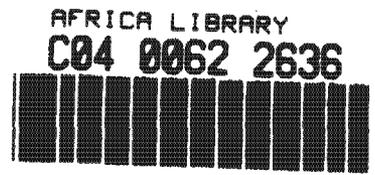


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LEGAL ENCOURAGEMENT FOR SALVAGE

An Examination upon South African, English and German Salvage Law

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A Dissertation submitted to

The Faculty of Law, University of Cape Town

in partial fulfilment of the requirements for the degree of Master of Law

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*...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, ...*

(From the Preamble of the International Convention on Salvage, London, 1989)

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Christian Kaestner

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CHAPTER I

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INTRODUCTION

The scope of this dissertation is an examination of the different aspects of legal encouragement for salvors in English, South African, and German salvage laws. For this purpose, attention will be given to the questions of whether the present salvage laws in England, as the „mother“-country for maritime law, in South Africa, and in Germany encourage modern salvors to undertake expensive and risky salvage operations or whether the mentioned legal systems dampen the salvor’s motivation to salvage life and maritime property out of distress situations. Then, the present salvage laws - including its recent developments - will be examined and a comparison between English, South African, and German salvage laws will be made. Differences in law, wherever they occur, will be spotted and annotations will be made. The results of this examination will be summarised in the final conclusions of Chapter VII.

But before dealing with the different aspects of legal encouragement for salvors and its examination, it is important - for a better understanding of the matter - to have a short overview of the historical background, the principles, and the present economic importance of salvage as well as the sources of salvage law.

1.) HISTORIC BACKGROUND

Salvage has ancient origins and has been practised as long as there are ships playing the seas. Traditionally, salvage is perceived as the raising of sunken ships from the sea-bed or, more romantically, as diving operations on fabulous wrecks in search of treasure hoards from the Spanish Main or the Roman Empire¹. Herodius, for instance, who lived 460 BC, describes a Greek diver salvaging treasures from a Persian vessel wrecked off Mount Pelion. In more recent history, the unsuccessful attempts by William Tracey in 1783/1784 and by the brothers John and Charles Deane from 1836 to 1839 to raise the wreck of the English warship *HMS Royal George* which sank off Spithead on 29 August 1782 with the loss of more than 900 lives, is also a notable example of an early marine salvage operation.

The origins of salvage law can be traced back to the Rhodians of 1000 BC. The Rhodians granted fixed awards to salvors of gold and silver which were depending on the depths of the wreck². The law of salvage developed - on the one hand - out of the need to encourage seafarers to assist each other in times of trouble and distress and - on the other hand - to give some sort of orderly legitimisation to needs which might otherwise in earlier times have led to theft, extortion, and piracy. In Germany, for instance, ship, cargo, crew, and passengers were without rights in an emergency situation and distress at sea till the 18th century. Occasional attempts to change this situation by legal prohibitions³ failed in general. The inhabitants of the German coast, who often were themselves attacked and robbed by foreign

¹ Williams, *Salvage! Rescued from the Deep*, page 4

² According to the Rhodian „salvage law“ the salvor was entitled to 1/3 of the salvaged value at a depth of 8 fathoms and to 1/2 of the value at 15 fathoms

³ eg.: The attempt by Friedrich II in 1220 („Authentica Navigia“)

seafarers and pirates, made ships strand by setting false beacons to „enforce“ their „law of the beach“⁴. Saved lives and other items from the stranded ship became property of these „salvors“. But often there was not a saved life; shipwrecked persons were killed more often in these days. Even the feudal lords of the German coast line were involved in wrecking and were claiming this „law of the beach“ for their own account. In the churches of some German coast line communities people were praying for a „blessed beach“ till the late 18th century. In the 19th century the situation at the German coast fortunately changed: The „law of the beach“ became an offence and was penalised as beach robbery. But the most important step in this new direction was the foundation of the „Deutsche Gesellschaft zur Rettung Schiffbrüchiger“ (The German rescue organisation [„society“] for people in distress) in 1865, which is a private body, and financed by donations. This organisation - which still dominates the SAR⁵ service along the German coast - was a central factor of the beginning development of the modern German salvage law.

The British coast line, during the Middle Ages, was even worse: misleading fires made hundreds of ships wreck on the rocks. In England, the first salvage legislation was enacted in 1353 by King Edward III. In 1753, King George II made it a felony to put out false beacons and to „beat wound or obstruct people trying to escape from foundering vessels“. But in spite of this wrecking at the coast continued. British Admiralty Courts started to develop case law on salvage. Eventually, it was the underwriters of Lloyds which put

⁴ Rüßmann/Rabe. Seehandelsrecht, page 903

⁵ SAR = Search and Rescue

the brakes on the wreckers by demanding some incentive to encourage people to save ship, cargo and lives, because the underwriters had to bear most of the financial brunt of the wrecker's exploit. In 1890 the first „Lloyd's Form“ - a salvage agreement and forerunner of the Lloyd's Open Forms which are in world-wide use today - was signed between a salvor and the Committee of Lloyds for a salvage operation in the Dardanelles.

