SALVAGE COMPANIES AND PROTECTION OF THE MARINE ENVIRONMENT: TIME TO PAY THE PIPER?

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Abstract

While the traditional law of salvage was effective in reducing the loss of property at sea the ‘no cure–no pay’ doctrine resulted in perverse outcomes like those seen in the Torrey Canyon incident, where volunteer salvors would protect the marine environment from the catastrophic consequences of would be oil spills, yet be left without remuneration and forced to bear their own costs. The development of the 1989 Salvage Convention and its contractual alternative SCOPIC provided a much needed exception to the longstanding ‘no cure–no pay’ rule by introducing a safety net provision to provide some compensation to cover the salvors expenses where they were not entitled to claim a reward. However, the negotiators of the 1989 Salvage Convention concluded that issues of a public law nature such as access to places of refuge and State interference in salvage operations were best dealt with by a separate convention. This dissertation submits that the public law aspects of salvage law remain unremedied and continue to discourage salvage companies from undertaking a crucial role in protecting the marine environment. As a result, a new convention is required to provide certainty as to the rights and obligations of parties involved in incidents posing a potential threat to the marine environment. Will it take another catastrophe such as the Prestige to prompt decision makers into taking action?
Acknowledgements

To my supervisor Erika Techera, thank you for your patience, insight and support throughout the past two years.

To Colin and Cheryl Edwardes, Jim Thomson, Alex Drake–Brockman, Akash Mehta, Annelese Karreman, Peter Handford, Jim Thomson and Kanaga Dharmananda, thank you.

This dissertation is dedicated to Anne Allison. Thank you mum.
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If Horatio Nelson had been in charge of this operation, I hardly think that he would have waited for official instructions.

The Doctor.
INTRODUCTION

Professional salvage companies developed as a consequence of a long-standing rule and of maritime law that rewarded volunteers for their efforts in successfully saving ships in peril at sea. Through wide acceptance, the core principles of salvage law became recognised as a customary law norm and were later codified in the *1910 Convention*. A salvage reward does not merely compensate salvors for their costs: as its name implies, it rewards them. It is a unique remedy designed to encourage salvors to maintain the skills and equipment necessary to respond to maritime casualties in the future. The requirement of success is cornerstone to the salvage.

The ‘no cure – no pay’ rule means what it says on the tin: a salvor must succeed in rescuing the imperilled ship and cargo to be entitled to a reward. Even where considerable time and resources are expended, ‘no cure – no pay’ means a salvor might walk away at a loss. This formula operated with considerable success for some time.

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2 A salvage reward ordinarily represents a percentage of the value of the imperilled ship and cargo assessed at the end of a salvage operation. As a result, the greater the success, the greater the potential reward. The reward is paid by ship-owners, cargo owners and their respective insurers, on the basis that these were the parties who benefited from a successful salvage operation.

3 *The Blackwall, 77 US 1 (1869); Martin Norris, Benedict on Admiralty (1997) 159.*
However, the ‘no cure – no pay’ rule began to create problems during the second half of the 20th century. Continual growth in tanker capacity meant a single ship could pose an enormous threat to the marine environment. One by one, the world witnessed environmental catastrophes involving vessels such as the Torrey Canyon and the Amoco Cadiz. On both occasions, volunteer salvors went to the aid of leaking tankers helping to avert environmental catastrophes, reducing a ship’s liability to third parties and limiting potential government clean-up costs. Despite these efforts, where the ship and cargo was ultimately lost whether due to the nature of the incident or subsequent actions taken by officials, the salvors would not be able to recover any compensation or reward as they did not ‘succeed’ in terms of the ‘no cure – no pay’ rule. Success in saving the maritime environment was not, on its own, sufficient.

Whilst salvage companies had the technical capacity and know-how to prevent the disastrous impacts of oil pollution on the marine environment, the traditional requirement of success began to deter them from engaging in salvage operations. Those in arguably the best position to protect the marine environment had no financial incentive to do so. Reform was clearly necessary.

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4 Even where a salvage operation was successful, any reward was capped at the value of the salved property.

THE MONTRÉAL COMPROMISE

The oil pollution resulting from the grounding of the *Amoco Cadiz* prompted the Inter-Governmental Maritime Consultative Organization (IMCO)\(^6\) to work with the Comité Maritime International (CMI) and develop a draft convention on salvage remunerating salvors who prevent environmental damage.\(^7\) As part of this process, a radical reform was proposed. In a Report on the Revision of the Law of Salvage prepared in April 1989, Professor Erling Selvig proposed the recognition of an additional form of salvage: liability salvage.\(^8\) The proposal proved too controversial and contentious to obtain international agreement.

Despite this, reform was deemed necessary and this led to what is known as the Montréal Compromise.\(^9\) The Montréal Compromise was the result of delicate bargaining by delegates to the plenary session of the Comité Maritime International in 1981. Two key reforms to the law of salvage were agreed upon.

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First, in the event of a successful salvage operation, the efforts of salvors in protecting the marine environment would to be considered as an additional factor in the assessment of a salvage reward. Second, a new regime of special compensation was agreed to. Salvors would be reimbursed (as opposed to rewarded) for their expenses incurred in protecting the marine environment from the threat of harm. They would also be entitled to an additional amount of up to 30% of expenses where their work actually succeeded in preventing environmental harm. Further compensation of up to 100% of expenses could also be awarded where ‘fair and just’ to do so. While not as generous as the liability salvage proposal, the special compensation still went some way to ameliorating the harshness of the ‘no cure – no pay’ doctrine. The Montréal Compromise formed the basis of subsequent negotiations at the International Maritime Organization and was substantially adopted in the 1989 International Convention on Salvage (1989 Salvage Convention).10

**COMMERCIAL RISK**
The 1989 Salvage Convention included new provisions aimed specifically at addressing key concerns regarding the ‘no cure – no pay’ doctrine. Article 13 provided for an enhanced salvage reward that would recognise efforts by ‘successful’ salvors in preventing or reducing damage to the environment.

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Where a salvor was not successful in saving ship or cargo, the Article 14 safety net (or ‘special compensation’) provision would require compensation be paid to the salvor for costs involved in a salvage operation that threatened the environment. Where the salvors could establish they actually prevented damaged to the marine environment, they would be eligible for a potential uplift of up to 100%.  

The special compensation provision in Article 14 of the new convention was tested in a number of jurisdictions. Salvors argued, unsuccessfully, that the remuneration envisaged by Article 14 could encompass a profit element to encourage salvors to protect the marine environment even where the prospect of saving property in danger was unlikely. Despite rejecting this argument, the cases reveal some ambiguity as to the assessment of special compensation. Further attention has been drawn to the difficulty surrounding other key phrases of the convention relating to the provision of special compensation.

11 Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530, 538–9; Catherine Redgwell, ‘The Greening of Salvage Law’ (1990) 14 Marine Policy 142, 147. See Brent Nielsen, Report of the CMI to IMO on the draft convention on salvage, approved by the XXXII International Conference of the CMI held in Montréal, May 1981, IMO Doc LEG 52/4-Annex 2 in Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Pt I Annex 6, 33: ‘Other solutions were considered during the work of the CMI, but it became obvious that the ‘safety net’ model should be preferred mainly on the grounds that it expresses a compromise among all the interested parties. Thus the compromise is a balanced solution which is not dominated by any of the interests involved and works in the general interest of the public’.

Alongside these developments has been the revision of the *Lloyd’s Standard Form of Salvage Agreement*, known as Lloyd’s Open Form (LOF). LOF was developed around the time as the codification of the law of salvage through the 1910 *Convention*. Originally published by the Committee of Lloyd’s, LOF provides a standard form agreement for use by salvors and ship-owners governing the provision of salvage services. The majority of salvage operations occur pursuant to boilerplate contracts such as LOF, which is the most popular.

A revision in the early 1980s, shortly before the Montréal Compromise, recognised a limited compensation regime to recompense salvors for their efforts in protecting the marine environment from potential damage caused by an oil tanker in distress. Industry appeared to be adapting to calls for change in the public law of salvage. The special compensation regime in the Montréal

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15 Thomas Nummey, ‘Environmental Salvage Law in the Age of the Tanker’ (2009) 20 *Fordham Environmental Law Review* 267, 288: ‘Lloyd’s Open Form has been used for over a hundred years, and its terms are periodically revised by the Council of Lloyd’s’.


Compromise provided a significantly greater level of compensation than the LOF provision. However, as the special compensation regime came under fire in the mid 1990s, industry reacted by creating an alternative. In 1999, a new, optional clause was added to LOF: the SCOPIC clause. SCOPIC aimed to address difficulties in the assessment of special compensation under Article 14 of the Salvage Convention. The clause represented a balance between the interests of salvors, ship-owners, underwriters and the P&I clubs. While the introduction of the SCOPIC clause tweaked the special compensation regime in Article 14, it did not substantially change it. Notably, it, like the Salvage Convention, did not include a profit element in favour of salvors who work to protect the marine environment in otherwise unsuccessful salvage operations.

The International Salvage Union (ISU), an industry body representing professional salvors, is very critical of the current framework. In 2010, ISU proposed the recognition of a freestanding environmental salvage reward, citing inadequate rewards for salvors under SCOPIC and the Montréal Compromise. The reward would operate in place of the Article 14 special compensation regime. Article 13.1(b) would be removed to shift liability for payment of a salvage reward relating to protection of the marine environment from ship and cargo underwriters to a vessel’s P&I club. The proposal includes

18 Broadly, the total reimbursement and compensation of up to 100% of expenses far exceeded the 15% available under clause 80 of LOF.
a number of other suggested changes in favour of salvors. In addition, some have argued that coastal States should also contribute, where they benefit from the efforts of salvors to protect their marine environment and are saved from the costs of clean up operations. It is hardly surprising that while salvors and underwriters are in support of reform, P&I clubs are fiercely against change. It is they who stand to lose. This brings us to the present stalemate between industry players. How the law of salvage should recognise and encourage the efforts of salvors raises many questions to be addressed by this dissertation.

POLITICAL RISK
The commercial risk was compounded by the political risk involved: government intervention could increase costs that the salvors would incur in an operation, and could even have the effect of preventing an operation achieving a success. Catherine Redgwell describes these political risks as active and passive interference.\textsuperscript{19} Deliberate actions of coastal States seeking to safeguard their marine environment, which reduce the likelihood of a successful salvage operation resulting in a reward, may be described as active interference. In addition, passive interference includes issues such as the refusal of coastal States to allow imperilled vessels into their port for the purposes of refuge: this

is known as the maritime leper syndrome.\textsuperscript{20} The lack of access to port facilities and coastal waters reduces the likelihood of a successful salvage operation, resulting in a reduced reward, or no reward at all.

Passive interference by coastal States was potentially just as damaging to salvors as active interference. Without a port of refuge it became almost impossible for salvors to save the tanker in question. On many occasions they were left towing leaking oil tankers aimlessly as they tried to find a friendly coastal nation who would give them access to the facilities. The potential pollution meant that on most occasions nations wanted the ships to be as far away as possible from their coastlines.\textsuperscript{21} ‘NIMBY’ became the unofficial policy of coastal States.\textsuperscript{22}

On some occasions nation States intervened in such a way as to ensure there was no chance of success under the traditional formula of ‘no cure – no pay’. In the \textit{Torrey Canyon} disaster, the British government made a decision to bomb an oil spill, taking with it the ship in question.\textsuperscript{23} The salvors in that case were quite

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\textsuperscript{20} Mark Cohen, ‘Travails of the Flying Dutchmen: Lloyd’s Standard Form of Salvage Agreement and the US Salvage Industry’ (1982) 6 Marine Policy 265, 278
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\textsuperscript{23} Alan Khee-Jin Tan, \textit{Vessel Source Marine Pollution: The Law and Politics of International Regulation} (Cambridge University Press, 2006) 70: ‘The huge damage claims which arose out of the accident were
close to achieving some success in saving the vessel but following the intervention by government this was not possible.

There were other issues too. In the Tojo Maru\textsuperscript{24} case, the House of Lords held that salvors could be held liable for negligence and salvage operations. Not only was success very difficult to achieve, salvage companies also risked opening themselves up to liability resulting from damage caused by a polluting vessel.

It is not surprising that salvors became wary about partaking in salvage operations where there was a risk of marine pollution and questionable chances of success under the traditional ‘no cure – no pay’ formula. These were private entities designed to make a profit. Whilst they were best able to help achieve the public policy objective of protecting the world’s marine environment, even considered the first line of defence against pollution, there was no incentive for them to play this role. Quite the opposite, there was a disincentive.

The negotiators of the 1989 Salvage Convention acknowledged that the relationship between salvors and coastal States was a matter of public law and not well suited to an international convention primarily concerned with the contractual relationships between commercial parties. It is submitted that these

unparalleled. A large proportion of the claims could not be settled and this resulted in the widespread belief that an international compensatory scheme had to be urgently crafted to deal with similar accidents in the future’.

\textsuperscript{24} Tojo Maru [1972] AC 24.
issues have yet to be adequately remedied through public law. It is the responsibility of governments and not the maritime industry to reduce the political risks involved in salvage operations. Salvage law as evidenced in the continuing development of Lloyd’s Open Form involves a delicate balance of the various interests involved in salvage operations, in order to provide adequate incentives for professional salvors to go to the aid of vessels in distress thereby protecting the interests of those involved in the maritime adventure. The onus is on governments to remove political barriers impeding these commercial relationships that benefit not only shipping interests but also the interests of coastal States.

**AIM AND SCOPE**

Despite their private, profit driven motives, it is beyond doubt that the professional salvage industry can play a crucial role in protecting the marine environment from vessel source pollution. There are clear public policy objectives in ensuring the industry maintains the skills and equipment necessary to respond to potential disasters.

This dissertation will advance the scholarship in this field by developing our understanding of the commercial and political risks faced by would-be salvors contemplating salvage operations that would remove the threat of catastrophic environmental harm. It will detail how these risks have been addressed by the development of salvage law.
Having examined the development of salvage law in this context, the dissertation will turn to potential opportunities for reform from both public and private law perspectives. Much has been written and continues to be written on whether the 1989 Salvage Convention should be modified to provide for environmental salvage rewards. The merits of this proposal have been extensively debated for some time. Considering the various commercial interests involved, the dissertation will ask whether resolution of this issue is likely. At this point, the proposal appears to be at a standstill as industry stakeholders are unable to agree on reform. It is questionable whether the International Maritime Organization will formally consider it without industry’s blessing.

The dissertation will critique the failure of international community to address public law issues identified during the negotiation of the salvage convention. Given the nature of the 1989 Salvage Convention as a predominantly private law convention it was felt that it would not be the appropriate vehicle to address public law issues.\textsuperscript{25} However, as time has passed and public law issues such as places of refuge have become increasingly significant, developments in this area have been lacking.

\textsuperscript{25} There was also a pragmatic concern that to do so would risk the adoption of the convention.
The dissertation will ask whether a new convention is required to provide clarity as to the rights and obligations of parties such as coastal States and salvage companies in salvage operations where the marine environment is threatened. While the commercial risks have been addressed in a way that attempts to balance the various interests of the commercial parties to a salvage operation, the political risks have not been approached in such a balanced way. International, regional and national regulatory development has occurred on a knee jerk basis in response to public anger over marine pollution. The result is an obscure array of conventions, guidelines and enactments that could have some bearing on the legal relationship between coastal States and salvage companies during maritime casualty scenarios. Until this occurs, the world faces the fearful prospect that it will take a catastrophe similar to that seen in the Prestige incident to prompt decision makers into responding.

METHODOLOGY
This dissertation primarily comprises of a doctrinal analysis of the law of salvage as it has developed over time through a desk-based study of the literature. No empirical work has been undertaken. While the dissertation does not include a literature review, analysis of the primary and secondary literature is woven together throughout the chapters.
The dissertation will examine the law of salvage through analysis of the primary international conventions, contractual regimes and key case law. This analysis will be aided by reference to secondary materials including committee deliberations and reports, draft instruments, travaux préparatoires, media reports, and industry and governmental submissions. Further reference will be made to the array of other international instruments that touch of the law of salvage.

Salvage law is accompanied by a wealth of high calibre academic commentary. The dissertation draws on the work of Anthony Miller, Barry Sheen.
Anthony Bessamer-Clark, Donald O’May, Peter Coulthard, Mark Cohen, and Steven Friedell to shed light on the development of Lloyd’s Open Form (1980) and the subsequent negotiations leading up to the Montréal Compromise.

The adoption of the 1989 Salvage Convention was analysed in detail by a number of articles including those by Michael Kerr, Donald Kerr, Edgar Gold, Nicholas Gaskell, James Wooder, William Nielsen, Brian Binney, Catherine Redgwell, and the preeminent Geoffrey Brice.


