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**THE LEGALITY AND PRACTICALITY OF INTRODUCING AN
AWARD FOR ENVIRONMENTAL SALVAGE INDEPENDENT OF
THE TRADITIONAL SALVAGE AWARD**

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CONTENTS

1. INTRODUCTION
2. DEVELOPMENT OF THE CONCEPT OF ENVIRONMENTAL SALVAGE
 - (a) The Concept Itself
 - (b) Traditional Salvage Awards
 - (c) The 1989 Salvage Convention
 - (d) Lloyds Open Form
 - (e) SCOPIC (Special Compensation P & I Clause)
3. APPROACH FOLLOWED BY THE COURTS REGARDING ENVIRONMENTAL SALVAGE

A brief overview of the different approaches followed by the Courts in the following cases:

 - *Hendricks v Tug GORDON GILL*;
 - *Westar Marine Service v. Heerema Marine Contractors*;
 - *Allseas Maritime S.A v M/V MIMOSA*;
 - *Trico Marine Operators Incorporated v Dow Chemical Company*;
 - *The Blackwall* ;
 - *Ocean Towing and Salvage v. Brown*
 - *Semco Salvage & Marine Pty.Ltd v Lancer Navigation (The "Nagasaki Spirit")*;
4. THE INTERNATIONAL SALVAGE UNION'S APPROACH TO THE ISSUE OF ENVIRONMENTAL SALVAGE
5. SUGGESTED SOLUTIONS TO THE PROBLEM BY THE INTERNATIONAL SALVAGE UNION
6. WHO SHOULD BE HELD LIABLE FOR PAYMENT OF ENVIRONMENTAL AWARDS, WERE IT TO BE RECOGNISED, WHAT WOULD THE EFFECT THEREOF BE AND HOW CAN IT BE ACHIEVED? – as set out by the ISU
7. CONCLUSION

1. INTRODUCTION

“To the professional salvor, the principle of ‘no cure – no pay’ is one of the most inequitable rules to be adopted by the admiralty courts. Under this principle, the skilled professional salvor will receive no reward in the event that his salvage efforts fail, or in the event that the salvaged property has little or no value.”¹

Salvors have traditionally been rewarded generously for salvaging property at sea, with the object of encouraging them to continue with such salvage operations. During the earlier centuries of salvage however the environment was not a great concern for the shipping industry, until oil transportation began to increase, causing a few major casualties. As a result of these casualties, the public became more environmentally aware and sensitive to damage caused to the environment by oil spills and salvors began to play an important role in the prevention of such damage to the environment.² Salvors now owe a duty to ship owners to carry out salvage operations with due care and to exercise due care to prevent or minimize damage to the environment during these salvage operations.³ Because of their important role, it is generally accepted that salvors should be encouraged and that some incentive must be awarded to them to continue their salvage operations.⁴

Currently the law of salvage provides only limited incentives for salvors to prevent pollution and it also inadequately compensates salvors for the risks they assume when assisting a ship that threatens the environment. Therefore current salvage law is inadequate to protect the public from the threat of pollution.⁵ Thus one of the most interesting and important developments in the law of salvage has been this growing attention paid to the environment. The predominant purpose of salvage operations is shifting from the purpose of rescuing property to the purpose of preventing damage to the environment.⁶ According to Clift and Gay⁷ this development in the law of salvage may ultimately result in either (i) the performance of salvage operations in terms of a fixed-price contract between salvors and insurers of pollution risks or (ii) the development of a general maritime principle in terms of which liability salvage will be recognised as an existing right on its own, independent of property salvage.

¹ Stephen F. White ‘Salvage Convention of 1989: Rewarding Efforts to Protect the Environment’ available at www.vesselassist.com/SWhite_salcon89.html

² International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

³ Article 8(1)(a) and (b) of the 1989 Salvage Convention

⁴ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

⁵ Brian F. Binney ‘Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention’ (1990) *Washington Law Review* 639

⁶ Rhys Clift & Robert Gay ‘The Shifting Nature of Salvage Law: A View from a Distance (2005) *The Tulane Law Review Association* 1357 available at www.westlaw.com

⁷ Ibid

The International Salvage Union is working hard in order to introduce such a general maritime principle of environmental salvage as an existing right on its own, independent of traditional salvage awards.⁸

The question arises however whether the introduction of a separate environmental salvage award would be practical and what the legality thereof would be? In order to determine the answer, one has to look at how this award for salvage has developed over the years. Traditionally under salvage law a salvor could only claim an award if he was successful and the amount that could be awarded to him was limited to the value of the salvaged property. Then came the Salvage Convention, Lloyds Open Form and SCOPIC (Special Compensation P & I Clubs), in which provision is made for so called "special compensation" where the salvor was unsuccessful in salvaging property, but did manage to prevent damage to the environment.

