



FACULTY OF LAW
Lund University

Natalia Malashkina

Law Reform in the International
Regime of Salvage:
The Insurance Perspective

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Proshanto Mukherjee

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Summary

As the case of the Deepwater Horizon reveals, the consequences of an oil spill or any other marine incident can be devastating. Although pollution from ships implies a much lesser scale, nevertheless there must be maximum efforts for preventing the possible risks and consequences of marine casualties.

For centuries salvors have remained the ones who will provide the fastest response to a ship in distress. A successful salvor is to be remunerated for his services, while the amount of his reward cannot exceed the value of the salvaged fund.

Traditional justification for salvage remuneration evolved from the principles of unjust enrichment. Those who act on behalf of another in an emergency should be compensated for doing so. At the same time, a salvage award has never been limited merely to the law of restitution, as there has always been a sound public policy for encouraging rescues at sea.

As long as the salvage subjects were mainly limited to the maritime property, it was relatively easy to identify the meaning of success and estimate contributing values. However, beginning from the late 1960s environmental and liability aspects became dominant in a salvage operation, and that triggered serious shifts in the whole system. It became evident that the main beneficiaries should be looked for not on the part of property owners and their insurers, but on the part of shipowners and liability underwriters, who avoid potential claims due to salvors' intervention.

The further evolution of the law of salvage will largely depend on the outcome of the negotiating process between the two groups of underwriters – property insurers and P&I Clubs. So far, to adjust the salvage practices to the contemporary challenges, the solutions of contractual nature have been found. As the pressure rises for further changes, it is important to grasp the rationales behind the negotiating parties' positions in order to analyze where that development can take salvage law to.

Abbreviations

CLC	Civil Liability Convention(s)
CMI	Comité Maritime International
CRDT	Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessel
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
HFO	Heavy Fuel Oil
HNSC	Hazardous and Noxious Substances Convention
H&M	Hull & Machinery
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
ISU	International Salvage Union
IUMI	International Union of Marine Insurance
LOF	Lloyd's Open Form
MIA 1906	Marine Insurance Act 1906 (UK)
P&I	Protection and Indemnity
SCOPIC	Special Compensation P&I Clause
SOSREP	Secretary of State's Representative (UK)

TOVALOP

Tanker Owners Voluntary
Agreement concerning Liability for
Oil Pollution

UNCLOS

United Nations Convention on the
Law of the Sea

YAR

York-Antwerp Rules

1 Introduction

1.1 Background

The risk of a casualty is coeval with the invention of the first floating device. Since then, ships have become bigger in size and much more technically sophisticated, enabling global transportation of greater quantities of goods. The progress of sea-borne trade has an incomputable effect on the world's economic development. However, all those achievements have their price to pay since the scale and gravity of casualties have been progressing too. As the case of the Deepwater Horizon reveals, the consequences of an oil spill or any other marine incident can be devastating. Yet, a total phasedown of all human commercial activities carried out at sea will hardly be an option either. Instead there must be zero tolerance to the unsafe practices at sea and maximum efforts aimed at preventing, mitigating and reducing the possible risks and consequences of marine casualties.

At the present time the most capital-intensive stage of such efforts are often carried out far from the place of the incident itself. Those are the negotiators representing interested parties, sitting ashore, calculating the aftermath of the incident and spreading the risks among themselves. But as three thousand years ago, the ones who will expose themselves to peril at sea and provide the fastest response to a ship in distress are the salvors.

The range of challenges salvors have to deal with today is extensive and seems to be infinite. A fire on board represents a danger which has probably been familiar to seafarers since the first maritime adventure, but in combination with a new kind of cargo it can beget a type of hazard never seen before. The only thing, that has remained invariable throughout the centuries, is the progressive character of a marine casualty. An incident is unlikely to get improved by itself. Unless the assistance is extended

promptly, the situation is definitely going to deteriorate, resulting in a more expensive cure later.¹

While the importance of salvage is commonly taken as an axiom, far less unanimity can be seen when the value of the salvor's intervention is under discussion. For centuries there has been a traditional cap, setting an upper limit of a salvor's remuneration; by no means can it exceed the value of the salvaged property assessed at the date and place of termination of the salvage services². At the same time, only a successful salvor can anticipate to be rewarded, while the absence of a useful result precludes any remuneration no matter how great the salvor's exertions were.³ That ground principle is expressed by the "no cure no pay" formula.

At a certain turn of history the traditional principles became insufficient and even counter-productive, posing a threat to sustainability of the salvage industry. A discussion on the required changes started and soon two ground-breaking provisions were incorporated in the most prevalent standard salvage contract at that time – the Lloyd's Open Form 1980. That constituted the first deviation from the customary principles. The amendments were later adopted and broadened by the drafters of the 1989 Salvage Convention.⁴

At the present time the pressure for further changes is rising with new vigour. Today the salvor is rendering assistance not only to the property in peril, but also – and often to a much larger extent – to the environment, being "an environmental responder in the first instance".⁵ From the salvor's perspective, this new role is worthy of a new principle for reward-setting.

In the maritime industry hardly anything can be reformed simply by imposing a mandatory solution by one of the parties. Quite to the opposite,

¹ Umbdenstock, B. (2003, January). *Salvage Contracts: Why Terms Matter*. Retrieved February 20, 2010 from the World Wide Web:

http://www.smany.org/sma/pdf/Vol34_No2_Jan2003.pdf

² Geoffrey Brice, *Maritime Law of Salvage*, London: Sweet and Maxwell 2003, 4th edition, p. 1.

³ *Ibid.*

⁴ International Convention on Salvage, 1989; further referred to as "1989 Convention" and "1989 Salvage Convention".

⁵ Witte A. (2008, September 16). *Environmental Salvage*. IUMI Vancouver Conference. Retrieved February 15, 2010 from the World Wide Web:

<http://www.iumi.com/index.cfm?id=7244>

it is compromise-making and informal agreements which pave the way to changes. A retrospect of the reforms in the law of salvage in the 1980s also discloses a long negotiation process, held mostly between various insurance groups. Today, just as thirty years ago, property and liability underwriters still constitute two groups of interests who have the last word in the discussion of the new methods for remunerating salvors, as they are the main parties ensuring the funds for such payments.

The common aim of insurers is to prevent themselves from excessive costs. Therefore any proposed alteration in the existing law or current insurance practices will be scrutinized by them. A new convention or national law, neglecting objections from the insurance industry, is running a risk of failure at the stage of implementation. Modern history contains a few such examples. Thus, the first attempt to adopt the HNS Convention failed *inter alia* because of the opposition of marine insurers and P&I Clubs. The CRDT constitutes another example in that regard.⁶ On the other hand, sometimes insurance interests presuppose that that should be the new convention or legislation which is to adapt to the existing insurance practices, and not *vice versa*. What is often left underestimated is the capacity of the insurance industry to adjust to new rules.⁷

A grasp of the property and liability underwriters' positions is therefore underlying for analyzing the current possibilities for reforming the law of salvage. The picture, however, will be incomplete unless the influence of the coastal states on salvage-related matters is taken into consideration. Public policy has traditionally been sound within that private-law field, but today states' attention to a salvage operation is even greater due to environmental concerns. A state's direct opportunities to influence other interested parties – salvors, marine underwriters and P&I Clubs – can

⁶ Oral Report of the Liability Committee to the Council IUMI Conference Paris (1997, September 15). *Marine Insurance – the Way Forward. Reaction of Liability Insurers to New Legal Liabilities under International Conventions and National Law* (pp. 2, 5, 6). Retrieved February 20, 2010 from the World Wide Web:

<http://www.aimu.org/IUMI%20PAPERS/LIABILITY/Marine%20Insurance%20-%20The%20Way%20Forward%20Reaction%20of%20Liability.pdf>

⁷ Rosaeg E. (2001). *The Impact of Insurance Practices on Liability Conventions*. Retrieved February 16, 2010 from the World Wide Web:

<http://folk.uio.no/erikro/WWW/corrgr/insurance/Lysebu.pdf>

be limited sometimes. However, the state can and persistently does adopt new laws and liability regimes throughout its sovereign space, changing thus the rules of the game for the other three groups of interests. Therefore, it is important to be aware of the rationale for a state's intervention in a salvage operation and the forms, which such intervention can take.

1.2 Problem Description

The impact of insurance practices is essential for the further adaptation of salvage law to modern challenges. The need for changes is advocated by salvors, but certain interests on the part of underwriters are concerned about the potential exposure to excessive costs the changes may bring. Taking that view as a starting point of the research, the purpose of the thesis is to analyze where the possibilities for a reform in the law of salvage lie at the present time. This goal embraces the following research objectives:

- Outline the general evolution of the law of salvage from customary law to its current forms.
- Observe the modern dimensions of a salvage operation and their legal foundations.
- Identify the interested parties to the issue, and their correlative power balance.
- Examine liability and property insurers' cover for salvage remuneration.
- Highlight the premises for reforming the salvage law at the current stage.
- Reason upon the possible scale and form of implementation for the future reforms in the world of salvage.

1.3 Disposition

The paper consists of three chapters. Chapter 1 starts with highlighting the underlying principles of traditional salvage law, and

proceeds to cover the changes brought about by the two salvage conventions. An examination of the existing contractual forms is also present in the chapter as an essential part for outlining the boundaries of the subject of the research.

Chapter 2 addresses the interests of the main parties standing behind a salvage operation. The author contemplates if it is difficult to reach a compromise on a new approach to set a salvage award and the sources for its payment. Chapter 3 introduces a discussion on the concept of “environmental salvage” and the implications it imposes on the current legal and contractual facilities in the law of salvage.

1.4 Method

The traditional legal method has been adopted as the main research technique of the study. The author discovers the legal principles relevant to the outlined problem through addressing statutes and regulations, case material, textbooks, journal articles, working documents and internet-based sources of information.

1.5 Delimitation

Highlighting the history of the 1989 Salvage Convention, Chapter 2 will show that the reforms introduced at that time were treated as a package. The various parties negotiated and compromised their positions to keep a balance of the responsibilities, especially concerning the liabilities to pay. The same “give-and-take” spirit can be seen under the ongoing discussion of the potential changes. However, in the space of this paper it is possible to deal with these matters only in outline. The paper does not aim at comprising all the positions, factors, motives and outcomes which arise or have arisen from the attempts to renovate the law of salvage at the present time. The main thread is rather to deliver the principle idea of how the compromise-making is achieved in this segment of the marine market. The

study is therefore limited to embracing only the facts, which, in the opinion of the writer, are necessary for fulfilling the research objectives.

English law has been persistently influencing the trends in the law of salvage. The 1989 Salvage Convention is based on the fundamental understanding reached between the marine property underwriters and the P&I Clubs, most of which are operated from London. The 1910 Convention was negotiated following very closely the approach in English law. Moreover, the Lloyd's Open Form, as the most popular standard salvage agreement, is reinforcing the position of English law in salvage-related matters. Hence, references will be made to English law and the Marine Insurance Act 1906 in particular. References to other forums can be made for the purpose of providing comparisons.

2 Evolution of the Law of Salvage

Tracing its history for more than three thousand years, the law of salvage is one of the most antiquated areas of maritime law. Its origins are embedded in Roman law, while its practices have no analogies in other spheres of legal relations, being limited rigidly to the maritime sector. A voluntary act of preserving or saving the property of another from a danger gives rise to a reward only if that act takes place in navigable waters. Despite the universal acceptance of that broad principle, the development of salvage law has not been proceeding identically in all jurisdictions. In the end of the nineteenth century the international shipping community recognized the need for uniformity, which subsequently resulted in adoption of the first international convention on salvage in 1910. The convention served for several decades and might well have gone on to complete its century, had not the environmental concerns paved the way to the 1989 Salvage Convention. Meanwhile pressure is rising again for introducing further changes in order to recognize a new subject of salvage.

The Chapter outlines the basic traits of salvage law under customary law and the two conventions. The contractual arrangements elaborated by the shipping world are highlighted here as well. In sum the chapter outlines the legal regime of a salvage operation along with the main challenges in this private law field.

2.1 Customary Law

Under customary law, five prerequisites will be taken in discretion in qualifying an act of rendering assistance at sea as a salvage service:

- (a) danger,
- (b) voluntariness,
- (c) success,

- (d) place of rendering the services, and
- (e) type of property salvaged.⁸

A salvage service is considered to take place when a person, acting without any pre-existing contractual or other legal duty preserves or contributes to preserving at sea any vessel, cargo, freight or other recognized subject of salvage from danger.⁹

The meanings of the first three ingredients – danger, voluntariness, success – have been interpreted by courts on numerous occasions. Not every act of rendering assistance at sea can be qualified as salvage under customary law. There are two other categories of human involvement at sea which are relatively proximate to salvage: towage and wreck removal. The same three ingredients can be blended in their composition as well, and it is not uncommon that the parties to the same casualty reveal diverse views on how the aid rendered should be qualified and, consequently, remunerated. As the case has often been, such a conflict of perceptions will eventually be resolved by the court, and there have been a number of court decisions at various jurisdictions elucidating on what “success”, “danger” or “voluntariness” imply.