36 Steven Friedell, ‘Salvage and the Public Interest’ (1982) 4 Cardozo Law Review 43.


Further, the collation of *The Travaux Preparatoires of the 1989 Salvage Convention* by the Comité Maritime International in 2003 provides a wealth of material for further analysis.46

The *Nagasaki Spirit* decision led to work by Aaron Gilligan47 and Stephen Girvin.48 The University of Queensland’s Michael White contributes a well argued and engaging no–holds–barred critique on the decision.49

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Analysis of the International Salvage Union environmental salvage proposal has been aided by the work of Thomas Nummey,50 Mišo Mudrić,51 and Natalia Malashkina.52 Whilst advocating the cause of the salvors, Archie Bishop makes several important contributions to the literature and provides a detailed critique of a number of issues arising from the 1989 Salvage Convention.53 A United States’ perspective on the 1989 Salvage Convention has been provided by former University of Western Australia lecturer Martin Davies.54

Places of refuge is an incredibly complex area of law. The sheer volume of material means it is not possible to do a comprehensive analysis of all aspects


52 Natalia Malashkina, Law Reform in the International Regime of Salvage: The Insurance Perspective (Master thesis, Faculty of Law, Lund University, Spring 2010).


within this paper. Anthony Morrison’s PhD thesis\textsuperscript{55} (subsequently published\textsuperscript{56}) comprises an outstanding analysis of the issues in this field. His work is complemented by an excellent collection of papers published by Aldo Chircop and Olof Linden.\textsuperscript{57} Further, an Australian perspective on places of refuge is provided by Dione Maddern and Stephen Knight.\textsuperscript{58} This analysis benefits from


\textsuperscript{56} Anthony Morrison, Places of Refuge for Ships in Distress: Problems and Methods of Resolution (2012).


further research by Eric Van Hooydonk,59 Susanne Storgårds,60 Richard Shaw,61 Alan Jin62 and Erik Molenaar.63

STRUCTURE
This dissertation is divided into four chapters:

Chapter 1 provides a general overview of the traditional law of salvage under general law and the 1910 Convention. The chapter will then consider how the law became alienated by the events taking place during the latter half of the 20th century.

Chapter 2 will detail both the industry response through provision of the Lloyd’s Open Form standard contract to salvage services in 1980 and international response through the creation of the 1989 Salvage Convention.

Chapter 3 will consider whether the reforms made by the salvage convention achieve their objective. It will provide an in depth analysis of the safety net that


60 Susanne Storgårds, Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012).


63 Erik Molenaar, Coastal State Jurisdiction over Vessel-Source Pollution (Kluwer, 1998).
arose from the Montréal Compromise as adopted by the 1989 Salvage Convention.

It will consider its interpretation and application to determine to what extent it succeeded in providing encouragement for salvors to go to the aid of vessels posing a threat to the marine environment. As the chapter will demonstrate, the issues surrounding the application of the safety net led to industry taking matters into their own hands through development of the SCOPIC clause.

Chapter 4 will examine and critique potential opportunities for reform of salvage law from both public and private law perspectives. Attention will be given to the recent push by salvors for environmental salvage rewards and whether that has prospects of success. From the public law angle, it will consider the attempts to create a legal regime governing the provision of places of salvage to ships in distress.

Chapter 5 will conclude the dissertation. It was recognised during the negotiation of the 1989 Salvage Convention that public law issues would be better addressed through a separate public law convention. The chapter will consider whether that recognition remains valid and conclude as to a new public law convention should be developed to complete the reform of salvage law that began in the late 1970s.
BACKGROUND

The law of salvage emerged largely during the eighteenth and nineteenth centuries by the English Admiralty Court.\textsuperscript{64} The Admiralty Court consistently found that a volunteer who saved maritime property in danger was entitled to a reward. Some suggest that the rationale behind the law of salvage lies in the law of restitution.\textsuperscript{65} Others suggest it is derived from equitable principles.\textsuperscript{66} For some, the doctrine of salvage may be derived from the lex maritima - the uniform maritime law principles - reflective of Roman law.\textsuperscript{67} It is beyond the scope of this dissertation to analyse the traditional basis of salvage law. Save to say that the law of salvage is an internationally recognised doctrine with global


support evidenced in the uptake of the salvage conventions and enforcement of admiralty jurisdiction.

The principle of ‘no cure – no pay’ alludes to the central theme of salvage: risk and reward. As a private citizen or enterprise, the salvor must decide whether the potential reward is sufficient to take part in an operation that may leave them out of pocket. It is an opportunity to make a profit, but carries with it a corresponding risk of incurring a loss.

A salvage reward is a unique remedy in the common law. It represents a departure from the compensatory nature of most common law remedies. It is a highly discretionary remedy designed to allow a salvor to profit from the salvage operation. In The City of Chester, Sir William Brett MR stated:

There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of the salvage reward.68

Salvage rewards are payable by those with interests in the maritime activity concerned including the ship-owner, their underwriters and cargo interests. Not only can the rewards be enforced in personam, they also constitute a recognised maritime lien against the vessel and cargo in question. As a result,

68 The City of Chester (1884) 9 PD 18.
rewards are enforceable internationally through admiralty jurisdiction, and vessels may be arrested to obtain security from salvage claim.

It has been recognised for some time adequate incentives would guarantee prompt assistance at times of maritime emergency. The profitable nature of salvage operations has led to the creation of specialist salvage companies. These companies are well equipped and have the skills and experience necessary to quickly respond to maritime casualties and undertake salvage operations. As Donald Kerr notes:

It was not long before shipping interests came to realize that the best thing of all would be to have available, perhaps on station at strategic points, teams of specially trained and equipped professional salvors. Such people, naturally, would have to be rewarded "with great liberality" in cases of success, not only because they stood the chance of getting nothing but also by reason of the fact that they accumulated and maintained vessels specially equipped for salvage purposes

Lord Mustill recently echoed this sentiment in the *Nagasaki Spirit* case:

My Lords, the law of maritime salvage is old, and for much of its long history it was simple. The reward for successful salvage was always large; for failure it was nil. At first, the typical salvor was one who

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happened on a ship in distress, and used personal efforts and property to effect a rescue. As time progressed, improvements in speed, propulsive power and communications bred a new community of professional salvors who found it worth while to keep tugs and equipment continually in readiness, and for much of the time idle, waiting for an opportunity to provide assistance and earn a large reward. This arrangement served the maritime community and its insurers well, and the salvors made a satisfactory living.\textsuperscript{72}

Acknowledgement of the critical role played by salvors in maintaining adequate skills, equipment and know-how is included as an express factor to be considered by tribunals in assessing the quantum of the salvage reward. These criteria were first set out in the case of the \textit{Blackwall}.\textsuperscript{73} They are:

(1) The labour expended by the salvors in rendering the salvage service.

(2) The promptitude, skill, and energy displayed in rendering the service and saving the property.

(3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.

(4) The risk incurred by the salvors in securing the property from the impending peril.

(5) The value of the property saved.

\textsuperscript{72} \textit{The Nagasaki Spirit} [1997] 1 Lloyd’s Rep 323

\textsuperscript{73} \textit{The Blackwall}, 77 US 1 (1869).
If successful, a salvage reward is generally capped at the value of the salved property, valued at the termination of the salvage operation. As the Blackwall criteria demonstrate it is also a factor taken into account in determining the salvage reward. For Thomas Nummey, it is ‘arguably the most important element amongst the Blackwall factors’. Salvage rewards will generally reflect only a percentage of that amount. This limitation remains relevant to salvage law today and will be critical to the analysis in the latter chapters.

THE 1910 CONVENTION
The two modern legal bases for salvage law are international conventions and contract law. This traditional doctrine of ‘no cure – no pay’ was codified by the international community through the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea signed at Brussels on 23 September 1910 (The 1910 Convention). The 1910 Convention received wide ratification. For some, the concision and simplicity of the 1910 Convention
contributed to its widespread adoption.\textsuperscript{77} Natalia Malashkina is more cautious in making that assertion noting it must be kept in mind that at the time when the \textit{1910 Convention} was discussed it was easier to achieve international consensus on matters relating to shipping as:

The British Empire was controlling 40\% of the world’s tonnage, and by reason of the geopolitical situation at the time, the United Kingdom’s acceptance of an international treaty would automatically trigger a signing avalanche worldwide.\textsuperscript{78}

The essence of the law of salvage is unmistakably set out in Article 2 of the \textit{1910 Convention}.\textsuperscript{79} The article contains three key limbs. First, the article provides that every act of assistance or salvage that has had a useful result gives right to equitable remuneration. Second, no remuneration is due if the services rendered had no beneficial result. Third, in no case can the sum to be paid exceed the value of the property salved.


\textsuperscript{78} Natalia Malashkina, \textit{Law Reform in the International Regime of Salvage: The Insurance Perspective} (Master thesis, Faculty of Law, Lund University, Spring 2010) 14.

The first limb sets out the threshold requirement for a salvage reward. A salvage reward will arise where a party, acting as a volunteer, is successful in saving from danger property regarded as the subject of salvage. In most cases that consists of the vessel, her cargo and freight. The second limb clearly emphasises that the traditional ‘no cure – no pay’ principle applies under the new regime. Without achieving a beneficial result, a salvor will not fulfil the requirements of success. The salvage reward will not arise and the salvor will be left to bear their own costs. The final component of Article 2 is the third limb that limits the value of any salvage reward to the value of the salved property (that is at the time the salvage operation has been completed).

Article 6 allows the parties to a salvage operation to agree on the quantum of remuneration, failing which this will be done by the court. The quantum is determined according to the considerations as set out in Article 8 of the 1910 Convention. It provides:

The remuneration is fixed by the court according to the circumstances of each case, on the basis of the following considerations:

(a) firstly, the measure of success obtained, the efforts and deserts of the salvors, the danger run by the salved vessel, by her passengers, crew and cargo, by the salvors, and by the salving vessel; the time expended, the

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expenses incurred and losses suffered, and the risks of liability and other
risks run by the salvors, and also the value of the property exposed to
such risks, due regard being had to the special appropriation (if any) of
the salvors’ vessel for salvage purposes

(b) secondly, the value of the property salved.81

The factors as set out in Article 8 are reflective of the Blackwell criteria.

LLOYD’S OPEN FORM
As the 1910 Convention was being developed, salvage agreements emerged. The
Lloyd’s Open Form, originally published by the Committee of Lloyd’s, was the
most prominent and remains the dominant standard form salvage agreement.
The legal norms governing the creation of a salvage reward are reflected in the
LOF.82 As Edgar Gold notes:

The LOF was based on the belief that a widely accepted standard form of
contract would be the best way to ensure the acceptance of a salvage
agreement under adverse conditions83

81 1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at
Sea, opened for signature 23 September 1910 (entered into force 1 March 1913) as amended by the 1967
Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Assistance

82 See for example Council of Lloyd’s, Lloyd’s Standard Form of Salvage Agreement (LOF 2011).

Commerce 487, 488. ‘Since its appearance in the 1890s, the Lloyd’s Standard Form of Salvage Agreement,
commonly referred to as the Lloyd’s Open Form (“LOF”), has become the most widely used form of
salvage contract in the world’ in Robert Jarvis, ‘Salvage Arbitration: The arbitration provisions of the LOF
are unenforceable in purely domestic salvage cases. Brier v. Northstar Marine, Inc., 1993 AMC 1194 (D.N.J.
benefits for both the salvager and the salvagee. The salvager is benefited because the contract will not be
vulnerable to accusations that it was made under duress, or that it will be voided for unconscionability. If
The later chapters will look in more depth at the LOF and how it developed alongside salvage law throughout the last century. For the purposes of this chapter it is sufficient to note that parties had a contractual alternative to the 1910 Convention, but nonetheless the legal norms governing the relationship were more or less the same.

THE WHIPPINGHAM FACTOR

Questions arise as to whether the framework provided for in the 1910 Convention could provide some basis for environmental salvage reward. In particular, some have asked whether actions taken to prevent liabilities to third parties could be considered as saving the property of the ship owner. Further, there has been some discussion as to whether potential liability could be regarded as a danger in and of itself. In this context the decision in the Whippingham is most often cited. In the Whippingham, a ship lost control in a gale while taking action to avoid a collision and fouled some yachts and risked fouling more. Bateson J found in favour of the salvor stating:

The mere saving of a vessel from danger to other ships which might result in claims is a service, to my mind, because although the claim may

the salvager requested a specific amount of compensation, his strong bargaining position could make the owner feel as though he has no choice but to accept the proposal, no matter how unfair it is. The salvagee is helped because he will not have to try to persuade a court that the contract should be voided for duress or unconscionability’ in Thomas Nummey, ‘Environmental Salvage Law in the Age of the Tanker’ (2009) 20 Fordham Environmental Law Review 267, 287–8.

84 The Whippingham (1934) 48 Lloyd’s Rep 49.
not be a good one there is considerable damage attached to successfully defending a claim, because there is all the expense which you don’t recover even when you are a successful claimant. I think that in itself would be a ground of claim for salvage.85

In addition to these comments Nicholas Gooding argues that:

Additionally, English Courts and Lloyd’s Open Form arbitrators have for many years, taken into consideration potential liabilities to third parties as a distinct element of danger when assessing salvage awards even though the Convention is silent on the point.86

Despite this, there is very little on record and Bateson’s comments in the Whippingham case have not been followed and have been criticised as lacking authority.87 It is fair to conclude that on the balance of authorities third-party liabilities are not to be taken into consideration in the assessment of a traditional salvage reward.

THE ONSLAUGHT OF OIL

The 1910 Convention achieved its objective; it provided a uniform regime setting out the basis for a maritime salvage reward and the manner in which it may be enforced. However, as the twentieth century progressed and the nature of

85 The Whippingham (1934) 48 Lloyd’s Rep 49.

86 Nicholas Gooding, Environmental Salvage: The Marine Property Underwriters’ View (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010).

shipping disasters changed, the suitability of the existing framework was in question. The problem may be stated quite crudely: oil. The transportation of vast quantities of oil by sea. Oil had been discovered on the Saudi peninsula and the West wanted it. Following the closure of the Suez canal, ship-owners responded building even larger ships known as cape-size vessels designed to transport cargo around the Cape Horn of Africa but still deliver the same profits.88

Salvage operations involving such tankers became subject to interference from coastal States. Not only were catastrophes involving such large amounts of oil potentially devastating for the marine environment, they also captured the public eye in a way that had not previously been done. Once seen, it is hard to forget the image of a seabird covered in crude oil. The same could be said for once pristine beaches. This only served to put further pressure on the

88 The growth in oil exports from the Saudi peninsula combined with geopolitical factors created demand for the construction of larger vessels. See Thomas Nummey, ‘Environmental Salvage Law in the Age of the Tanker’ (2009) 20 Fordham Environmental Law Review 267: ‘But in the modern world, if an oil tanker or a vessel carrying hazardous substances crashes, it can have dire consequences not only for the ship-owners, their crews, and the cargo owners; but also for other parties who rely on the waters’. ‘The marine world is a major (sometimes primary) source of food for many of people, who may suffer tremendously if they are unable to fish, or eat contaminated seafood’: at 284; Colin de la Rue, ‘Special Report: Torrey Canyon Clean-up Raised International Issues’, Lloyd’s List International (18 March 1997): The ‘modern tale of pollution from ships can be traced to the Suez Crisis of 1956, and the disruption of oil supplies from the Middle East to the western world via the Suez Canal. Bigger ships had to be built to carry oil on an economic scale on the longer route around the Cape of Good Hope. Soon the world’s first 100,000 dwt tanker came into service, and by 1966 VLCCs of more than 200,000 dwt were afloat. It was only a matter of time before one of the new breed of supertankers would unleash pollution on a scale not previously seen from a ship, with far-reaching consequences for all involved’. See also, Alan Khee-Jin Tan, Vessel Source Marine Pollution: The Law and Politics of International Regulation (Cambridge University Press, 2006): ‘By the early 1960s, the Japanese shipyards were producing tankers well over 100,000 deadweight tons (dwt). In time, the so-called Very Large Crude Carriers (VLCCs) of over 200,000 and 300,000 dwt came into service. The early 1970s witnessed the advent of the Ultra Large Crude Carriers (ULCCs), supertankers of over 400,000 dwt.’ ‘With their increasing size, it was only a matter of time before one of these tankers caused pollution of unprecedented severity’: at 120.
governments of coastal States to take action. However, instead of cooperating
with and promoting the efforts of salvors to remove the threat of environmental
harm, the governments of coastal States took an interventionist approach. The
coastal States had fallen ill to ‘disaster reaction syndrome’ further fuelled by
the media. They even went to the effort of creating a new convention: the
International Convention Relating to Intervention on the High Seas in Cases of Oil
Pollution Casualties 1969 enabling coastal States to intervene in clean-up
operations following a maritime casualty.

Coastal State intervention had the capacity to increase costs to salvors and more
importantly, reduce the likelihood of a successful outcome and thereby deprive
the salvors of a reward under the 1910 Convention. Such intervention has been
described as active and passive. An example of active intervention was seen in
the case of the Torrey Canyon in 1967. The British Government had determined
that the threat of the spill to its coast was so high that it justified ording the
Royal Airforce to bomb the vessel until it sunk. With the ship now wrecked on

89 Nicholas Gaskell, ‘Compensation for Offshore Pollution: Ships and Platforms’ in Malcolm Clark (ed), Maritime Law Evolving (2013) ch 4: The ‘disaster reaction syndrome’ can be seen in many instances following the Torrey Canyon’. ‘It is a feature of human affairs that the focus tends to become more concentrated after a particular disaster rather than before it’: at 63–4.