This development will be discussed in detail in order to show that development is taking place in salvage law and that it is becoming a more and more recognised concept that salvors should be encouraged to protect the environment during salvage operations by way of some form of a reward. Whether this development will ultimately lead to a separate award for environmental salvage as predicted by Clift and Gay⁹ remains to be seen, as the Courts are unwilling to award such claims in practice as will be seen from the court decisions later illustrated herein. In the light of the following discussion I will illustrate that the prediction by Clift and Gay might indeed be a possibility not too far off in the future.

2. DEVELOPMENT OF THE CONCEPT OF ENVIRONMENTAL SALVAGE

(a) The Concept Itself

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 1969 (known as the Intervention Convention) granted governments the rights and jurisdiction to take measures on the high seas in order to prevent imminent dangers of pollution. Governments started interfering in marine casualties, resulting in ships in distress being sent out to sea rather than being provided with a place of refuge. In doing this, the object of the salvor, namely salvaging the vessel and its cargo, was frustrated, and so also his means of earning a reward. Salvors thought twice before entering into a salvage agreement when there was a threat of damage to the

⁸ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

⁹ Rhys Clift & Robert Gay 'The Shifting Nature of Salvage Law: A View from a Distance (2005) *The Tulane Law Review Association* 1357 available at www.westlaw.com

environment, as it meant more work and greater risks and greater expenses for the salvor, which would not be recoverable in the event of failure.¹⁰

As a result of this unsatisfactory situation the concept of environmental salvage was created by Professor Selvig, Chairman of a special committee set up by the Comité Maritime International (CMI).¹¹ In terms of this concept a salvor would be paid for the benefit he rendered to the shipowner in preventing something like environmental damage, which would otherwise have been a liability for the shipowner. This award would take place in addition to the traditional salvage award for property saved.¹² His proposal was however rejected by the CMI and the shipping community in general in favour of two other remedies, which will be discussed at a later stage.

(b) Traditional Salvage Awards

In order to claim a traditional salvage award, a salvor must prove that the maritime property was in danger, and that the salvor acted voluntarily and that he was under no duty to assist and that he was successful in preserving and salvaging property. If he was not successful in salvaging the property, he could not claim a salvage award. This last requirement became known as the “no cure – no pay” principle which can be briefly formulated as meaning “regardless of the merits of the salvage effort, if no property is recovered the salvor receives no compensation.”¹³ This rule of “no cure – no pay” is also contained in article 12 of the 1989 Salvage Convention.¹⁴ For the salvage industry it is unsatisfactory and unjust that the amount of the award should be limited by the value of the property salvaged and by the need to leave something for the owners of the property. This results in insufficient encouragement for salvors to continue with salvage operations in the future. If liability salvage (environmental salvage) is recognised, it must be dealt with by way of direct action against the vessel’s liability insurers according to Cliff and Gay.¹⁵

(c) Articles 13 and 14 of the 1989 Salvage Convention (“the Salvage Convention”)

The traditional salvage award must be assessed in terms of article 13 of the Salvage Convention. Ten criteria is set out in article 13(1) which criteria must be taken into account by the Court or and Arbitrator when assessing a salvage award, with specific reference to article 13(1)(b) relevant to this discussion, namely the “skill and efforts of the salvors in preventing or minimizing damage to

¹⁰ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

¹¹ Ibid

¹² Ibid

¹³ Brian F. Binney ‘Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention’ (1990) *Washington Law Review* 639, 640

¹⁴ Article 12 of the Salvage Convention determines that only salvage operations which have had a useful result give right to a reward.