The issue of definitions is hardly of a scholastic nature only. A service qualified as salvage gives rise to a corresponding reward which has traditionally been bigger than the remuneration for the other types of assistance rendered at sea. While those types of payment reflect basically *quantum meruit*, a salvage reward will most likely be significantly enhanced in accordance with the sound public policy for encouragement of salvage services.¹⁰ That policy dates back to the era when the line between an honest sailor and a freebooter was so subtle¹¹ that seafarers were well able to wear both hats interchangeably. Thus, a salvor, proceeding full sail to a ship in distress, could probably decide on the very last mile which role to put on at

⁸ William Tetley, *Maritime Liens and Claims*, 2nd edition, Montreal: International Shipping Publications, 1998, p.331.

⁹ Brice, *supra*, note 2, at p.1.

¹⁰ Kennedy and Rose, *The Law of Salvage*, London: Sweet and Maxwell 2002, 6th edition, p. 647.

¹¹ Anderson A., *Salvage and Recreational Vessels: Modern Concepts and Misconceptions* (pp. 206-207). Retrieved February 13, 2010 from the World Wide Web: http://www.safesea.com/salvage/law/anderson/anderson_main.html

that time. To encourage provision of salvage services in the perilous sea and to boost motivation for honest behaviour, the practice of making awards on a generous scale was adopted.

The customary salvage remuneration will be paid only in the case of a successful service or contribution to the ultimate success. The entire principle of assessing salvor's remuneration is based on the prerequisite that there is some property salvaged, which constitutes the only fund for making the reward. Hence, no matter how assiduous a salvor's efforts were: in the case of failing to save any property, he faces the severe reality that he was operating in the red. The risk of dissatisfaction with the amount of the reward is preserved even in the case of a successful salvage service since the amount of the reward might be less than the costs of the operation. The owner of the salvaged property should also enjoy the benefit of the salvage service; therefore, the amount of the reward very seldom exhausts the value of the salvaged fund.

These principles are embraced by a laconic formula "no cure no pay", which has been the cornerstone of the balance of interests in salvage for centuries. It has been there to remind that traditionally salvage is a risky form of activity. Its underlying driving force cannot be an acquisitive instinct of the salvor, simply for the reason that it is impossible to forecast success while the chance for failure and "no pay" is always present. The motivation for a salvor's intervention is rather sparked by the altruistic and commercially unsound desire to lend a helpful hand to another in the situation, in which the salvor himself would never deny external assistance. To encourage that instinctual inspiration, the public policy has been providing the incentives of monetary gain.

Salvage remuneration is only recoverable in case of saving of a recognized subject of salvage, which traditionally would be the ship, her stores and apparel, cargo and freight at risk.¹² The value of the salvaged property is assessed at the date and place of termination of the salvage

¹² Different jurisdictions suggest diverging approaches to the issue. Within a more conservative English law approach that property must be "maritime" in nature (i.e. it needs to be a ship or cargo or part thereof), while American law is less restrictive in that regard. The divergences were evened with adoption of the 1989 Salvage Convention (see Brice, *supra*, note 2 at pp.221-222).

service.¹³ Every and each interest benefiting from the salvage service must contribute to the payment of the salvage reward.¹⁴ That right is protected by a maritime claim of the highest priority, namely the salvage lien.¹⁵

The assessment and enforcement procedures are of a great significance for the salvor. First of all, the assessment is clearly impacting the amount of the remuneration he will finally be entitled to. Timing is extremely important in that regard, since the condition of the salvaged property can deteriorate after the termination of the salvage service and a delayed evaluation may predetermine a smaller ultimate reward. Secondly, by virtue of the salvage lien, the persons responsible for payment of the award will have to reveal themselves. They are usually represented by the shipowner, cargo owners, their respective insurers and the owners of freight at risk. Ironically enough, a salvor, skillful to win the battle with a peril of the sea, can afterwards fail to pass the stages of assessment and identification of the benefiting parties and eventually end up empty-handed.

It may well happen that the salvor's intervention has prevented not only physical damage to the maritime property, but that it has also helped avoid the risk of third party liability. Under customary law, consideration of non-physical danger can be done as a feature to enhance the salvage reward, but not as an independent ground for such a reward.¹⁶ Salvors' actions to prevent or minimize the environmental damage in the pre-Convention period¹⁷ would probably have fallen out of consideration completely. The expansion of liability for pollution at sea springs from the casualties of the late 1960s; therefore, prior to that period environmental damage was not perceived as a danger at all – neither physical, or non-physical.

2.2 The 1910 Brussels Convention

Maritime trade, involving transactions between parties of different nationalities and ships of different flags, was probably among the first

¹³ Brice, *supra*, note 2 at p.1.

¹⁴ Kennedy and Rose, *supra*, note 10 at p. 15.

¹⁵ Institute of Maritime Law (2008). *Southampton on Shipping Law*, London: Informa, p.161.

¹⁶ Kennedy and Rose, *supra*, note 10 at pp. 167-170.

¹⁷ At least prior to adoption of the 1910 Salvage Convention.

industries which felt the touch of globalization and its demand for unification of rules. Elaboration of a uniform international approach in relation to cases of assistance and salvage was undertaken by Comité Maritime International, soon after it was founded in 1897.¹⁸

The discussion started at the International Conference of Brussels in 1905, and five years later the new convention was concluded *ibidem*. It entered into force in 1913. Prior to its conclusion, there were conceptual distinctions in salvage law among countries. Basically, there were two different systems of the same law: assistance and salvage. A number of countries were differentiating those concepts according to the presence of the crew on board the vessel in distress. In the case of an abandoned vessel, it would be qualified as salvage and remuneration would be determined applying a set ratio to the value of the salvaged properties.¹⁹ Meanwhile assistance implied presence of the crew onboard and their collaboration with the salvor, and that would be taken into consideration under calculation of the salvage reward. On the other hand, English law was not making that distinction, and the 1910 Convention followed the path of abolitionism too.

The 1910 Convention consists of nineteen articles and performs to be a relatively simple document. There is an opinion that that simplicity must have predetermined the wide and rapid acceptance of the convention.²⁰ However far the validity of that assumption might extend, it is also worth keeping in mind that at the time when the 1910 Convention was discussed, it was much easier to achieve international agreement on matters related to shipping. The British Empire was controlling forty percent of the world's tonnage,²¹ and by reason of the geopolitical situation at that time, the United Kingdom's acceptance of an international treaty would automatically trigger a signing avalanche worldwide.

¹⁸ Enrico Vincenzini, *International Salvage Law*, Lloyd's of London Press Ltd., 1992, p. 9.

¹⁹ *Ibid* at pp. 9-11.

²⁰ Griggs, Patrick J.S. Obstacles to Uniformity of Maritime Law. The Nicholas Healy Lecture. In *CMI Yearbook 2002*, (p. 169). Retrieved February, 2010 from the World Wide Web: http://www.comitemaritime.org/year/pdf/obst_uniform.pdf

²¹ Kerr, M. (1990, July). The International Convention on Salvage 1989: How It Came To Be. *The International and Comparative Law Quarterly*, Vol. 39, No. 3 (p. 531). Retrieved May, 2009 from the World Wide Web: <http://www.jstor.org.ludwig.lub.lu.se/stable/pdfplus/760115.pdf?cookieSet=1>

The 1910 Convention substantially reproduces the traditional principles of English law. Apart from conciliation of the two concepts of salvage, it does not appear to have contributed to more ground-breaking outcomes. There are certainly several particularities in the Convention which would be of a significant interest for research on the genesis of the contemporary salvage law, but for the purposes of this paper they are left out of the examination. The 1910 Convention remained in operation for several decades outlasting a lot of changes in the technological and public-policy landscapes. It was not until *The Amoco Cadiz* accident that the necessity for a new institutional regime became critical, paving the way to the new salvage convention.

2.3 Transition to the 1989 Salvage Convention

In the postwar period, a combination of factors of a geopolitical and economic nature triggered a growth in size of ship hulls. A potential gravity of marine casualties was rising symmetrically. In 1942 a casualty off the US east coast involved *The E.H. Blum*, which was the largest oil tanker at the time. Her carrying capacity was 11,600 tons gross. A quarter-century later, in 1967, an accident of greater renown also involved one of the biggest vessels of those days – *The Torrey Canyon*. Her bunker tanks alone contained 700 tons more than the entire carrying capacity of *The E.H. Blum*.²² The ambitions of naval architects seemed to set no limit and soon the Batillus-class supertankers were released in the period between 1976-1979, while 1979 witnessed the birth of *The Seawise Giant* known also as *The Happy Giant*, *The Jahre Viking* and *The Knock Navis*. The era of supertankers got officially started and has been ongoing up to now. Considering the sizes of the ships such as *The Oasis of the Seas* or *The Emma Mærsk*, the question arises how salvable those types of vessels are in principle.

²² Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, 1st edition, London, Hong Kong: Lloyd's of London Press, 1998, pp. 10-11.

Cargo was also subject to alterations. The quantities of transported goods were scaling up in ratio to the hull's sizes. The characteristics of these goods underwent significant changes as well, referring to the progress in several branches of science such as chemistry. The full list of side-effects of new substances might stay unknown even for their manufacturers and product engineers. To handle the consequences of a sporadic spill of a few gallons of kerosene can be possible in a legal vacuum, but once spilling becomes a repetitive phenomenon involving bigger amounts of highly hazardous and noxious substances, an adequate legal response will be required. Following several spectacular disasters, concerns spread among the public; that in turn forced the national governments to start taking protective measures. At that point the classic triangle of interests to a salvage service "salvor – ship – cargo" was completed by a fourth authoritative party, namely the coastal state.

The outlined trends triggered shifts in priorities under a salvage service. In accordance with customary law, there are two main subjects of salvage – the ship and cargo. The 1910 Convention is even more meticulous in that regard favouring the ship above all.²³ Throughout the twentieth century however, it became common that cargo values started significantly prevailing over hull values. From the salvor's perspective a bigger salvaged value is likely to result in a higher remuneration; therefore, focus started shifting from the ship to her cargo. But at least in those days the interest was still one-fold and unanimous: to preserve as much property as possible, which later would comprise the fund for the reward. All the parties to a salvage operation – the salvor, shipowner, cargo owner and property insurers – had a common understanding of that goal.

Then the liability underwriters came into picture, whose interest could probably be served better if the ship with her cargo was staying away from the coastline²⁴ and third parties, to whom their assured could be held liable.

²³ Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, signed at Brussels September 23, 1910. Article 1.

²⁴ Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, 2d edition, London: Informa, 2009, p. 555.

Finally, the party of private interests was joined by a counter-power represented by the public authorities of a coastal state, sharing their own views on how a salvage operation should be performed and what should be prioritized under the salvage service. Thereby, the traditional approach to a salvage operation was eroded.

2.4 The 1989 Salvage Convention

The inadequacy of the legal regime governing the third party issues was rigorously revealed by *The Torrey Canyon* accident. The casualty was unprecedented not only due to the scale of the oil spill. It also evoked a host of questions which had no ready answers in the laws of the involved parties, and probably nowhere else in the world at that time. The issues were of a public and of a private law nature, focusing on the legal right of a state to intervene, rights of compensation for the pollution damage, limitation of liability, and enforcement of the rights of recovery.²⁵ Salvage issues also fell under discussion as the ship was held in the hands of commercial salvors for several days before the British Government intervened.²⁶

Prompted by *The Torrey Canyon*, several initiatives were undertaken internationally. At the inter-state level, a few conventions were adopted: the Intervention Convention 1969, the Civil Liability Convention 1969 and the Fund Convention 1971. The industry responded with the establishment of the TOVALOP, later underpinned by another voluntary scheme, CRISTAL.

Revision of the law of salvage was however postponed till another major oil spill which took place as a result of the *Amoco Cadiz* disaster on 16 March 1978. Following the incident, IMCO launched a study on whether the 1910 Brussels Convention should be replaced.²⁷ In process of time the CMI offered to cooperate with IMCO on the issues of re-examination and possible amendment of the existing salvage law.²⁸

²⁵ Colin de la Rue, *supra*, note 22 at pp. 11-13.

²⁶ *Ibid* at p. 569.

²⁷ *Ibid*.

²⁸ *Ibid* at p.574.

The private-law circles in London also embarked upon a course for change. In 1979 the Committee of Lloyd's appointed a Working Party to update the Lloyd's Open Form.²⁹

The drafters at both private and public law layers came up with ideas of the same conceptual gist: in light of the newly-added environmental dimension to salvage operations, the rigorous "no cure no pay" principle had to be transcended. The general principle was to restore the equitable foundations of salvage law by binding all the parties, benefiting from salvage services, to contribute to the reward. Analysis of the new aspects of marine incidents rang a bell that the equitable principle of contribution had been dismantled due to the alterations of liability frameworks. The largest beneficiaries of a salvage service (or biggest losers, subject to the ultimate outcome of a marine casualty) were to be found not on the part of the property underwriters anymore, but on the part of the underwriters of the shipowners' liability. However, the latter had never had any legal obligations to contribute to salvage remuneration.

In the processes of revising the LOF and elaborating the new salvage convention two solutions were proposed: the concept of *liability salvage* and the idea of a *safety-net*.

The concept of liability salvage implies that the liability for potential damage should be treated as a distinct basis for fixing a salvage award. Accordingly, the assessment of salvage remuneration should rest on the assumption what the consequences *could have been*, had the salvor taken no action. The traditional cap – the value of the salvaged property – becomes rudimentary, as there can still be a fund for remuneration even if the whole property is towed by the salvor to the open sea to be sunk there, preventing thus beneficiaries on the part of the liability underwriters from facing the claims of third parties.

