

Maritime Law of Salvage and Adequacy of Laws Protecting the Salvors' Interest

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ABSTRACT: Under maritime law salvage is encouraged and given priority with respect to salvage awards in many aspects such as maritime liens, leniency on salvors' negligence, right to limit liability and to the extent of departure from "no cure no pay principle" in the case of unsuccessful salvage but have saved the environment. These laws in favor of salvage affecting the salvors are not straight forward and have been criticized in some cases. This paper discusses the relevant maritime law principles under each circumstances criticism they face and legal remedies available to safeguard the interest of the salvors and access the adequacy of maritime laws protecting the salvors interest.

1 INTRODUCTION

Salvage covers section of maritime law under assistance at sea and in port. Modern principles of maritime salvage law established in the early part of 19th century but the maritime salvage practice existed long before that time. Modern day maritime salvage constitutes on three basic principles: when there is an imminent danger at sea concerning a marine peril; the salvor voluntarily render a service and; upon successful completion he will be awarded the salvage taking into consideration all the relevant factors including the value of the property and the degree of risk he has taken. Having its roots in the law of equity¹⁸ maritime salvage bears very peculiar set of laws quite different from others. The well known principle "no cure no pay" is one of the yard stick taken in determining the salvage award but exceptions to this also have developed that is to considers further recovering some of expenses that have reasonably incurred in cases of contribution to marine environmental protection even without the success of salvaging the whole property. Salvors priority in maritime liens, leniency on negligence observed by the courts, allowed for limitation of liability by existing limitation liability convention and even departure from the no cure no pay principle were allowed for salvors by 1989 International Salvage Convention but, these are not without controversies. Alt-

hough today salvage mainly depends upon 1989 International Salvage Convention its interpretation depends upon the national courts thus need the understanding of the interpretation under varies jurisdictions specially the English and the American. English law and the Lloyds Open Form played a historical role in developing salvage law on the other hand American salvage law have also shown steady progress.

2 LEGAL INSTRUMENTS

Many of the countries are signatories to 1989 International Salvage Convention. About 58 contracting states representing 47% of the world shipping tonnage including Poland, UK, USA, China, and Greece are some of the countries. On the other hand Lloyd Open Form has incorporated the provisions of the convention to be applied contractually; therefore, even a non contracting state will abide by salvage convention's terms and condition contractually provided the parties have signed the relevant Lloyd Open form. By keeping the tradition paramount Salvage Convention described the reward shall be fixed with a view to encourage salvage operation¹⁹ in ad-

¹⁹ Article 13 (1) The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below
(a) the salvaged value of the vessel and other property;
(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

¹⁸ Set of legal principles under common law tradition

dition to these the Limitation Liability Convention has the provisions for salvors to limit their liability²⁰ and also 1993 International Convention on Maritime Liens and Mortgages in force ratified by few countries reestablishes that salvage claim having priority above all other claims. On the domestic laws the English Supreme Court Act²¹ consider the salvage claims attached to a maritime lien and the English courts recognizes the priority available to a salvage claim above all other maritime lien claims.

Although the United States of America has not ratified the Limitation Liability Convention it has its own statute on limitation they, instead of tonnage limitation take into consideration the value of the salvaged ship and the freight to be earned and base on these values the salvor may limit his liabilities to the salvaged.

Although English law widely in use other common law countries and USA can also be considered for forum for handling salvage claims. Lloyd Open Form has provisions for English law but it can be altered to suit the circumstances.

3 SALVAGE CLAIMS AND LIENS

English law embraces the salvage claim as a maritime lien as described under English Supreme Courts Act states that under any contract in relation to salvage services whether covered under salvage convention or not. Under the English law salvage awards are given priority on liens. They consider among other things damage done by a ship, seamen's wages, masters wages and disbursements. The courts will determine the distribution of the funds in order of their priorities²² but there are no strict rules of rankings.

1 Admiralty Marshal's cost

2 Claimant's cost

3 Maritime Lienees

4 Mortgagees

5 Other in rem claimants

- When there are several salvors the last in time take priority.
- When there are different category of maritime liens the salvor take priority

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

(d) the nature and degree of the danger;

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

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

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

(h) the promptness of the services rendered;

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

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

²⁰ 1976 Limitation Liability convention Article 1

²¹ Section 20 (2) of English Supreme Courts Act 1981 (SCA1981)

²² SCA 1981 S21(6)

- When a claimant has a damage lien subsequent to lien that preserved the ship (salvage) the damage lien will take priority over salvage²³.

English law considers the extinction of maritime liens under the following circumstances: Immunity; delay of law suit; upon providing financial security by the defendant; establishment of limitation fund; waiver; destruction of property; Judgment on liability; Judicial sale and; sister ship arrest.

