House of Lords before the Lord Chancellor; Lords Goff of Chieveley; Mustill; Lloyd of Berwick; Hope of Craighead 6th February 1997

LORD MACKAY OF CLASHFERN L.C. My Lords,
I have had the advantage of reading in draft the speech to be given by my noble and learned friend, Lord Mustill. I agree with him for the reasons that he has given that the appeal and the cross-appeal should be dismissed, in each case with costs.

In relation to the appeal I would in particular emphasise the importance of the interpretation of the relevant words in their context. Although no doubt an interpretation clause defining expenses could specifically include an item or items that were not expenses it would more naturally be concerned with identifying particular heads or types of expenses. When the expenses as defined are repeatedly spoken of as incurred this appears to me to preclude the view that expenses as defined includes remuneration or profit. The use of the term rate is explained by the need to do more than identify a particular figure. The circumstances require a judgment of how much of the total expense incurred for equipment and personnel is fairly to be taken as applying to the equipment actually and reasonably used in the salvage operation in question taking into consideration the criteria referred to.

For my own part I would not have found it necessary to examine the travaux preparatoires in order to reach a decision on the central issue in this appeal. However out of respect for the very full and detailed arguments to which your Lordships were treated, I am glad and grateful to my noble and learned friend that he has done so in such an admirable way, in an area of the law in which he is such an eminent authority and has reached the conclusion that this analysis strongly reinforces the view formed on the words themselves read in their context.

LORD GOFF OF CHIEVELEY My Lords,
I have had the benefit of reading in draft the speech to be given by my noble and learned friend, Lord Mustill. I agree with it, and for the reasons which he gives I would dismiss both the appeal and the cross-appeal.

LORD MUSTILL My Lords,
The law of maritime salvage is old, and for much of its long history it was simple. The reward for successful salvage was always large; for failure it was nil. At first, the typical salvor was one who happened on a ship in distress, and used personal efforts and property to effect a rescue. As time progressed, improvements in speed, propulsive power and communications bred a new community of professional salvors who found it worth while to keep tugs and equipment continually in readiness, and for much of the time idle, waiting for an opportunity to provide assistance and earn a large reward. This arrangement served the maritime community and its insurers well, and the salvors made a satisfactory living. It was however an expensive business and in recent years the capital and running costs have been difficult for the traditional salvage concerns to sustain. A number of these were absorbed into larger enterprises, less committed perhaps to the former spirit, and unwilling to stake heavy outlays on the triple chance of finding a vessel in need of assistance, of accomplishing a salvage liable to be more arduous and prolonged than in the days of smaller merchant ships, and of finding that there was sufficient value left in the salved property at the end of the service to justify a substantial award. At about the same time a new factor entered the equation. Crude oil and its products have been moved around the world by sea in large quantities for many years, and the risk that cargo or fuel escaping from a distressed vessel would damage the flora and fauna of the sea and shore, and would impregnate the shoreline itself, was always present; but so long as the amount carried by a single vessel was comparatively small, such incidents as did happen were not large enough to attract widespread attention. This changed with the prodigious increase in the capacity of crude oil carriers which began some three decades ago, carrying with it the possibility of a disaster whose consequences might extend far beyond the loss of the imperilled goods and cargo. Such a disaster duly happened, at a time when public opinion was already becoming sensitive to assaults on the integrity of the natural environment. Cargo escaping from the wreck of the Torry Canyon off the Scillies caused widespread contamination of sea, foreshore and wild life. The resulting concern and indignation were sharpened when the Amoco Cadiz laden with 220,000 tons of crude oil stranded on the coast of France, causing pollution on an even larger scale, in circumstances which rightly or wrongly were believed to have involved a possibly fatal delay during negotiations with the intended salvors.

To this problem the traditional law of salvage provided no answer, for the only success which mattered was success in preserving the ship, cargo and associated interests; and this was logical, since the owners of those interests, who had to bear any salvage award that was made, had no financial stake in the protection of anything else. This meant that a salvor who might perform a valuable service to the community in the course of an attempted salvage, by for example moving the vessel to a place where the escape of oil would be less harmful, would recover nothing or only very little, if in the end the ship was lost or greatly damaged. Something more was required to induce professional salvors, upon whom the community must rely for protection, to keep in existence and on call the fleets necessary for the protection of natural resources in peril. Some new form of remuneration must be devised. It is with an important aspect of the scheme worked out during long and hard-fought negotiations between the shipowning and cargo interests and their insurers on the one hand and representatives of salvors on the other, with participation by governmental and other agencies, that the present appeal is concerned.