Albeit the liability salvage had already been familiar to arbitrators, the P&I Clubs voiced unanimous resistance against further expansion of that principle.³⁰ First under the LOF revision and later under the discussion of

²⁹ Colin de la Rue, *supra*, note 22 at p.571.

³⁰ There will be further discussion on this point later in the thesis, see *infra* Chapter 3.

the 1989 Salvage Convention, the concept of liability salvage was persistently contradicted by the P&I Clubs. Each time the ultimate outcome – the LOF 1980 and the 1989 Convention – would incorporate the concept in a highly diluted form,³¹ whilst enticing salvors by an arrangement of a less controversial nature – the safety-net.

The LOF 1980 imposed a new duty on the salvor “to use his best endeavours to prevent the escape of oil from the vessel”.³² Where the salvage services were partially successful or not successful, or where the contractor was prevented from completing them, the salvor would still be paid, provided that there had been no negligence on his part. The payment amounted to the expenses, reasonably incurred by the salvor, and an increment not exceeding 15 per cent of such expenses.³³ The LOF 1980 could be applied notwithstanding geographical limitations, but its safety-net provisions were designed only for tankers laden or partly laden with a cargo of oil.

The safety-net costs were assigned to the P&I Clubs, while the property underwriters agreed to cover for the salvage awards under the existing forms of policies, whether or not those awards were enhanced in light of the preventive measures. The arrangement was fixed by the informal Funding Agreement between the property underwriters in the London market and the International Group of P&I Clubs.³⁴

The rigorous “no cure no pay” was transformed into “no cure some pay”.³⁵ Although the LOF 1980 broke a ground thereby, salvors were dissatisfied with the constraints it contained. The safety-net provisions were applicable only in a limited number of situations,³⁶ and the amount of reimbursement was raising doubt if that could make up a sufficient incentive

³¹ See the discussion on the enhanced award in the LOF 1980 and the 1989 Salvage Convention below in the text.

³² LOF 1980 Cl. 1(a).

³³ For the text of LOF 1980 see Gerald Darling and Christopher Smith, *LOF 90 and the New Salvage Convention*, Lloyd's of London Press Ltd., 1991, pp. 172-180.

³⁴ Funding Agreement 1980 (as cited in Colin de la Rue, 2009, p. 546).

³⁵ Brunner R. (2006). Comment on the legality and practicality of introducing environmental salvage (p.4). Retrieved February, 2010 from the World Wide Web: <http://web.uct.ac.za/depts/shiplaw/assign2006/brunnersalvage.pdf>

³⁶ Tankers in ballast, chemical carriers or vessels with substantial amount of bunker oil onboard could present a far greater threat, nevertheless they were exempted from the safety-net umbrella.

for a salvor to intervene. The same skepticism was voiced against the enhanced award, which incorporated the concept of liability salvage. The promise of an enhancement for “preventing the escape of oil” implied so many restrictions, that it was arguably providing a hollow incentive.³⁷

In addition to the salvors’ dissatisfaction with the particular provisions of the LOF 1980, by no means could a contractual arrangement fulfill the function of a legal instrument of a status as high as an international convention. While the LOF generally regulates the relationship between the parties involved, its ability to deal with issues involving third parties is limited. The Convention, on the other hand, is intended to provide a uniform legal regime.³⁸

At the intergovernmental level the elaboration of the new convention was developing under a similar scenario. At the heart of the convention lied a compromise of the same decision-makers: the P&I Clubs and property insurers. An important milestone was CMI’s conference held in Montreal in 1981. The agreement achieved there became known as the Montreal compromise and was subsequently embodied in Article 13 and Article 14 of the 1989 Salvage Convention. The Montreal compromise as a forerunner to the 1989 Convention set the balance of allocating the financial burden between the insurers. The traditional salvage reward bearing from then the element of enhancement (Art.13), fell on the shoulders of the general average community – the cargo and hull underwriters. The safety-net “bolt-on”,³⁹ in the form of a special compensation (Art.14), was assigned to shipowners, or to be more precise to their P&I Clubs.

In its present form Article 13.1(b) states that “the skill and efforts of the salvors in preventing or minimizing damage to the environment” shall be allowed in the criteria enhancing the salvage reward.⁴⁰ The safety-net concept is embraced by Article 14 of the convention.⁴¹ If the salvor has

³⁷ Coulthard P., A New Cure for Salvors? – A Comparative Analysis of the LOF 1980 and the C.M.I. Draft Salvage Convention. *Journal of Maritime Law and Commerce*, Vol. 14, № 1, January 1983, p. 55.

³⁸ Darling and Smith, *supra*, note 33 at p.3.

³⁹ As cited by Enrico Vincenzini, *supra*, note 18 at p. 168.

⁴⁰ See Supplement A.

⁴¹ See *ibid.*

failed to earn a reward under Article 13, he is entitled to special compensation, which is equivalent to his expenses plus an increment accrued by the tribunal. The special compensation is paid solely by the shipowner in the part exceeding the amount of the reward assessed in accordance with Article 13.

The innovations, brought into effect by the LOF 1980, are expanded in the 1989 Convention, for its provisions are applicable to *all* vessels and to pollution of *various* forms and sources of origin. Moreover, the special compensation increment can be extended up to 100%.

On the other hand, compared to the LOF 1980, some of the 1989 Convention's provisions appear to be more stringent. Thus, an actual success in preventing or minimizing pollution must be present in order for Article 14 to be applied. Besides, the application of the safety-net is limited only to coastal or inland waters or areas adjacent thereto.

The safety-net solution together with the compromise on liability salvage was piloted by the LOF 1980 in order to bring the law of salvage in line with the challenges of the day. That combination was found workable, and the same ingredients, taken in greater amounts though, became a cornerstone of the new convention ruling salvage-related matters. However, the achieved equilibrium is fragile and may sometimes seem unjust.

By virtue of incorporation of Article 13.1(b), the hull and cargo interests have assumed an obligation to pay for the gains accrued by the P&I Clubs. On the other hand, the special compensation for “a salvage operation in respect of a vessel which by itself or *its cargo* threatened damage to the environment” (emphasis added) is recoverable strictly against the shipowner and his P&I Club. Therefore, it may well happen that shipowners and liability insurers are defraying potential expenses for the liability risks of the cargo owners.⁴² The effort to make a return to the equitable foundations of salvage is worthy of praise, but the realization of the come-back via such cross-dependence of the interests seems to be over-complicated.

⁴² Even though Article 14(6) is granting a shipowner the right of recourse against the cargo interests in the case when the casualty occurs to the fault of the latter, that right may be of limited help.

2.5 Contractual Arrangements

In the practice of professional salvage, rendering salvage services will be always supported by an agreement /contract. A salvage contract *per se* is not a foundation for a legal relationship between the salvor and salvee, as the right to a salvage claim, to a salvage lien and eventually to salvage remuneration exists notwithstanding any agreement between the parties to the service. All those substantive rights owe their binding force to legal principles outside contract law.⁴³ They spring from the very fact of delivering a useful result to someone by virtue of saving their property. Their aim is to prevent unjust enrichment and ensure fairness.

Hence, the rationale behind a salvage agreement lies rather in facilitating the procedural matters of the legal relationship between the parties to the salvage service. The service is often rendered under severe time restrictions, where debate over the most efficient contractual terms would be counterproductive. That is why it has become common to use standard forms, the most popular of which is the Lloyd's Standard Form of Salvage Agreement, usually in full referred to as Lloyd's Open Form "No Cure No Pay". By signing LOF the parties to the agreement give their consent to the arbitration in London to assess the sum of the salvage remuneration, and to English law to govern the settlement.

In English law there is the concept of consideration, lying at the heart of contract law. In simple terms, parties to a contract make promises to exchange one item of value for another – "this for that" or *quid pro quo*.⁴⁴ The contract usually defines the "quid", the "quo", and the terms of the transaction between the parties to the deal. Hence, to state that LOF "No Cure No Pay" is a salvage *contract* can be misleading. In its pure form LOF is not a contract in *stricto sensu*, as the requirement for consideration is not fulfilled completely.

Geographically LOF witnessed its rise in the Turkish straits. This area has always been abound with salvage cases due to the intensive

⁴³ Goode Roy, *Commercial Law*, 3rd edition, Penguin Books, 2004, at p.67.

⁴⁴ *Ibid.*

shipping traffic in addition to navigational difficulties.⁴⁵ In 1908, the form was first officially published and since then it has been undergoing systematic revision, following closely the changes in the convention law on salvage or sometimes forerunning these.

A genuine salvage contract is expected to preserve the classic ingredients of salvage, namely danger, voluntariness and success. However Article 6(1) of the 1989 Convention gives the parties the freedom to abrogate the traditional requirements:

“This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides”.

Therefore, the following questions arise: what happens if any of those three elements is ousted by the parties from a salvage agreement? Would that agreement shift into the realm of contract where not the salvage law but only contractual terms themselves define what the parties are entitled to?

Since the 1980s, LOF has undergone several significant changes, adopting certain features of a purely contractual nature, but the presence of danger is still paramount. A salvage contract is entered into by the parties in written or oral form in the face of danger, even though the danger might not necessarily be immediate. It should be real and not too remote as to be a mere possibility.⁴⁶ In the past, the presence of danger was perceived as a factor, misbalancing the bargaining power of the parties to a salvage agreement, which in turn could have resulted in unfairness of its terms relative to one of the parties.⁴⁷ That apprehension is now met by Article 7(a) of the 1989 Convention, which stipulates annulment and modification of a contract in cases where:

“(a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable”.

⁴⁵ Darling and Smith, *supra*, note 33 at p. 8.

⁴⁶ Christopher Hill, *Maritime Law*, 4th edition, Lloyd’s of London Press Ltd., p. 340.

⁴⁷ Brice, *supra*, note 2 at p. 322.

Salvage agreements are usually scrutinized by the tribunal with due diligence, though the terms of the standard forms are very unlikely to be held inequitable.⁴⁸

Voluntariness is also preserved as a key element indicating a salvage contract. Services rendered under a pre-existing duty are not merited to be identified as salvage. Signing of the LOF does not change the nature of rescue and does not affect the voluntary nature of the operation as it does not constitute the passing of consideration.⁴⁹

The most significant changes have touched on the requirement for success. The traditional approach is reflected by the formula “no cure no pay”, which can still be found in LOF’s name; it is also preserved by Articles 12 and 13 of the 1989 Convention. But the introduction of the safety-net concept has substantially reduced the need to achieve success, which in turn triggered essential alteration of the nature of LOF.

The concept of the safety-net has never been native to salvage law. As explained earlier, it was engrafted upon the law of salvage due to the considerations for environmental protection and in strife for a more equitable reallocation of the payments the salvor is entitled for his service. The concept was pioneered by the LOF 1980 on a very limited scale; then it underwent a significant enlargement and legislative confirmation by Article 14 of the 1989 Convention. After that, in tradition of keeping the LOF in adherence to the governing law of salvage, the enlarged version of the safety-net was absorbed back by the LOF 1990. Thus, Article 14, incorporated in the LOF 1990, started operating even before the 1989 Convention entered in force in 1996.

In its bold sense, the safety-net concept abolishes the requirement for success in salving *property* and transfers the calculation of the remuneration on to the basis of compensating for the expenses reasonably incurred by the salvor, plus an increment. The requirement for success is not ousted completely though, as it can still be found in Article 14(2):

⁴⁸ Kennedy and Rose, *supra*, note 10 at p .443.

⁴⁹ Christopher Hill, *supra*, note 46 at p. 347.

“If <...> the salvor by his salvage operations has prevented or minimized damage to the environment, ...”

However, further amendment to LOF, embodied in SCOPIC, has entirely abolished the requirement for success during a salvage operation. As the practice goes, the need for revision of the LOF stems not only from the necessity to follow the changing legislation. Practitioners and the interested commercial parties can also come up with proposals for changes to be made to the form “in response to shortcomings that become apparent from its operation”.⁵⁰

Such was the path for introducing the SCOPIC after the first serious test-drive for Article 14. The case of *The Nagasaki Spirit* revealed a host of flaws in Article 14.⁵¹ The case had a lengthy history of arbitration proceeded by litigation.⁵² It eventually ended up with the House of Lords’ ultimate interpretation of several issues arising from Article 14. The outcome was received without enthusiasm equally by the salvors and shipowners; so the parties pooled their efforts to seek a more effective solution. That is how the SCOPIC Clause was elaborated and entered a two-year trial period on 1 August, 1999.

SCOPIC is a complex instrument, representing a kind of a separate sub-contract within LOF. It consists of fifteen clauses, three appendices and two codes of practice, running to no less than 20 pages in sum. It brings in a few significant improvements to the LOF. Analysis of the whole clause is beyond the scope of this work, but for the purpose of this chapter it is sufficient to say a few words about the basis for assessment of SCOPIC remuneration and the effect it produced on the nature of LOF.

As a response to the shortcomings of Article 14, SCOPIC addresses the same goal: to give incentives to salvors to endeavour a salvage operation in cases where the traditional approach of “no cure no pay” is counterproductive.

⁵⁰ Darling and Smith, *supra*, note 33 at pp. 10-11.

⁵¹ See e.g. Browne, B. Salvage – LOF and SCOPIC. *The International Journal of Shipping Law*, 1999, S. 2, pp. 118-119.