1993 International Convention on Maritime Liens and Mortgages came into force in Sept 2004. Few countries have so far ratified this convention they are: Indonesia, Ecuador, Estonia, Nigeria, Monaco, Russia, St Vincent and Grenadians, Spain, Tunisia, Ukraine and Vanuatu.²⁴ This convention contained the provisions in relation to maritime liens similar to that have generally accepted by major maritime nations and it also has the provisions that each state under its own law may grant maritime liens on a vessel to secure claims other than those generally recognized.²⁵

Maritime liens on salvage claims are less controversial and, without conflict with other laws. They are recognized equally by international conventions and national laws.

4 SALVORS RIGHT TO LIMIT LIABILITY

Prior to 1976 Limitation Liability Convention, salvors had no right to limit their liabilities in cases of negligence or misconduct which blame on salvor their liabilities were unlimited for example the Tojo Maru Case in 1972²⁶.

1976 Limitation of Liability Convention, states that ship owners and salvors as defined, may limit their liability in accordance with rules of this convention for claims in respect of loss or damaged to property occurring on board in relation to salvage operation²⁷ subject to certain exceptions such as gross negligence if proved limitations will not be allowed. This new development was a direct conse-

23 The case "Veritas" 1901 the vessel was safely towed by the salvors but unfortunately her engine failed and a second salvor assisted her to prevent her from sinking. During the operation the vessel came into contact with landing stage belonging to the Dock Board. The Board used its statutory powers to remove the vessel and claim against the ship in this case priority was given to the Board's claim against the ship before considering the salvage awards.

24 Article 4 (1) (c) Maritime Liens - Claim for reward for the salvage of the ship

Article 5 - Priority of maritime liens; Article 15- Conflict of laws ; Article 16 - Extinction of maritime liens because of time limit

25 Article 6 -Other maritime liens Each State Party may, under its law, grant other maritime liens on a vessel to secure claims...subject to condition which include time bar and rank below Salvage lien.

26 Tojo Maru case salvors were not allowed to limit liability under the old system existed before 1976 Limitation of liability Convention.

27 Article 2 (1) (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbor works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting ...

quence of 1972 Tojo Maru case. Limitation Liability Convention, ratified by 52 States about 50% of world shipping tonnage and its latest protocol with higher amount of limits has ratified by 37 states about 42 % of the world shipping tonnage. 1996 protocol to Limitation Liability Convention provides an enhanced compensation regime compare to the former. USA is not a party to these conventions but they have their own statutory provisions.

Inclusion of salvors for limitation of liability is a recent development in favor of their rights.

5 NEGLIGENCE OF SALVORS

Salvor taking the risk to save the property and during the salvage operation accidents occur due to salvors negligence or misconduct the question is to what extend these negligence or misconduct affect the salvage award and whether the ship owner can make a counterclaim for damages. Decisions on these were difficult because of the extra ordinary nature of the job and involvement of the high risk.

Although both UK and USA are the signatories to the 1989 Salvage Convention the interpretation of provisions on salvors negligence by the courts have been different. Under the convention the salvor shall owe a duty to the owner of the vessel or other property in danger to carry out the salvage operations with due care also to exercise due care to prevent minimize damages to the environment and take assistance when reasonably requested²⁸. The salvor's negligence may also deprive him of whole or part of the award²⁹ the convention is silence on how they are measured and, it has left the decisions to national courts.

The case "Alenquer" courts description to what extend the leniency can be granted has a notable value. A brief outcome of the English law cases described below.

Case 1947 The Delphinula (Court of Appeal)

28Article 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.

Article 8 has been incorporated in LOF 2000 cl J

The consequences of salvors misconduct is laid down in conventions article 18

29 Article 18 - The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

The salvor guilty of misconduct reduction in salvaged value due to his misconduct was taken into consideration and also a counter claim or independent action.

Case 1955 The Alenquer

No salvage award was made but the damage claim had to be paid in full the judge adhered to the general principle and described why leniency cannot be applied here " when the their behavior is criticized contrary to public interest, the result of the courts decision as such to discourage salvors of taking unnecessary risks"

Case 1972 Tojo Maru³⁰ (House of Lords)

It was held that when the salvage operation is successful but there is negligence of the salvor in the case of successful salvage the owners can counterclaim damages from the salvor and the measure of damage is the difference between undamaged value of the ship base on "no negligence" of the salvor and damaged value of the ship and, the salvage award to be calculated base on undamaged value of the ship.

Finally the salvage award and owners counterclaim will set off against each other the balance will be due owner or salvor. It was also held that when there is no success in salvage there can be no counter claims as well.

This case has the highest authority the House of Lords however its calculation of the award taking into account undamaged value of the ship although there were "no negligence" has created a friction between it and "no cure no pay" principle. There are also other concerns on application of this case law to cases with two or more salvors with only one at fault and how it can affect the one who is not at fault.