92 Redgwell

93 See
the ocean floor there was no ‘success’ upon which the salvors could claim a reward.\textsuperscript{94} For Catherine Redgwell, passive interference by a coastal State is illustrated by the ‘maritime leper syndrome’.\textsuperscript{95} As an example she cites the 1979 collision of the Atlantic Empress and Aegean Captain where salvage efforts were impeded when a number of coastal States refused to offer a place of refuge to allow the salvors to extinguish the fire.

The perverse outcomes resulting from interventions by coastal States did not impress the salvage industry. Salvors were discouraged from participating in a salvage operation that could avert significant risk to the marine environment on the basis that the operation might not be successful in rescuing property. For Peter Coulthard, the combination of diminished salvage awards, increased potential for liability, and coastal State involvement had created an atmosphere which inhibited salvors from performing what all parties agreed was a function essential to both shipping and environmental safety.\textsuperscript{96}

\textsuperscript{94} Redgwell citing Sheen fn 16 As Mr Justice Sheen describes: ‘On this occasion they suffered a double misfortune. First, one of their experienced men lost his life in the engine-room of the Torrey Carzyotz. Second, at a time when it seemed probable that the salvors were nearing success, the public outcry arising from the pollution of the English coastline was such that the government ordered the ship and remainder of her cargo to be destroyed by fire. She was bombed by naval planes so that the oil burnt. For the salvors this inevitably meant that there was no cure’.


Given these potential commercial and political risks, it is hardly surprising that would-be salvors would think twice before engaging in an operation that could prevent irreparable harm to the environment. Doctor and patient became separated by the outmoded doctrine of ‘no cure – no pay’. Salvors were, in practice, ‘discouraged from assisting the very ships the world wanted them to salve’.97

In addition, following the House of Lords decision in the Tojo Maru98 case, the very real potential that a salvor could be held liable for negligence (and that liability could even extend to third-party damage)99 became a major concern of the salvage industry.100 In that case the House of Lords permitted the owners of a tanker to bring a claim against the salvor for damage resulting from an explosion caused by the negligence of the a salvage diver.101 Further, the House


99 Peter Coulthard, ‘A New Cure for Salvors - A Comparative Analysis of the LOF 1980 and the CMI Draft Salvage Convention’ (1983) 14 Journal of Maritime Law and Commerce 45, 47 at fn 10. Peter Coulthard notes this was a logical extension of the Tojo Maru decision while recognising that others had suggested that international conventions could potentially protect salvors. See also Bernard Dubais, ‘Liability of a Salvor Responsible for Oil Pollution Damage’ (1976) 8 Journal of Maritime Law and Commerce 375, 381.


101 See Cadwallader, ‘The Salvor’s Duty of Care’ (1973) 1(1) Maritime Policy and Management 3; Rudolph, ‘Negligent Salvage: Reduction of Award, Forfeiture of Award or Damages’ (1975) 7 Journal of Maritime Law
of Lords held that the standard of care expected of professional salvors was
greater than that of other salvors. The decision has been mitigated to some
extent by the subsequent adoption of the 1976 Convention on Limitation of
Liability for Maritime Claims which expressly entitled salvors to claim
limitation.102

Further, technological advancements throughout that period meant that vessels
became exceedingly expensive to repair and would often be written off as a
constructive total loss. Peter Coulthard notes this trend was not hampered by
the marine insurance industry noting they appeared to be sufficiently elastic to
accommodate such claims.103

As Peter Coulthard notes, the worst fears of coastal States were realised in 1978
with the grounding of the Amoco Cadiz resulting in the spillage of 230,000 tons
of crude oil off the French coastline.104 As she sailed through a severe storm, her

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102 1976 Convention on Limitation of Liability for Maritime Claims (LLMC), opened for signature 19 November
1976, 1456 UNTS 221 (entered into force 1 December 1986) and Protocol of 2 May 1996 to amend the
Convention on Limitation of Liability for Maritime Claims, opened for signature 2 May 1996 (entered into force


Salvage Convention’ (1983) 14 Journal of Maritime Law and Commerce 45. See also, ‘On this day: The
Supertanker Amoco Cadiz is Wrecked on the French coast’, The Times (16 March 2013); Bill Richards, ‘Responsibility for
Amoco Cadiz Oil Spill Off Brittany Coast to Be Set This Week’, The Wall Street Journal (18 April 1984); Rudolph
Chelminski, Amoco Cadiz: The Shipwreck That Had to Happen (1987); ‘Black Tide on the beaches of Brittany’, Lloyd’s List
(17 March 2008).
steering failed within miles of the Brittany coastline. She then ran aground off Brittany and lost all her cargo. As Donald O’May asserted in 1982, for more than 70 years the 1910 Convention withstood the test of time.\footnote{Donald O’May, ‘Lloyd’s Form and the Montréal Convention’ (1982) 57 Tulane Law Review 1412.} He continued that it:

bestowed upon it that rare accolade for international conventions, ratification by the United States of America. It might well have gone on to complete its entry, had not the steering failed on the Amoco Cadiz in March 1978, whose subsequent grounding and oil pollution made front-page news throughout the world and brought the subject of salvage into sharp focus.\footnote{Donald O’May, ‘Lloyd’s Form and the Montréal Convention’ (1982) 57 Tulane Law Review 1412. This sentiment was echoed by Michael Kerr in ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530, 525. See, also, Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65: ‘In the later part of the 20th century the world developed an environmental conscience and today there is little that is not affected by concern for it. Its biggest enemy has undoubtedly been pollution and any form of that has become abhorrent to the public eye’.}

For Michael Kerr, this was the single most important event that ultimately led to the creation of a new salvage convention, the subject of the next chapter.\footnote{Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530, 525.}

BACKGROUND

The *Amoco Cadiz* incident put preservation of the marine environment at the top of the global agenda. The case became central to discussions held by the legal committee of the IMO (then IMCO) in mid 1978. France was leading the charge, indicating that measures adopted internationally had proved insufficient to prevent a disaster such as that seen in the case of the *Amoco Cadiz*. A number of options had been proposed for consideration, including legal matters such as:

i. revision of the existing regime of assistance and salvage, with reference to the 1910 Convention;

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ii. a legal framework which would make it mandatory for any ship to report to the authorities of the flag and coastal States and to any classification society concerned the circumstances in which the safe and efficient navigation of the ship is impaired by reasons of damage;

iii. a reconsideration the limits of compensation available for the victims of disastrous pollution incidents.  

The French delegation contended that the focus of the 1910 Convention on private commercial relationships between salvors and shipping interests was ‘inadequate to protect the interests of the State as a potential victim of a maritime casualty involving pollution’. Resulting from the meeting was a request to the secretary to undertake a study of the legal ramifications that had been raised. It is clear that the primary concern of the French delegation was in bolstering coastal States rights to interfere with salvage operations. Reforming the law of salvage to provide incentives for salvors to assist in protecting the marine environment, when they would otherwise incur a


commercial loss to the salvor, did not seem to be on the radar.\textsuperscript{115} This was not lost on Mark Cohen, who begins his 1982 paper with a very poetic and engaging description of the type of phone call that may take place in the midst of a maritime casualty crisis:

Suddenly the phone rings. You groggily awaken to an urgent message from your office’s night operator. The owners of an oil tanker fleet have called. One of their ships is in trouble. The tanker grounded several hours ago on a reef just off the coast of a busy Caribbean resort. The tanker is carrying a cargo of crude oil. The ship is holed and leaking.

Now wide awake, you ask what the precise situation is. Quickly your office tells you that an oil spill cleanup crew is already en route. The weather is good now, but is expected to deteriorate in 24 hours. Local government representatives are standing by. They have done nothing yet, but they are talking about an imminent threat of oil pollution. They want to know how the owners intend to remove the stranded tanker and its cargo.

‘What have the owners done?’ you ask.

‘Contacted a salvage company’, you are told. ‘The owners offered a Lloyd’s Standard Form of Salvage Agreement, but the salvors sounded very reluctant to take the job. They were complaining about oil pollution liability, and they don’t like the idea of no-cure-no-pay. They want a guaranteed fee, and perhaps a special reward, too, if another Amoco Cadiz is to be prevented’.

\textsuperscript{115} This is not necessarily surprising given France was primarily motivated by the need to respond to threats to its own marine environment such as that seen in the Amoco Cadiz case.
You ask if the owners have been in touch with any other salvage contractors.

‘Yes’, says your office, ‘And they’re all saying the same thing’.116

Despite the lack of recognition given to the role of salvors in protecting the marine environment, and how that is influenced by the commercial remuneration incentive structure, other industry and academic commentators did not ignore this issue.117 With this came an important global discussion on the role that the law of salvage could play in encouraging professional salvors to go to the aid of vessels in distress that represented a substantial threat to the marine environment.118 The time had come to consider creating an exception to the long-standing rule of ‘no cure – no pay’. This move had widespread support: the change, whilst quite sudden, was the result of the culmination of various factors that had placed pressure over the salvage industry for some time.119 However, this acceptance was merely the beginning of a long-running saga that would play out through the 1980s. The question was not whether the change was needed, but what form that change should take.


THE 1980 REVISION OF LLOYD’S OPEN FORM

First to respond to this growing pressure was the business community itself.120 With the international community seemingly avoiding the question of salvor remuneration, it was left to industry to take the initiative and address the issue on their own. The vehicle for reform was to be the LOF,121 the standard form salvage agreement produced by the Council of Lloyd’s.

In August 1978, the Committee of Lloyd’s convened the first meeting of the working group whose purpose was to recommend changes to the LOF.122 By May 1980 a revised LOF had been published.123 This revision, known as LOF 1980, included a new radical provision that for the first time would ameliorate the harshness of the ‘no cure – no pay’ rule. The new standard form contract for the provision of salvage services included what became known as the safety net provision. This clause allowed for the compensation of salvors in respect of costs incurred in salvage operations involving oil tankers. Clause 1(a) of LOF 1980 reads:

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The services shall be rendered and accepted as salvage services upon the principle of ‘no cure – no pay’ except that where the property being salved is a laden tanker or partly laden with a cargo of oil and without negligence on the part of the Contractor and/or his Servants and/or his Agents (1) the services are not successful or (2) are only partially successful or (3) the contractor is prevented from completing the services the Contractor shall nevertheless be awarded solely against the Owners of such tanker his reasonably incurred expenses and an increment not exceeding 15% of such expenses but only if and to the extent that such expenses together with the increment are greater than any amount otherwise recoverable under this Agreement. Within the meaning of the said exemption to the principle of ‘no cure – no pay’ expenses shall in addition to actual out of pockets expenses include a fair rate for all tugs craft personnel and other equipment used by the Contractor in the services and oil shall mean crude oil fuel oil heavy diesel oil and lubricating oil.124

Pursuant to this provision, where a salvage operation is undertaken with respect to a tanker laden with oil, the salvor would be entitled to recover their expenses plus an additional 15%. The provision operated as a safety net only to the extent that the salvor could not recover those expenses under a traditional salvage reward therefore creating a ‘no cure – some pay’ principle. However, there were some limitations. The industry led response merely presented a partial solution as it applied only in the context of tankers.125 Importantly, it did

124 Council of Lloyd’s, Lloyd’s Standard Form of Salvage Agreement (1980).

not provide a solution for what have been described as the maritime leper (or Flying Dutchman) cases. As Mark Cohen quips:

In fairness to the drafters of LOF 1980, modifications in Clause 1 should do a good job of preventing Flying Dutchman cases caused by uncooperative owners. Nevertheless, these cases will persist because the problem has less to do with difficult owners than with terrified, unsympathetic landlubbers. It is simply easier for a government faced with a stricken tanker seeking entry to say, ‘No!’ This answer apparently costs nothing, and the government may thereby avoid the risk of oil spills, explosions and harbour obstructions.

Further, as a standard form contract whilst LOF may be the preferred legal framework in the context of salvage operations its adoption by the parties remains voluntary. Still, the new form represented a pragmatic industry-led approach intended to resolve the issues that had plagued the salvage industry up until that time.

MOVES TOWARDS A NEW SALVAGE CONVENTION

The 1980 revision of LOF became the predecessor and inspiration for a new salvage convention. In contrast to the speed of the industry process, the ‘more

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128 Steven Friedell, ‘Salvage and the Public Interest’ (1982) 4 Cardozo Law Review 431, 436: ‘Although the change made by the Committee of Lloyd’s was limited, it set the stage one year later for a much more liberal treatment of salvors who prevented pollution’.
ponderous wheels of international law also began to turn immediately after the Amoco Cadiz incident’. At first however, the coastal States seemed less interested in curing the defective system relating to the remuneration of salvors having taken part in salvage operations involving a threat of pollution to the marine environment. Instead, they seemed far more worried about the entrenchment of their powers to intervene in potential scenarios and impose on ships in distress compulsory measures of assistance and salvage.

In 24 May 1979, President Francesco Berlingieri of the Comité Maritime International (CMI) wrote to the Secretary General of the IMCO on the subject. For the CMI, the legal questions raised by the Amoco Cadiz disaster relating to the law of salvage meant the subject deserved immediate attention. In their letter, the CMI indicated it would be willing to offer its cooperation relating to the study of the matter and the question whether the 1910 Convention should be revised or a separate convention should be prepared relating to casualties that pose a threat of pollution to the marine environment. The letter


132 Letter of the President of the CMI to the Secretary General of IMCO, 24 May 1979 in Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Pt I Annex 2, 9: The CMI ‘would therefore be willing to offer IMCO its cooperation for the study of this subject and to explore whether the 1910 Convention should be revised or a separate convention should be prepared in order to
proposed the establishment of an International Sub-Committee to carefully consider material that had been prepared on the subject up until that date. Berlingieri placed emphasis on what the CMI considered to be a ‘great privilege to achieve its object of unification of maritime law through cooperation with IMCO’ noting such cooperation had proved ‘so fruitful in the past’.133

On 22 June 1979, the Secretary-General of the IMCO responded to CMI noting its generous offer of renewed cooperation and that the proposed establishment of an International Sub-Committee had been communicated to the IMCO’s Legal Committee at its 40th session held earlier that month.134 The Secretary-General echoed the sentiments of CMI noting that as, in the past, collaboration between the two organisations will ‘contribute to the solution of what is clearly one of the important problems arising from the lamentable “Amoco Cadiz” disaster’.135 In answer to the substantial questions posed, the Secretary-General decided to reproduce the following ‘pertinent excerpts’ from the report of the Legal Committee’s 40th session:

cover those casualties which may cause a threat of pollution, thereby creating a direct and primary interest of the coastal States in the salvage operations’.


65. The Committee held a wide-ranging exchange of views on the generous offer of the CMI to assist IMCO, particularly in a study of the question of salvage. The Committee expressed its approval and gratitude for the proposal.

66. It considered that the CMI should be requested to review the private law principles of salvage, centring its examination of the matter on the 1910 Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, with Protocol of 1967. Such a review would not encompass questions of coastal State intervention or the control of salvage operations by public authorities in the context of intervention.

67. The Committee would be grateful for all the facilities of co-operative effort that have characterised the collaboration between IMCO and the CMI in the past. It would be desirable for the international sub-committee established by the CMI to be guided entirely by its own expertise, with the understanding that among the purposes of the two bodies undertaking this study were the need to induce and accelerate effective salvage operations in particular cases and generally to encourage the salvage industry in its beneficial activities.\footnote{Letter of Secretary General of IMO to the President of the CMI, 22 June 1979 in Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Pt I Annex 3, 10.}

On 19 September 1979, the CMI set up the International Sub-Committee to report to the CMI conference, which was set to take place in Montréal in May 1981. Professor Erling Christian Øverland Selvig of the Norwegian Maritime Law Association was appointed as chair. The first task of the Sub-Committee was to prepare an initial report to be considered by the CMI Assembly.