⁵² For a more detailed coverage of the case see Hill, *supra*, note 46 at pp.362-365.

The salvor has to decide whether he wants to incorporate SCOPIC at the moment of signing LOF. Once the Clause has been incorporated, the salvor loses his right to claim under Article 14. The next step will be to decide whether he wants to invoke the Clause. He can do that at any day of the salvage service, but SCOPIC remuneration will be calculated starting only from the day of its invocation. SCOPIC remuneration will be paid by the shipowner's P&I Club only for the part exceeding the remuneration under Article 13, which in turn will be covered by the traditional general average community.

Compared with Article 14, which does not expressly outline the guidance for assessing special compensation, SCOPIC offers an assessment based on tariff rates, especially agreed in one of its appendices. That arrangement makes it possible for salvors to be compensated on the basis of more commercially realistic rates for use of their tugs and equipment, while from the liability insurers' point of view, it contributes to greater clarity under risk assessment and underwriting.⁵³ In sum, remuneration based on tariff rates promotes a simpler approach and overcomes the obscurity intrinsic in Article 14. That is generally regarded as being one of major improvements brought about by the clause.⁵⁴

SCOPIC omits the requirement for success as in the interpretation of Article 14, i.e. success in preventing or minimizing damage to the environment. Hence, the salvage operation conducted under SCOPIC does not need to be successful at all – neither in relation to traditional subjects of salvage, nor in delivering at least notional success to the environment. Invocation of SCOPIC explicitly marks complete abolition of one of the three pillars of salvage law – the requirement of success – which, together with a tariff-based assessment, withdraws the original salvage contract LOF from the realm of salvage and turns it into a contract for work and labour / contract of service,⁵⁵ where the right to payment arises not from traditional or convention rules, but from the terms of contract itself.

⁵³ Christopher Hill, *supra*, note 46 at p. 365.

⁵⁴ Browne, *supra*, note 51 at p. 121.

⁵⁵ Salvors are rejecting such view on the LOF agreements incorporating SCOPIC.

Salvors have made their choice for a solution of a contractual nature, while the mechanism suggested by Article 14 is recognized by the industry as impractical. For the relatively young Convention that would be a dubious achievement. According to Lloyd's statistics, SCOPIC was invoked 196 times between August 1999 and the end of November 2009. Over 96% of SCOPIC were settled. SCOPIC is incorporated into about a third of LOFs and is invoked in about 18% of all LOF cases. It is now established overwhelmingly as more workable than Article 14.⁵⁶

The SCOPIC solution is available only within the LOF forum. LOF remains the standard contract form which is the most in use for salvage operations, but there are other open forms, available regionally such as the Turkish Open Form, the Japanese Open Form and the Chinese Open Form. Although not all of them take the approach of LOF in finding the middle balance of interests, shipowners might still be bound to sign one of those forms instead of LOF, should a casualty occur in a certain region. That can happen in the situation of stringent local legislation combined with a bid market, where demand for salvage services exceeds supply. Thus, in the same waters which were once a cradle for LOF, a steady oligopoly of the few local salvage service providers has resulted in the adoption of a compulsory salvage contract, whose provisions are likely to be found somewhat contravening general salvage law.⁵⁷

It is virtually impossible to include examination of all contractual salvage sub-regimes in this study; therefore, the main emphasis is limited to highlighting the salvage agreement which has been generally recognized as the most marketable standard form, i.e. the Lloyd's Open Form. To a large extent LOF owes its popularity to the formula of the balance of interests it fixes. The efforts to optimize that balance have been the driving force for the development of the existing regulatory framework both on the public

⁵⁶ Browne, B. (2009). Trends and Developments in Salvage Law and Practice. *Paper for delivery at Lloyd's Maritime Academy Seminar on Salvage Law and Practice on 15 December 2009*, p. 2.

⁵⁷ Salvage in Turkish waters. *Gard News, Issue № 181 (2006)*. Retrieved March 15, 2010 from the World Wide Web: http://www.gard.no/ikbViewer/page/iknowbook/section?p_document_id=52202&p_subdoc_id=52210

and private law layers. As it has been shown, this development sometimes entails quite serious divergences from the traditional approach, and that might in turn bring the parties to a dead-lock as in the situation with Article 14. In that case a solution of a contractual nature was found, but where will the next change, such as for instance the recognition of liability salvage, lead to? Having outlined the major features and trends of modern salvage law, the next step will be to analyze the motivations of its main parties.

3 Interplay of Interests in the Realm of Salvage

The existing balance in the responsibility to remunerate the salvor is rooted in the Montreal compromise. The essence of that agreement, reached between the salvor, ship and cargo interests, was incorporated later in the key articles of the 1989 Convention.⁵⁸ During the negotiations each of the parties had to give up some of their proposals; therefore, eventually no one was completely satisfied with the outcome. Moreover, there were certain parties who argued that their interests had not been represented adequately at all.⁵⁹ In general, the whole history of drafting the 1989 Convention goes to prove the complexity of the bargaining process during reforming the law of salvage. Should the door for new reforms be opened, the old controversies will be back.

3.1 Casualty from Salvor's Perspective

Financially, salvage has always been a risky enterprise due to the principle “no cure no pay”. A professional salvor, who has made salvage his daily business, is doubly exposed to the risks, for as an entrepreneur he may be unsuccessful in his operations and suffer losses. Keeping in mind the scale of investments in fleet maintenance and personnel training salvors have to uphold, one can understand why salvage is today characterized as a “virtually unforgiving business”.⁶⁰ Hence, it stands to reason that before proceeding to a casualty and signing a contract, the salvor needs to obtain as much clarity on the upcoming services as possible:

- *Control over operation.* When conducting the operation, the salvor would like to secure that he possesses full control over it

⁵⁸ Articles 13 and 14 of the 1989 Convention.

⁵⁹ For example, the North-American cargo underwriters.

⁶⁰ Umbdenstock B. (2003, January). *Salvage Contracts: Why Terms Matter*. Retrieved February 20, 2010 from the World Wide Web: http://www.smany.org/sma/pdf/Vol34_No2_Jan2003.pdf

and that he undertakes steps based on his own estimations of safety and practicability, including financial feasibility.

- *Place of safety.* On completing the services, the salvor needs to deliver the damaged vessel into a place of safety where the salvaged values can be assessed.
- *Protection of the right to remuneration.* There should be instruments to ensure that the salvor's rights to remuneration are properly protected and enforceable.
- *Salvors' liability.* Giving his consent to the shipowner's request, the salvor wants to be fully aware of the range of liabilities he will be exposed to by virtue of his voluntary intervention in the casualty.

In practice, salvors can encounter serious problems in securing one or more of these issues.

Thus, in some countries an official oversight of casualty response, including actions at the stage of salvage services, has already become a standard. Article 9 of the 1989 Convention also recognizes this right of a coastal state. A state can require taking certain actions notwithstanding if such measures imply additional costs for private parties, or that they may be unnecessary from the standpoint of the operation safety.⁶¹ During the recent grounding a ship in a dangerous proximity to the Australian Great Barrier Reef, the risk of a major oil spill was modest.⁶² In the writer's belief, had the salvors been conducting the operation on the traditional "no cure no pay" principle guided by their own calculations, the services would have been accomplished in a matter of hours. However, government supervision of the salvage operation was substantial due to the significance of the endangered area. As a result, the operation lasted longer and many of the

⁶¹ The coastal state's authorities can demand removal of bunkers before the salvage service starts. In some situations however those costs might be covered by the shipowner's P&I Club.

⁶² Pierce, A. (2010, April 8). Were you sleeping, mate? *Tradewinds*. Retrieved April 8, 2010 from the World Wide Web: <http://www.tradewinds.no/casualties/article556875.ece?service=printArticle>

undertaken measures were dedicated to prevention of environmental damage.⁶³

A coastal state's intervention can limit salvors in pursuing the cure as in the cases of *The Prestige* or *The Castor*, and ultimately the "success" in the traditional understanding may even become unachievable. From a salvor's perspective, entering a "no cure no pay" open form can be promising a handsome remuneration in the beginning of the operation. But if at a later stage public authorities intervene, such form becomes counterproductive. In these situations a more preferable solution would be a daily hire or time and material contract, which fall out of the realm of salvage. Working under these types of contract the salvor may protract the services or endeavour more sophisticated and expensive solutions, motivating his actions by the need to protect the environment. While such explanation may be completely sufficient for the supervising authority of a coastal state, the paying party, for example the shipowner, would be reluctant to cover for the costs of the services.

A host of similar problems arise when salvors are bringing the vessel into a place of safety.⁶⁴ National, regional and port authorities will be concerned when seeing a leaking ship in the waters adjacent to their territory. They can order the salvor to divert the ship from their coastline or make the access conditional on the provision of the guarantees to secure payment of possible claims for any consequences.⁶⁵ The negotiations between the shipowners and their P&I Club, who can take the responsibility for providing such guarantees, may be lengthy or even yield no result. Meanwhile, the salvor will stay trapped at sea, mooning around with a leper ship in his hands.

Another challenge arises once a place of safety has been reached and a successful salvor wishes to secure his right to remuneration. The salvage lien protects only the right to the award assessed in accordance with Article 13, while the provision of security for the Article 14 payment is supported

⁶³ Pierce, A. (2010, April 7). Shen Neng 1 Oil off in Days. *Tradewinds*. Retrieved April 8, 2010 from the World Wide Web:

<http://www.tradewinds.no/casualties/article556825.ece?service=printArticle>

⁶⁴ See *post* § 3.4.

⁶⁵ Colin de la Rue, *supra*, note 24 at p.554.

by the non-binding Code of Practice between the International Group and the International Salvage Union (ISU). It is unlikely that the Code will be applied in situations where the salvor is not a member of ISU, or where the shipowner does not have a P&I cover or his P&I Club has decided to stand aside.⁶⁶ In addition, claims for special compensation are likely to arise either when there is insufficient salvaged value, or when the property has been lost. Hence, in the absence of a realistic threat of the security provisions being enforced, insurers are frequently unwilling to provide the security required. As a result, there have been many cases, involving claims for special compensation, where security has not been provided. In several cases, because of the lack of security and the unwillingness of the liability underwriters to pay, salvors had to negotiate settlements substantially less than the amount properly found to be theirs.⁶⁷

To obtain security for the remuneration, which is to be paid by the general average community, can also be difficult. A container ship with several thousand bills of lading implies a lot of effort in identifying and contacting all the beneficiaries at the stages of placing security as well as collecting the apportioned contributions. Salvors would rather prefer to deal with a few easily identifiable parties such as a shipowner or his insurers, assigning them the right of recourse against cargo owners. As for the traditional salvage award, the 1989 Convention does not regulate that issue, prescribing the matter to be addressed by national law (Art. 13.2). In that regard, Article 14 appears to be a step forward for it says that special compensation is to be paid by the shipowner only, who can take further recourse upon cargo owners. Unfortunately, this provision does not compensate for other flaws of the article; therefore, Article 14 remains generally unfriendly to salvors.

As voluntarily interference into casualties constitutes their daily business, salvors have been campaigning for a right to “responder immunity”, that is protection from criminal liability or strict civil liability

⁶⁶ See e.g. Code of Practice (ISU and International Group of P&I Clubs), Cl. 4.

⁶⁷ Rose, S., & Bergmann, K.E. (2007). LOF & SCOPIC 2007. Power Point Presentation prepared for the Verein Hanseatischer Transportversicherer e.V. Trainingscamp. Retrieved May 20, 2009 from the World Wide Web: <http://www.vht-online.de/vht2008/trainingscamp/en/referate/07.pdf>

for pollution caused through their intervention.⁶⁸ Salvors have always been civilly liable in negligence, but most conventions⁶⁹ have provisions channeling their liability to the shipowner. By contrast, the Bunkers Convention 2001⁷⁰ lacks such stipulation, exposing salvors to direct claims from third parties under other laws. In recent times a new potential threat for salvors is also arising from the EU Ship-Source Pollution Directive,⁷¹ which requires all EU members to introduce criminal liability for all pollution caused by “serious negligence”. Article 13.1(g) provides that the risk of liability and other risks run by the salvors shall be taken into account when the reward is fixed. However, the 1989 Convention was elaborated in the 1980s, and it is arguable if its articles can compensate salvors adequately for the expansion of liabilities witnessed in recent years.

The salvage law prior to the 1989 Convention was encouraging to save merely the traditional subjects of salvage – the ship and cargo. The introduction of special compensation and later SCOPIC was aimed at adjusting the remuneration schemes to the challenges brought about by the need for environmental protection. Costs for assistance to the environment became indemnifiable, but the creators of those compensation schemes were not intending to open an easy avenue to the salvor’s enrichment. Instead, salvors faced a stricter external control over their operational expenses,⁷² problems with obtaining security and stringent requirements for proving the threat to the environment.⁷³ At the end of the day, Article 14 turned to be

⁶⁸ Institute of Maritime Law (2008). *Southampton on Shipping Law*, London: Informa, p. 176.

⁶⁹ Civil Liability Convention 1992 Art.III.4; Hazardous and Noxious Substances Convention, 1996 Art.7.5.

