



Professional salvage from freedom of contract

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Highly qualified international experienced maritime law specialist
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I recently earned my LLM in INTERNATIONAL MARITIME LAW with merit (Swansea), and hold a masters degree from University of Copenhagen.

I have been an intern with Charles Taylor Consulting in London, including working with the STANDARD P&I CLUB and RICHARDS HOGG LINDLEY.

I studied at CAMBRIDGE UNIVERSITY, and at a Summer Law Institute in China, arranged by CORNELL, HASTINGS COLLEGE OF LAW (USA), and BUCERIUS (Germany).

I work as legal advisor at COPENHAGEN LEGAL AID and as associate EDITOR IN CHIEF at the Nan Yang Law Review (Shanghai).

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Traditionally, a salvor did only get an award for the successful salvage of maritime property, which was in danger at sea. The trade at sea developed, still increasing quantities of substances, which potentially could cause a massive threat to the environment, are transported. Instead of salvage awards being incentives for the casual salvor, a professional salvage industry was required and arose. The International Salvage Union (ISU) managed to get the prior 1910 salvage convention changed. Since then the preservation of the environment has been a increasing concern. This concern has supported the salvors, who long have advocated for the salvage convention to be changed in regard to environmental salvage.

The 1989 salvage convention

The approach of the safety-net provision¹ in the Lloyd's Open Form 1980 was adopted into the 1989 salvage convention². The maritime community saw the sense of elevating the approach into the salvage convention. The special compensation is available for salvors, who have expenses for minimizing a threat to the environment. If the tribunal deem fair the reward can be increased to 100% of the expenses.

The Nagasaki Spirit and the creation of SCOPIC

The wording of the conventions on special compensation is not very clear. After some disagreement by the judges in the different instances of the Nagasaki Spirit³, it was decided by the House of Lords, that a "fair rate of expenditure did not include an element of profit" and did only cover "out of pocket expenses" in the period of the salvage operation. This outcome was highly unsatisfying for the salvors, who as a reaction to the judgment created the SCOPIC agreement in corporation with the P&I Clubs. When the SCOPIC is invoked it is the end of the fair rate discussion in the convention.

"The salvors got the convention changed once, but will they succeed in getting the salvage convention changed once more?"

The compromise of international conventions

One the one hand, a convention should be changed if there is the need for a change. The pressure leading up to the changes in 1989 arose from a need to include the environment as a term to consider in salvage. The pressure came back then also from the professional salvors, then why not another change, which could accommodate the present wishes of the ISU? On the other hand, it should be remembered, that major convention of international dimensions always would



Potential future developments to the convention

In the vast majority of cases salvors sign LOF's and include the SCOPIC as an option in their agreement. The salvors advocate for higher awards under the convention. This can be achieved in the convention by defining a new cap for the award, making the award for environmental salvage a free standing provision, or by making the assessment criteria for the award for environmental salvage different from those of traditional salvage.⁴

There are several combined advantages of adopting these proposals. They will encourage the professional salvors to engage in operations to save the environment; provide for better equipment, which eventually would reduce the number of spills and decrease the response time. As a result, the claims directed towards the P&I Clubs would decrease.⁵ However, the proposals are not without challenges.

represent a major compromise, and that they always will be subject to debate. Thus, the suggested developments for the convention would be subject to international diplomatic compromises, and that the convention operates to secure a bar for protection of interests in salvage operations.

Freedom of contract – a commercial decision of professional salvors

In present stage the convention secures special compensation for the salvor who operates against a threat of damage to the environment. It is, however, free for the parties to opt out of the convention by agreement⁶. The convention's provision on special compensation, which at present stage is under debate, is created to encourage professional salvors to engage in salvage operations.

“The convention operates to secure a bar for protection of interests in salvage operations.”

Accordingly, the public policy backing the access to special compensation, is as such not aimed at the casual salvor, and the interest in a change is directed from the professional salvors, who can - and have indeed to a large extent with the Lloyd's Open Forms – opt out of the convention by agreement.⁷ If the convention is changed as advocated for by the ISU, the professional salvors most likely find some elements of the change, that they don't like, and opt out of the convention again by agreement⁸.

Conclusion

The preamble to the convention makes it clear that the environmental salvage was to encourage professional salvors. Parties in a salvage operation are free to opt out of the convention, and agree otherwise – and they are likely to do so. There is no need to change the convention, as it already builds a satisfying framework in which the salvors can operate. If the salvors want further incentive, they are free to contract on other – for them – more lucrative terms. A change to the convention will be based on compromises and the professional salvors are very likely to opt out of the convention. Hence, a change to the convention seems unnecessary and is unlikely to develop with the current arguments in the near future. What the industry can expect and must be willing to accept are revisions of SCOPIC and Lloyd's Open Forms, which are more salvor friendly. However, that seems to be no issue for the industry, how have accepted such revisions for decades.

1 Lloyd's Clause 1(a).

2 In 1910 the environment was not mentioned in the salvage convention. The incident in 1967 of the Torrey Canyon and in 1979 the incident of Atlantic Empress raised the awareness of salvage operations with huge environmental risks. The salvage of the maritime property were unsuccessful and accordingly were the salvors not paid even though they have had a lot of expenses in the attempt to save the vessels and the environment from the oil spills. After incidents like these the salvors introduced the “safety-net provision” in the revision of the 1980 Lloyd's Open Form. The provision protects the salvors in terms of liability for oil, which may escape from the vessel during an operation, and to encourage the salvage of a vessel which value is not sufficiently high.

3 The Nagasaki Spirit [1995] vol. 2, Lloyd's Law Report QB 44; [1996] vol. 1 Lloyd's Law Report AC 449; ,House of Lords, [1997] Appeal Cases, 455.

4 Discussion Paper for review of the Salvage Convention 1989, International sub-committee meeting, 12th May 2010, at p. 23.

5 D.R. Thomas “ Marine Salvage and the environment: Prospects and Problems”, p. 8. Paper delivered on the ILTS Colloquium; New uses of the Sea 2010.

6 Art 6 of the 1989 Salvage Convention.

7 Kennedy and Rose “Law of Salvage” 7th edn (2010) Sweet and Maxwell, at para 1.086 and 2.040.

8 If such an agreement is fair and just it will be upheld by the Admiralty Court, see Kennedy and Rose “Law of Salvage” 7th edn (2010) Sweet and Maxwell, at para 10.081.