It is important to make clear at the start that the solution devised in the 1980's was not to create a new institution: a kind of free-standing *"environmental salvage."* The services performed remain, as they have always been, services to ship and cargo, and the award is borne by those standing behind ship and cargo. The difference is that the sum payable to the salvor may now contain an additional element to reflect the risk to the environment posed by the vessel for which the services are performed. This element of *"special compensation"* is based on the salvor's *"expenses"* (as defined) and may be enhanced in cases where the salvage operations have actually prevented or minimised environmental damage. The

reward for the salvage itself is assessed and apportioned between the vessel and other property interests as before, and the difference if any between the amount so awarded (or nil, if there is no award) and the amount of the special compensation is due to the salvor from the shipowner alone. Two issues are now before the House about the principles on which the special compensation should be assessed. Of these, one is much the more difficult. I will concentrate on this, leaving over the second point for a brief reference at the end.

The events which have led successively to hearings before Mr. R.F. Stone Q.C. as salvage arbitrator, Mr. J.F. Willmer Q.C. as appeal arbitrator, Clarke J., sitting in the Commercial Court on appeal from the award of Mr. Willmer, the Court of Appeal [1996] 1 Lloyd's Rep. 449, and finally your Lordships were summarised by Clarke J. [1995] 2 Lloyd's Rep. 44, 46-47 in terms which I am glad to adopt. At about 23.20 hours on 19 September 1992 Nagasaki Spirit collided with the container ship Ocean Blessing. The collision occurred in the northern part of the Malacca Straits. At the time of the collision Nagasaki Spirit was part laden with a cargo of 40,154 tonnes of Khafji crude oil. As a result of the collision, about 12,000 tonnes of Nagasaki Spirit's cargo were released into the sea and caught fire. Both ships were engulfed by the fire. Only two members of the crew of Nagasaki Spirit survived the fire. All the crew of Ocean Blessing lost their lives. At about 09.00 hours on 20 September the appellants, Semco Salvage and Marine Pte. Ltd. ("Semco"), agreed to salve Nagasaki Spirit and her cargo on the terms of Lloyds Open Form 1990 (hereafter "L.O.F. 1990"). Later that day they agreed to salve Ocean Blessing on the terms of the same form.

On the same day Semco mobilized a number of tugs, which proceeded to the position of the casualty. Semco fought the fire on Nagasaki Spirit. They succeeded in extinguishing it at about 12.20 on 26 September. At about 17.00 hours on 26 September the Malaysian police expressed concern that the casualty might cause pollution. They ordered Semco to tow Nagasaki Spirit away from the Malaysian coast. At about 14.03 hours on 3 October Nagasaki Spirit was anchored in a position off Belawan in Indonesia. She remained at this anchorage until 24 October.

On 22 October the Indonesian authorities granted Semco permission for a ship to ship transfer of the cargo remaining on board Nagasaki Spirit. On 24 October, Semco moved Nagasaki Spirit to a new position in order to transfer her cargo. Transhipment of the cargo from Nagasaki Spirit to Pacific Diamond was commenced at 00.25 hours on 29 October. Nagasaki Spirit remained at the anchorage position until about 14.00 hours on 25 November when a tow to Singapore commenced. At 15.40 hours on 12 December Nagasaki Spirit was redelivered to her owners afloat alongside the shipyard quay in Singapore.

Before turning to the relevant provisions of L.O.F. 1990 a little of its history must be given. The move towards the evolution of what has been called a *"safety net,"* designed to provide an additional incentive for salvors to keep fleets on station, began during the late 1970's with two parallel initiatives. These first bore fruit in the 1980 revision of the Lloyds Open Form, so as to make clause 1(a) read as follows:

"The Contractor agrees to use his best endeavours to salve the . . . and/or her cargo bunkers and stores and take them to . . . or other place to be hereafter agreed or if no place is named or agreed to a place of safety. The Contractor further agrees to use his best endeavours to prevent the escape of oil from the vessel while performing the services of salving the subject vessel and/or her cargo bunkers and stores. The services shall be rendered and accepted as salvage services upon the principle of 'no cure-no pay' except that where the property being salved is a tanker laden or partly laden with a cargo of oil and without negligence on the part of the Contractor and/or his Servants and/or Agents (1) the services are not successful or (2) are only partially successful or (3) the Contractor is prevented from completing the services the Contractor shall nevertheless be awarded solely against the Owners of such tanker his reasonably incurred expenses and an increment not exceeding 15 per cent of such expenses but only if and to the extent that such expenses together with the increment are greater than any amount otherwise recoverable under this Agreement. Within the meaning of the said exception to the principle of 'no cure-no pay' expenses shall in addition to actual out of pocket expenses include a fair rate for all tugs craft personnel and other equipment used by the Contractor in the services and oil shall mean crude oil fuel oil heavy diesel oil and lubricating oil."