⁷⁰ International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

⁷¹ Directive 2005/35/EC of the European parliament and of the Council of 30 September 2005 on ship-source pollution and on the introduction of penalties for infringements. Retrieved May 10, 2010 from the World Wide Web:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0011:0021:EN:PDF>

⁷² Assessment under Article 14 is lengthy and might lead to a close examination of the salvage company’s entire accounts (Browne, *supra*, note 51 at p. 119).

⁷³ To claim an Article 14 compensation salvor must prove that there was a threat of “substantial physical damage to human health or marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or other similar incident” (1989 Salvage Convention, Art. 1(d)).

unattractive for salvors as well as for the party who was assigned the liabilities to pay for special compensation, namely the P&I Clubs.

SCOPIC is usually perceived as a contractual arrangement elaborated to remove the flaws of Article 14. However, the clause contains provisions which make the salvor think twice both before incorporating the clause and further before invoking it. Incorporation of SCOPIC disallows claim under Article 14; while if the clause has been invoked, but the Article 13 award turns out to be greater than the SCOPIC, then the award will be discounted by 25% of the amount by which the Article 13 award exceeds the SCOPIC remuneration. These stipulations, acting more in a spirit of a stick than of a carrot, induce salvors to assess the casualty and the potential salvable values more thoroughly. Hence, salvors cannot easily abandon the traditional “no cure no pay” principle at the first hint of a problem.

The problems outlined above allow drawing the conclusion that from the salvor’s perspective, salvage law has not been modified yet to meet modern challenges adequately. The 1989 Convention was designed to give incentives to salvors to proceed to casualties posing threats of a new kind – the environmental hazards. However, it seems that the main gains are still lying in rescuing the traditional subjects, while where the salvor has attempted to assist the environment and pursue subsequent payment for that, he faces numerous problems. It stands, therefore, to reason that the salvors are pushing for further changes.⁷⁴ The evolution of salvage law has been ongoing for many centuries, while today’s ambitions extend to introduce a wholly alien concept into its canons within just a few years. Although the significance of environmental protection has already been generally recognized, the process of its framing into the salvage law has been uneven so far. To a large extent that happens at the expense of salvors.

⁷⁴ See *infra* Chapter 4.

3.2 Property Underwriters

The right to salvage remuneration arises independently from whether the benefiting interests are insured or not, or if the peril which has triggered the need for salvage is included by the policy. The contract of insurance defines only the procedure through which the contributing parties have the right to recover their expenses from the insurers.

The 1989 Convention provides that the Article 13 award shall be made by all of the vessel and other property interests in proportion to their respective values. Thus, two biggest groups of interests the Article indirectly refers to are hull and cargo underwriters.

The circumstances when a shipowner needs a salvor's assistance may vary. The ship can be in ballast or laden with cargo; the shipowner might enter a salvage agreement or not; he may enter a salvage agreement on the "no cure no pay" principle, thus preserving the main essence of the "pure" salvage,⁷⁵ or it can be stipulated that some sum of money is to be paid anyway.⁷⁶ Salvage remuneration paid at any of these situations is generally perceived as a loss, and should the peril that created the danger necessitating the salvage services be a peril insured against under the policy, that loss will be recoverable from the insurers under the relevant clause.

Under the Marine Insurance Act 1906 the following schemes are provided (Table1.1):

	Parties affected	Type of loss	Definition in MIA 1906
"Pure" salvage		Particular	Salvage charges

⁷⁵ Institute of Chartered Shipbrokers, *Marine Insurance*, 2006, Witherby & Company Ltd., at p.63.

⁷⁶ According to Kennedy and Rose, *supra*, note 10 at p. 274, "An agreement may provide for remuneration on alternative bases without losing its character as a salvage agreement. It may provide for salvage remuneration in the event of the services proving successful or beneficial, and for payment of expenses, loss or damage incurred if the services are not successful or beneficial. Such an agreement does not prevent the agreement as a whole from being regarded as a salvage agreement". Opinions similar to that one can be found also in Brice, *supra*, note 2 at p. 323; Darling and Smith, *supra*, note 33 at p.63. However, in the opinion of the writer, a contract stipulating a certain amount of payment under any scenario tends to be just a contract rather than as a salvage agreement.

(no contract)		average	
Salvage under contract	All parties to the adventure	General average	General average expenditure
	One interest involved (ship)	Particular charges	Sue and Labour

While all the losses presented in Table 1.1 are usually indemnified against in marine insurance contracts, the importance of differentiating between the types of claims has some practical implications.⁷⁷ In practice, awards made under LOF are treated as salvage charges insofar there is no contractual undertaking to take any particular action or to pay any particular sum of money.⁷⁸ The York Antwerp Rules, with the exception for the YAR 2004, provide that salvage charges incurred for the common safety are allowed in general average irrespective of whether the salvage services were rendered under contract or not.⁷⁹

For the purposes of this paper, the key point would be that the property insurers are not covering for the liability arising from Article 14, which is met by the shipowner's P&I Club. Property insurers do not generally cover for the liability which is not limited by insurance policy, such as third party liability. But the Montreal compromise fixed the provision deviating from that ground principle. It was agreed then and later embodied in Article 13.1(b), that the skill and efforts of the salvors in preventing or minimizing damage to the environment shall be taken into account under assessment of the Article 13 award. Hence, property underwriters are paying for the full amount of the Article 13 award, notwithstanding how much it might be inflated by that provision.⁸⁰ By virtue of this enhancement element, property insurers are indemnifying for

⁷⁷ See e.g. Francis D. Rose, *General Average: Law and Practice*, 2d edition, Lloyd's of London Press Ltd., 2005, at pp.5, 63.

⁷⁸ Institute of Chartered Shipbrokers, *Marine Insurance*, 2006, Witherby & Company Ltd., at p. 63.

⁷⁹ York-Antwerp Rules, 1974, Rule VI; York-Antwerp Rules, 1974, as amended 1990, Rule VI(a); York-Antwerp Rules, 1994, Rule VI(a).

⁸⁰ Bennett, H. *The Law of Marine Insurance*, Oxford University Press 2006, 2d edition, p. 771.

the liability the P&I Clubs may have avoided due to the actions of salvors in preventing or minimizing damage to the environment.

Questions arise as to what extent the Article 13.1(b) criterion is actually affecting the amount of the award paid by property insurers. Is it possible to separate that criteria and quantify the increment which the criterion is bringing about? Obviously, a lot will depend on the actual circumstances of the case and the will of arbitrator. However, is it possible to find a common rationale behind the award assessment conducted by various arbitrators?

In Brice's opinion, it is impossible in practice to state in precise financial terms how much of an Article 13 award is attributable to Article 13.1(b).⁸¹ For example under a complex salvage operation the routine actions such as removal of bunkers can also be viewed as measures in preventing or minimizing damage to the environment. The costs for such measures will be borne by property underwriters, while the eventual risks are avoided to the benefit of a broader circle of interests, namely the liability insurers and the inhabitants of the coastal area adjacent to the casualty. The actual extent of taking that criterion into account is likely to depend solely on the consideration of the arbitrator.

Cargo underwriters share concerns of their own. Since the days of discussing the Montreal compromise back in the 1980s, they have been convinced that the cargo interests are placed in the least equitable position because of the inclusion of Article 13.1(b).⁸² On most occasions cargo interests will claim that the ship was unseaworthy, and that unseaworthiness was the main cause of the necessity for salvage. Furthermore, the values of cargoes and their corresponding insured values are often far greater than the values of the ships; therefore, the "innocent cargo" is exposed to far greater contributions. In the opinion of the author, despite the existing differences in the interests of property underwriters, both groups will generally welcome

⁸¹ Brice, *supra*, note 2 at p.36.

⁸² Kerr, *supra*, note 21 at pp. 539-543; Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement*, at pp. 26-27. Retrieved May 20, 2009 from the World Wide Web:
<http://www.personal.soton.ac.uk/njg/Publications/1989%20Salvage%20Convention%20and%20LOF%201990%20%281991.%20web%20version%29.pdf>.

ousting the enhancement element from assessment of the traditional award under Article 13.

3.3 P&I Clubs

The history of the law of salvage runs from antiquity, while the institute of Protection and Indemnity has not witnessed its second centenary yet. For a very long time hull policies were covering all claims arising out of salvage services, but at present claims for life salvage or special compensation / SCOPIC are indemnified by P&I Clubs.

Prior to the second half of the nineteenth century, ship ownership and operation did not attract the scale of liabilities that is now commonplace.⁸³ Due to the expansion of shipowners' liabilities together with their desire to counteract the monopoly of the London underwriters,⁸⁴ the P&I Clubs came into being and have developed since then into a separate and very influential group of insurers. It all started with one-fourth collision liability, liabilities arising in respect of claims for loss of life and personal injury, and cargo claims. By the beginning of the twentieth century P&I Clubs had been recognized as full-fledged actors in the English insurance market. The Marine Insurance Act 1906 in its section 85 contains a definition of mutual insurance as follows: "Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance".

Claims for damage to the marine environment constitute a relatively new head of the P&I cover. Despite that, they have become one of the major claim categories for the marine liability insurers. International agreements that specifically address liability and compensation for pollution damage had not been in existence until 1969. *The Torrey Canyon* case revealed the legal vacuum in handling the consequences of an oil spill, and soon the International Convention on Civil Liability for Oil Pollution Damage 1969

⁸³ Edgar Gold, *Gard Handbook on P&I Insurance*, 5th edition, 2002, p. 65.

⁸⁴ Steven J. Hazelwood, *P. & I. Clubs: Law and Practice*, 3rd ed., Lloyd's of London Press Ltd., 2000, pp 1-8.

launched a new legal regime. Together with its Protocols of 1976, 1984 and 1992, CLC provides a uniform set of international rules and procedures for determining liability and compensating for the damage caused by escape or discharge of oil from ships.⁸⁵ CLC channels liability only to the registered owner of the polluting vessel, and normally his liability is covered under the P&I policy. The Club will cover only in respect of the liabilities that the member faces in his capacity as a shipowner or a charterer of the entered vessel and not as, for example, an owner of cargo.⁸⁶

With the concept of mutuality being in the heart of the P&I system, the risk incurred by one shipowner can be spread on all the members of the 13 clubs of the International Group. By virtue of the overspill arrangement, the upper limit of that cover rests approximately at the figure of US\$4.5 billion for one claim.⁸⁷ The ultimate ceiling is not to be estimated precisely until such a “catastrophic” claim arises; however, it is very unlikely that the world will ever witness such a payment to be made. First of all, the P&I Clubs are holding a very strict line regarding the shipowners’ rights to limit liability. As a general rule, the maximum sum recoverable from a Club is capped at the amount to which a member may limit his liability under the circumstances.⁸⁸ Moreover, the Clubs are very intuitive regarding the claims which carry potential to trigger a need for the overspill arrangement. Therefore, claims for marine pollution, though they are not the largest P&I claims category, represent the only area where P&I coverage is actually assigned to a special limit of US\$1 billion.⁸⁹ The accessibility to the unprecedented settlement funds does not imply that the Clubs are looking forward to the opportunity to test the overspill scheme and exhaust it.

The same philosophy governs the Clubs’ position regarding salvage payments. Once environmental concerns paved the way to the broad shipowners’ liabilities, the question arose if those liabilities could become a subject of salvage in addition to the traditional subjects such as ship and

⁸⁵ Gold, *supra*, note 83 at p. 422.

⁸⁶ Hazelwood, *supra*, note 84 at p. 219.

⁸⁷ Anderson Ph., Postgraduate Diploma in Marine Insurance “*P&I Clubs and Mutual Insurance*”, World Maritime University 2007/2008, pp. 57-59.

⁸⁸ Gold, *supra*, note 83 at p.506.

⁸⁹ *Ibid* at p. 453.

cargo. First, the issue was scrutinized under the revision of the LOF 1980,⁹⁰ and since then the idea of liability salvage has been haunting the interested parties. Back to the origin of the discussion in the 1980s, the P&I Clubs rejected the concept of liability salvage as unworkable and unacceptable, pointing out a host of issues which lacked certainty.⁹¹ The P&I Clubs were against exposing themselves to the liability of an unidentifiable scale. Eventually all the parties agreed to the safety-net arrangement, under which the Clubs are to cover for the special compensation under Article 14 of the 1989 Convention.

From the perspective of the P&I Clubs, the special compensation regime has proved to be insufficient. Among the features which at one point or another gave rise to the Clubs' unfavourable criticism are the following:

1. Difficulty with assessment of the "fair rate" and the size of uplift under Article 14.2.
2. The regime of special compensation covers the entire salvage operation, even after the threat of damage to the environment has been removed by the salvor.
3. The shipowner's rights to terminate the salvage operation are too limited.
4. The P&I Clubs do not have access to monitor the expenses during the service for which they might be held liable later.

The Clubs' dissatisfaction with Article 14 resulted in salvors' difficulties in obtaining security for their claims for special compensation and enforcing awards. Article 14 constituted the P&I Clubs' first serious experience of covering for salvage costs. It stands to reason, therefore, that many flaws revealed themselves only after Article 14 started operating. As a contractual response to the article, SCOPIC was elaborated in light of that dissatisfaction. Addressing the issues criticized by the Clubs, the clause has proved to be much more operable than its predecessor. Being invited to

⁹⁰ Colin de la Rue, *supra*, note 24 at pp. 543-545.

⁹¹ *Ibid* at p. 544. For a more thorough examination of the Clubs' critics see *ante* Chapter 4.

share the bill for salvage services, the P&I Clubs have realized that their rights should be proportional to the duties.