¹⁵ Rhys Cliff & Robert Gay ‘The Shifting Nature of Salvage Law: A View from a Distance (2005) *The Tulane Law Review Association* 1357, 1381 available at www.westlaw.com

the environment.”¹⁶ The addition of article 13(1)(b) was the second remedy adopted by the CMI when they rejected Professor Selvig’s concept of a separate award for environmental salvage. These factors that were taken up in article 13 were originally identified in *The Blackwall*¹⁷ case and it was held that the formula for determining the award is discretionary and unscientific. The salvage award must furthermore be large enough to encourage salvors whilst not too large that it exceeds the value of the salvaged property, as article 13(3) of the Convention determines that the “salvage rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.” Despite article 13 recognising the skill and efforts of salvors in preventing environmental damage during salvage operations as a factor to be taken account when determining the salvage award, the award is still limited to the value of the salvaged property. Therefore article 13 in my view does not address the current problem the International Salvage Union has with the inadequate awards for environmental salvage, but it was the first step in acknowledging that salvors should be rewarded if their operations prevent environmental damage.

As stated earlier the proposal by Professor Selvig of a separate award for environmental salvage was rejected by the CMI in favour of **two** other remedies, the second one mentioned above. The first remedy however that was adopted was the so-called “Safety Net”. The Safety Net had its origin in the Lloyds Open Form (LOF) 80 in which it was provided that whenever salvage services were rendered to a laden tanker, the salvor would recover his expenses plus an uplift of up to 15% of those expenses, even if the salvor was unsuccessful or partially successful.¹⁸ Article 14 of the Salvage Convention of 1989 then replaced this idea. In article 14 of the Convention a new remedy of special compensation was established, which at least guaranteed the salvor’s expenses.

In terms of Article 14(1) “[I]f 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.” It furthermore in article 14(2) provides that if “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 percent 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 percent of

¹⁶ Geoffrey Brice ‘The Law of Salvage: A time for change? “No cure-no pay” no Good?’ 1(999) *The Tulane Law Review Association* 1831, 1833

¹⁷ 7 U.S. 1 (1869)

¹⁸ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

the expenses incurred by the salvor. The article however limits the salvor's expenses to out-of-pocket expenses and to a fair rate for equipment and personnel taking into consideration the criteria set out in article 13(1).¹⁹ Special compensation in terms of article 14 is also only payable to the extent that the special compensation exceeds the reward in terms of article 13.²⁰

To summarise, Article 14 determines that if a salvor performed salvage operations and there was a threat of damage to the environment, he would at least be able to recover his expenses. If he was successful in protecting the environment, he would receive a further upliftment of up to a 100% of those expenses.²¹

From the above it is clear that salvors do play the most important role in protecting the environment from damage caused by pollution resulting from marine casualties. It is recognised internationally that they should be encouraged to continue playing this important role and that incentives should be put in place as encouragement. Exactly what these incentives should be however, is controversial but slowly but surely these incentives are being put in place. Therefore I agree with Clift and Gay²² that these developments like the Salvage Conventions and the continuous amendments to LOF and clauses like SCOPIIC are leading the way to and may ultimately result in a general maritime principle in terms of which liability salvage and environmental will be recognised as existing rights on its own, independent of property salvage. Thus, even though at the moment these measures might not provide sufficient encouragement to salvors, it must be borne in mind that it is still in the process of development.

According to the ISU²³ the remedies set out above as adopted by the CMI, provide little financial reward or encouragement for a salvor to protect the environment. As stated previously, in terms of the Convention a salvor now has a duty to protect the environment, which duty has become the most important aspect of a salvage operation. Despite this ever-increasing role of the salvor, he is getting paid very little for it. In terms of ISU statistics²⁴, in the last eleven years the ISU has salvaged over 9.4 million tons of oil, which if it was not salvaged, would have caused great environmental damage.

¹⁹ Article 14(3) of the 1989 Salvage Convention

²⁰ Article 14(4) of the 1989 Salvage Convention

²¹ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

²² Rhys Clift & Robert Gay 'The Shifting Nature of Salvage Law: A View from a Distance (2005) *The Tulane Law Review Association* 1357, 1381 available at www.westlaw.com

²³ *Supra* 21

²⁴ *Supra* 21

(d) Lloyds Open Form (LOF)

According to Brice²⁵ the International Salvage Convention of 1989 led to the remedy of special compensation, because at the same time of the conclusion of the Convention, Lloyds of London immediately incorporated an important and fundamental reform in the Lloyds Open Form (LOF) of 1980, and later also in LOF of 1990. This reform also became known as the Safety Net, which guaranteed a salvor his out-of-pocket expenses and a fair rate for his craft if the vessel in distress was a laden tanker **and** if he had been unable to recover any or an insufficient salvage reward. The safety net payment was payable only by the owner (and thus in reality by his P & I Club). In effect the safety net meant that a salvor was guaranteed his expenses, even in the event of failure and therefore it was an exception to the rule of “no cure – no pay”.²⁶ It is important to emphasize that LOF has to be contractually agreed to by the owners and the salvors. Where parties have not agreed to make use of LOF, the general principles of maritime law of salvage have to be applied and remain in existence, which in effect means that the 1989 Salvage Convention will be applied.²⁷