The history of this revision to the common form of salvage contract does not appear from the materials before the House, but it is possible to give an account of the contemporaneous efforts to reach an international solution, in the shape of a replacement for the Salvage Convention of 1910. Within a few months of the Amoco Cadiz disaster the International Maritime Organisation ("I.M.O.") had taken the matter in hand and prepared an initial report (not before the House). The problem was also addressed by the Comite Maritime International ("C.M.I.") which agreed to co-operate in a study of the private law principles of salvage. The outcome was the establishment of sub-committee under the chairmanship of Professor E. Selvig, which prepared a draft convention accompanied by a report. These documents were placed before a conference of C.M.I. in Montreal during May 1981, by which time L.O.F. 1980 with its safety net provision had come into force. The debates at Montreal led to a final draft, together with a report by Mr. B. Nielsen. For a time there was little further progress, but eventually a diplomatic conference led to the agreement of the International Convention on Salvage, 1989 ("the Convention"). This did not come into force internationally until July 1996, when the necessary ratifications were achieved. So far as English domestic law is concerned the Convention was given the force of law in the United Kingdom by the Merchant Shipping Act 1995, section 224. But the Act did not affect rights and liabilities arising out of operations started before 1 January 1996. Accordingly, the claim now under consideration is a private law claim, based on L.O.F. 1990. The Convention is relevant only because having partly been inspired by LOF 1980 it is now incorporated by reference into L.O.F. 1990.

It is appropriate next to quote the relevant terms of L.O.F. 1990 and the Convention. The former provides as follows:
"1. (a) The Contractor shall use his best endeavours:-

(i) to salve the '. . .' and/or her cargo freight bunkers stores and any other property thereon and take them to . . . or to such other place as may hereafter be agreed either place to be deemed a place of safety or if no such place is named or agreed to a place of safety and

(ii) while performing the salvage services to prevent or minimize damage to the environment.

(b) Subject to clause 2 incorporating Convention Article 14 the services shall be rendered and accepted as salvage services upon the principle of 'no cure--no pay.'

(c) The Contractor's remuneration shall be fixed by Arbitration in London in the manner hereinafter prescribed and any other difference arising out of this Agreement or the operations thereunder shall be referred to Arbitration in the same way. . . .

"2. Articles 1(a) to (e), 8, 13.1, 13.2 first sentence, 13.3 and 14 of the International Convention on Salvage 1989 ('the Convention Articles') set out hereafter are hereby incorporated into this Agreement. The terms 'Contractor' and 'services'/'salvage services' in this Agreement shall have the same meanings as the terms 'salvor(s)' and 'salvage operation(s)' in the Convention Articles."

As regards the Convention the following are material:

Article 1

"Definitions

For the purpose of this Convention: . . .

(d) Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

(e) Payment means any reward, remuneration or compensation due under this Convention. . . . "

Article 8

"Duties of the salvor and of the owner and master

"1 The salvor shall owe a duty to the owner of the vessel or other property in danger:

(a) to carry out the salvage operations with due care;

(b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment; . . .

"2 The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:

(a) to co-operate fully with him during the course of the salvage operations;

(b) in so doing, to exercise due care to prevent or minimize damage to the environment; . . . "

Article 12

"Conditions for reward

"1 Salvage operations which have had a useful result give right to a reward. . . . "

Article 13

"Criteria for fixing the reward

"1 The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof. . . .

"3 The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property."

Article 14

"Special compensation

"1 If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

"2 If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30 per cent. of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special

compensation further, but in no event shall the total increase be more than 100 per cent. of the expenses incurred by the salvor.

"3 Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

"4 The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13."