3.4 Coastal States

The interest of the public authorities in salvage operations arose immediately after the major oil spills in the late 1960s. Prior to *The Torrey Canyon* incident, little were coastal states considering intervening with salvage services, which were hitherto viewed mostly as a commercial enterprise. The way the British government reacted to *The Torrey Canyon* constituted a spectacular allegory: environmental pollution perceived as an enemy, threatening a state's borders, was met by high explosive and napalm bombs, spread by naval aircraft of the Fleet Air Arm.⁹² That approach, though it has never been repeated by any other government, marked a significant shift in the world of salvage.

Basically, a coastal state's interest in a salvage operation can be traced in two aspects. Firstly, as a guardian of the public interest, it is incumbent on the state to obtain a certain degree of control over the salvage operation, since its outcomes affect the public interest directly. This poses the problem of an optimal form of interaction between public authorities and salvors. Secondly, in the situation where a salvage operation prevents or minimizes environmental damage, the benefit of that service is extended to the state as an entity representing local communities who have escaped the adverse effects of the potential pollution due to the salvor's intervention. Hence, the question arises if the state ought to contribute to the salvage remuneration as a benefiting party to the salvage service.

Addressing the first aspect, Article 9 of the 1989 Convention, headed "Rights of Coastal States", provides as follows:

"Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests

⁹² Colin de la Rue, *supra*, note 24 at p. 899.

from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions to relation to salvage operations.”

This provision reconfirms that as a private law document the 1989 Convention recognizes the supremacy of public law issues. During the discussion leading up to the adoption of the 1989 Convention, a number of countries voiced their opinions that the Article should have had more of a binding character. The suggestions were to impose duties on the coastal states, such as a positive obligation to provide safe havens or other means of assistance to vessels in distress off their coasts, and to devise and maintain contingency plans for this purpose.⁹³ However, it was eventually agreed that the 1989 Convention should keep its private law nature, and that a more extensive regulation of coastal states’ rights or duties would have been undesirable there. Instead, those issues should be addressed by separate public law instrument.

One dimension of the state’s involvement in a salvage operation, namely the right to intervene on the high seas, is regulated by the Intervention Convention 1969. Another common ground for a state’s involvement with salvage services arises where a ship in distress seeks shelter in coastal waters. There is no convention regulating the issue of places of refuge, and the degree of sensitivity of that matter carries the inference that it is unlikely to expect one in the near future. The existing right of innocent passage⁹⁴ allows ships to pass through territorial waters of another state, and it even includes stopping and anchoring. However, the right is unlikely to apply where a damaged ship presenting a threat to the environment is explicitly requesting for an access to sheltered waters; such circumstances do not fall under the definitions of either “passage” or “innocent”.

Article 11 of the 1989 Convention refers to the problem of cooperation between states, salvors, other interested parties and public

⁹³ Kerr, *supra*, note 21 at p. 551.

⁹⁴ UNCLOS, Art. 17.

authorities in matters such as admission to ports. However, it does not actually bind the states to anything more than “taking into account” the need for such cooperation.

A lack of an international regulation can be regarded as a flaw, but from a certain perspective that gives the states *carte blanche*, extending rather than limiting their rights throughout their sovereign spaces. In that regard much will depend on how a particular state fills that gap in the absence of an international convention. Some states have derived lessons from serious casualties in their vicinity and adopted a sustainable approach based on scientific expertise and clean-cut domestic legislation. Other states are taking rather the path of alarmist expectations when assessing the risks of bringing a leaking ship into the safety of a port in their territory. The divergence of the approaches can be observed even within the EU’s borders, despite that this regional formation reveals a serious degree of adherence to harmonization of law and legal practices.

Thus, in the United Kingdom a number of casualties and succeeding governmental investigations resulted in the establishment of the position of the Secretary of State Representative (SOSREP). This official has a significant mandate over responses to incidents that threaten or cause marine pollution, including actions at the stage of a salvage operation. The key element here would be that the SOSREP is not a person affiliated closely with the government or politicians. Such a person should rather be an experienced mariner than a bureaucrat, acting more as an observer over a salvage operation rather than an instructor. His main function is to represent and secure the public interest in the enterprise of private parties. The powers vested in the SOSREP allow him to deliver a prompt decision required on behalf of the state without delay or recourse to higher authority.⁹⁵ The system has proved to be effective, including appreciation on behalf of the salvors.⁹⁶

A marine casualty with a high risk of pollution performs a sensitive test for the political elite of a coastal state. It is likely that in such

⁹⁵ Colin de la Rue, *supra*, note 24 at pp. 915-916.

⁹⁶ *Ibid* at p. 916.

circumstances delegating the control over a salvage operation to an independent body would not be the most expedient approach, although in hindsight it proves to be the most balanced one. The opinion of a ship's master, who is asking for sheltered waters, or salvors, hired by the shipowners, can be mistrusted *a priori*, for they are perceived as guardians of their self-interests. Meanwhile, these are the professionals capable of providing the most adequate assessment of the situation. Such was the case of *The Prestige*, where a governmental surveyor delivered the order to turn the leaking ship out of the Spanish coast and bring her into the Atlantic ocean, where she eventually sank due to her damaged condition and bad weather. The investigation of the Bahamas Maritime Authority revealed that the speed with which the Spanish authorities made the decision to exile the ship from their waters was incompatible with thorough assessment of the situation and its consequences.⁹⁷ The casualty constitutes one of the most well-known cases, which indicate the disability of certain states to address the issue of ports of refuge under their own power. Since the legislators in these states do not prioritize such matters, a coherent international convention could be an option.

The problem is not limited to the issue of the port of refuge. An entire response to an incident with a threat of an oil spill would imply tight interaction between a representative of public interests, i.e. the state, and private contractors, such as salvors, who possess the necessary expertise and knowledge to remedy a dangerous situation. These actors have different bargaining powers, but at the end of the day they are equally interdependent. By virtue of their profession, salvors are doomed to be responders in a first instance; therefore, they have to face the very primary reaction of the political decision-makers. The necessity for the approval of the latter is likely to arise at the moment when the degree of danger cannot be perceived adequately yet. Hence, it is doubly important in such situations to rely on the functioning institutes rather than trusting the decision-making to an *ad hoc* group of civil servants. Their major field of expertise is far from

⁹⁷ Colin de la Rue, *supra*, note 24 at p. 912.

salvage; moreover, it becomes often impossible to identify precisely at a later stage which person was originally responsible for the decision.

States have introduced themselves into the world of salvage services and that trend appears to be of an irreversible character. Thus the tangle of interests to a salvage operation gains its ultimate current shape. Those are represented by coastal states, salvors, shipowners and their P&I Clubs and property insurers, with the latter falling into two groups of interests – H&M and cargo. Not all of them are equally interested in maximizing the preservation of the ship and her cargo in light of the environmental concerns and the financial liabilities originating from damage to the environment. This public dimension of salvage services constitutes a recently new phenomenon, and it is poorly balanced by the existing salvage law and schemes of securing remuneration to salvors.

Coastal states should not join the community of interests who are indemnifying for salvage, since their involvement takes place not of their free will. A coastal state is not a party to the maritime adventure which has caused the risk of marine contamination in the areas adjacent to its coastline. However, once such a casualty takes place, the state's intervention with its handling is justified. It must not occur spontaneously though, for the results can be much more adverse than a simple loss of the imperiled property and consequently the loss of the remuneration of the salvor. The coastal state must outline a comprehensive legal regime, assigning public authorities with clear obligations regarding issue of access to ports of refuge and similar matters. The establishment of clearly identified rules regulating the procedures of state intervention will diminish the uncertainty for the paying parties and will enable them to readjust the remuneration schemes among themselves in the manner they will find the most equitable under those rules.

4 Proposed Changes

The P&I Clubs were anticipating that breaking with the “no cure no pay” principle would expose them to massive financial liabilities. In practice, up to the introduction of the LOF 1990, which was adjusted in view of the 1989 Salvage Convention, there were only four cases involving the LOF 1980 safety net.⁹⁸ However, the Clubs’ apprehension has by no means ceased, especially in light of the revival of the discourse on environmental salvage.

Environmental salvage is an evolving concept. Therefore, the examination of its features in this chapter carries no intention to suggest a workable definition of the concept or to limit its scope.

A salvage operation directed at the traditional subjects of salvage can at the same time constitute a service for prevention or minimization of environmental damage. It may even happen that the traditional subjects are sacrificed to prevent such damage. The actual outcomes of this “environmental service”⁹⁹ can be categorized as follows:

- a) conferment of benefit to third parties;
- b) minimization/ avoidance of damage to the environment;
- c) minimization /avoidance of legal liabilities of salvees.

For instance, by preventing a bunker spill the salvor can (a) save the coastal economy based on ecotourism, (b) protect the vulnerable environment from the adverse effects of interaction with HFO and (c) exonerate liability insurers from the potential claims. Under the existing salvage law not all of these achievements will be remunerated or remunerated adequately.

The questions arise, if the salvor should be indemnified for rendering each of these types of benefits, who should indemnify him for that and to what extent. The fact is that in the absence of actual environmental damage,

⁹⁸ Lacey, M.J. (2010). *Special Compensation in Marine Salvage: Article 14 of the 1989 Salvage Convention and the Special Compensation P & I Club Clause, “SCOPIC”*. Unpublished paper, London, United Kingdom.

⁹⁹ Kennedy and Rose, *supra*, note 10 at p. 191.

reasoning about significance of the services for its prevention and possible beneficiaries becomes quite speculative. Once an oil spill has taken place, it will be relatively easy to identify the afflicted parties and contributing parties, and quantify indemnification. However, where salvor's intervention prevents a spill, the argument on the potential consequences of his services and benefiting parties will lack empirical support. Since the existing salvage law cannot resolve this issue, the concept of environmental salvage has been promoted by salvors to justify more generous remuneration.

In the opinion of this writer, the concept of environmental salvage, in the way it has evolved, does not embrace the first of the three aforementioned effects of environmental service, *i.e.*, conferment of benefit to third parties. Third party beneficiaries, generally represented by the coastal state, are exempted from remunerating the salvor. As mentioned earlier, it would not be fair to compel those unidentifiable beneficiaries to pay for the services which were necessitated by the mistakes of other parties such as shipowners, cargo owners or intermediary trading companies. Therefore, as long as the issue of third parties' contribution to salvage remuneration is not within consideration, the advocates of the concept of environmental salvage find no interest in it.

The second effect of the environmental service – minimization/avoidance of damage to the environment – does not constitute an independent basis for salvage remuneration under the traditional salvage law. The 1989 Convention, however, broke new ground when it recognized the phenomenon of damage to the environment in Articles 1 and 14 and by including “the skill and efforts of the salvors in preventing or minimizing damage to the environment” in the criteria for enhancing the traditional salvage reward in Article 13.1(b).

Colin de la Rue emphasizes that “... the avoidance of damage to the environment is to be distinguished from the avoidance of liabilities which might otherwise have been incurred by the shipowner¹⁰⁰ or any other party involved: liability salvage is not a factor recognized by Article 13”.¹⁰¹

¹⁰⁰ Article (c) at the previous page.

¹⁰¹ Colin de la Rue, *supra*, note 24 at p. 555.

Such differentiation can perhaps be smoothly exercised in theory, and it was probably in the minds of the drafting fathers of the 1989 Convention, but in practice it appears to be much less straightforward. Should that viewpoint be correct, then it stands that, for instance, Article 13.1(b) enhances salvage reward purely because the environment constitutes a universal value, or at least because there is a reason to perceive the environment as such. However, if looking back at the history of recent changes to the law of salvage, the shipping community began considering the environmental aspects not due to recognition of their universal significance, but only in light of the *costs and liabilities* which those environmental aspects started giving rise to. Humanitarian considerations did not play a decisive role there, but the financial considerations for being “environmentally friendly” did.

Hypothetically, there may be a salvage operation which assists the property in danger together with providing a benefit to the environment, but at the same time the liabilities are minimal or zero. For example, the salvage services, involving a tanker fully laden with oil, are carried out on the high seas. The property has been successfully salvaged and damage to the environment is prevented; in this situation the enhancement of the reward in accordance with Article 13.1(b) will be free of the liability factor. But should the same operation take place in proximity to the US coastline, no one can guarantee that the arbitrator, whilst taking into account the 13.1(b) provision, will disengage himself from the plume of liabilities which can be triggered by environmental damage in those waters.