In South Africa, the development of the salvage law is very closely related to the developments in England, because of South Africa's affiliation to the British Empire⁶. In the last decades of this century, South Africa developed its „own“ salvage law⁷, but the influence and the applicability of English law in South Africa is still remarkable.

The maritime law now allows persons who render useful services to maritime property at risk to claim a reward. As a legal principle, this is very unusual indeed. In general, voluntary action will go legally uncompensated, certainly unrewarded⁸. But the legal regime of salvage rewards has worked: it has been incentive enough to encourage seafarers to assist each other in distress and it has helped to eliminate the wrecking at the coast lines. Nowadays, the principles of salvage - including the salvage reward incentive - are well established world wide and recognised by national law and international conventions⁹.

⁶ See - for instance - the English Colonial Courts of Admiralty Act, 1890, which is still applicable in South Africa and which had the following intention: „*An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom*“

⁷ See the South African Wreck and Salvage Act No. 94 of 1996 & the Admiralty Jurisdiction Regulation Act No. 105 of 1983

⁸ Chorley & Giles, *Shipping Law*, page 427; R. Grime, *Shipping Law*, page 276

⁹ 1.) The Brussels Salvage Convention, 1910; 2.) The London Salvage Convention, 1989

2.) PRINCIPLES OF SALVAGE

There are certain international accepted principles for the salvage. Salvage is governed by **equity**. For instance, inequitable rewards for salvage, even if agreed in advance, may be brought in line by the courts¹⁰. Further, there is the principle of **public policy**¹¹, which is described in a judgement¹² from Dr. Lushington¹³ as follow:

Salvage is not governed by ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and maritime commerce. All owners of ships and cargo and all underwriters are interested in the great principle of adequate remuneration being paid for salvage service; and none more interested than the underwriter of the cargo.

In the second half of this century this principle of public policy became a central issue under a new aspect: As huge oil tankers in distress polluted and damaged vast areas of the sea shores and of the maritime environment, the group of interests benefiting from a successful salvage operation grew. Such disasters no longer just involved ship owners, cargo owners, and underwriters but also the peoples living at or living from the polluted shore and costal waters as well as the authorities of the state concerned. Thus, salvage is more than ever a matter of public policy. All parties which may or might be involved in salvage operation are concerned that there is enough

¹⁰ See: *The Medina*, (1876), 1PD

¹¹ Kennedy, Law of Salvage, para. 1113

¹² See: *The Fusilier*, (1865), Lush 341

¹³ Dr. Lushington, who was a judge at the Admiralty Court in England from 1838 to 1867, developed the modern Admiralty Jurisdiction in the UK and was the leading capacity in salvage law at that time

encouragement for salvors (also legal encouragement) to make them deploy a world-wide salvage fleet which is able to render assistance to all kinds of ships wherever they might get into a distress situation.

Another central matter of salvage is that a salvage service must consist of certain **classical elements**. These basic elements are:

- Voluntariness
- „Maritime property“
- Danger
- Success.

A reward is payable to those who render voluntary services to maritime property in danger if those services are successful in assisting in the preservation of that property. Unsuccessful salvage, however meritorious, however expensive, will get nothing: „**no cure, no pay**“. The following essential ingredients are, therefore, present in all salvage operations and claims: A salvage service of a particular nature; successfully rendered to salvaged maritime property¹⁴ (perhaps coupled with the saving of life) in a danger situation at sea; giving rise to a salvaged fund from which an award is made; to a voluntary salvor whose conduct does not vitiate or reduce the reward.

3.) ECONOMIC IMPORTANCE OF SALVAGE

The economic importance of salvage has to be seen under different aspects:

¹⁴ Note: Article 1 (c) of the International Convention on Salvage, 1989 has enlarged the meaning of „property“ which can be salvaged in a salvage operation; see Appendix I for the wording of the provision

First of all, the **value of the property** which might be subject of salvage is increasing. Ships are becoming bigger and bigger and are carrying more and more goods per vessel. Thus, the CMI¹⁵ reported in 1984 that *the values of ships and cargo have increased drastically in a heavy concentration of risks on fewer keels*. An example makes it clear: A VLCC¹⁶ tanker has a value of - let's say - US \$ 90 million, her cargo of 270,000 tonnes of crude oil today has a market price around US \$ 60 millions. Thus, the salvaged fund of the VLCC would likely to be US \$ 150 millions. Also the statistics of the ISU¹⁷ bear out this development: In 1995, for instance, the total values salvaged were at an all time high of US \$ 1,744 million, just eclipsing the previous record year of 1992 (there the salvaged values had been US \$ 1,692 million); in 1986 the total salvaged values has been US \$ 997 million (including the Gulf War cases)¹⁸.