THE SELVIG REPORT AND THE LIABILITY SALVAGE PROPOSAL

In his report Professor Selvig emphasised that the modern law of salvage should compensate salvage services ‘to the extent needed to support an adequate and viable international salvage industry’.137 This burden should be shared among the interests concerned with international shipping: if ‘the concept of salvage is to retain its vitality in the future, all such economic interests benefiting from salvage operations will have to assume proportionate shares’. For Professor Selvig, it was preferable to distinguish between cases involving shipping cargo at risk and those situations posing a threat to third-party interests. Professor Selvig proposed a dramatic change to the law of salvage in the form of a freestanding salvage reward to recognise the efforts of salvors in reducing potential liabilities of the ship-owner (liability salvage).138 In his view, a salvor’s efforts in preventing or minimising a ship’s liability for damage to third party interests should be considered to be ‘a useful result’ within the meaning of the ‘no cure – no pay’ principle enshrined in the 1910 Convention. A reward of this nature would not be determined with reference to


138 Donald O’May, ‘Lloyd’s Form and the Montréal Convention Admiralty Law Institute Symposium on American and International Maritime Law: Comparative Aspects of Current Importance’ (1982) 57 Tulane Law Review 1412: ‘This arresting, if rather misleading, phrase was shorthand for a novel idea which amounted to the following: that salvors, in addition to being remunerated out of the salved property fund for services to ship and cargo, should also be entitled to receive additional remuneration for relieving shipowners (and cargo interests) from liability to third parties which they might otherwise have incurred but for the salvors’ efforts’: at 1423.
the value of the salved ship and cargo, but with reference to the potential liability of the ship to third parties having regard to the relevant limits of liability set out in the relevant international conventions. Professor Selvig stated:

Nevertheless, the concept of salvage should be extended so as to take account of the fact that damage to third party interests has been prevented. Since the ship which created the danger, will have a duty to take preventive measures in order to avoid such damage, this will mean that salvage should refer not to ship and cargo, but also to the ship’s interest in avoiding third party liabilities (liability — salvage). Thus, the ship’s liability insurers should be involved in the salvage settlement and pay for benefits obtained by the salvage operation.139

It was evidently in the public interest that there exist a well-organised machinery ready to meet the needs of salvage operations relating to international shipping.140


140 Professor Erling Selvig, Report on the Revision of the Law of Salvage, Document SALVAGE-5/IV-80 in Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Pt I Annex 4: Professor Selvig noted that it is in ‘the interest of the international community there should exist a well organized machinery ready to meet the needs for salvage operations resulting from international shipping. Several public interests are involved in any salvage operation. One is the shipping and trading interests of the States concerned. States have also an interest in avoiding that marine accidents result in damage to persons, property or other third party interests outside the ship, such as damage to the environment. The public interest in avoiding damage to third party interests is not limited to pollution damage caused by oil escaping from laden tankers. It extends to other types of damage caused by tankers
Professor Selvig made a number of comments in relation to the role of (or intervention by) coastal States in the context of private salvage operations. While States can be expected to seek powers necessary to supervise or direct salvage operations in particular cases, a distinction must be drawn between ‘state-guaranteed’ operations – where the State has agreed to remunerate the salvors – and ‘state-organised’ operations, which are carried out with resources provided by the State. For Professor Selvig, the overall cost of a hybrid system where private salvage companies maintain adequate capacity to complement State-based salvage resources would probably be less than a system based only on State organised salvage. He stated that:

in the overall context of international shipping state-organized machineries established at the national level, cannot be regarded as a viable alternative to an internationally active private salvage industry. National machineries will probably be tailor-made to the needs of the coastal State concerned and primarily for use in the waters adjacent to that State. However, most States will not be in a position to establish or maintain on its own or on a regional level a salvage machinery with the

or their cargoes as well as to pollution or other damage caused by ships carrying noxious, hazardous or otherwise dangerous goods’: at 17.


overall capacity required. Consequently, the role of national machineries can be expected to be only a supplementary one, mainly limited to the area within their respective jurisdictions.143

Professor Selvig concluded that the need for a coherent and consistent legal regime to salvage, suited to modern conditions, suggests that a new comprehensive international treaty was required.144

THE MONTRÉAL COMPROMISE

There were two divergent approaches put forward in the International Sub-Committee.145 While there was general consensus as to the existence of problems facing the salvage industry, the means of rectifying them was subject to ‘a great deal of dispute’.146 To quote Professor Selvig’s report:


144 Professor Erling Selvig, Report on the Revision of the Law of Salvage, Document SALVAGE-5/IV-80 in Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Pt I Annex 4, 14: ‘The Salvage Convention 1910 needs revision in light of subsequent experience and practice. The need to elaborate a coherent and consistent legal regime for salvage, suited to modern conditions, suggests that a new comprehensive convention to replace the 1910 Convention be drafted. Experience has shown that protocols or other additional instruments to existing conventions are likely to create difficulties in practice, particularly as a result of their adverse effect on the uniformity of law. It is the conclusion of this report that revision of existing standard salvage contracts is not an adequate answer, and that the remedy needed is a new international treaty on salvage. The form of this treaty must eventually be determined in light of the nature and the scope of the law revision actually undertaken. I submit that, having regard to the wide range of problems involved and the need for a coherent legal system, the reconsideration of the international law of salvage can best be undertaken within the framework of the preparation of a new convention’: at 26.


The main differences of view in the sub-committee related to the question of whether salvors should be entitled to payments on the grounds that salvage operations have been carried out, also in order to prevent damage to the environment or that by the endeavours of the salvors, such damage has actually been avoided. One approach to these problems was suggested in the chairman’s initial report, another in the LOF 1980 and the draft prepared by the British MLA. The compromise, now contained in the draft convention Articles 3.2 and 3.3, reflects the ‘safety net’ idea of the LOF 1980 as well as certain other notions having emerged during the discussion, and assumes that, in accordance with the draft convention Article 1.5, these articles may be departed from by contract.147

The liability salvage proposal was ‘viciously debated’ by the International Sub-Committee for a variety of reasons.148 The proposal was subject to a number of


criticisms. How was it to be quantified? Who would be required to pay and provide security? Mark Cohen notes:

The problem with liability salvage is the problem with many good ideas - it makes sense, but it would be very hard to put into practice. The fundamental premise of liability salvage is reward for preventing what did not happen. Thus arbitrators, average adjusters and marine underwriters would have to evaluate a speculative risk. For the admiralty bar liability salvage would be hard to accept because of the common law prejudice against speculative damages. There is also the question of who should pay for liability salvage awards - Cargo? Hull? P&I? All three? Two? One?

Third-party liability is interwoven with the financial health of the P&I clubs. It was they who would seemingly pay the price of liability salvage. Unsurprisingly, they were reluctant to support the proposal.

149 Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530: ‘At first sight this concept has the same logical attraction as the precept that the punishment should fit the crime. But it never works in practice to try to put the law into a logical straitjacket. This soon came to be realised about the concept of “liability salvage”. Its essence was that it would have required salvage arbitrators to determine what, if any, liability would or might have been incurred, presumably on a balance of probability, by the shipowners but for the salvors’ efforts and, if so, to make some assessment of the amount of the avoided liability. This would have transformed salvage arbitrations into contests of a very different kind and created field-days for lawyers and experts. It would have required arbitrators to determine issues of liability and quantum in the fields of tort and breach of statutory duty, possibly under different legal systems if the avoided pollution had threatened a number of jurisdictions. All this would have been wholly alien to the spirit and practice of the law of salvage’: at 537.


152 Peter Coulthard, ‘A New Cure for Salvors - A Comparative Analysis of the LOF 1980 and the CMI Draft Salvage Convention’ (1983) 14 Journal of Maritime Law and Commerce 45: ‘It must be remembered, in considering the liabilities of ship and cargo owners, that the interests of their respective insurers are not
The liability salvage proposal evidently proved too radical for many of the stakeholders involved. Without compromise, there was a ‘very real danger that the two differing approaches would prove to be irreconcilable’. Many were concerned that this would result in a failure to reach international agreement, and would leave the global community without a draft convention ready for the Montréal Conference.

Fortunately, a compromise was reached.\textsuperscript{153} It became known as the Montréal Compromise. The compromise adopted and broadened the LOF 1980 formula by endorsing both an enhanced salvage reward, paid by hull and cargo insurers, that would take into account an additional factor relating to efforts by the salvor in preventing or reducing damage to the environment, as well as a safety net (or ‘special compensation’) provision where the P&I clubs would pay the salvors expenses (in addition to potential uplift) where the conventional salvage reward was not sufficient to cover them.\textsuperscript{154} The safety net would no longer be far behind’ … ‘Pollution liability is in the realm of the P&I insurance groups, whose system of mutual insurance was bound to be adversely affected by the increased cost of providing protection for "liability salvage". One need only consider the enormous claims which have arisen from the "Amoco Cadiz" grounding to recognize the reason for the reluctance of ship and cargo owners, and their P&I clubs, to accept this extension of the law of salvage’: at 52.


\textsuperscript{154} Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530, 538–9; Catherine Redgwell, ‘The Greening of Salvage Law’ (1990) 14 Marine Policy 142, 147. See Brent Nielsen, Report of the CMI to IMO on the draft convention on salvage, approved by the XXXII International Conference of the CMI held in Montréal, May 1981, IMO Doc LEG 52/4-Annex 2 in Comité Maritime International, The Travaux Préparatoires of the 1989 Salvage Convention (2003) Pt I Annex 6, 33: ‘Other solutions were considered during the work of the CMI, but it became obvious that the ‘safety net’ model should be preferred mainly on the grounds that it expresses a compromise among all the interested parties. Thus the compromise is a balanced solution which is not dominated by any of the interests involved and works in the general interest of the public’.
limited to cases involving oil pollution. The liability salvage proposal was put aside.\textsuperscript{155} Further, the parties to a salvage operation would come under an obligation to use their best endeavours to prevent or minimise damage to the environment. As Nicholas Gaskell notes, ‘nobody was happy with everything, but the need to reach agreement was regarded as paramount’.\textsuperscript{156} A Draft Convention on Salvage\textsuperscript{157} was produced and submitted to the International Maritime Organization.

INTERIM DEVELOPMENTS

It was not all good news, however. As, Michael Kerr notes, ‘during the intervening eight years a large cloud had appeared on the horizon which placed the entire Montréal compromise in jeopardy’. Marine insurers from the United States and Canada began to voice opposition to the agreement – one they were never party to. The North American marine insurance market, dominated by


cargo underwriters (as opposed to hull underwriters and P&I clubs)\textsuperscript{158}, felt the compromise would unfairly shift a large portion of the cost of the environmental measures on to them.\textsuperscript{159} Given cargo is very often worth far more than the vessel carrying it, and cargo interests often end up paying for a large portion of a salvage reward.\textsuperscript{160} As a result, the overall ‘burden of the new environmental enhancements of salvage would fall heavily on “innocent” cargo interests and relatively lightly on hull insurers and the P&I clubs, despite the higher probability that the underlying cause of the casualty would be the ship-owner’s fault’.\textsuperscript{161} The United States government in a submission regarding the Draft Salvage Convention reflected their concerns.\textsuperscript{162} The Legal Committee of

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\textsuperscript{158} Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530: ‘It had become apparent that the agreement which had then been reached was disclaimed by representatives of the North American marine insurance market—both in the United States and Canada—on the ground that they had not been parties to it and had never accepted its terms. Since the agreement had been concluded informally in what in bygone days would have been described as meetings held in smoke-filled rooms, there was no basis for challenging this disclaimer; nor would this have served any purpose. There was no alternative but to re-open the argument so far as necessary: at 539.


\textsuperscript{160} Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 International and Comparative Law Quarterly 530, 540. William Nielsen, ‘The 1989 International Convention on Salvage’ (1992) 24 Connecticut Law Review 1203: ‘The underlying concern, however, was clearly that salvage arbitrators and courts might view the new convention as an invitation to greatly increase salvage awards, and that the largest part of the increase would be unfairly borne by cargo interests … While logically correct, the extent to which the fears of the North American insurers were justified depended on how much salvage awards would increase as a result of the new environmental factor’: at 1227–8.

\textsuperscript{161} William Nielsen, ‘The 1989 International Convention on Salvage’ (1992) 24 Connecticut Law Review 1203, 1227. Nielson notes that it was also possible that a special compensation order could be shifted from being a P&I club liability to an hull and cargo underwriter liability through the mechanism of general average.

the International Maritime Organization pressed on,\textsuperscript{163} and in 1987 produced a set of \textit{Draft Articles for a Convention on Salvage}, recommending they be submitted to a diplomatic conference in 1989.\textsuperscript{164}

**THE DIPLOMATIC CONFERENCE**

A diplomatic conference was convened in London at the headquarters of the International Maritime Organization.\textsuperscript{165} A key concern of delegates was a fear that the United States led opposition would sink the convention. Some battle weary delegates had been involved in previous conferences, during which United States had played an active part in drafting the text of international conventions, yet had subsequently failed to ratify them.\textsuperscript{166}

the American government’s proposals were a manifestation of deep-seated opposition to the Montréal Compromise that would frustrate the goal of the Diplomatic Conference scheduled to begin on April 17, 1989 … A few weeks before the conference was to begin, the Exxon Valdez went aground on Bligh Reef, giving renewed urgency to the subject matter and perhaps reducing contentious tendencies. In fact, the Conference successfully completed its work and adopted the International Convention on Salvage, 1989:\textsuperscript{at 540.}

\textsuperscript{163}Michael Kerr, ‘The International Convention on Salvage 1989 – How it Came to Be’ (1990) 39 \textit{International and Comparative Law Quarterly} 530: ‘However, although fully aware of this dispute in the international marine insurance market, which figured in ceaseless discussions at many levels from the Montréal CMI meeting in 1981 to the Diplomatic Conference in 1989, the members of the IMO Legal Committee remained undeterred. They prepared a final text for a new convention whose principles were based firmly on the Montréal draft’: at 540.


As Nicholas Gaskell notes, ‘there were times, particularly on the last day, when it seemed that comparatively minor differences on entry into force provisions might cause such a delay that there would be no time to conclude negotiations’. The protests from the American insurers led to compromise being reached in the adoption of the common understanding of Articles 13 and 14 as an attachment to the convention. In addition, a second attachment was agreed upon to provide comfort to the cargo insurers. Attachment Two consisted of a request for the amendment of the York Antwerp Rules 1974, to make it abundantly clear that cargo owners were not to pay for Article 14 compensation.

The convention was adopted by the diplomatic conference on 28 April 1989. It opened for signature on 1 July 1989. Writing in 1991, Nicholas Gaskell

167 Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990’ [1991] 16 Tulane Law Review 1: All diplomatic conferences have their ‘moments of drama when all seems to hang in the balance’. However at 6:30 PM, on the last day of the conference, amid continuing discussions on final clauses, secretary-general announced with great drama that interpreters would have to leave at 7 PM. Actually, the crucial final vote was taken at 7:10 PM. The secretary-general appealed to the IMO spirit of compromise, and his voice was heeded’: at 8.

168 Comité Maritime International, The Travaux Preparatoires of the 1989 Salvage Convention (2003) Part I, 401 ‘Common Understanding concerning Articles 13 and 14’: It is the common understanding of the Conference that, in fixing a reward under Article 13 and assessing special compensation under Article 14 of the International Convention on Salvage, 1989 the tribunal is under no duty to fix a reward under Article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under Article 14.

suggested that the international maritime law world was ‘still reeling’ from the
decision by the United States not to ratify the 1984 protocols to the International
Convention on Civil Liability for Oil Pollution Damage (CLC) of 1969\textsuperscript{170} and the
International Convention on the Establishment of an International Fund for
Compensation for Oil Pollution Damage 1971.\textsuperscript{171} The result, he notes ‘has been to
ensure that the protocols will almost certainly never enter into force
internationally’.\textsuperscript{172} It was for this reason that the drafting of the 1989 Salvage
Convention was ‘heavily influenced by the desire of international negotiators to
meet the United States concerns and the final text reflects this’.\textsuperscript{173} Gaskell
doubted whether practitioners and academics in the United States and United
Kingdom would pay much attention to the new convention as, even if neither
country ratified it, it had already achieved a ‘significant measure of practical
implementation by virtue of its incorporation into standard form contracts used

Conference was conducted in nine working languages, with the final text drawn up in six of them: Arabic,
Chinese, English, French, Russian and Spanish. During the late evening of the final day of the second week
which had been allotted to the Conference, all the delegations-save those who had to catch earlier flights-
signed a Final Act adopting a new International Convention on Salvage 1989’.\textsuperscript{170}

\textsuperscript{170} International Convention on Civil Liability for Oil Pollution Damage (CLC), opened for signature 29

\textsuperscript{171} International Convention on the Establishment of an International Fund for Compensation for Oil Pollution
Damage (FUND 1971), opened for signature 18 December 1971 (entered into force 16 October 1978) and
Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil

\textsuperscript{172} Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement
1990’ [1991] 16 Tulane Maritime Law Journal 1, 4. Both protocols were eventually abandoned and replaced
by new protocols in 1992 with less demanding entry into force requirements.

\textsuperscript{173} Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement
in the salvage industry — most particularly the Lloyd’s Open Form salvage agreement (LOF) 1980’.174

The 1989 Salvage Convention came into force on 1 July 1995. Its entry into force was triggered by the signing of 15 States to the convention, as provided for in Article 29.175 For Nelson, while it was an ‘inordinately long time’ in the making, the convention was a ‘welcome development in the law of salvage bringing a modern form of promoting the rescue of property at sea’.176 Edgar Gold echoes this sentiment stating that:

In terms of international shipping marine salvage is presently at the ‘cutting edge’ of new environmental development. Salvors are today capable of bringing extraordinary skills and technology to bear on marine accidents. Yet the stage has been reached where pollution prevention and abatement may well be more crucial and cost-effective than the traditional salvage of maritime property. It is this change which the shipping community addressed in the negotiations culminating in the new Salvage Convention. The obvious raising of environmental

174 Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990’ [1991] 16 Tulane Maritime Law Journal 1, 4. At the time of writing, Nicholas Gaskell noted that salvage services were already being performed subject to the convention’s terms.