Another trapdoor through which liability salvage potentially creeps into the salvage reward would be Article 13.1(d): “the nature and degree of danger”. It has long been the practice to take into consideration non-physical dangers in assessing salvage awards. Thus account has been taken of the following:

- potential loss of proprietary rights (*The Cythera* [1965] 2 Lloyd’s Rep. 454);
- the risk of destruction by a port or governmental authority (*The Merannio* (1927) 28 Ll.L.Rep. 352, 353);

- the inability or reduced ability of a valuable, profit-earning asset to earn profits whilst disabled (*The Glaucus* (1948) 81 Ll.L.Rep 262, 266; *The Troilus* [1951] A.C. 820 and *The Orelia* [1958] 1 Lloyd's Rep. 441, 450);
- the avoidance of liability to third parties for failure to perform contracts;
- the avoidance by an inexpensive salvage service of more expensive liability to other salvors (*The Tsiropinas* (1935) 51 Ll.L.Rep. 87, 89; *The Sandefjord* [1953] 2 Lloyd's Rep. 557);
- the avoidance of tortious liability to third parties;
- the risk to a shipowner's reputation from the disability of a prestigious liner (*The Queen Elizabeth* (1949) 82 Ll.L.Rep. 803, 820).¹⁰²

Those factors were regarded as consequences of physical danger enhancing the award, and not as distinct heads of danger, preservation from which *per se* justifies an award. Nevertheless, in *The Whippingham* (1934) it was said that the mere saving of a vessel from damage to other ships, which might have resulted in claims against her, was a distinct service.¹⁰³ Hence, the avoidance or diminution of the extent of potential liability to third parties is in principle capable of providing a distinct service whereby property is salvaged from danger. But it does not necessarily follow that this will require a higher reward than will normally be given for preservation from physical dangers that will almost invariably be present whenever such potential liability arises.¹⁰⁴

Though the 1989 Salvage Convention in general and Article 13 in particular are silent on the issue of whether salvors may be rewarded for the avoidance of liabilities to third parties, in practice LOF arbitrators do have regard to the avoidance of potential liabilities to third parties when setting their awards and, in some cases, this can account for a significant proportion

¹⁰² Kennedy & Rose, *supra*, note 10 at p. 167.

¹⁰³ *Ibid.* at p.169.

¹⁰⁴ *Ibid.*

of the award.¹⁰⁵ Therefore, in the present context of a salvage operation, avoidance of damage to the environment and avoidance of legal liabilities of salvees are intermingled, even though only the former is recognized by the existing law.

Separation of the legal liability as an independent ground for a salvage award was first attempted under the revision of the LOF 1980. The idea was to assess the value of potential liability, and reward the salvor for the success in avoiding it, independently from the success in salvaging the property. The costs of the awards for liability salvage were presumed to be met by the P&I Clubs, but the Clubs firmly declined to accept the concept pointing out to a number of factors, which lacked clarity and would have inevitably given room for debate. The main “grey areas” identified then were the following:

- calculation of the “pollution fund” from which the salvor would be rewarded for his services in avoiding or minimizing pollution;
- measurement of the scale of the pollution avoided and the extent of the admitted losses;
- shipowner’s right of limitation of his liability for such damage;
- rights of recourse available to the shipowner against third parties.¹⁰⁶

Considering the uncompromising attitude of the Clubs towards the idea of liability salvage, the safety-net concept was adopted instead.¹⁰⁷ It was first embodied in the LOF 1980; then it was upgraded in Article 14 of the 1989 Salvage Convention. The next reincarnation of the safety net was the SCOPIC Clause. However, regardless of all the improvements and increments, the ground principle has been the same: the safety net is there just to *compensate* the salvor, but *not to reward* him for the environmental services. The reward mechanism, implying a higher remuneration but also a

¹⁰⁵ Browne, B. (2007). *Environmental Salvage from Marine Property Insurers’ Perspective*. Paper presented at the IUMI Spring Technical Committee Meetings in Casablanca on 12th March 2007. (p.6).

¹⁰⁶ Colin de la Rue, *supra*, note 24 at p. 544.

¹⁰⁷ As Gaskell describes the Montreal compromise, which laid the basis for the 1989 Salvage Convention, “Like most compromises, nobody was happy with everything, but the need to reach agreement was regarded as paramount”. *Supra*, note 82 at p.3.

higher risk due to the “no cure no pay” principle, is still applicable only to the traditional property. It is embodied in Article 13 and supplemented by the enhancement criteria.

In sum, all that produces a lot of dissatisfaction:

- Salvors are witnessing the shift of the major values from property to the environment following the changes in liability regimes, but no corresponding shift on the part of the remuneration schemes.
- Property insurers are not pleased that their contributions are inflated by the enhancement elements, which *de facto* represent liability salvage.
- P&I Clubs are enjoying at no cost the avoidance of liabilities for which they are underwriting their members, thus accumulating monetary gains. However, the concern grows that such balance is shaky, so the need for changes becomes more persistent. At the same time the Clubs are not ready to expose themselves to the unlimited or potentially high payments, especially in the light of “creeping” liabilities for environmental pollution.

Meanwhile, the International Salvage Union, representing the voice of the salvors’ interests, are advocating the necessity of “environmental salvage” or “environmental reward”, which in essence is simply a reformulated version of the liability salvage concept.

In their view, environmental award should be akin to the current Article 13 award. As one of the possible scenarios, the ISU suggests the following reorganization:

“Perhaps the salvor should have an option to elect:

- a) LOF without Scopic or environmental salvage.*
- b) LOF with Scopic.*
- c) LOF with environmental salvage, excluding Scopic.*

The current Article 13 fixing the property award should have Article 13 1(b) the skill of the salvor removed from consideration.¹⁰⁸ Should the salvor elect an environmental award consideration, perhaps a re-defined Article 14 should be appropriate.

The Article 14 award would include:

14.1 If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment he shall in addition to the reward to which he may be entitled under Article 13, be entitled to an environmental award taking into account the following criteria without regard to the order in which they are presented below.

a) Any reward made under Article 13.

b) The criteria set out in Article 13.1 (c) (d) (f) (g) (h) (i) and (j)

c) The skill, efforts and extent to which the salvor has prevented or minimized damage to the environment and the resultant benefit conferred.

14.2 The fund out of which an environmental award shall be made shall be calculated on the basis of US\$250 per gross ton of the vessel, the subject of the salvage services, with a minimum fund of US\$5,000,000 (the limit of a vessel of 20,000 gt) and a maximum fund of US\$25,000,000.

14.3 For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

14.4 Any environmental award shall be paid by the shipowners.

14.5 If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any environmental award due under this Article.”¹⁰⁹

A detailed analysis of the above passage is beyond the scope of this work, for the outlined proposal constitutes only one of the possible scenarios which have been presented by the ISU in recent years. However, they all seem to keep the same line. One particular part of the proposal is

¹⁰⁸ Emphasize added.

¹⁰⁹ Witte A. (2008, September 16). *Environmental Salvage*. IUMI Vancouver Conference. Retrieved February 15, 2010 from the World Wide Web: <http://www.iumi.com/index.cfm?id=7244>

underlined above as it appears to be of a specific interest for the current research: the ISU has been persistently suggesting removing Article 13.1(b) from the criteria list in assessing the traditional salvage award.¹¹⁰ That will mean that the assessment of the reward for salvaging the property will be back to the position where it had been in prior to the 1989 Convention; that in turn will be definitely supported by the property underwriters.

Following the exemplary scenario above, the burden which will fall on the P&I Clubs will be capped between five and twenty five million US\$; however, those figures may be adjusted in line with the limitation conventions. What stays unclear is how the “cure” to the environment will be assessed within the established cap. A cursory glance at the draft discloses other uncertainties and distortions. The general impression would be that either the ambitions of the drafters are extending too far, or rather that they have raised the ante intentionally so under the eventual negotiations with the other interested parties in the traditions of the London market’s “give-and-take” dialogue, there will be a fair margin of concessions to make. As it can be observed, the draft also implies that the changes should be conducted via amending the 1989 Salvage Convention, which is a challenging goal *per se*. In sum, the proposal appears to be too utopian to be taken as the real agenda of the ISU.

It is much more likely that the entire policy of exaggerating the claims and heating up the debate has been adopted by the ISU specially to pave an easier way to the more minor changes. In the opinion of the author, the genuine short-term goal of the salvors’ lobby is to raise the recognition of the environmental aspect of their services. Salvors wish to have more transparency regarding the principles of fixing the award under Article 13, in order to have a clearer idea of what percent of the reward is constituted by their skill and efforts in preventing or minimizing damage to the environment.

This step appears to be much more moderate compared with the draft of the proposed amendments to the 1989 Convention, but conceptually they

¹¹⁰ As the same suggestion was mentioned in the paper by Archie Bishop (ISU) delivered in London in January 2007 (as cited by Browne B., *supra*, note 105 at pp.8-9).

both serve the same goal of boosting the differentiating of the environmental/liability element in the assessment of the salvage award. That in turn will make apparent which part of the Article 13 award is covered by property insurers for the benefit of the P&I Clubs. Before that is done, the property underwriters' allegations that they are paying the liability insurers' part of the bill will remain undefined. The concrete figures will be of help under the next round of the campaign for environmental salvage which, in the opinion of the author, will unite property underwriters and salvors regarding transferring of the total burden for the environmental aspect onto the shoulders of the shipowners. That, however, as it has already been the case, can take place only with the consent of the P&I Clubs.

The pressure for changes is rising. Only after concrete figures show the quantum of indemnification provided by property underwriters to indemnify the avoidance of liabilities of the Clubs,¹¹¹ can the resistance of the liability underwriters be overcome. If environmental salvage breaks new ground as a distinct category of salvage, paid solely by the liability underwriters, the remaining issues can be seen as technicalities. There will be a need for an assessment formula, which would satisfy the indemnifying party. Such a formula will certainly contain limitation of liability as that has been shown in the proposal above. Secondly, there will be a need for the assessment of the avoided potential liabilities within that cap. That should not be a complete novelty for salvage arbitrators as they are already doing that, for instance, when taking into account the degree and nature of danger (Article 13.1(d)), or assessing to what extent the uplift under Article 14 should be made. "Where arbitrators have become accustomed to assessing awards on a particular basis, they may have a feel for the level of awards, and a different basis may seem strange and nebulous. However, in time the new basis of assessment would become accustomed and natural".¹¹²

¹¹¹ Despite that the liability factor is not recognized *de jure*.

¹¹² Clift R. and Gaye R., *The Shifting Nature of Salvage Law: A View from a Distance*, Tulane Law Review, 2005: Vol. 79 № 5 & 6. (as cited by Hetherington, S. in the Discussion Paper for Review of Salvage Convention 1989 for the International Sub-Committee Meeting, 12 May, 2010, at p. 13).

5 Conclusion

Adaptability is an essential prerequisite for survival not only among life forms; but also a legal institute evolves, develops and ceases eventually, unless it meets the challenges of the fast-changing environment. In that regard the law of salvage, being one of the most antiquated areas of maritime law, constitutes an illustrative case: either it will be updated in light of environmental protection concerns, or it will share the fate of general average institute, which evokes regular appeals for its abolishment.

For centuries two basic principles of salvage law remained intact. The first of them, worded in the “no cure no pay” motto, implies that only successful salvors can be remunerated for the rendered services. The amount of that remuneration cannot exceed the value of the salvaged fund, the second principle says.

As long as the salvage subjects were mainly limited to the maritime property, it was relatively easy to identify the meaning of success. All parties, interested in the salvage operation, shared the same goal: to save as much of the ship and cargo as possible and to deliver the values to the place of safety for their assessment.

If the parties had any disagreements regarding the value of the salvaged property or the nature of the services rendered, they would end up at court, which was solving cases based on previous court decisions. At a certain moment of time, it was realized that addressing a consolidated legislative document would be more practicable than searching through the court’s archives for analogous case. Moreover, there was a certain need for international unification of the rules regulating salvage. This is how the 1910 Convention on salvage came into being, which substantially reproduced the principles of traditional salvage law.

The 1910 Convention was in operation for several decades outlasting numerous changes in both the technological landscape and public-policy course. However, eventually its provisions stopped providing salvors with incentives to endeavour a risky operation. In light of the rise of the

environmental dimension of salvage, the 1910 Convention's traditional principles appeared to be too rigorous.

Customarily, the "cure" was interpreted as success in salvaging the traditional values – ship and cargo. However, starting from the late 1960s it became evident that not a single value of a ship or cargo can ever come close to the costs of the consequences of a major oil spill. It was realized that endeavouring rescuing the property could endanger the public welfare. Once such risk appeared, the coastal state as a guardian of public interest invited itself to the party of private actors involved in a salvage operation.

However, a state's priorities do not always coincide with the traditional approach. Should the choice be made between either salvaging property or sacrificing it for cleaner environment, the state will not hesitate to opt for the latter. Salvors cannot ignore a state's position when they are trying to handle the casualty in the territorial waters or seeking to bring the damaged ship in the shelter of a harbour. In many spots of the world the legislative framework regulating interaction between official authorities and private parties such as salvors has not yet been elaborated adequately. The adverse effects of this legislative gap were fully demonstrated by such incidents as *The Prestige* and *The Castor*.

It took some time before the salvor's new role of an environmental respondent was recognized in assessing the remuneration. Originally, salvage contributions were met by the standard insurance policies. That lasted for centuries, but property underwriters were not looking forward to extend their covers to indemnify for the measures to prevent or minimize damage to the environment. There was another group of insurers, indemnifying for such risks, namely the P&I Clubs. So they were invited to share the burden for the salvage payments. Inclusion of liability underwriters into the remuneration schemes resulted in significant change of the law of salvage and adoption of a new salvage convention.

The draft of the 1989 Salvage Convention was presented in Montreal in 1981. What was later famed as the "Montreal compromise", constituted an agreement of the major indemnifying parties – property underwriters and P&I Clubs – to reallocate the burden of salvage payment among them.

Two basic concepts were presented there for discussion. The first, known as the concept of liability salvage, suggested that the shipowner's liabilities should constitute another head of salvage. If the salvor's intervention led to prevention or minimization of those liabilities, the effect should constitute an independent ground for rewarding salvors, and it was to be assessed along with other salvaged values.