This safety net provided for in LOF must be seen as an exception to the rule of “no cure – no pay” and not as an abolishment thereof, because clause 1(a) of LOF provides that the contractor’s services must “be rendered and accepted as salvage services upon the principle of ‘no cure – no pay.’” Regarding the award, LOF only determines that the award must be determined by the Arbitrator and that such arbitration must be governed by English law.²⁸ Article 14 of the 1989 Salvage Convention is also incorporated into the LOF as stated previously. As LOF only makes provision for a safety net for salvors of laden oil tankers, it is also not the solution to the problems experienced by the International Salvage Union and by the salvage industry as a whole.

The difference between the safety net provided for in LOF and the special compensation provided for in article 14 of the Convention is that (i) special compensation is not limited to laden tankers, it applies to any type of vessel or cargo; (ii) special compensation is dependent on a threat of damage to the environment; (iii) the remedy of special compensation applies to services in coastal waters; and (iv) the discretion in article 14(2) is higher than what is provided for in LOF.²⁹

²⁵ Geoffrey Brice ‘The Law of Salvage: A time for change? “No cure-no pay” no Good?’ 1(1999) *The Tulane Law Review Association* 1831, 1836

²⁶ Ibid

²⁷ Rhys Clift & Robert Gay ‘The Shifting Nature of Salvage Law: A View from a Distance (2005) *The Tulane Law Review Association* 1357, 1366 available at www.westlaw.com

²⁸ Ibid

²⁹ Supra 25

(e) SCOPIC (Special Compensation P & I Clause)

SCOPIC has been created after wide consultation with salvors, ship owners, property insurers and P & I Clubs in 1999³⁰ and it contractually replaced Article 14 of the Convention despite it basically having the same effect as article 14.³¹ If a salvor enters into a salvage contract and invokes SCOPIC, there are no risks involved for him even if the salvage operation is unsuccessful,³² as it makes provision for a system of limited but guaranteed remuneration for salvors.³³ In terms of SCOPIC there is even the possibility that a salvor might earn a profit. The salvor thus has greater security. It is important to emphasize that an award in terms of SCOPIC is only paid to the extent that its assessment exceeds the award in terms of Article 13.³⁴ Thus another form of a safety net is established which encourages a salvor to enter into a traditional salvage contract as the full effect of the principle of “no cure – no pay” is excluded.

It is furthermore important to note that despite the SCOPIC clause making reference to “special compensation”, it is not the same as referred to in the Convention and when SCOPIC is invoked, there must be no claim for special compensation in terms of article 14 of the Convention.³⁵ SCOPIC is supplementary to LOF and has to be agreed to contractually, it is not part of traditional salvage law. SCOPIC will apply only where it has been invoked and where the salvaged property has no or little value. SCOPIC remuneration is also only payable to the extent that it exceeds the total award payable in terms of article 13 of the Convention. The award in terms of article 13 can therefore not be diminished by SCOPIC remuneration.³⁶

Problematic in this regard is that SCOPIC has to be contractually invoked and agreed to by parties. In the event of the parties not being able to agree to the application of SCOPIC, traditional principles of salvage will apply, more specifically the rule of “no cure – no pay”.

3. APPROACH FOLLOWED BY THE COURTS REGARDING ENVIRONMENTAL SALVAGE

According to Newell D. Smith³⁷ the traditional rule followed by the Courts is that a salvor cannot argue and claim that the value of the property which was salvaged, includes liabilities for which the vessel would have been liable had it not been for the salvage operations. This rule was established

³⁰ Geoffrey Brice ‘The Law of Salvage: A time for change? “No cure-no pay” no Good?’ 1(999) *The Tulane Law Review Association* 1831, 1839

³¹ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

³² Ibid

³³ Supra 30

³⁴ Supra 31

³⁵ Supra 30

³⁶ Supra 30

³⁷ Newell D. Smith ‘The Law of Salvage’ (1994) available at <http://www.mikkelborg.com/files/salvage.pdf>

in *Hendricks v Tug GORDON GILL*³⁸ and the same rule was applied in *Westar Marine Service v. Heerema Marine Contractors*³⁹. In both cases the notion of liability salvage (and therefore also the notion of environmental salvage) was rejected.