175 Edgar Gold notes that this requirement was subject to a ‘fairly lengthy debate’. He notes the ‘Draft had suggested that the consent of ten States should bring the Convention into force. Once again, a large group of developing States, voting in a most un-IMO manner almost as a block, opposed this for reasons best known to themselves. They instead suggested that the minimum should be 20 or 25 States which would virtually ensure that it would take a very long time for the Convention to enter into force. The compromise, as contained in Article 29, was set at 15 States. This is still a large number and will, undoubtedly, result in some delay for entry into force’: in ‘Marine Salvage: Towards a New Regime’ (1989) 20(4) Journal of Maritime Law and Commerce 487, 502.

consciousness throughout the world resulted in these pressures in the first place. The marine environment is community property and thus needs protection by all ocean users, and the commercial cost for this protection has to be spread equitably amongst all sectors of the shipping industry. The new Salvage Convention has provided an acceptable regime to achieve this aim.\textsuperscript{177}

It was a turbulent time for maritime policy as competing interests battled for over a decade through a variety of fora causing developments to take various paths. Those at the helm had to tack and gybe through difficult seas to get to the best end point possible. The next chapter will analyse some key provisions of the convention and much of that analysis is negative. But that agreement was reached at all was a truly remarkable achievement. A similar level of determination and pragmatism will be required to make any reform to the current state of the law, should that be necessary.

CHAPTER 3: THE MONTRÉAL COMPROMISE IN ACTION

The convention made two critical alterations to the law of salvage as it related to salvage operations that have potential to impact the marine environment. First, it revised the criteria to be used in assessing the quantum of the reward to include explicit reference to the skill and effort of salvors in preventing or minimising damage to the environment. This change has become known as ‘the enhanced reward’. Second, a radical addition was made in the form of the Article 14 special compensation provision known as the safety net. The environmental focus of the 1989 Salvage Convention is reflected in the preamble that states:

The States Parties to the present Convention,

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

Noting that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the [1910] Convention. . .

Conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,
Convinced of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger,

Have Agreed as follows:178

The 1989 Salvage Convention also makes a number of other references to the environment. Article 8 imposes duties on both ship-owners and salvors in the context of salvage operations. This includes a duty on salvors to exercise due care to prevent or minimise damage to the environment during the exercise of the salvage operation. Article 8 reads:

**Article 8 - Duties of the salvor and of the owner and master**

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

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

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

   (c) whenever circumstances reasonably require, to seek assistance from other salvors; and

   (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

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

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

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

(c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.\textsuperscript{179}

This duty cannot be modified by contract.\textsuperscript{180} Article 8(1)(b) clearly demonstrates the environmental focus of the \textit{1989 Salvage Convention}. However, it is not clear how the duty to ‘exercise due care to prevent or minimize damage to the environment’ in carrying out salvage operations translates into enforceable rights and obligations between ship-owner and salvor. It is clear however that the duty only operates during the course of a ‘salvage operation’. It is not a freestanding duty requiring would-be salvors to intervene to protect the marine environment where they are not otherwise engaged in a salvage operation.


THE ENHANCED AWARD IN ARTICLE 13

The first significant departure from the existing law of salvage came in the enhanced salvage reward as provided by Article 13 of the 1989 Salvage Convention. Article 13(1) provides:

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

(a) the salved value of the vessel and other property;
(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
(c) the measure of success obtained by the salvor;
(d) the nature and degree of the danger;
(e) the skill and efforts of the salvors in salving the vessel, other property and life;
(f) the time used and expenses and losses incurred by the salvors;
(g) the risk of liability and other risks run by the salvors or their equipment;
(h) the promptness of the services rendered;
(i) the availability and use of vessels or other equipment intended for salvage operations;
(j) the state of readiness and efficiency of the salvor’s equipment and the value thereof.181

Article 13(2) provides for a reward to be proportioned between property interests in relation to their respective salved values. Article 13(3) sets a cap on the reward. It limits a salvage reward from exceeding the value of the salved property. As Archie Bishop states, the enhanced reward ‘does reward salvors adequately whenever the salved fund is high’ however, ‘all too often, in cases where there is such a threat, values are too low to permit this to be done’.182

The reference to ‘the skill and efforts of the salvors in preventing or minimizing damage to the environment’ provided a key incentive for salvors to participate in salvage operations that reduce the risk of environmental harm posed by a maritime casualty. It is submitted that Article 13(1)(b) should be read in light of the other criteria suggesting an intention that a reward will not only recognise the skill and efforts of salvors in relation to a particular incident, but also the commercial and political risks posed to the salvors. Further, it would appear to encourage salvors to acquire and maintain skills, vessels and equipment to enable it to respond to a maritime casualty threatening environmental harm in future.


It appeared that the 1989 Salvage Convention ruled out any application of the Whippingham\textsuperscript{183} factor. As Martin Davies noted:

\begin{quote}
now that the Salvage Convention 1989 has come into force, it seems clear that liability salvage cannot be taken into account in the manner originally suggested by the Comité Maritime International subcommittee, with a detailed consideration of the existence and extent of the liability averted by the salvor’s actions.\textsuperscript{184}
\end{quote}

However, in United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC\textsuperscript{185} the Federal Court of Australia held that the 1989 Salvage Convention did not prohibit consideration of averted liability in the determination of an Article 13 salvage reward. Tamberlin J stated that the potential exposure to third party liability operates generally to inform the fixation of the global figure resulting from the evaluation of the criteria listed in Article 13 that may be relevant in the particular case.\textsuperscript{186} Despite this, ‘it would not be appropriate to investigate, admit and consider detailed evidence as to the nature and extent of such liability’.\textsuperscript{187} Tamberlin J concluded:

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\textsuperscript{183} The Whippingham (1934) 48 Lloyd’s Rep 49. \\
\textsuperscript{185} United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC (2006) 163 FCR 151 (Tamberlin J). \\
\textsuperscript{186} United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC (2006) 163 FCR 151, 166 (Tamberlin J). \\
\textsuperscript{187} United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC (2006) 163 FCR 151, 166 (Tamberlin J).
\end{flushright}
Having considered the authorities, the Travaux, the 1989 Salvage Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel’s exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors. And, in appropriate circumstances, this may inform the fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor. In some circumstances, it may not be of any significant weight.\textsuperscript{188}

The trial judge’s decision was upheld on appeal.\textsuperscript{189} For Martin Davies, the ‘Full Court must therefore be taken to have impliedly approved the significance of the factor’.\textsuperscript{190} The Tamberlin J approach is consistent with the obiter comments of an American court in made in Allseas Maritime SA v MV Mimosa\textsuperscript{191} and the


\textsuperscript{189} United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC (2007) 163 FCR 183, 196.


\textsuperscript{191} 812 F.2d 243,244, 1987 AMC 2515, 2516 (5th Cir. 1987); Martin Davies, ‘Whatever Happened to the Salvage Convention 1989’ (2008) 39 Journal of Maritime Law and Commerce 463, 496: While the negotiating history of the convention ‘makes it clear’ that a general rule of compensation for averted liability did not exist, nevertheless, ‘it seems appropriate to take the factor into account in general terms in some cases’: at 496. See also James Brown, ‘Allseas Maritime S.A. v. the Mimosa: Has the Keel Been Laid for Liability Salvage in the Fifth Circuit’ (1988) 19 Journal of Maritime Law and Commerce 583.
approach taken by salvage arbitrators.\textsuperscript{192} As one of the few decisions on Article 13, the \textit{United Salvage} decision has been subject to considerable international attention and not subject to overwhelming criticism. It does not seem to have resulted in an uproar (at least publicly) from shipowners and insurers. It was a courageous decision, but one based on solid analysis and reasoning and must be said to have become the leading worldwide authority on this tricky aspect of Article 13. The result is that the Article 13 calculus can accommodate averted third party liability to some degree. This assessment must be general in nature and not involve a detailed evidentiary process. However, the ability of a vessel to limit its liability to third parties should be considered.

It is important to remember that the determination of salvage rewards has never been a precise exercise. Its nature as a very fluid and discretionary process has never caused too much outrage. Even post Salvage Convention, the reward determination mechanism must continue to include some latitude to enable courts and tribunals to fix rewards in a manner that continues to encourage salvors to be on hand and prepared to respond to casualties. If a

\textsuperscript{192} \textit{Nicholas Gooding, Environmental Salvage: The Marine Property Underwritiers' View} (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010): ‘Despite the fact that Article 13 of the 1989 Convention does not provide that the “Whippingham factor” should be taken into account in practice LOF Arbitrators do have regard to the avoidance of potential liabilities to third parties when setting their awards. In some cases this can account for a significant proportion of the award: Imagine for a moment a vessel which is drifting onto a rocky shore with a very real danger that it will go aground and break up with all the environmental damage that a spill of bunkers might cause. A salvage tug manages to get a line on board in difficult weather and tow the casualty to safety. In practice an Arbitrator will have regard to the sum that has been saved in pollution fines, clean up costs and compensation even though there is nothing special which the salvor did to prevent damage to the environment per se – all the salvors’ work was done to save the ship and cargo’; at 2.
salvage scenario presents the potential for significant third party loss, the
general risks incurred by the salvors throughout the operation are increased as
they inevitably risk incurring liability themselves through potential negligence.
Perhaps the question of considering potential third party liability in the
assessment of an Article 13 reward needs to be reconceptualised in this manner.
That is, the third party liabilities hypothetically averted through an operation
were actually liabilities the salvors risked incurring themselves. In this respect,
perhaps the Article 13(g) factor regarding the ‘risk of liability and other risks
run by the salvors or their equipment’ deserves some more attention.

THE SAFETY NET IN ARTICLE 14

Article 14 represented a major departure from the traditional salvage
requirement of ‘no cure – no pay’. It has been described as the ‘most significant
innovation in the Salvage Convention 1989’. The ‘Special Compensation’
provision introduced a safety net to remunerate salvors for their efforts in
preventing and minimising damage to the environment during a salvage
operation, where that operation is not ultimately successful in rescuing

and Commerce 463, 479.
property.\textsuperscript{194} It had been based on the safety net formulated in the LOF 1980 but broadened in scope. It provides:

\textbf{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

\textsuperscript{194} With the ‘special compensation scheme’ in place, the ‘salvor is to be ensured that, providing that the ship in an emergency situation constitutes an environmental hazard, his efforts to prevent or minimize such pollution will be duly rewarded, in terms of compensation in the name of the salvor’s expenses involved’: Mišo Mudrić, ‘Liability Salvage – Environmental Award: A New Name for an Old Concept’ (2010) 49(164) Comparative Maritime Law 471, 476; Mojgan Momeni Farahani, Liability and Compensation Regime for Oil Pollution Damage under International Conventions (Masters Thesis, Faculty of Law, Lund University, Spring 2011) 66.
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.195

The key operative paragraphs are paragraph 1, 2 and 3. Paragraph 1 sets out the threshold test that must be met before a special compensation order may be made pursuant to Article 14. Paragraph 2 provides for an uplift in the quantum of compensation in certain circumstances. Paragraph 3 then sets out the test for determining the quantum of compensation available (prior to any paragraph 2 uplift). Paragraphs 1, 2 and 3 will each be considered in turn.

**Paragraph 1: The Threshold Requirement**

To be eligible for an award of special compensation pursuant to Article 14 of the 1989 Salvage Convention the salvor must:

1. carry out salvage operations in respect of a vessel; and

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2. the vessel by itself or through its cargo must have threatened damage to the environment.\textsuperscript{196}

Where these requirements are fulfilled, the salvor will be entitled to an order of special compensation under Article 14 if, and to the extent to, the amount of compensation exceeds any reward recoverable by the salvor pursuant to Article 13.\textsuperscript{197}

It is not correct to say that the Article 14 special compensation safety net is free from the traditional requirements of salvage. Article 14(1) only operates where ‘salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment’.\textsuperscript{198} Special compensation may only be considered where the operations were undertaken to save the


\textsuperscript{198}Susanne Storgård, Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012): ‘Although the institution of special compensation as a safety net for salvors represented an evolution of the salvage regime, it should be noted that the requirement that salvage operations take place in order for the compensation to become applicable retains the element of salvage as an essential component of the system of remuneration’: at 15.
vessel and cargo: the ‘primacy of the operations as salvage is thus emphasized’.

The relevant definitions in Article 1 of the convention include:

**Article 1 Definitions**

For the purpose of this Convention:

(a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

(b) Vessel means any ship or craft, or any structure capable of navigation.

(c) Property means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

Therefore, it is submitted that the primary purpose of the salvors still must be to rescue salvable property in danger. This brings the enquiry back to the traditional question of what constitutes salvable property and whether it is in danger. This question does not appear to be altered, save for the fact that the operation need not be successful in order for the safety net to work. Despite this, the primary intention of the salvors must be to succeed in salving property. It also follows that the property in danger still must have some value.

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For paragraph 1 to operate, the salvor does not have to succeed in protecting the marine environment. It is sufficient that they were involved in salvage operation in which the casualty ‘threatened’ damage to the environment. This has been defined as requiring a ‘reasonably perceived threat’ to the environment. An actual threat is not required. Article 1(d) provides:

**Article 1 Definitions**

For the purpose of this Convention: …

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

The word ‘substantial’ has created some difficulties. It has been noted that, in the early days, LOF arbitrations took a ‘fairly relaxed view of the word’ and accepted that a comparatively small amount of oil was sufficient to cause ‘substantial’ damage in particularly sensitive areas.

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201 Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (Informa, 3rd, 2013). Aleka Mandaraka-Sheppard notes this is the approached that has been adopted by Lloyd’s arbitrators. ‘In this connection, Brice had commented that the distinction between the two words used by the Convention, ‘danger’ in Art 13 and ‘threatened’ in Art 14, was significant. This was because there might be cases when a threat of damage to the environment might not materialise, as, for example, when there was change in wind force and direction, and, therefore, the danger never materialises. However, this approach was not universally acceptable by P&I clubs, and it was important that parties to a salvage agreement knew where they stood’: at [12.3].


There is considerable uncertainty surrounding the coastal or other waters requirement in this present respect, regarding how far out from the coastline and how far inland it can extend. The 1989 Salvage Convention did not make use of the clear delineation of maritime zones as set out in the United Nations Convention on Law of the Sea.\textsuperscript{204} That convention, which is the cornerstone of modern law of the sea, provides for a territorial sea extending 12 nautical miles from the baseline (which is in most cases the low-water mark) and in a number of other zones including the contiguous zone, and the exclusive economic zone. Some control may also be exercised over parts of the continental shelf that extend beyond the exclusive economic zone. Beyond these lines are the high seas. But this language was not used. Thankfully there is strong academic authority confirming that the definition would not extend to ‘a toy boat in a bath’.\textsuperscript{205} So we have some certainty.\textsuperscript{206} A number of delegations, particularly the United Kingdom, were concerned as to whether it would apply to inland the area, as is illustrated by a recent case where a ship, laden with 30,000 tons of petroleum and 100 tons of heavy fuel oil, was prevented from grounding near Cabo de Palos on the Spanish coast. In that case the LOF appeal arbitrator (whose decisions influence those of all the arbitrators), whilst accepting that the ship gave rise to a sufficient threat of damage to the environment to trigger Article 14.1, found that while a grounding and consequent leakage would have caused some damage, it would not have been sufficient to trigger Article 14.2 as the limited amount of damage that would have occurred would not have been “substantial” damage: at 69–70.


waters not normally concerned by the doctrines of maritime law. As a compromise, they were allowed to make reservations in relation to this.

A related question is whether the assessment of special compensation should continue after the threat of damage has been removed. The Admiralty Court in the case of the Nagasaki Spirit indicated that this was the case. Once triggered, the assessment of special compensation should continue until the end of salvage service. To do otherwise would discourage salvors from removing threats as soon as possible.

**Paragraph 2: The Uplift**

Where the salver, by his salvage operations, has prevented or minimised damage to the environment, then the special compensation payable by the owner to the salver under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salver. However, the tribunal:

1. if it deems it fair and just to do so and
2. bearing in mind the relevant criteria set out in Article 13, paragraph 1,
3. may increase such special compensation further
4. but in no event shall the total increase be more than 100% of the expenses incurred by the salver.