It is also necessary to set out the preamble to the Convention, which although not directly incorporated in L.O.F. 1990 is plainly relevant to a proper understanding of the provisions just quoted:

"The States Parties to the present Convention,

Recognizing the desirability of determining by agreement uniform international rules regarding salvage operations,

Noting that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

Conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,

Convinced of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger . . ."

The principal issue in the present appeal concerns the definition of "*expenses"* in article 14.3, and in particular that part of it which includes in the expenses "*a fair rate for equipment and personnel actually and reasonably used in the salvage operation."* Four elements have been identified as possible components of the *"fair rate."* The direct costs to the salvor of performing the service; the additional costs of keeping the vessels and equipment on standby; a further element to bring the recoverable "*expenses"* up to a rate capable of including an element of profit; and, a final element bringing the recovery up to the level of a salvage award. The respondent owners of ship and bunkers (whom I will call "the Owners") accept that the first two elements are properly included. For their part, the appellants Semco concede that the fourth element cannot be included. In my opinion this understanding is plainly right, for reasons too plain to call for elaboration. The dispute revolves around the third element. Semco asserts, and the Owners deny, that this too should feature in the calculation under article 14.3.

In a compressed form, which does less than justice to the reasoning, the opinions on this issue expressed by successive tribunals have been as follows. Much of the long and careful award of Mr. Stone Q.C. was concerned with a traditional salvage reward under article 13. This need not be described here. When he came to the "special compensation" the arbitrator stressed the need for encouragement. A professional salvor who had done his best but had in the event failed to avert damage to the environment would not be encouraged to stay in the business or try again if he merely received his expenditure even if that took account of idle time. To arrive at a *"rate"* which it is *"fair"* it is necessary to have in mind as a broad classification the type of work done; the scale of the job; whether the towage was to a large or small vessel, whether or not there were crew and machinery to assist, but not to the risks experienced and the benefit conferred. It must be a rate which makes some contribution to future investment; but this must be tempered by the fact that there will be further encouragement in the event of success. It is of great assistance in assessing a fair rate to know the actual cost and basic market rates, but a fair rate is none of these rates or a straight mathematical computation of those rates.

The arbitrator's opinion is exemplified by the figures set out in the award. As an example one may take the figures for the tug Salvenus. The basic daily cost averaged over a full year including overheads was $ 1,990. On a basis of 50 per cent. utilisation the figure was $ 3980 per day. A further uplift of 50 per cent. reflecting a minimum actual service performed increased the figure to $ 5970. Finally, a figure was shown of $ 7000 per day for a tug of that size engaged in a straightforward commercial ocean towage of a vessel of a similar size without taking into account specialist or extraordinary services. From these figures the arbitrator built upwards to a fair rate of $ 16000 per day. Applying a similar approach to the other vessels and to personnel and equipment the arbitrator arrived at a figure for "expenses" under article 14.3 of $ 3,623,180, equivalent in Singapore Dollars to S$ 5,967,671. After adding out- of-pocket expenses the total allowed under article 14.3 was S$ 7,658,117.

Since in the present case the salvage resulted in benefit to the environment the arbitrator was required to apply the strange formula for enhancement of the "*expenses"* contained in article 14.2. The difficulties caused by this formula, the outcome of an unresolved conflict between the states and interests taking part in the drafting of the Convention, will no doubt have to be resolved before long, but they do not arise on this appeal and need not be addressed now. It is enough to record that the arbitrator applied an increment of 65 per cent. The resulting figure was S$ 12,635,893, which exceeded the salvage awarded under article 13 by S$ 3,135,893. This was the special compensation, which now remains in dispute.

The Appeal Arbitrator disagreed with Mr. Stone in several respects. First, and of great significance in financial terms, he concluded that the award of traditional salvage under article 13 was too low, by S$ 1,250,000. Secondly, on the award of special compensation under Article 14 he took a different line from Mr. Stone, as follows:

1. Although the definition of expenses may be broad, it is still a definition of expenses. It does not support the finding of a fair rate at such a level as by itself to lead to an encouraging profit for the salvors, still less anything which would be regarded as akin to salvage remuneration. The addition of an increment under article 14.2 could all too easily lead to a figure which went well beyond compensation and became salvage remuneration by the back door.