In *Allseas Maritime S.A. v. M/V MIMOSA*⁴⁰ the Court held that awards for salvage must not be limited to a strict amount, it is more in the nature of “bounty” and thus it provides an incentive for seamen to undertake salvage operations. It was however confirmed that the value of the salvage award is limited to the value of the property that was salvaged, and after all the appropriate factors has been taken into account. The Court made a comment however in dictum that “[t]here is considerable merit, nonetheless, in the position that salvors should be compensated for liability avoided. Whether the salvor protects a shipowner’s vessel or his other assets, the economic benefits are equally valuable.”⁴¹ On the facts of the case the owner’s liability was limited to the value of the vessel in terms of the Limitation of Liability Act⁴² and therefore the owner could not be required to pay more than the salvaged value of the vessel, even if damage was prevented by the Salvor and his salvage operations.

In *Trico Marine Operator Incorporated v. Dow Chemical Company*⁴³ the M/V LISA C was towing barges, which were carrying Benzene, when the tow broke. A distress signal was sent out to which Trico Marine Operators responded, and they were successful in rounding up all the barges. They contended that in addition to rescuing the barges and their cargo, they also prevented an environmental disaster, as their salvage operation prevented any benzene from spilling and causing damage to the environment. The Court confirmed that there is no precise formula for determining what an appropriate salvage reward is and that each case must be evaluated according to its own facts.⁴⁴ The Court held that the award for salvage is limited to the value of the property that was salvaged after all the relevant factors as set out in the *Blackwell Case* and taken up in article 13 of the Salvage Convention, have been taken into account, but a Court will not award salvors compensation for liability that was averted.

This idea that the award is limited to the value of the saved property is commonly known and referred to as the “Blackwell Principle”. According to the view of some commentators, if the award

³⁸ 737 F.Supp. 1099, 1104

³⁹ 621 F.Supp 1135, 1988

⁴⁰ 812 F.2d. 243, 247

⁴¹ Ibid

⁴² Limitation of Liability Act of 1851, Sections 183 – 188

⁴³ 809 F.Supp 440, 441

⁴⁴ 809 F.Supp 440, 441

is so limited in terms of the Blackwell Principle, it will not provide an adequate incentive for potential salvors to undertake salvage operations to protect the environment.

The Court in the *Trico Marine Case* proposed either one of two remedies⁴⁵ namely (1) recognition of liability salvage or (2) the addition of further criterion to the Blackwell list namely that of environmental protection. According to the Court, in order to give effect to the remedy in (1), one will have to discard the Blackwell principle as a whole, and to give effect to remedy (2), one will have to allow an exception to the Blackwell Principle where a salvor saves property which has no/little value but where he prevents environmental damage. This second remedy is exactly what has been achieved with the 1989 Salvage Convention as discussed earlier.

Therefore Judge Clement ultimately held⁴⁶ that the Court would not adopt a rule of compensation for averted liability. Since the 1989 Salvage Convention and LOF 1990 rejected the idea of liability salvage, the Court declined to follow the dicta of *Allseas Maritime*, which suggested that salvors should be compensated for avoided liability. Instead the Court applied the rules as set forth in the Salvage Convention and LOF.

According to Newell D. Smith's summary⁴⁷ of *Ocean Services Towing and Salvage v. Brown*⁴⁸ the Court did take into consideration the salvor's out-of-pocket expenses for oil pollution containment equipment, but declined to address the issue of whether an exception exists to the principle that the salvaged value serves as a ceiling for the maximum allowable total award, if the salvor's actions avoided the owner's potential exposure to liability for such environmental damage. The reason why the Court did not address the issue was because it could not be proven on a preponderance of probabilities that damage to the environment would have occurred had it not been for the salvor's successful salvage operation.

A leading case on the topic of environmental salvage is the case of *Semco Salvage & Marine Pty.Ltd v Lancer Navigation (The "Nagasaki Spirit")*⁴⁹ and therefore the case requires a more detailed discussion.