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Unlike paragraph 1, it is not sufficient to prove the existence of a reasonably perceived threat. Instead, the salvor must show on the balance of probabilities that, but for the salvage services, damage to the environment would have occurred.209

Michael White noted that it is ‘widely recognised’ that Article 14 is not well drafted. For example, he describes the drafting of Article 14(2) as ‘fairly close to nonsense’, citing the lack of criteria to guide a court or tribunal as to where a 100% uplift would be justified as ‘more unsatisfactory’. However, as Michael White states, it was the only draft able to attract sufficient support at the diplomatic conference and, as a result, ‘the maritime world has had to work with it’.210 Archie Bishop has noted:

LOF arbitrators have taken the 30% to be the point at which one should pause for thought and which one should not exceed except in the most serious of cases. To date the 100% mark has never been reached despite some serious casualties. The highest uplift recorded has been 65% (The Nagasaki Spirit). It is perhaps right to say that an uplift of 100% is highly unlikely. No matter how serious the casualty or threat of damage to the

209 Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65. Archie Bishop cites an LOF appeal arbitrator who found that salvor must prove that they actually prevented or minimise damage to environment. ‘In that decision, a ship ran aground on an outcrop of rocks in a northern part of Scotland. As a result, her fuel tanks were punctured and she lost about 30t of gas oil. 45 t of gas oil remained on board and this was successfully salved. However, the vessel was lost. A claim to special compensation was made. The appeal arbitrator awarded expenses under paragraph 1. as there was a reasonably perceived threat of damage to environment. However, no increment under paragraph 2 was awarded, because the 30t of gas oil which had leaked had not caused any damage, and the arbitrator was not satisfied that the remaining 45t would have done so either’: at 67.

environment, one can always envisage something worse for which the 100% mark should be reserved.211

**Paragraph 3: The Quantum of Compensation**

Paragraph 3 addresses the calculation of the amount of special compensation available under Article 14. When the threshold test in paragraph 1 is satisfied the salvor is entitled to recover out-of-pocket expenses:

1. reasonably incurred by the salvor
2. in the salvage operation; and

In addition, the salvor may recover ‘a fair rate’:

1. for equipment and personnel
2. actually and
3. reasonably
4. used in the salvage operation
5. taking into consideration the criteria set out in Article 13, paragraph 1(h), (i) and (j).212


212 1989 International Convention on Salvage (1989 Salvage Convention), 28 April 1989, 1953 UNTS 193, [1998] ATS 2, LEG/CONF.7/27 (entered into force 14 July 1995) Article 13(1)(h)–(j) ‘Criteria for fixing the reward’: ‘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: (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’.
While out-of-pocket expenses are fairly easily ascertained, the assessment of ‘fair rates’ for equipment and personnel ‘actually and reasonably used’ has been a ‘particularly difficult problem’.\footnote{Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65, 73.} The pivotal authority on the interpretation of paragraph 3 is the decision of the House of Lords in the case of the Nagasaki Spirit.\footnote{The Nagasaki Spirit [1997] 1 Lloyd’s Rep 323.} The decision was eagerly awaited ‘not least for the reason that it would unlock a backlog of other salvage arbitration cases stayed pending the outcome’.\footnote{See Stephen Girvin, ‘Special Compensation Under the Salvage Convention 1989: A Fair Rate? (The Nagasaki Spirit)’ [1997] Lloyd’s Maritime and Commercial Law Quarterly 321.}

On 19 September 1992, the Nagasaki Spirit was involved in a collision with a container ship in the northern part of the Malacca Straits. On board was 40,154 tonnes of Karfji crude oil, approximately 12,000 tonnes of which spilled into the sea and caught fire. Both vessels were destroyed by fire, taking the crew with them. Semco Salvage and Marine Pte agreed to undertake salvage operations in respect of both vessels pursuant to Lloyd’s Open Form (1990).\footnote{Council of Lloyd’s, Lloyd’s Standard Form of Salvage Agreement (1990).} After six days of extinguishing the fire the salvors were ordered by an anxious Malaysian government to tow the vessel away from their coastline.\footnote{The Nagasaki Spirit [1995] 2 Lloyd’s Rep 44, 47 (Clarke J).} The salvors later...
transferred the oil to another vessel and returned the vessel to Singapore. The operation took 84 days.

While the 1989 Salvage Convention had not come into force, its cornerstone provisions (in particular Articles 13 and 14\(^{218}\)) had been incorporated into the LOF contract the parties adopted.\(^{219}\) At arbitration, Richard Stone QC made an award of 9,500,000 Singaporean dollars pursuant to Article 13 and then went on to determine the quantum of special compensation as 12,635,893 Singaporean dollars.\(^{220}\) That calculation was based on a sum of 7,658,117 Singaporean dollars awarded pursuant to paragraph 3 in Article 14, with a further uplift of 65\% pursuant to paragraph 2 of Article 14.\(^{221}\) Richard Stone QC stressed the importance of the reference to a ‘fair rate’ in paragraph 3 as encouraging contribution to future salvage investment.\(^{222}\)

The arbitrator’s decision was then appealed. The appeal arbitrator, John Willmer QC, changed the award in two respects: he increased the Article 13 portion of the award to $10,750,000 Singaporean dollars and then decreased the


\(^{219}\) Council of Lloyd’s, Lloyd’s Standard Form of Salvage Agreement (1990) Clause 2.

\(^{220}\) The Nagasaki Spirit [1995] 2 Lloyd’s Rep 44, 48 (Clarke J). The notional award of 9,500,000 Singaporean dollars pursuant to Article 13 was deducted from the total of special compensation pursuant to Article 14(4).


special compensation amount to $8,607,066.90 Singaporean dollars (he also reduced the paragraph 2 uplift in the process). As the Article 14 assessment was less than the Article 13 assessment, the result was no special compensation was payable.\footnote{Having regard to paragraph 4 of Article 14.}

Not content with the appeal outcome, the salvor, Semco, took the matter to the judiciary.\footnote{See The Nagasaki Spirit [1995] 2 Lloyd’s Rep 44 (Clarke J).} Acting for Semco, the pre-eminent Geoffrey Brice submitted that two interpretations of a ‘fair rate’ pursuant to paragraph 3 of Article 14 were possible:

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

(b) restricted to mere compensation or restitution of the actual expense to the salvor of performing the particular salvage operation but taking into account the criteria in art. 13.1(h), (i) and (j) insofar as those criteria resulted in additional direct or indirect expense to the salvor?\footnote{The Nagasaki Spirit [1995] 2 Lloyd’s Rep 44, 49 (Clarke J).}

Clarke J equated the arbitrator’s approach with interpretation (a) and the appeal arbitrator’s approach with the interpretation in (b). The salvors put
forward an extensive case in favour of the proposition that paragraph 3 incorporated an element of profit in favour of the salvors. Despite their best efforts, they were not able to convince the court that this was the correct approach. Clarke J concluded that a fair rate meant a fair rate of expense and not remuneration. While the ordinary and natural meaning of a ‘fair rate’ suggested a quantum of remuneration that would ordinarily include some profit, the phrase must be construed in the context of the 1989 Salvage Convention from which it was derived. From that it could be seen that there was a distinction between an Article 13 reward, which did include an element of profit, and the compensatory nature of the safety net in Article 14. In reference to the consideration of the factors in Article 13.1(h), (i) and (j), Clarke J noted:

the effect of the reference to matters such as promptness, availability, state of readiness and efficiency is to ensure that a fair proportion of the cost of maintaining expensive vessels and equipment in a state of readiness is fully taken into account. It is not to transfer the concept of expense into something which goes beyond what could fairly be regarded as a type of expense.


227 The Nagasaki Spirit [1995] 2 Lloyd’s Rep 44, 50, 63 (Clarke J). ‘If it was intended that the expenses referred to in art. 14.1 should include an element of profit, it would have been very simple to make that clear. It is in my judgment significant that what is being defined in art. 14.3 is expenses and not remuneration or reward. Moreover it appears to me that the scheme of art. 14 is that the salvor is to be able to recover expenses but not remuneration if he satisfies art. 14.1’: at 51.

In situations involving unsuccessful salvage operations or operations that resulted in this saving of property of minimal value, provided there was a threat to the environment, the salvors were to be paid their expenses on a ‘broad and generous basis’ to include indirect expenses: this ‘solution represented a fair balance between all the interested parties and their various insurers’. In addition, Clarke J addressed the question as to what period of a salvage operation Article 14 would apply. He concluded the natural meaning of ‘salvage operation’ in paragraph 3 meant the whole of the salvage operation. Clarke J rejected the appeal arbitrator’s determination of the Article 13 reward. It was incorrect to make reference to the special compensation he had assessed pursuant to paragraph 3 of Article 14 in determining the value of an Article 13 reward.

The outcome was appealed once again. Lord Justice Staughton of the Court of Appeal upheld the approach of Clarke J in interpreting a ‘fair rate’ as meaning ‘a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having resources instantly

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available’. It was through the operation of the uplift provision in paragraph 2 that any remuneration or profit would be reflected, if at all. Lord Justice Evans dissented, holding that ‘fair rate’ should be determined by reference to:

the commercial value of those services, disregarding the special considerations which lead to the equivalent of enhanced rates for salvage services when the reward for a successful salvage is assessed. When market comparisons can be made, then contemporary market rates must have a corresponding relevance when the fair rate has to be assessed. The costs, direct and overhead, to the salvor and the benefits gained or sought to be gained by the ship-owner e.g. successful towage are also potentially relevant, and as the relevance of market rates decreases so these factors are likely to become more important.

The case then made its way to the House of Lords. The salvors contended that the use of the expression ‘fair rate’ referred to a rate of remuneration that is ‘fair in all the circumstances’. The word rate, they argued, would not normally have a meaning limited to mere expenses noting that it ‘was common sense that

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235 The Nagasaki Spirit [1996] 1 Lloyd’s Rep 449, 459 (Evans LJ): This is ‘most likely … to have been the intention of those who drafted art. 14. The salvors were not to receive a salvage rate, but the shipowners (and their insurers) agreed to pay ‘a fair rate’ meaning a rate which is fair to both parties having regard to the value of the services in fact performed’. The reference to articles 13.1 (h), (i) and (j) ‘shows that regard should be had to factors which are relevant to the commercial value of the services provided, e.g. the promptness with which the demand was met’.


a salvor would be discouraged from risking his craft, equipment, and men to protect the environment if his recovery was limited to expenses’. An interpretation in which a fair rate did not include a profit element would be inconsistent with the spirit of the 1989 Salvage Convention, in providing an incentive for salvors to protect the marine environment. In reply, the shipowners placed emphasis on the underlying concept of ‘no cure – no pay’ as a cornerstone to salvage rewards. Where this did not take place, the provision of special compensation in reference to expenses and not profit was an improvement over the existing legal regime and fulfilled its purpose of providing a ‘safety net’ for salvors.

Lord Mustill took a ‘remarkably fresh and measured analysis’ of the issues concluding substantially in agreement with the approaches taken by Clarke J and the Court of Appeal.238 For Lord Mustill, a ‘fair rate’ pursuant to Article 14 could possibly comprise of:

1. direct costs to the salvor of performing the service;
2. additional costs of keeping the vessels and equipment on standby;
3. a further element to bring the recoverable ‘expenses’ up to a rate capable of including an element of profit; and

4. a final element bringing the recovery up to the level of a salvage award.

The ship-owners conceded that special consideration could consist of (1) and (2). The salvors accepted that it could not consist of (4). The question for the House of Lords was whether it would extend to (3). That is, could the recoverable expenses under Article 14 include a profit element?

From a textual perspective Lord Mustill regarded the repeated reference to the word ‘expenses’ as significant. It denotes ‘amounts either dispersed or borne, not earned as profits’. The general description of the Article 14 safety net as ‘compensation’ also supported the interpretation of expenses as that of recompense as the term normally refers to reimbursement not a source of profit.

From a contextual perspective, the purpose of the 1989 Salvage Convention was also relevant. It was designed to provide adequate incentives to salvors to protect the marine environment. A narrow reading of paragraph 3 still allowed the salvor an indemnity against outlays and the opportunity to receive some contribution to their costs. As this ameliorated the risks associated with the ‘no

239 *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep 323 (Lord Mustill): paragraph 2 twice used the term ‘expenses incurred’ and ‘in ordinary speech the salvor would not ‘incur’ something which yields him a profit’: at 332.

cure – no pay’ doctrine the purposes of the convention were fulfilled. Furthermore, were a profit element to be included in the calculation of special compensation it would in essence create a separate freestanding environmental salvage award. Lord Mustill stated that the:

promoters of convention did not choose as they might have done to create entirely new and distinct category of environmental salvage which would finance owners of vessels and gear to keep them in readiness simply for the purposes of preventing damage to environment. Paragraphs 1 and two and three of Article 14 all make it clear that right to special compensation depends on performance of salvage operations which are defined by Article 1(a) as operations to assist vessel in distress. Although Article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available this is still for purposes of a salvage for which the primary incentive remains a traditional salvage award.241

Furthermore, his Lordship considered Lord Justice Evans interpretation of ‘fair rate’ as being the market rate for the services rendered.242 This approach was rejected, as it included elements that the safety net was not meant to embrace,243 and placed undue emphasis on the term ‘rate’. In the context of Article 14 ‘rate’ denoted ‘an amount attributable to the equipment and personnel used’.

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The House of Lords decision received criticism from some commentators, who questioned whether the narrow interpretation of the special compensation provision provided sufficient incentive to accomplish the environmental objectives of the 1989 Salvage Convention.244 The International Chamber of Shipping complained that the decision added complexity and expense to the determination of special compensation.245 Replying to these criticisms, Lord Mustill defended his judgment, stating that ‘he was only the pianist who had to perform the music composed by someone else’.246

There is no doubt that the Article 14 safety net gives rise to crippling uncertainty.247 This is evident in the complex interpretation exercise undertaken


245 Aaron Gilligan, ‘Nagasaki Spirit: A Recent Decision Affecting Marine Salvage and Environmental Concerns International Maritime Law: International Note’ (1997) 22 Tulane Maritime Law Journal 619, 624: ‘Further dissatisfaction with the Nagasaki Spirit decision is evidenced by the actions of the South African Legislature in enacting the Wreck & Salvage Act of 1996 which provides: ‘Notwithstanding the provisions of Article 14(3) of the Convention, for the purposes of this Act, the expression ‘fair rate’ means a rate of remuneration which is fair having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature’. This provision within the South African Wreck and Salvage Act clearly rejects the holding in Nagasaki Spirit. Thus, it appears that while the House of Lords decision is final for purposes of English law, the issue may still be undetermined within the international community’: at 624.


247 Susanne Storgårds, Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012) 15: ‘the special compensation regime of the 1989 convention, although initially welcomed by the different actors of the maritime industry, eventually gave rise to growing dissatisfaction, particularly concerning its implementation and in reputation’. Citing Colin De la Rue and Charles Anderson, Shipping Law and the Environment: Law and Practice (Informa, 2nd, 2009) 658. See also Mojgan Momeni Farahani, Liability and Compensation Regime for Oil Pollution Damage under International Conventions (Masters Thesis, Faculty of Law, Lund University, Spring 2011) 67.
by the five courts and tribunals that considered the case. To say the case stands for the conclusion that Article 14 compensation does not include a profit element is overly simple and misses the point. What the case demonstrates is that the wording of Article 14 is unworkable in practical terms. As Archie Bishop states:

As a result of the House of Lords’ decision in The Nagasaki Spirit and the final wording of Article 14(3), namely ‘taking into consideration the criteria set out in Article 13, paragraph 1(h), (i) and (j),’ a court must investigate in every Article 14 case the cost to the salvor of not only the craft and equipment used during the course of the salvage services, but also the availability and value of other vessels or equipment intended for salvage operations. For a large salvage company, this is a major accounting exercise with many remaining unanswered questions. For instance, which periods of idle time of the salvage equipment should be considered when calculating the costs borne by the salvor? It is common to use a one-year period, but is this the correct period? Alterations in the duration of the period would result in huge differences in rewards. Furthermore, what about depreciation? Should one adapt the accounting practices of the company, which may differ from one company to another?248

248 Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65, 73–4: ‘A proper assessment invariably requires an examination of all of the accounts of the salvor, not only in respect to the salvage equipment actually used in the salvage operation, but also to all the other equipment available for use, as well as administrative costs. To comply with the provisions of the London Salvage Convention, the salvor must consider the active and inactive periods of each one of its main salvage units and to apportion its overall direct and indirect expenses among each of those units before making a judgment as to how much should form part of a special compensation assessment. The situation is compounded when there is a joint salvage operation between two or more professional companies ... the assessment of special compensation, even in standard cases, takes considerable time and will nearly always involve lawyers and
There are further issues, and Article 14 assessment may not be enforceable. Unlike an Article 13 reward, special compensation order does not constitute a lien over the vessel or cargo.249

There is no doubt that Article 14 represented an important step in attempting to redress the perverse outcomes evidenced by the pre-convention cases, where salvors were not able to recover expenses relating to a ‘failed’ salvage operation that nonetheless succeeded in preventing and minimising environmental harm. However, the operation of the Article 14 safety net is marred by uncertainty and complexity.250 It does not provide a sustainable legal mechanism that will encourage salvors to go to the aid of vessels threatening the marine environment. In an industry centred on risk-assessment, its uncertainty only

accountants. As a result, it is expensive and leaves the parties in complete uncertainty as to how much special compensation is due until many months, sometimes years, after the services have been completed’: at 75.

249 Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65, 75. Archie Bishop cites a number of cases where insurers have refused to pay special compensation and have negotiated lower settlements. He notes that while ‘most owners are insured for their liability for special compensation, their insurers, in the absence of a risk of the security provisions being enforced, are frequently unwilling to provide the security required. As a result, there were many cases where security was not provided for special compensation claims. While in some cases these claims were ultimately paid, there were others where the liability underwriters were unwilling to meet a properly assessed special compensation claim, even though they had supported the owner in defending the claim. In several cases, because of the lack of security and the unwillingness of the liability underwriters to pay, the salvors had to negotiate settlements substantially less than the LOF arbitrator found due’.