2. The travaux preparatoires were inconsistent with a construction of article 14.3 as providing a rate which was encouraging, even before the addition of any increment under article 14.2.
3. A rate which reflected idle time and the availability of vessels but which did not take into account the criteria of paragraphs (h), (i) and (j) of article 13.1 would be too low.
4. The type and scope of the job would be a relevant factor in assessing the fair rate, if only because it would be reflected in the cost to the salvors of undertaking the services.
5. The ability in certain cases to obtain an award of special compensation is an additional incentive, but it is a fall-back or safety net. It is only awarded when it is greater than any award recoverable for salvage. It follows that in any case where the services are substantial the salvage award ought to be more, and where possible significantly more, than what would be awarded by way of special compensation, unless the amount which can be awarded for salvage is constrained by the value of the salved fund.

Applying these and other considerations the appeal arbitrator concluded that the total amount awarded by Mr. Stone was much too high. He then performed three assessments, on each of which he differed from Mr. Stone. The first was to reconsider the salvage award, which he regarded to be insufficiently encouraging; and he increased it to S$ 10,750,000. Your Lordships are not troubled with this question. Secondly, he arrived at his own figures for the expenses under article 14.3. For example, in respect of the Salvenus he awarded a rate of S$ 7,500 per day, as against the arbitrator's figure of $ 16,000. Finally, as to the increment under article 14.2 he agreed with the arbitrator's basic approach. On the figures for expenses under article 14.3, the appeal arbitrator would have regarded the arbitrator's uplift of 65 per cent. as too much. But on the appeal arbitrator's own approach to expenses this increment seemed fair and reasonable. The result was to increase the grand total under article 14.3 of S$ 5,216,404 to S$ 8,607,067. This was less than the salvage award, so that no special compensation was payable.

On appeal to Clarke J. [1995] 2 Lloyd's Rep. 44 four principal questions were discussed, two relating to salvage and two to special compensation under article 14. As to the latter, the learned judge broadly accepted the arguments which the owners were later to repeat before this House, and accordingly upheld the general principles which the appeal arbitrator had sought to apply. But the learned judge did not agree with the way in which the appeal arbitrator had arrived at the figures which he had substituted for those of the arbitrator. As to salvage under article 13, the judge concluded that the Appeal Arbitrator was entitled in principle to differ from the award of the arbitrator, and that he was also entitled to cross-check between the amounts which he proposed to grant as salvage and as special compensation; but that since the figures for the latter were wrongly assessed the Appeal Arbitrator's salvage award might thereby have been distorted. He therefore remitted the matter to the Appeal Arbitrator to reconsider the quantification of salvage.

In the Court of Appeal a majority (Staughton and Swinton Thomas L.JJ.) agreed with Clarke J. As Staughton L.J. put it [1996] 1 Lloyd's Rep. 449, 455: *". . . a fair rate . . . means a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having resources instantly available. Remuneration or uplift or profits is to be provided, if at all, under article 14.2. Beyond that, what is a fair rate is a matter of judgment for the tribunals(s) of fact."*

Evans L.J. took a different view, which I describe at a later stage. In the result the appeal on this aspect of the dispute was dismissed, since it was accepted that on the view of the majority no award of special compensation would ensue. Semco now appeal.

My Lords, leaving aside for the moment the interpretation preferred by Evans L.J., the rival contentions on the meaning of "fair rate," as summarised in the parties' Agreed Statement of Facts and Issues, were as follows:

"(i) is it a fair rate of remuneration having regard to the circumstances of the case, including the type of craft actually used and the type of work required (but in general terms) and a rate which acts as an incentive to the salvor (i.e. normally including a profit element but without amounting to a salvage reward or anything like it), as Semco contend;

"or

"(ii) does it mean a fair rate of expense which is to be comprehensive of indirect or overhead expenses and to include the additional cost of having resources instantly available, as the shipowners contend."

My Lords, whichever alternative your Lordships prefer will not leave the parties and arbitrators in salvage disputes with any precise guidance on how to arrive at the special compensation. The fact is, however, that the assessment of salvage has never been an exact science, and the embellishment added by article 14.3 is well known to have been an uneasy compromise. At all events, although the possibilities are not exhausted by the two alternatives quoted they are, in my view, more plausible than any others. On the choice between them, although weight has rightly been given to the history of the Convention I prefer to begin with its words, read in the general context of the new regime. As to the words themselves, I feel little doubt that they support the narrower interpretation. The concept of "*expenses*" permeates the first three paragraphs of article 14. In its ordinary meaning this word denotes amounts either disbursed or borne, not earned as profits. Again, the computation prescribed by article 14.3 requires the fair rate to be added to the *"out- of-pocket"* expenses, as clear an instance as one could find of a quantification which contains no element of profit; and it surely cannot have been intended that the "*salvors' expenses*" should contain two disparate elements. It is moreover highly significant that article 14.2 twice makes use of the expression "*expenses incurred*" by the salvor, for in ordinary speech the salvor would not "incur" something which yields him a profit. The idea of an award of expenses as a recompense, not a source of profit, is further reinforced by the general description of the recovery as *"compensation",* which normally has a flavour of reimbursement. I acknowledge that this word has long been used to denote the amount recoverable as