With regard to Limitation of liability of the salvors the Court of Appeal in the above case held that limitation of liability can be applied before setting off owners counter claim.

When considering the salvors' negligence or misconduct the American method is different from the English courts. They categorize them as distinguishable damages and independent damages. Distinguishable damages means they inherit in the situation for example the Tojo Maru case was a distinguishable damage and the independent damages means they were caused independently by the salvor any counter claim for damages the independent damages may only consider. Limitation of liability under the American statute is the damaged

30 1972 Tojo Maru collision accident in Persian Gulf salvors agreed to tow her to Kobe during the salvage operation, the salvors negligence caused an explosion and heavy damages to the ship. They however were successful in towing her to final destination. The owners counterclaim damages from salvor due to negligence.

value of the ship plus the freight in the course of being earned.

Under the Lloyd Open Form 2000 the salvor is required to have observed best endeavors³¹, there has been no definition of best endeavors it is commonly used in industry and widely known therefore best endeavor means Standard of reasonableness is that of a prudent sailor acting properly in the interest of salvaged property.

The law with respect to negligence and misconduct of salvors their interpretations by English Courts are conflicting and the American Courts interpretations much preferred with respect to preservation of salvors rights.

6 SPECIAL COMPENSATION

Special compensation was introduced in 1989 Salvage Convention to compensate the salvors if their salvage operation has contributed to protection of the marine environment even though they could not earn full or any salvage award.

Under the 1989 Salvage Convention if a salvor has carried out salvage operation in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn reward under article 13 he shall be entitled to special compensation from the owner of the vessel equivalent to his expenses as defined in article 14. This appear to be a another step to encourage the salvor for saving the environment but the calculation of the salvage expenses without considering the profits or bonuses turn out to be an unpractical one. The principle issue in the Nagasaki Spirit case was concern with the definition of expenses in Article 14(3) and, in particular, that part of it which refers to "fair rate for equipment and personnel actually and reasonably used in the salvage operation...³²". The question was whether is it permissible to include a market or profitable rate, or whether the salvor was entitled to solely to reimbursement of expenditure. House of Lords delivering the judgment held that fair rate under article 14(3) meant fair rate of expenditure and did not include any element of profits. This draws strong reaction from the salvors and after lengthy discussions the marine salvage community arrived with the solu-

tion. This was a set of clause giving the basis for calculation of special compensation including bonuses under the guide lines set up by International Salvage Union (ISU) and clarifying other relevant criteria known as Special Compensation and Indemnity Clause (SCOPIC). The solution provided by SCOPIC is, the parties to a salvage contract may agree to incorporate SCOPIC into any LOF contract by reference, therefore contracting out of Article 14 of the Convention. Such contracting out is allowed under article 6 of the Salvage Convention³³. The ship owners P&I clubs have agreed through a code of conduct (a gentlemen agreement between P&I Clubs and ISU) to provide financial security required for SCOPIC compensation by a standard guarantee form known as ISU5.

Special compensation available to salvors under the convention have faced with problems in practical application, SCOPIC so introduced is a contractual obligation and not a statutory one. Salvage convention compensation limits to apply if SCOPIC is not agreed.

7 SUMMARY AND CONCLUSION

Conflict of law with respect to maritime liens on salvage less likely priority for salvor has maintained throughout, but uncertainty exists in the English law with respect to claims on salvors negligence American law appears to be more settled on this regard. Limitation of liability conventions applied to salvors but under American law different limits will consider since they are not party to international Limitation Liability Conventions. Special compensation applicable to salvor under the 1989 Salvage Convention not practical therefore contracts shall insert SCOPIC clause in order for the salvor to get reasonable rate including bonus.

The adequacy of the laws protecting the salvors interest today depends upon international conventions and national laws. The existing set of maritime salvage laws covering the interest of the salvors with respect to limitation of liability and priority in maritime liens appeared to be adequate, with regard to judgment on salvors misconduct and negligence the existing laws are not universal therefore inadequate. Similarly, special compensation provisions which are available under the salvage convention do not encourage the salvor and seems inadequate unless SCOPIC is inserted.

31 LOF 2000 cl A

32 14(3) Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1 (h), (i) and (j).

Article 13 the Criteria for fixing the rewards

(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.

33 Article 6 - Salvage contracts. 1. This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication

REFERENCE LIST

- [1] 1989 International Salvage Convention
- [2] 1976 Limitation of Liability Convention
- [3] 1996 Protocol to Limitation of liability Convention
- [4] Limitation of Liability Act USA 46 U.S.C SS181 -196
- [5] 1993 International Convention on Maritime Liens and Mortgages.
- [6] English Supreme Courts Act 1981.
- [7] Lloyd Open Form 2000
- [8] International Salvage Union Form ISU5 and SCOPIC clause