Semco Salvage & Marine Pty.Ltd v Lancer Navigation (The "Nagasaki Spirit")

The *Nagasaki Spirit*, partly laden with a cargo of crude oil, collided with a container ship, *the Ocean Blessing*. As a result of the collision some of her cargo was released into the sea and it caught fire, and later the *Ocean Blessing* also caught fire. The salvor agreed to salvage the *Nagasaki Spirit* and

⁴⁵ 809 F.Supp 440, 441

⁴⁶ 809 F.Supp 440, 443

⁴⁷ Newell D. Smith 'The Law of Salvage' (1994) available at <http://www.mikkelborg.com/files/salvage.pdf>

⁴⁸ 810 F.Supp. 1258

⁴⁹ [1997] 1 Lloyd's Rep. 323

her cargo in terms of Lloyds Open Form 1990 and later also agreed to save the *Ocean Blessing* in terms of the same form. A number of salvage tugs fought the fires and eventually extinguished it. There was a concern that the *Nagasaki Spirit* might cause pollution and spill the rest of her cargo, as a result she was ordered away and anchored, after which a ship-to-ship transfer of her cargo was done. She was eventually towed to a shipyard. The claim by the Salvor under consideration was a private claim based on Lloyds Open Form of 1990 and the Convention was relevant only because it has been partly inspired by L.O.F of 1980 and the Convention is now incorporated into L.O.F of 1990.

The first arbitrator who heard the matter was more concerned with a traditional salvage reward under article 13 and when it came to the calculation of special compensation he placed emphasis on the fact that salvors need to be encouraged. He therefore found that a professional salvor who had done his best but had failed to prevent or avert damage to the environment must be encouraged to continue with the business of salvage.

In this case the salvage resulted in benefit for the environment and therefore the arbitrator was required to apply the strange formula for enhancement of the “expenses” contained in article 14.2. This enhanced reward exceeded the salvage award under article 13, and this special compensation was the cause of the dispute. The first arbitrator awarded a considerable amount of special compensation to the Salvors based on their prevention of damage to the environment.

The Appeal Arbitrator disagreed with the findings of the first arbitrator. According to him the traditional salvage award awarded under article 13 was too low and he increased the traditional salvage award. Regarding special compensation he found that even though the definition of expenses is broad, it is only still a definition and it does not support the first arbitrator’s finding of a fair rate at such a level that it encourages profit for salvors, which would be akin to salvage remuneration. He held that “[t]he ability in certain cases to obtain an award of special compensation is an additional incentive, but it is a fall-back or safety net. It is only awarded when it is greater than any award recoverable for salvage. It follows that in any case where the services are substantial the salvage award ought to be more, and where possible significantly more, than what would be awarded by way of special compensation, unless the amount which can be awarded for salvage is constrained by the value of the salvaged fund.” He made adjustments to the award which had the effect of the amount calculated in terms of article 14 not exceeding the award in terms of article 13, with the result that no special compensation was awarded.

The Salvor appealed, and the Court of Appeal dismissed the appeal as it agreed with the Appeal Arbitrator’s arguments that no award of special compensation was payable, to which the Salvor appealed to the House of Lords and judgment was delivered by Lord Mustill.

Lord Mustill held that the Law of 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 nothing. The only success that was important was the success in saving the ship, cargo and associated interests. The reason for this was that the owners of these interests had no financial stake in the protection of anything else.

If a salvor in his salvage operations performed a valuable service to the community, he would recover nothing or only very little if the ship was lost or greatly damaged in the end. Something more was required to serve as an incentive to salvors to keep in existence for the protection of natural resources in peril. Some new form of remuneration had to be devised.

According to Lord Mustill this solution which was devised in 1980 was not meant to create a new form of "environmental salvage" independent of traditional salvage. He stated that the service rendered by the salvor effectively remains services rendered to ship and cargo and the award is paid by those who own the ship and cargo. The sum payable to the salvor may however contain an additional element to reflect the risk that was posed to the environment by the salvaged vessel. This element is an element of "special compensation" and it is based on the salvor's expenses. It may furthermore be enhanced in certain cases where the salvage operations have actually prevented environmental damage or substantially lessened such environmental damage.

Lord Mustill further held that "[t]he assessment of salvage has never been an exact science, and the embellishment added by article 14.3 is well known to have been an uneasy compromise. At all events, although the possibilities are not exhausted by the two alternatives quoted they are, in my view, more plausible than any others."

According to Lord Mustill, salvors do not need a profit element as a further incentive to continue with salvage operations and he states that the principle of "no cure – no pay" is no longer the case, because even if the salvor receives little or no award for traditional salvage under article 13 the salvor will, in the event of having successfully protected the environment, be awarded a multiple of his direct costs and the indirect standby costs. Thus a lack of success no longer means "No pay," and the provision of this safety net does in the Court's opinion suffice to fulfil the purposes encouraging salvors and providing them with incentives.

