections thereto within one month after receipt of the award, the NAI shall be authorised to have the award published without mentioning the names of the parties and deleting any further details that might disclose the identity of the parties.”

While the Dutch MLA understands the possible frustration with the small amount of arbitration awards being published, we see no basis for a rule in an amended Salvage Convention which would interfere with the basic right of parties to a possible dispute to decide upon their mode of dispute resolution, and whether or not these parties may want to choose for confidential arbitration.

9. General

9.2. Are there any other issues or problems that you are aware of in relation to the Salvage Convention 1989 which the IWG should consider for possible amendment?

Netherlands: No

9.3. How many salvage cases have been decided in your jurisdiction under the 1989 Salvage Convention?

Netherlands: The precise number of cases is unknown. Only seven cases have been reported in *Schip & Schade* but it is fair to say that the vast majority of cases have not been published.

Rotterdam, 16 August 2010

Nederlandse Vereniging voor Zee- en Vervoersrecht
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