250 Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) 37(1) Tulane Maritime Law Journal 65: ‘It was some seven years before the London Salvage Convention came into force internationally (July 14, 1996), but its essential provisions were immediately endorsed by Lloyd’s and incorporated into LOF 90… As a result, the salvage industry gained experience concerning special compensation long before the Convention actually came into force. Unfortunately, the experience was not good. While the concept of special compensation was felt to be beneficial, the mechanism of assessing it in accordance with the provisions of Article 14 proved to be time-consuming, cumbersome, expensive, and uncertain’: at 74.
operates to skew that commercial calculus in a manner that discourages would be salvors. It simply does not work and in light of this, the shipping industry pursued an alternative safety net to Article 13. It came up with SCOPIC.

**The Industry Alternative: SCOPIC**

The interpretation of Article 14 led to uncertainty and dissatisfaction. Among the many problems understood, the claims for uplift necessitated proving that damage to environment would have resulted but for the intervention, as well as the extent of damage had the operation been unsuccessful. A variety of experts were needed, such as naval architects, drift experts and environmental experts, and in addition, the accounting exercise referred to by House of Lords was found to be time-consuming and expensive. As a result of this, the SCOPIC (Special Compensation Protection & Indemnity Club) Clause\(^\text{251}\) was negotiated. It was specifically designed to replace but to have the same effect as Article 14. SCOPIC is an addendum to LOF, and is only included as part of that contract if initially agreed in writing. When incorporated it replaces Article 14 of the 1989 Salvage Convention. It must be invoked by salvor, and remuneration will not begin until then. There is no longer any need to prove a threat of damage to environment. Ship owners are required to provide security of $3 million.

Once SCOPIC is invoked, remuneration is to be assessed in accordance with tariffs, plus a bonus uplift of 25%. The remuneration from the ship-owner is

\(^{251}\) Technically a number of clauses.
only payable as far as it exceeds the traditional salvage award under Article 13. To discourage unnecessary reliance on this safety net, if an Article 13 award exceeds SCOPIC remuneration, then the award will be discounted by 25%. Further, the owner is entitled to terminate SCOPIC compensation at any time after five days written notice, provided appropriate authorities do not object. However, the salvor may then withdraw from the entire contract where it is no longer financially viable. SCOPIC also provides for the appointment of a special casualty representative (SCR) to represent all salved property during the operation. In addition, underwriters are each permitted to send a special representative to observe and report.

SCOPIC therefore provides a contractual fix for the problems inherent in the 1989 Salvage Convention. Despite this, it is only applicable in 25% of LOF cases. And as a supplement to LOF, it will not operate unless that contractual regime is used. It represents a pragmatic industry solution by enabling the safety net provision of the 1989 Salvage Convention to operate.

Could SCOPIC be the basis for a revision of Article 13? SCOPIC’s efficacy rests on the delicate procedure behind the setting of tariff rates for the use of salvage equipment. This careful determination must result in tariff rates that are attractive enough to incentivise salvors to engage in operations containing an environmental element whilst ensuring that shipowners and their insurers will continue to adopt SCOPIC. If a convention based SCOPIC could accommodate such a mechanism, perhaps by reference to an independent body of experts,
then SCOPIC should be considered as at least the starting point for a new Article 13.

**A REVIVAL OF SELVIG’S LIABILITY SALVAGE?**

The International Salvage Union (ISU) have stated that the Montréal Compromise should not continue into the future for a number of reasons.\(^\text{252}\) First, the thirty-year-old compromise needs to be adaptable to changing circumstances. Second, environmental issues play a far greater role in salvage operations today than they did 30 years ago. Third, the bunker fuel capacity of modern day shipping has increased drastically from 30 years ago to in excess of 5,000 tonnes. Fourth, as the environment is the primary concern for coastal States, environmental protection measures are often undertaken by salvors although not necessary for the successful salvage of a ship and its cargo.

The ISU proposes that the reference to the skill and efforts in preventing and minimising damage to the environment be removed from the criteria as set out in Article 13 of the *1989 Salvage Convention*.\(^\text{253}\) The recognition of environmental salvage rewards would be through a new Article 14 that would act as an

\(^{252}\) Data collected since 1978 by the International Salvage Union, which covers approximately 2,900 LOF cases, demonstrated that average salvage revenue generated from awards and negotiated settlements was around 8% of the salved values. This revenue is fairly modest when compared to the values at risk, amounting to US$24.5 billion under LOF between 1978 and 2008. Since 1994, members of the International Salvage Union have salved ships containing annual averages above 1 million tonnes of potential pollutants. Each year some real risks of environmental damage by vessels were avoided. In 2000 this revenue reached the highest average of 12.5% of salved valued.

additional reward separate from the Article 13 award. The proposal is in substance the same as the liability salvage proposal that was put forward by Professor Selvig in his report in the late 1970s.

The Comité Maritime International responded through the establishment of the International Working Group in 2009. A questionnaire was sent to the various national maritime law associations in July that year. A further questionnaire was sent to those organisations in 2010.

In response to the proposal, the International Chamber of Shipping has emphasized that the Montréal Compromise was a ‘package of carefully balanced and delicately negotiated measures, whereby ship-owner and cargo interests agreed to increase their present liabilities for pollution prevention’.254 For Kiran Khosla, reviving the concept of environmental salvage would necessitate unravelling the complex compromises agreed in the 1989 Salvage Convention. The International Chamber of Shipping appeared somewhat dismissive of the role of professional salvage companies in protecting the marine environment. Kiran Khosla noted:

The approach taken in the Salvage Convention is reinforced in subsequent international conventions (OPRC and OPRC-HNS) and national laws. Governments are not asking the salvage industry to build

up capacities for preventing damage to the environment. Rather, they accept that this is a task for governments as such. In Europe for example, [the European Maritime Safety Agency (EMSA)] has been entrusted with the task of pollution response, supplementing the resources and arrangements that have already been set up at national or regional levels. These structures are recognised as making a significant contribution to the continual improvement of preparing for and responding to marine pollution. EMSA is currently completing the network of stand-by availability contracts for at-sea oil recovery services and having the arrangements fully operational.255

Further, the International Chamber of Shipping reflected on what was said in relation to the Selvig liability salvage proposal following the Amoco Cadiz incident, noting the proposal was rejected in favour of the special compensation regime. As Lord Mustill explained succinctly later in the Nagasaki Spirit:

it was agreed that the Salvage Convention should not create a new and distinct category of environmental salvage, which would finance professional salvors to keep their vessels and equipment in readiness for the purpose of preventing damage to the environment. The primary purpose of “salvage operations” continues to be to assist a vessel in distress, for which the primary incentive is, as ever, a traditional salvage reward. The prevention of damage to the environment is an incidental benefit of some salvage operations. While the international community agreed the incidental benefit conferred by the salvor deserved financial

255 Kiran Khosla, International Chamber of Shipping, Salvageable but is it working? Does it protect the environment? (Speech to the Comité Maritime International and Asociación Argentina de Derecho Maritimo Colloquium, Buenos Aires, October 2010).
recognition by way of special compensation, it was not agreed that it justified a free-standing reward.256

The International Chamber of Shipping cites SCOPIC as an example of the industry responding proactively to salvors’ concerns about the interpretation of Article 14 of the 1989 Salvage Convention.257 While the 1989 Salvage Convention was applauded for encouraging salvors to respond to the threat of pollution, ‘it became apparent that the mechanism of Article 14 was cumbersome and contentious’.258 SCOPIC provides salvors with the ‘certainty of a reasonable and profitable reward’ for protecting the marine environment in cases that ‘might otherwise not be financially attractive’ as the prospects of earning a salvage reward are slight. SCOPIC effectively disposed of all the difficulties associated with Article 14 and has resulted in an efficient and orderly provision of salvage


257 1989 International Convention on Salvage (1989 Salvage Convention), 28 April 1989, 1953 UNTS 193, [1998] ATS 2, LEG/CONF.7/27 (entered into force 14 July 1995) Article 14. Kiran Khosla, International Chamber of Shipping, Salvageable but is it working? Does it protect the environment? (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010). Citing then International Chamber of Shipping President as stating that SCOPIC ‘provides the all-important financial incentive when salvors are confronted with cases which might otherwise lack financial viability. Given Society’s zero tolerance of pollution, it is important that salvors have this incentive to respond to all casualty-related pollution threats – even when property values are low and the risks are high. The fact that the international P&I system has agreed to an increase in the SCOPIC tariff confirms this system’s valuable role in preventing damage to the environment. The decision also contributes to the maintenance of high levels of salvage service’ (Salvage World, September 2007).

258 Kiran Khosla, International Chamber of Shipping, Salvageable but is it working? Does it protect the environment? (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010): ‘By that analysis then, the salvage system works! It works in that it rewards salvors for their efforts in saving property and provides an enhancement if they have taken steps to avoid damage to the environment. It also encourages them to take such steps even when the salvage award is likely to be too small to adequately compensate them for taking such steps, through the special Compensation scheme. That is certainly shipowners’ analysis and also of the IG Clubs’.
services for the prevention of pollution to the environment and generally on an amicable basis.\footnote{Kiran Khosla, International Chamber of Shipping, Salvageable but is it working? Does it protect the environment? (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010): ‘It’s important to note that the SCOPIC clause is rarely arbitrated, I think from the last set of statistics from the ISU, only about 6 or seven times’.
} They go on to note that salvors have confirmed their continuing satisfaction with SCOPIC. Kiran Khosla concluded that:

The present law of salvage works in that it provides salvors with the potential to earn an award for saving property and contains a mechanism for providing an incentive to respond to pollution prevention when otherwise they might not earn an award. It works because all parties to the adventure contribute to the risk of a possible casualty and loss of property. It works because it reflects the principle that all parties to the adventure and governments are responsible for the protection of the environment.\footnote{Kiran Khosla, International Chamber of Shipping, Salvageable but is it working? Does it protect the environment? (Speech to the Comité Maritime International and Asociación Argentina de Derecho Marítimo Colloquium, Buenos Aires, October 2010).}

The main criticism of the proposal relates to the assessment of environmental salvage awards. The criticism centres on the nature of the proposed assessment as highly discretionary. This is no doubt correct however one cannot help but notice that salvage law has always been highly discretionary.

While there is merit in the argument that the salver should be rewarded for their crucial role in protecting the marine environment, the ISU proposal disproportionately shifts the brunt of that to the ship-owner and their insurers.
It cannot be ignored that a significant aspect of the problem is the role of coastal States in salvage operations. Not only are they beneficiaries of the work of salvors in protecting the marine environment, their interference or lack of cooperation increases the costs incurred by the salvor. While the ISU proposal originally referred to the role of coastal State interference, the references were not included in the final proposal. To be fair to the ISU, this was probably over a concern that it would be impossible to get support for such a proposal given the certain opposition of coastal States.

Commercial interests motivate the current deadlock between industry players. The salvage lobby understandably seeks greater remuneration for the work of salvors in averting the risk of environmental harm resulting from maritime casualties. Hull and machinery underwriters also seek change. As a result of the 1989 Salvage Convention hull underwriters share the burden of liability relating to enhancement of an Article 13 reward. This is despite the fact that the enhancement is in recognition of the salvor’s efforts in minimising the third party liabilities of the vessel which is normally a matter for P&I clubs. They are content with environmental salvage proposal as they will no longer be liable for any enhancement in salvage rewards. While the motivations of the underwriters and salvors in seeking change to the current regime may differ, they still represent the side of industry seeking change.

On the other side of this battle are ship-owners and P&I clubs. Their motivations are quite clear. If the reforms were adopted and environmental
salvage claims were allowed, it would be them who would pay for it. Neither side of the debate show any indication of compromise in respect to their positions regarding the environmental salvage proposal. Given the commercial considerations involved, this is hardly surprising. And it is for this reason that it is submitted that the deadlock between industry players will not be resolved. The ISU proposal appears to have met the same fate as Professor Selvig’s liability salvage proposal.

COMMERCIAL RISK FOLLOWING SCOPIC AND THE 1989 SALVAGE CONVENTION
The Montréal Compromise has made substantial inroads in addressing the commercial risks faced by would be salvors contemplating operations with an environmental protection aspect. This is due to a combination of developments that have worked to compliment each other and ensure the compromise can work in practice. Of particular importance is the liberal reading of the enhanced salvage reward criteria in Article 13 by Tamberlin J in United Salvage (and followed in salvage arbitrations) in addition to the work of the various industry bodies to make the safety net concept work. The safety net concept enshrined in the 1989 Salvage Convention may be viewed as a success only thanks to industry that devised the safety net, first brought it into use, and fixed it, so it could operate in a workable manner whilst still achieving its objectives. This once again highlights the critical importance of industry in this area: not only in terms of influence, but also in terms of practicality.
The ISU proposal for a stand alone environmental liability salvage reward has failed to gain traction in the shipping industry. As this chapter has submitted, an Article 13 reward may take into account potential third party liability as a result of the *United Salvage* decision in Australia in addition to its characterisation as a potential risk to the salvor as a result of potential negligence claims.

From the outset this paper acknowledged that the plight of the salvor involved in operations containing an environmental aspect is two fold: commercial risk and political risk. The totality of the developments explored in this chapter have largely remedied the balance of interests between ship, insurer and salvor in relation to commercial risks. However, vulnerability of salvors to coastal State conduct depriving them of any reward and potentially leaving them out of pocket for millions of pounds remains. It is a vulnerability that not even the ISU proposal could adequately address. As Chapter 2 addressed, during the Salvage Convention negotiations in the 1980s, States maintained that the new convention should remain of a private nature and that the public law aspects should be dealt with in a separate convention. They were not. This thread will be picked up in the following chapter.
That leaves us with political risk. The active and passive intervention of coastal States continues to discourage salvors from engaging in salvage operations where a threat to the environment is present. 261

OUTLINING THE PROBLEM: NIMBY AND NOMFUP

Coastal States that are particularly vulnerable to vessel-sourced pollution have been the lead players in the development of the vast majority of international treaties relating to environmental regulation and shipping. As was evident in the negotiation of the 1989 Salvage Convention, France has been particularly aggressive in seeking greater regulation over shipping. Given the litany of accidents that have occurred off the French coastline, this is not particularly surprising. Australia is another States regarded as being ‘extremely adept at advancing [its] interests’ on the floor of the IMO.262 This is not surprising given its susceptibility to maritime pollution which results from having such a vast

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261 Catherine Redgwell, ‘The Greening of Salvage Law’ (1990) 14 Marine Policy 142. To borrow Catherine Redgwell’s dichotomy, political risk may be characterised through the active and passive intervention of coastal States in a salvage operation. Active intervention of coastal States was evidenced in the case of the Torrey Canyon where the decision of the British Government to bomb an oil spill resulted in the loss of maritime property, effectively depriving the salvors of any recompense for their important efforts in towing the vessel away from the coastline. In addition, the passive intervention of coastal States is seen comprises of issues such as places of refuge, criminilisation of the seafarer and salvor liability.

262 Alan Khee-Jin Tan, Vessel Source Marine Pollution: The Law and Politics of International Regulation (Cambridge University Press, 2006): ‘Ever mindful of the sensitivity of its vast marine eco-systems, particularly in the Great Barrier Reef, Australia has recently led efforts to address the problem of non-indigenous organisms introduced into local waters by the discharge of ballast water. Like the Canadians, Australia’s prominence at international fora owes much to its ability to send delegations to influence IMO negotiations’: at 72.
coastline and being so heavily reliant on shipping. The growing influence of coastal States has caused a shift in the ‘regulatory mood’ at the organization: it has gone from an ‘almost exclusively pro-shipping and environmentally conservative’ body to one with a ‘much more liberal outlook’.

Another growing influence over the work of the International Maritime Organization has been public opinion as expressed through the media and coastal States. This has led some to describe many of the organisations and initiatives as ‘ill-considered knee-jerk reactions to catastrophic vessel pollution incidents’.

In almost all cases, popular opinion has been shaped by adverse media reports and images of spilled pollutants, contaminated beaches and soiled seabirds and wildlife. In some instances, media reporting has been sensational and lacking in accuracy and objectivity. This is largely due to the lack of specialist shipping correspondents in the mainstream media who are familiar with the nature of the shipping trade or the technical consequences of oil spills. Thus, the media often neglects to report that only a minuscule percentage of oil carried by sea ends up being spilled.

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263 Alan Khee-Jin Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge University Press, 2006): ‘This shift has evidently been at the behest of an elite group of state actors which share common characteristics of being developed, pluralist democracies’: at 73.

in accidents or that the environmental effects of many spills may only be temporary.\textsuperscript{265}

ACTIVE POLITICAL RISK: COASTAL STATE INTERFERENCE

Article VI of the \textit{Intervention Convention}\textsuperscript{266} states that a party who takes measures in contravention of those permitted by the convention are liable to pay compensation relating to damages arising from measures that exceed those reasonably necessary. However the prevailing view is that this right is only exercisable by States and not private entities.\textsuperscript{267}

Article 232 of the \textit{United Nations Convention on Law of the Sea} makes States liable for damages resulting from enforcement measures taken in the protection and preservation of the marine environment where those measures ‘exceed those reasonably required in light of the available information’. Recourse against the State is to occur in their municipal courts. Private parties do not have standing before the dispute settlement mechanism provided for by the convention. This

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\textsuperscript{267} Susanne Storgård, \textit{Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor} (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012) 79. Susanne Storgård notes that the French version of the \textit{Intervention Convention} suggests that a private party could bring a claim. However she accepts that while this argument appears logical to her it is not shared by other writers.
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is of course subject to the ability of flag states to provide a Fiat allowing a private party to bring an action in their name.