4. THE INTERNATIONAL SALVAGE UNION'S APPROACH TO THE ISSUE OF ENVIRONMENTAL SALVAGE

It is the ISU's viewpoint that all the measures set out above provide little financial reward or encouragement to salvors for protecting the environment against damage caused by pollution.⁵⁰ The ISU makes the alarming statement that “[t]he salvage industry is ailing. There is less work than before. Fewer casualties are obviously a good thing for the shipping industry as a whole, but there will always be accidents and unless a viable salvage industry is maintained they will not be dealt with properly.”⁵¹ They feel that salvors will always be needed as they have an important role to play in protecting the environment by preventing oil leaks, containing the remaining cargo in the ships and avoiding expensive clean ups. Therefore they should be encouraged by receiving proper remuneration for all their efforts, failing which will cause salvors to try and earn an income elsewhere. And that is a point that should not be reached, because without salvors, the environmental damage that would then occur is unimaginable. A solution by way of compromise will have to be reached before such a point is reached.

5. SUGGESTED SOLUTION TO THE PROBLEM BY THE INTERNATIONAL SALVAGE UNION⁵²

According to the ISU the solution to the problem is the creation of an award for environmental salvage as a separate award independent of the traditional salvage award. If a salvor protects the environment, he should be generously rewarded for that service by the entities that benefited from it. Arbitrators should then assess the environmental award in the same way as they currently assess the traditional salvage award, taking into account new criteria that must be set.

This brings to the forefront precisely what new criteria should be considered when assessing an environmental salvage award? The ISU maintains that the same criteria as set out in article 13.1 of the Salvage Convention should be considered, with the exception of the criteria in article 13.1(a). According to them the criteria in article 13.1 (a) should be substituted by two new elements namely (i) “the salvage award to be paid by the ship and cargo under the traditional salvage award” and (ii) “the amount of the limit of liability of the appropriate pollution liability convention(s)”.

⁵⁰ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage*

⁵¹ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage: Conclusions*

⁵² International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage: A Possible Solution*

5. WHO SHOULD BE HELD LIABLE FOR PAYMENT OF ENVIRONMENTAL AWARDS, WERE IT TO BE RECOGNISED, WHAT WOULD THE EFFECT THEREOF BE AND HOW CAN IT BE ACHIEVED⁵³

In the ISU's viewpoint the environmental award should be paid by those who benefit from it and who exactly benefits, depends on the type of the vessel and the cargo she is carrying.

If the pollution is caused by a laden tanker, the ship owners and their third party liability insurers (P & I Clubs) benefit (as they would have been liable in terms of the Civil Liability Convention of 1992) and oil companies benefit (as they would have been liable in terms of the 1992 Fund Convention). According to the ISU the solution is then that the environmental award should be shared by the CLC and the Fund Convention, pro-rata to their maximum liability prescribed in the relevant Conventions.

If a vessel carrying hazardous cargo causes the pollution, liability is governed by the HNS Convention of 1996 (modelled on the CLC Convention) and the Fund Convention. The HNS Convention creates two funds based on (i) the tonnage of the ship and which is payable by the owner and (ii) another fund which is payable by the cargo receivers who pays any excess subject to an overall limit. Again the ISU's solution is that the environmental award should be paid by both funds pro rata to their individual maximum liability.

If the pollution is caused by bunkers of ships not covered in the first two mentioned above, the Bunker Convention of 2001 imposes strict liability on shipowners for resultant damage, but they can limit their liability in accordance with the 1976 Limitation Convention. An environmental award should then be covered by this fund. Where damage is caused by a vessel that carries oil and hazardous cargo in the ship and the bunkers, all the funds should contribute to the environmental award pro-rata to their maximum liability prescribed in the relevant Conventions.⁵⁴

What could be problematic is that in the event of the funds being exhausted, the salvor would only share pro-rata with other claimants against the fund. Again the ISU suggests that the solution to this problem would be to provide that the "liability of these funds for any environmental salvage should be in addition to any liability they may have to claimants who have suffered damage."⁵⁵

If the above environmental salvage award is accepted as an award independent of the traditional salvage, it would mean that the factor set out in article 13 of the Salvage Convention of 1989 would