conventional salvage: see for example Abbott on Merchant Ships 5th ed. (1827) at p. 610. Nevertheless it is significant that a clear distinction is drawn in paragraphs 1 and 4 of article 14 between compensation and reward, and the same contrast appears in article 1(e), quoted above.

This purely textual account of the text must now be measured against the aims of the Convention. For Semco Mr. Brice Q.C. emphasises that the explicit purpose of the new salvage regime is, in the words of the Preamble, to provide *"adequate incentives"* to keep themselves in readiness to protect the environment, and contends that a level of compensation which will furnish in cases where the efforts fail without the salvor's fault no more than direct and standby costs is not adequate for this purpose. My Lords, as to the purpose of the Convention this is plainly right, but the careful submissions of counsel have not persuaded me that this *"teleological"* method (as he described it) enables profitability to be written into expenses. I say this for two reasons.

In the first place I do not accept that salvors need a profit element as a further incentive. Under the former regime the undertaking of salvage services was a stark gamble. No cure - no pay. This is no longer so, since even if traditional salvage yields little or nothing under article 13 the salvor will, in the event of success in protecting the environment be awarded a multiple not only of his direct costs but also the indirect standby costs, yielding a profit. Moreover, even if there is no environmental benefit he is assured of an indemnity against his outlays and receives at least some contribution to his standing costs. Lack of success no longer means *"No pay,"* and the provision of this safety net does suffice, in my opinion, to fulfil the purposes of the new scheme.

Secondly, although Mr. Brice disclaimed any intention to revive the method adopted by the arbitrator, which was to treat article 14 as creating a salvage regime parallel to that of article 13, the argument for Semco was in essence the same. The omission from article 14.3 of paragraphs (a) to (g) of article 13.1 shows that expenses are not to be calculated on the same generous scale as an award for a successful salvage. If such considerations enter the assessment of special compensation at all, this is through the uplift under article 14.2. As Clarke J. said [1995] 2 Lloyd's Rep. 44, 51: *"the effect of the reference to matters such as promptness, availability, state of readiness and efficiency . . . is not to transfer the concept of expense into something which goes beyond what could fairly be regarded as a type of expense. If that had been intended it could readily have been done by plain language."*

Furthermore, and in my view decisively, the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of *"salvage operations"* which, as already seen, are defined by article 1(a) as operations to assist a vessel in distress. Thus, although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award. The only structural change in the scheme is that the incentive is now made more attractive by the possibility of obtaining new financial recognition for conferring a new type of incidental benefit. Important as it is, the remedy under article 14 is subordinate to the reward under article 13, and its functions should not be confused by giving it a character too closely akin to salvage.

My Lords, the materials on which these opinions are founded are confined to the instruments themselves, without the recourse to the travaux preparatoires, permissible where the meaning of an international agreement is found to be unclear: see ***Fothergill v. Monarch Airlines Ltd.*** [1981] A.C. 251. Nevertheless, reference was made to them in argument without objection, and they are a useful means of testing the tentative opinions already formed. Some caution is however required. The documentary antecedents of the Convention are incomplete, and there is nothing before the House to indicate the origins of the new safety-net provisions in L.O.F. 1980. This is understandable, since that Form is neither the document sued upon, nor incorporated into it. Nevertheless, it is plain from Professor Selvig's report that the first draft of the Convention was influenced by L.O.F. 1980, and a full account of L.O.F. 1990 cannot be given without knowing the history of its predecessor.

Subject to these reservations, I find in the travaux preparatoires strong reinforcement for the Owners' interpretation of article 14. In particular:

1. It is made quite clear throughout that the new remedy is linked to salvage and does not stand on its own.

2. The report of Professor Selvig records that the International Salvage Union proposed an amendment which would extend the salvor's expenses to:

a) the use and availability of vessels and other equipment intended for salvage operations and their standing costs;

b) the time expended by the salvor and the out of pocket expenses reasonably incurred by the salvor in the services;

c) the state of readiness of the salvors' vessels and equipment intended for salvage operations;

d) the level of investment and professionalism of the salvor."