While Article 11 of the 1989 Salvage Convention requires the cooperation of coastal States in salvage operations this is unlikely to amount to creating a cause of action against a coastal State. Even if that were not the case, Susan Storgård suggests that any action would be limited to what could be brought against the ship-owner.

There are few other international conventions that possibly provide a source of remuneration for salvors. They include the CLC Convention, the FUND Convention and the HNS Convention (were it to enter into force). Under the CLC Convention the ship-owner is strictly liable for damage resulting from oil

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269 Susanne Storgårds, Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012) 79.


pollution from tankers. Under the CLC Convention anyone can make a claim for compensation where they took preventative measures to prevent or minimise pollution damage. This may include salvors.

At first glance it would appear that Article 11 of the 1989 Salvage Convention would provide some relief to salvage crews in these scenarios. It states:

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

Article 11 has been criticised as a ‘classic example of the proverbial mix of apples and oranges’. While the private law provisions of the Convention referred to ‘definitive remedies’ of salvors, ship-owners, cargo interests and their respective insurers, in contrast the public law provisions have been severely criticised as lacking any meaningful content. Provisions such as Article 11 reference as to what ‘recourse is available to a salvor if the rights are abused

273 Subject to a limitation of liability.


or the soft obligations of virtually ignored by the coastal State’. Article 11 has been described as nothing more than an ‘empty exhortation’ that imposes no substantial duty on coastal states to grant a place of refuge for vessels in distress. It is merely a requirement upon states to cooperate with all interested parties when making decisions including as to whether or not to grant a place of refuge.

For Proshanto Mukherjee, it is significant that in a ‘rare show of consensus’ during negotiation of the 1989 Salvage Convention environmental organisations and ship-owners worked together in supporting the strengthening of the Article 11 obligation. Tongue-in-cheek he notes, the ‘intention of the 1989 convention was neither to confirm nor deny a right of access to a refuge of a ship in distress’. Despite this, Mukherjee suggests that on the positive side ‘perhaps the soft obligations of Article 11 imposed on the coastal states have moved the matter a half step forward’.

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280 Proshanto Mukherjee, ‘Refuge and Salvage’ in Aldo Chircop and Olof Linden (eds), Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom (2006) 278. While the truly contractual obligation on behalf of the ship-owner to cooperate in securing a place of safety for a vessel in distress would not translate into a duty borne by the coastal State, with Article 11 there is ‘at least some room for argument in favour of the salvor’.

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PASSIVE COASTAL STATE RISK: THE MARITIME LEPER

The need for a specific legal regime governing ships in distress and places of refuge has been described as one of the ‘most topical problems in both public and private maritime law’. The world has seen a litany of shipping disasters that have been exacerbated by the unwillingness of coastal States to provide ships in peril with a place of salvage. Their reluctance to allow these vessels near the coastline results in the maritime leper or Flying Dutchman scenario where a polluting ship is left to be towed aimlessly whilst waiting for a country to allow it refuge.

For example, the *Castor* suffered a severe crack whilst the tanker was navigating off the coast of Morocco in severe weather. At great risk to them, the salvors attempted to fix the crack to minimise risk of explosion. When the salvors sought to find a sheltered location more protected from the wind and waves, eight Mediterranean States refused to cooperate resulting in the ship aimlessly wandering around the sea for six weeks, endangering ship, cargo and the lives of the salvage crew.

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281 Eric Van Hooydonk, ‘The Obligation to Offer a Place of Refuge to a Ship in Distress’ (2004) 3 *Lloyd’s Maritime and Commercial Law Quarterly* 347


In a press release dated 22 November 2002, INTERTANKO and BIMCO stated that the incident highlighted concerns relating to the continued reluctance of coastal States to allow ships places of refuge. They went on to note that when ‘ships are not granted such refuge, the potential for a serious incident is frequently increased and the safety of the crew jeopardised. The emergency transfer of cargo and other measures to the stricken vessel may be similarly hindered with the consequent increased threat to the environment’.284

Authorities responsible for granting places of refuge ‘have everything to lose and nothing to gain’.285 This may be mitigated by some conventions that may provide compensation for a State in such a circumstance.286 However, this would still only be compensatory and would not provide a substantial incentive. It has been suggested that were coastal States able to make a salvage claim they may be encouraged to provide places of refuge.287

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Archie Bishop suggests that the International Salvage Union is comfortable with this situation and that such claims may be already allowable under the existing salvage regime.\textsuperscript{288} Despite this, the cap on salvage awards limiting them to the value of the property involved at the end of salvage operations would be a ‘major stumbling block to any such claims’.\textsuperscript{289} Where a place of refuge is necessary, it generally follows that the property in question is so badly damaged that they are unlikely to have a high value. Archie Bishop uses this issue to further his push for environmental salvage rewards.\textsuperscript{290}

Maritime law has traditionally recognised the right of refuge of vessels in distress.\textsuperscript{291} It was regarded as an unwritten norm of customary international law recognised by the entire international maritime community consisting of a complimentary right of the ship and crew to self-preservation and responsibility on coastal States to assist them. However, the increased concern for pollution and incidents such as the \textit{Torrey Canyon} has begun to undermine

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this recognition. It is no longer clear whether a coastal State has an obligation to provide refuge to vessels in distress.292

The International Maritime Organization has established guidelines on the ports of refuge issue. However it must be noted that the instrument deliberately avoids ‘peremptory language, such as rights and obligations’.293 The guidelines impose no specific obligation on coastal States. While they serve to encourage States to grant refuge to vessels in distress, States are not required to do so. The guidelines list criteria that should be considered by coastal States in making a decision whether or not to admit the vessel to its ports.294

While the guidelines impose, at best, soft law obligations it is through this that they could be actually adopted by coastal States. They are seen as the ‘first step in counter balancing the right of intervention of the coastal State and potentially paving the way for the re-emergence of the right of refuge to vessels in

292 1989 International Convention on Salvage (1989 Salvage Convention), 28 April 1989, 1953 UNTS 193, [1998] ATS 2, LEG/CONF.7/27 (entered into force 14 July 1995). Article 9 of the 1989 Salvage Convention explicitly provides coastal States of the right of intervention ‘in accordance with generally recognized principles of law’. Whether those qualifying words somehow recognise the right of refuge is unclear. It appears that the long-standing customary right vessels in distress can obtain access to put a refuge has been eroded over the past century.


294 The coastal State should consider all of the factors and risks and weigh them in a balanced manner. Further, where they agreed to provide refuge they are able to impose practical requirements on the vessel.
distress’. They are seen as part of an effort to clarify the responsibilities of parties involved and ensure that ships in distress are handled in a manner beneficial to maritime safety and the environment.

It is unclear whether coastal States could be liable for the loss caused by their refusal to grant a port of refuge. While there is nothing in the existing liability system to suggest the State is exempted from such liability, there is little guidance provided by the various international conventions on maritime pollution and the question is explicitly excluded from the IMO guidelines.

In 2009 the Comité Maritime International produced a Draft Instrument on Places of Refuge that has subsequently been forwarded to the Legal Committee of International Maritime Organization. The Draft Convention seeks to clarify the rights and obligations of coastal States in providing places of refuge. The convention would recognise a general right of access to a place of refuge for vessels in distress subject to the qualification that a coastal State could refuse access where such refusal was reasonable. The Draft Convention provides for

295 Susanne Storgård, Coastal State Intervention in Salvage Operations: Obligations and Liability Toward the Salvor (Small Masters Thesis, Master of Laws in Law of the Sea, University of Tromsø Faculty of Law, Fall 2012) 37.


coastal State liability where the State unreasonably refuses a place of refuge to a vessel.\textsuperscript{299} As a result, the Draft Convention guarantees salvors a right of compensation if they fail to earn a reward due to the coastal State’s unreasonable refusal of a place of refuge.\textsuperscript{300} This would be a welcome improvement to the current legal regime.

The Draft Convention emphasises the importance of places of refuge to the efficiency of salvage operations relating to vessels in distress. It provides a refreshing degree of reciprocity relating to the rights and obligations of both coastal States and salvage companies by recognising that the interests of both parties should be balanced in a fair and reasonable way. This would seem to be a more equitable approach than the current one-way system.

The CMI Draft Convention has been regarded as a step in the right direction towards creating a unified regime relating to the relationship between coastal States and salvage companies. However, it did not enjoy a good reception before coastal States at the IMO Legal Committee. The notion that they may be liable for a failure to provide a place of refuge did not prove popular. As Simon Baughen correctly notes, it is unlikely that the draft convention will be

\textsuperscript{299} The liability extends to damages resulting from the salvors’ inability to complete the salvage operation.

\textsuperscript{300} The onus would be on the coastal State to prove that the denial of refuge was justifiable in the circumstances.
adopted.\textsuperscript{301} It is to be expected that some particular coastal States would never agree to hard obligations in relation to these matters.

\section*{POLITICAL RISK PREVAILS}

The legal regime governing the relationship between salvors and coastal States during salvage operations where there is a threat to the marine environment is plagued by obscurity. The rights and obligations of coastal States vis-à-vis salvage companies engaged in salvage operations involving pollution are to be found (possibly) in a myriad of international, region and national instruments. As Nicholas Gaskell notes one consequence of the reaction to \textit{Torrey Canyon} has been that:

\begin{quote}
instead of a single liability regime, there has been a piecemeal accumulation of regimes to deal with particular problems as they arise (or as is allowed by the timetables and budgets of international organisations). Thus, there is one regime for pollution from oil tankers, another for the pollution by the fuel (bunkers) of ordinary merchant ships (other than oil tankers), and a separate convention on the carriage of hazardous and noxious substances (HNS) other than oil. There are also separate regimes for the wrecks of ships (and their contents) and the transportation of wastes.\textsuperscript{302}
\end{quote}


This is partially the result of law reform occurring on a reactionary basis to media and public pressure resulting from the visual spectacle of oil spills and other maritime calamities. This kneejerk approach to law reform by governments generates uncertainty that increases the political risks to would-be salvors. Yet without the technological capacity possessed by the salvage companies, the threat of catastrophic environmental harm increases exponentially. The resulting uncertainty means that political risk remains a significant factor discouraging salvage companies from seeking to help.

There is a clear lack of reciprocity with regards to the inroads coastal States have made into salvage law. While coastal States continue to demand extraordinary powers of intervention in the context of salvage operations, they have yielded very little in return in terms of cooperation with salvors and the provision of compensation to them. The existing coastal State obligations comprise of lukewarm ‘cooperation’ requirements and soft law guidelines.

They do not provide any certainty to salvage companies when deciding whether or not a particular salvage operation is commercially viable.

Further, the ‘maritime leper syndrome’ remains alive and well, making it very difficult for salvors to achieve the necessary success to obtain a salvage reward.

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The not in my back yard (NIMBY) approach to places of refuge deprives vessels in distress of necessary port facilities and sheltered waters. Coastal States want the leaking tanker as far away from them as possible. Despite this, they are not willing to pick up the bill in terms of compensating the salvor for expenses or the opportunity to obtain a salvage reward lost as a result of government intervention.

Coastal States are clearly a third actor in salvage operations where there is a threat to the environment. An appropriate and adapted legal regime governing salvage should identify the relationship between the coastal State and other interests involved including ship-owners, P&I clubs and salvage companies. To do otherwise leaves the other parties involved in the salvage operation with very little certainty as to when and if coastal States will intervene and if so how that will impact the commercial arrangement between the private parties involved.
CHAPTER 5: CONCLUSION

It is widely accepted that private salvage companies have the skills, equipment and know-how to respond to potentially catastrophic maritime casualties in a manner that coastal States cannot, or are unwilling to do so. This was illustrated following the recent grounding of the *Rena* in pristine waters along the New Zealand coastline. The fuel and cargo on board had the potential to cause enormous damage had the ship broken up. However the New Zealand government did not have the capacity to respond. Further the nature of the grounding and the prevailing weather conditions made any attempt to salvage the vessel risky both financially and in terms of the lives of the salvage crew involved. However, a private salvage company made an assessment of the risks, and proceeded to remove the potential pollutants from the grounded ship on to another vessel.

Cases such as the *Rena* demonstrate that given adequate incentives, these private profit-oriented entities can play a significant role in protecting vulnerable coastlines. The question is then, are the current incentives adequate? If not, how can the salvage regime be modified to fix this? This is not just a question of normative factors of what should happen in this context, it is necessary to ask what can happen.

In this respect, it is important to recognise the nature and interests of the relevant parties. To consider the incentive mechanism it makes sense to
examine the relationship of salvors vis-à-vis the beneficiaries of the salvage services. Where the efforts of a salvage company are successful in preventing harm to the marine environment and, as a result, operate avert liability to third parties, the key beneficiaries are the ship-owner/P&I clubs and coastal States.

While the traditional law of salvage worked well in reducing the loss of property at sea, the rule of ‘no cure – no pay’ became problematic throughout the second half of the 20th century. In many casualty scenarios such as the Torrey Canyon, salvage companies, acting as volunteers, would expend considerable time and resources in an effort to protect the marine environment from the catastrophic consequences of pollution. However, where the value was the ship and cargo at the end of the operation was minimal, or where due to the interference or lack of cooperation by coastal States that property was destroyed the salvors would be left without remuneration and forced to bear their own costs. Professional salvors would obviously be cautious in the case of future maritime casualties. It was the marine environment that would instead suffer enormous losses. The ‘no cure – no pay’ doctrine discouraged the very best equipped to protect the marine environment from doing so.

As this dissertation has advanced, the key obstacles to providing the appropriate incentive for salvors to go to the aid of vessels representing a risk to the marine environment are commercial and political risk.

The adoption of the 1989 Salvage Convention and the continued development of Lloyd’s Open Form have gone a long way in addressing commercial risk. The
Article 14 safety net provided a much needed exception to the harshness of ‘no cure – no pay’. However, as it became abundantly clear, it proved to be too unworkable to form the basis of a private commercial relationship between ship-owners and would be salvors. As a result, the maritime community worked together to produce the SCOPIC clause. This pragmatic, industry driven solution provided a workable mechanism whilst capturing the substance of the Article 14 compromise. SCOPIC removed a great deal of uncertainty from the operation of the Article 14 safety net. While it is necessary to tweak the clause from time to time to reflect salvage market conditions, it has no doubt been a success.

It is clear that these developments have aiding in mitigating the commercial risk posed to salvors by the ‘no cure – no pay’ doctrine. Having said that it does not go as far as salvors would have hoped. Their dream of a freestanding salvage reward to recognise their efforts in saving a ship-owner from potential liability failed before the Comité Maritime International in the 1970s and appears to have met a similar fate following its second outing before the 2012 CMI Conference in Beijing.

The drafters of the 1989 Salvage Convention acknowledged that the relationship between salvors and the governments of coastal States were a matter of public law and not well suited to an international convention primarily concerned with the contractual relationships between commercial parties. However, the world is still waiting for a public law convention to fill the void.
It is submitted that the public law issues identified during the drafting of the 1989 Salvage Convention have yet to be adequately addressed. Quite the opposite, they have become increasingly poignant since that time. A new convention is required to provide a unified regime detailing the rights and obligations for parties involved in maritime incidents posing a potential threat to the marine environment. Until these issues are addressed, the world faces the fearful prospect that it will take a catastrophe similar to that seen in the Prestige incident to prompt decision makers into responding in a comprehensive manner.

While macro negotiations with the insurance industry and international community may seem difficult, it is perhaps the micro negotiations particularly in relation to salvage contracts that may be where the salvage companies get a high degree of success. These are, after all, volunteers. In assessing the profitability of potential salvage operation a salvor must consider the potential for a missed opportunity to obtain a salvage reward or in addition to the threat of sustaining losses due to factors such as coastal State intervention. It is perhaps here that the salvors have an opportunity to negotiate for more favourable contract terms with the ship-owner. Alternatively, there may be the opportunity to negotiate directly for salvage related services with the coastal State. They do have a degree of bargaining power. This they should make use
of.\textsuperscript{305} Perhaps the solution would be to draft an alternative to SCOPIC on more favourable terms. This could be either on an individual or collective basis. A further consideration should be for the establishment of a standard form contract for the provision of clean-up services to government.

In the meantime you would expect shipowners to stick to the tried and tested \textit{and continually revised} LOF with SCOPIC adopting it where appropriate on a case by case basis. The salvage industry continues to show signs of consolidation. In May 2015, two giants of the salvage industry, Titan and Svitzer, announced a merger.\textsuperscript{306} With less competition, these professional salvage companies will be in a stronger bargaining position than ever before. When faced with a salvage operation riddled with potential commercial and political risk these salvors will have a greater capacity to ensure that any operation is done on adequate contractual terms.

Coastal States must remember that there is no point in having a power to intervene in salvage operations where there is no salvage operation taking place. The more coastal States seek to interfere, the less likely salvors are to take the risk in the first place. Coastal States must consider that in order to choose the music, you must pay the piper.

\textsuperscript{305} This is of course subject to the qualification relating to contracts concluded under duress.


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