⁵³ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage: Who Pays, Ramifications and How can a Change be Achieved*

⁵⁴ Ibid

⁵⁵ Supra 53

have to be removed from the assessment of the traditional salvage award, because if not, it will result in “double dipping.” Another consequence of such acceptance of environmental salvage would be that article 14 of the Salvage Convention of 1989 will be less relevant and less applied, for salvors would be more fairly and better rewarded.⁵⁶

The ISU suggests two ways in which to achieve widespread acceptance of the concept of environmental salvage.⁵⁷

Firstly they maintain that it could probably be achieved by making the appropriate amendments to the world’s principal salvage contract, LOF, as it is a “willing and useful vehicle for change”. Despite this not requiring a change in the law of Salvage, it will probably require a change to the Liability Conventions, which according to them would be just as difficult to achieve as changing the law of salvage.

The more viable way for achieving acceptance of environmental salvage suggested by the ISU, is that governments must accept initial responsibility for the cost of environmental salvage if it was reasonable expenses incurred in order to prevent environmental damage, the test then being one of reasonableness. The government can then recover the cost of the environmental salvage from the existing liability funds without amendments to the conventions being necessary. The benefits of this would be that (i) existing conventions would not need to be amended; (ii) such a system will be easy to introduce; (iii) salvors will be encouraged to be more available for salvage operation to those countries who allow environmental salvage claims; (iv) a fund would be provided against which an authority granting a place of refuge, could claim salvage; and (v) it would lessen the use of emergency rescue vessels at great expense.

The ISU appropriately states that even though governments would have to initially fund environmental awards, in the long run they will be better off as salvors would lessen the pollution that would occur and their coastlines will ultimately be better protected.

7. CONCLUSION

Exactly what contribution Salvors make in protecting the environment can be illustrated by some statistics. When looking at these statistics it is quite clear that the amount of environmental harm prevented by the salvage industry is considerable. According to a survey conducted by the ISU, in 2003 its members carried out 218 salvage operations. As a result of these salvage operations, more than 605,000 metric tons of potential pollutants were recovered. This amount more

⁵⁶ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage: Ramifications*

⁵⁷ International Salvage Union (ISU) Policy Paper 2: *Rewards for Environmental Salvage: How can a change be achieved*

specifically included 71,833 tons of fuel oil; 303,486 tons of crude oil; 61,177 tons of chemicals; and 169,181 tons of other pollutants. It is correctly stated in my view that “this total dwarfs the 37,000 tons of crude oil that was spilled when the EXXON VALDEZ grounded in Alaska in 1989, or the 77,000 tons lost when the PRESTIGE sank of the coast of Spain.”⁵⁸

One can only remember the absolute horror of the damage caused to the environment by the abovementioned two casualties. The mess caused by these oil spills cost billions of dollars to clean up and should not be forgotten, especially not by the governments and the Courts of the coastlines that suffered the damage. If this damage is compared to the damage that would have been caused by the pollutants recovered by the salvage industry, had they not been recovered, the horror of what the implications could have been should motivate governments and courts to compensate salvors for environmental salvage. It should serve as a reason in itself for the acceptance of environmental salvage.

As illustrated in this discussion, the few practical problems that might arise as a result of accepting the idea of environmental salvage, can easily be overcome with the solutions suggested, if only the involved parties are willing to compromise. Introducing an award for environmental salvage independent of traditional salvage, is not impractical, and can be achieved, if only the relevant parties are willing not just to acknowledge the major role played by the salvage industry in protecting the environment, but are also willing to adequately compensate them for that role. If according to the salvage industry the current measures of compensation, as set out in this paper, are insufficient and does not encourage them to continue with their salvage operations, another remedy **must** be devised so as to not lose the major role player in environmental protection.

No problems in respect of the legality of introducing such an award can really be foreseen, because from the developments discussed herein and from the changing approach of the Courts, it is clear that the idea of environmental salvage is slowly but surely gaining acceptance and might only be a step away from actually being introduced as a separate ground for claiming a salvage reward. The principle of “no cure – no pay” no longer applies and no longer prohibits awards for salvage where the salvor was unsuccessful in salvaging property.

In this case, the law can be changed and should be changed, even if it takes years. In the long run, all of us benefit from a cleaner environment.

⁵⁸ Interest of *Amici Curiae* available at <http://www.marinecharter.org/pdfs/NVBrief.pdf>. The statistics mentioned in this paragraph was also obtained from the same report.

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