The sub-committee rejected this proposal, and it is significant that whilst items a), b), and c), are broadly reflected in the ultimate text there is no counterpart to item d).

"3. In Mr. Bent Nielsen's commentary on the draft Convention as it stood at the end of the Montreal conference, which so far as concerned article 14.1 and 3. was almost identical to the form ultimately approved, there is nothing to suggest that the members of C.M.I. intended that the words of the draft might entitle the salvor to a profits guarantee. On the contrary, the author noted in relation to the predecessor of article 14.3: 'The reference to the criteria set out in [article 13.1 (h), (i) and (j)] is important, in particular because it is thereby made clear that due account shall be taken of the salvor's standing costs, overheads, etc., when determining what is a fair rate in the particular case.'

"4. L.O.F. 1980, which was undoubtedly one of the inspirations of the Convention, made use of the simpler formula '. . . the Contractor shall nevertheless be awarded . . . his reasonably incurred expenses.' It is even clearer here that the salvor was not intended to make a profit; and there is nothing in the documentary materials to suggest that the later expansion of the wording was meant to produce a wholly different result."

Such preliminary documents as are available thus support the narrower construction which I propose. Two other matters call for mention. First, your Lordships were pressed with a submission that the meaning given to article 14.3 by the judge and the Court of Appeal would be unworkable in practice. I cannot accept this, for it seems to me that the ascertainment of the fair rate must necessarily be performed with a fairly broad brush, albeit not so broad as the fixing of the reward under article 13, and the uplift under article 14.2. Quite sufficient information for such purposes could be derived from the salvor's books, as indeed became clear when reference to materials from that source was made in the course of argument.

Secondly, Miss Selvaratnam addressed the House on certain authorities concerning the assessment of a fair rate of hire or other remuneration for services performed in the absence, or outside the terms, of a binding contract. These decisions would indeed have been germane if the purpose of article 14.3 had been to give the salvor a reward, not directly defined by the contract, but generally referable to a fair rate of remuneration. In the present case however I have concluded for the reasons given that article 14.3 is not concerned with remuneration, but with a more restricted basis of recovery, and the authorities cited therefore do not assist.

These authorities do however point the way to an alternative argument for Semco, which did not form part of their submissions in the Court of Appeal and which was first proposed in the dissenting judgment of Evans L.J. It is best seen in the following passages from the judgment [1996] 1 Lloyd's Rep. 449, 457, 459:

"In summary, I would hold that the judge was wrong to exclude altogether a possible 'profit' element and that Mr. Stone erred in assessing the 'fair rate' as if it were a form of remuneration or reward. Broadly speaking, in my judgment Mr. Willmer was correct to have regard to commercial, or where relevant, market factors as well as to the salvor's costs. . . .

"I would hold that 'fair' means 'fair to both parties' and that 'a fair rate' for services provided in fact should be established by reference to what I would call the commercial value of those services, disregarding the special considerations which lead to the equivalent of enhanced rates for salvage services when the reward for a successful salvage is assessed. . . .

"If the intended meaning was 'a commercial rate for the particular service, taking account of market rates when those may apply', then the chosen formula 'a fair rate' comes close to expressing it, in a context where a straightforward reference to market rates was not possible, as both parties agree."

My Lords, the difficulty which I find with this interpretation is two-fold. First, the proposition gives no weight to the context which, for the reasons already given, point directly away from anything resembling the kind of remuneration which the salvor could expect, if not exactly in the open market, at least in some approximation to it. There are elements in such remuneration which the safety net was not in my opinion meant to embrace. Secondly, I believe that the Lord Justice attached undue importance to the word *"rate"*, which was understood as reflecting a notional periodical payment, to be multiplied-up to a figure forming part of the expenses. It would, I can see, be only a short step from this to look for a periodical basis of payment which could only be ascertained by reference to the market for vessels or equipment of this kind. For my part however I believe the word "rate" has sent the enquiry in the wrong direction. Whatever its ordinary meaning I believe that in the context of article 14 it simply denotes an amount attributable to the equipment and personnel used, just as the expenses include an amount attributable to out-of-pockets. This view is wholly consistent with the French language version of the Convention, where we find in article 14.4 the words *". . . les debours raisonnablement engagés par l'assistant dans les opérations d'assistance ainsi qu'une somme équitable pour le matériel et le personnel . . ."* We were informed that the Spanish version of the text is to similar effect. I believe that if there had been an opportunity to deploy before the Lord Justice the arguments which your Lordships have heard he might well have come to a different conclusion. At all events, I must respectfully dissent from it.