The concept met severe resistance from the P&I Clubs who were supposed to meet the costs for liability salvage rewards. The Clubs were unwilling to expose themselves to liabilities virtually of an unidentifiable scale. Instead, they offered the safety-net concept, according to which in the case where traditional salvaged fund was insufficient, the salvor who managed to minimize or avoid environmental damage was still entitled to reimburse his expenses and maybe get an increment.

The idea behind the safety-net is not to reward salvors for environmental services; they will not gain a generous remuneration under this scheme but only compensation plus an increment. On the other hand, the humble amount of payment is counter-balanced by greater certainty that the payment will be made, even if the traditional success is unattainable.

The safety-net concept was negotiated and eventually embodied in Article 14 of the 1989 Convention. At the same time, property underwriters, who kept covering for the traditional salvage award, gave their consent to a new enhancement element to be added to the criteria for fixing that award – “the skill and efforts of the salvors in preventing or minimizing damage to the environment” (Article 13). Being in its essence a remote version of liability salvage, this enhancement criterion is inflating traditional salvage rewards to some tune. Moreover, in light of environmental aspects, some traditional criteria such as a “the nature and degree of the danger” tend to open the door to liability salvage too, despite of the fact that the 1989 Convention is *de jure* silent on the liability factor. Thereby, it stands to reason that property underwriters experience dissatisfaction with Article 13, for they have to indemnify for liability salvage.

Back to its outset, the 1989 Convention broke new ground by making a step over the ground principle of “no cure no pay” in Article 14.

Moreover, from then it became admissible to arrive at a bigger amount of remuneration than the salvaged property fund. The initial idea was that these arrangements together with Article 13 would be enough to provide salvors with the incentives to proceed to casualties where their intervention was needed the most, namely where the risks for the environment were high.

However, in practice Article 14 did not prove to be a success. Both Clubs and salvors were dissatisfied with its operation; therefore, the industry came up with a solution of a purely contractual nature known as SCOPIC, incorporated in the most used salvage agreement known as Lloyd's Open Form.

SCOPIC completely abandons the controversial notion of "success" and transfers remuneration calculation on a barely economic basis. It confers more certainty and transparency to both parties; therefore, it is now more in use than Article 14, at least within the LOF forum.

Meanwhile, the idea of liability salvage still heats the minds of its supporters, represented mainly by salvors. The whole salvage community is standing to liability salvage closer than a first glance at the current legislation would suggest, but the final recognition of the concept is definitely not going to be made in one leap in the near future. Besides, the expression itself carries negative connotations for at least one of the negotiating parties – the P&I Clubs, who have been resisting the concept since its first day. Therefore, the concept was recently renovated and now is advocated under the name of "environmental salvage", which is a sure marketing strategy in the age of explosion of ideas about sustainable development and environmental protection. By creating a more positive image of their proposal together with continuing the opinion exchange among the interested parties, salvors can succeed in the long run in delivering the message that the environmental award akin to the Article 13 award is justifiable.

Traditional justification for salvage remuneration evolved from the principles of unjust enrichment. Those who act on behalf of another in an emergency should be compensated for doing so. At the same time, a salvage award has never been limited merely to the law of restitution, as there has

always been a sound public policy for encouraging rescues at sea. Armed with these two major principles, the arbitrators for centuries have been arriving at a certain amount of remuneration under the assessment of a traditional award.

The introduction of environmental and liability concerns has triggered serious shifts in that system. Once in the past, guided by “no cure no pay” approach, salvors would have diverted from the casualty if the chances for success were obviously not too good; that pattern is completely inadmissible today from the public interest perspective. Salvors meanwhile are not opportunist rescuers anymore, but businessmen interested in sustainability of their enterprise and high revenues for their share-holders. All that in sum pushes sometimes the parties to seek purely economic solutions, such as SCOPIC, which are not based on the estimation of the benefits incurred to the interested parties by virtue of the salvor’s intervention.

The shift in priorities evokes the temptation to seek the way back to the restitutionary approach along with the ideas of equity and public efficacy. In *The Torrey Canyon* incident the value of the hull was £5.98 million in 1967, the value of the cargo was £600.000.¹¹³ From the salvor’s perspective the ship was a more lucrative subject of salvage. Today, a prompt look at the aftermath of oil spills costs¹¹⁴ allows forming a general view of, first, who the new main beneficiaries of a salvage operation would be and, secondly, how vast the benefits derived from that service can potentially extend. Should a salvage operation be successful in minimizing the environmental damage and hence liabilities, this will mean that the “cure” can still be achieved even when the traditional subjects are sacrificed. The current debates are searching for the formula to quantify that cure which would be recognized efficient by all the parties, but the key prerequisite appears to be the consensus on the notion of justice.

¹¹³ Brough, W.T. (1990) Liability Salvage – By Private Ordering. *The Journal of Legal Studies*, Vol. 19, № 1, p. 101.

¹¹⁴ Supplement B.

Supplement A

International Convention on Salvage, 1989

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 salvaged 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 salvaging 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.

2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this Article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged 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% 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% 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.

5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this Article.

6. Nothing in this Article shall affect any right of recourse on the part of the owner of the vessel.

Supplement B

Incident	Year	Oil Spilt	Total Cost \$	Cost \$/ tonne	Oil type
Pacific Adventurer	2009	210	Au \$ 29,000,000	\$138,000	HFO
Hebei spirit	2007	11000	632,000,000 (est)	\$57,500	crude
Cosco Busan (USA)	2007	83	80,000,000	\$963,855	HFO
Prestige (Spain)	2002	63,000	1,443,000,000	\$22,904	HFO
Erika (France)	1999	19,800	247,500,000	\$12,500	HFO
Sea Empress (UK)	1996	73,000	55,200,000	\$756	crude
Braer (UK)	1993	84,000	78,000,000	\$928	crude
Exxon Valdez (USA)	1989	37,000	1,950,000,000	\$52,702	crude
Amoco Cadiz (France)	1978	223,000	225,000,000	\$1,009	crude

Table 2.¹¹⁵

¹¹⁵ Salt D. (2010, May). *Dealing with Oil Spills*. Presentation at the seminar “The Impact of the Environment on Marine Salvage”, ISU, London.

Bibliography

- Christopher Hill, *Maritime Law*, 4th edition, Lloyd's of London Press Ltd.
- Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, 1st edition, London, Hong Kong: Lloyd's of London Press, 1998.
- Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, 2d edition, London: Informa, 2009.
- Edgar Gold, *Gard Handbook on P&I Insurance*, 5th edition, 2002.
- Enrico Vincenzini, *International Salvage Law*, Lloyd's of London Press Ltd., 1992.
- Francis D. Rose, *General Average: Law and Practice*, 2d edition, Lloyd's of London Press Ltd., 2005.
- Geoffrey Brice, *Maritime Law of Salvage*, London: Sweet and Maxwell 2003, 4th edition.
- Gerald Darling & Christopher Smith, *LOF 90 and the New Salvage Convention*, Lloyd's of London Press Ltd., 1991.
- Goode Roy, *Commercial Law*, 3rd edition, Penguin Books, 2004.
- Howard Bennett. *The Law of Marine Insurance*, 2d edition, Oxford University Press, 2006.
- Institute of Chartered Shipbrokers, *Marine Insurance*, Witherby & Company Ltd., 2006.
- Institute of Maritime Law, *Southampton on Shipping Law*, London: Informa, 2008.
- Kennedy and Rose, *The Law of Salvage*, 6th edition, London: Sweet and Maxwell 2002.
- Phil Anderson, *Postgraduate Diploma in Marine Insurance "P&I Clubs and Mutual Insurance"*, World Maritime University 2007/2008.
- Steven J. Hazelwood, *P. & I. Clubs: Law and Practice*, 3rd ed., Lloyd's of London Press Ltd., 2000.
- William Tetley, *Maritime Liens and Claims*, 2nd edition, Montreal: International Shipping Publications, 1998.

Treaties and international instruments

Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, signed at Brussels September 23, 1910.

Directive 2005/35/EC of the European parliament and of the Council of 30 September 2005 on ship-source pollution and on the introduction of penalties for infringements.

Hazardous and Noxious Substances Convention, 1996.

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

International Conventions on Civil Liability for Oil Pollution Damage, 1969 and 1992.

International Convention on Salvage, 1989.

Salvage Agreement (LOF 80, LOF 90, LOF 95, LOF 2000).

Special Compensation P&I Clause (Code of Practice (ISU and International Group of P&I Clubs)).

United Nations Convention on the Law of the Sea, 1982.

York-Antwerp Rules, 1974; York-Antwerp Rules, 1974, as amended 1990; York-Antwerp Rules, 1994.

Other sources

Anderson A., *Salvage and Recreational Vessels: Modern Concepts and Misconceptions*. Retrieved February 13, 2010 from the World Wide Web: http://www.safesea.com/salvage/law/anderson/anderson_main.html

Brough, W.T. (1990) Liability Salvage – By Private Ordering. *The Journal of Legal Studies*, Vol. 19, № 1.

Browne, B. (2007). *Environmental Salvage from Marine Property Insurers' Perspective*. Paper presented at the IUMI Spring Technical Committee Meetings in Casablanca on 12th March 2007.

Browne, B. Salvage – LOF and SCOPIC. *The International Journal of Shipping Law*, 1999, S. 2.

Browne, B. (2009). Trends and Developments in Salvage Law and Practice. *Paper for delivery at Lloyd's Maritime Academy Seminar on Salvage Law and Practice on 15 December 2009*.

Brunner R. (2006). Comment on the legality and practicality of introducing environmental salvage. Retrieved February, 2010 from the World Wide Web: <http://web.uct.ac.za/depts/shiplaw/assign2006/brunnorsalvage.pdf>

Clift R. and Gaye R., *The Shifting Nature of Salvage Law: A View from a Distance*, Tulane Law Review, 2005: Vol. 79 № 5 & 6.

Coulthard P., A New Cure for Salvors? – A Comparative Analysis of the LOF 1980 and the C.M.I. Draft Salvage Convention. *Journal of Maritime Law and Commerce*, Vol. 14, № 1, January 1983.

Griggs, Patrick J.S. Obstacles to Uniformity of Maritime Law. The Nicholas Healy Lecture. In *CMI Yearbook 2002*. Retrieved February, 2010 from the World Wide Web: http://www.comitemaritime.org/year/pdffiles/obst_uniform.pdf

Hetherington, S. in the Discussion Paper for Review of Salvage Convention 1989 for the International Sub-Committee Meeting, London 12 May, 2010.

Kerr, M. (1990, July). The International Convention on Salvage 1989: How It Came To Be. *The International and Comparative Law Quarterly*, Vol. 39, No. 3. Retrieved May, 2009 from the World Wide Web: <http://www.jstor.org.ludwig.lub.lu.se/stable/pdfplus/760115.pdf?cookieSet=1>

Lacey, M.J. (2010). *Special Compensation in Marine Salvage: Article 14 of the 1989 Salvage Convention and the Special Compensation P & I Club Clause, "SCOPIC"*. Unpublished paper, London, United Kingdom.

Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement*. Retrieved May 20, 2009 from the World Wide Web:

<http://www.personal.soton.ac.uk/njg/Publications/1989%20Salvage%20Convention%20and%20LOF%201990%20%281991,%20web%20version%29.pdf>.

Oral Report of the Liability Committee to the Council IUMI Conference Paris (1997, September 15). *Marine Insurance – the Way Forward. Reaction of Liability Insurers to New Legal Liabilities under International Conventions and National Law*. Retrieved February 20, 2010 from the World Wide Web:

<http://www.aimu.org/IUMI%20PAPERS/LIABILITY/Marine%20Insurance%20-%20The%20Way%20Forward%20Reaction%20of%20Liability.pdf>

Pierce, A. (2010, April 8). Were you sleeping, mate? *Tradewinds*. Retrieved April 8, 2010 from the World Wide Web:

<http://www.tradewinds.no/casualties/article556875.ece?service=printArticle>

Rosaeg E. (2001). *The Impact of Insurance Practices on Liability Conventions*. Retrieved February 16, 2010 from the World Wide Web:

<http://folk.uio.no/erikro/WWW/corrgr/insurance/Lysebu.pdf>

Rose, S., & Bergmann, K.E. (2007). LOF & SCOPIC 2007. Power Point Presentation prepared for the Verein Hanseatischer Transportversicherer e.v. Trainingscamp. Retrieved May 20, 2009 from the World Wide Web:

<http://www.vht-online.de/vht2008/trainingscamp/en/referate/07.pdf>

Salt D. (2010, May). *Dealing with Oil Spills*. Presentation at the seminar "The Impact of the Environment on Marine Salvage", ISU, London.

Salvage in Turkish waters. *Gard News, Issue № 181 (2006)*. Retrieved March 15, 2010 from the World Wide Web:

http://www.gard.no/ikbViewer/page/iknowbook/section?p_document_id=52202&p_subdoc_id=52210

Umbdenstock, B. (2003, January). *Salvage Contracts: Why Terms Matter*. Retrieved February 20, 2010 from the World Wide Web:

http://www.smany.org/sma/pdf/Vol34_No2_Jan2003.pdf

Witte A. (2008, September 16). *Environmental Salvage*. IUMI Vancouver Conference. Retrieved February 15, 2010 from the World Wide Web:

<http://www.iumi.com/index.cfm?id=7244>