Finally, whilst the French text is still in mind I would draw attention to the word *"indemnité"* which appears in article 14 in the same places as *"compensation"* in the English version. Mr. Brice correctly warned that this may be a *"false friend"* with indemnity in the English language, since one of its meanings does correspond to a salary or other payment for work done. Nevertheless I think that there is still a flavour of reimbursement for outlays, which accords with the meaning I have already proposed.

My Lords, I have explored the matter at length in deference to the practical importance of the question, the differences between the opinions expressed, and the thoughtful argument of Mr. Brice. Otherwise I would have been content simply to express my agreement in every respect with the economical and convincing judgment of Clarke J.

There remains a contingent cross-appeal by the Owners, contingent because the figures are such that it will arise only if Semco prevail on the principal issue under article 14.3, which in my opinion they do not. The question is whether the expenses comprise those incurred during the whole of the salvage operation, or only during the times when a threat to the environment is still in existence. Clarke J. and all members of the Court of Appeal preferred the former opinion. In a spirited argument Mr. Thomas Q.C. supported the latter view, but your Lordships did not think it necessary to invite a response from Mr. Brice. I think the matter plain, and am content to adopt the reasons given by Clarke J. for deciding that it is to the entirety of the operation that the expenses should be referred.

I therefore propose that the appeal and the cross-appeal should be dismissed, in each case with costs.

LORD LLOYD OF BERWICK My Lords,
I agree that the appeal and cross-appeal should each be dismissed for the reasons given by my noble and learned friend, Lord Mustill. Since Mr. Brice Q.C., for Semco, described the appeal as a test case of international importance on a point which has not so far been considered elsewhere, I underline what seem to me to be the salient points:

1) *". . . fair rate for equipment and personnel actually and reasonably used in the salvage operation"* in article 14.3 means a fair rate of expenditure, and does not include any element of profit. This is clear from the context, and in particular from the reference to *"expenses*" in article 14.1 and 2, and the definition of "*salvors' expenses*" in article 14.3. No doubt expenses could have been defined so as to include an element of profit, if very clear language to that effect had been used. But it was not. The profit element is confined to the mark-up under article 14.2, if damage to the environment is minimised or prevented.

2) The first half of article 14.3 covers out-of-pocket expenses. One would expect to find that the second half of the paragraph covered overhead expenses. This is what it does. If confirmation is needed, it is to be found in the reference to sub-paragraphs (h) to (j) of article 13.1, (which are apt to cover overhead expenses) and the omission of sub-paragraphs (a) to (g).

3) Mr. Brice argued that the word *"rate"* indicated more naturally a rate of remuneration rather than a rate of expenditure. But, as Lord Mustill points out, rate is the appropriate word when attributing or apportioning general overheads to the equipment and personnel actually and reasonably used on the particular salvage operation.

4) Mr. Brice argued that if fair rate means rate of expenditure it would require "*a team of accountants*" in every salvage arbitration, where the environment has been at risk. Mr. Thomas's answer was that the basic rates in the present case (not a straightforward one) were agreed without difficulty by the two firms of solicitors. In any event accountants are nowadays, as he says, a part of ordinary life.

5) Although the meaning of article 13 is clear enough, and resort to the travaux preparatoires is therefore not strictly justified, I have never known a case where the travaux point so strongly in favour of one party rather than another. The commentaries on the draft documents show conclusively what the salvors' representatives' were seeking to achieve during the international negotiations leading up to the 1989 Convention, and how it was that sub-paragraphs (h) to (j) found their way into that Convention.

6) Mr. Brice made out a strong case that professional salvors of today need encouragement by way of remuneration over and above their expenses if they are going to stay in business. But that is not what they were seeking to achieve during the negotiations. Nor is it what was in fact agreed. I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD My Lords,
I have had the benefit of reading in draft the speech to be given by my noble and learned friend, Lord Mustill. I agree with it, and for the reasons which he gives I too would dismiss both the appeal and the cross-appeal.