A 11 Years Statistical Survey of Salvage Remuneration (Source: ISU¹⁹):

Year	Total salvaged Values	Total salvaged values incl. Gulf War cases
1986	US \$ 839 millions	US \$ 997 millions
1987	US \$ 709 millions	US \$ 1,146 millions
1988	US \$ 739 millions	US \$ 912 millions
1989	US \$ 1,017 millions	US \$ 1,187 millions
1990	US \$ 1,175 millions	US \$ 1,331 millions
1991	US \$ 1,228 millions	US \$ 1,247 millions
1992	US \$ 1,692 millions	
1993	US \$ 1,506 millions	
1994	US \$ 1,185 millions	
1995	US \$ 1,744 millions	
1996	US \$ 1,159 millions	

¹⁵ CMI = Comité Maritime Internationale (perhaps the most significant non-UN body in the maritime area which is an organisation composed of national maritime law associations)

¹⁶ VLCC = Very Large Crude Carrier

¹⁷ ISU = International Salvage Union (the most important salvors lobby organisation)

¹⁸ ISU Bulletin 15 of 1996, page 14

¹⁹ ISU Bulletin 15 of 1996, page 14 together with ISU Bulletin 16 of 1997, page 14

Another aspect are the costs of modern salvage operations. Salvage techniques have improved substantially and have become far more capital intensive. The innovative high-tech engineering equipment required for salvage and offshore operations in the late 20th century (diving bells, diving suits, submarine decompression or recompression chambers, specialised submersible search crafts to locate even the most minute items in the deepest waters, etc.) is comparable with that developed for the space exploration industry²⁰. Only professional salvors can afford to buy this expensive salvage equipment and to keep it in stock. No wonder that big salvage concerns such as *Smit*²¹ and *Wijsmuller*²² had to face lean times in the recent past although marine accidents hit the news headlines often enough to give the impression that there was and is a lot of money (salvage rewards) to earn. The reality seems to be that there are now, perhaps, too many salvage companies chasing too few salvage contracts with too little return. Klaas Reinigert, group director of Antwerp-based professional salvor *Scaldis*²³, describes the present situation as follow: „We go after a casualty like a pack of wolves because we are so hungry“. With so much capital unprofitably tied up in idle, expensive equipment and with no prospect in sight of improvements to the salvage terms, these is a constant threat of rationalisation, retrenchment and bankruptcy²⁴.

²⁰ Williams, *Salvage! Rescued from the Deep*, page 16

²¹ *Smit Take BV*, a dutch based professional salvage operator (Zalmstraat 1, 3016 DS Rotterdam) and member of the International Salvage Union (ISU)

²² *Wijsmuller Salvage BV*, Netherlands (Sluisplein 34, PO Box 510, 1970 AM IJmuiden), ISU member

²³ *Scaldis Salvage & Marine Contractors NV* (Noordelaan 133 Bus 31, B-2030 Antwerp, Belgium) is a professional salvage company and member of the International Salvage Union (ISU)

²⁴ Williams, *Salvage! Rescued from the Deep*, page 16

Last but not least, the **environmental aspect** is gaining more and more importance. Salvage operation often do not only secure maritime property but also the maritime environment from heavy pollution. Tanker accidents are causing oil spills and this oil (or other dangerous substances) may pollute the maritime environment for extended periods. In 1995, salvors recovered 2,088,000 tonnes of pollutants (1,978,000 tonnes of crude oil; 54,000 tonnes bunkers; 56,000 tonnes hazardous chemicals)²⁵. In 1996, the recovery of pollutants amounted to 1,866,930 tonnes²⁶. It is inconceivable what 2 million tonnes of such cargo can cause in pollution and remedial costs, if one has in mind the *Exxon Valdez* spill²⁷ where (only!) 37,000 tonnes caused an oil pollution at the Alaska's south coast and caused clean-up costs and claims reaching US \$ 5 billion.

All these facts show the high stakes, which are involved in salvage, and the importance and necessity for professional salvage. Everybody benefits from the prevention of oil spills; owners of ship and cargo and underwriters²⁸ do even more so from successful salvage. Thus, legal systems have to take into account the overriding importance of salvage and have to induce salvors to invest in expensive equipment. The legal encouragement for salvage is an essential matter in this respect.

²⁵ ISU Bulletin 15 of 1996, page 4

²⁶ ISU Bulletin 16 of 1997, page 4

²⁷ The *Exxon Valdez*, a VLCC tanker went aground in 1989 and caused an oil spill in Alaska's Prince William Sound; Lloyd's List, 21. June 1997, „Exxon states case on Alaskas spill damages“

²⁸ The big insurance companies are, apparently, more than willing to underwrite it to make salvage worthwhile!

4.) SOURCES OF SALVAGE LAW

Salvage - because of its outstanding importance - is subject to International Conventions and domestic law in England, South Africa, and Germany. Perhaps, the most important source of salvage law nowadays is the International Convention on Salvage (IMO, London, April 28, 1989); also known as the 1989 London Salvage Convention which came internationally into force in August 1996 (see Appendix I). Forerunner of this 1989 Salvage Convention was the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels, September 23, 1910 (The Brussels Salvage Convention, 1910) which - as its most significant short-coming from today's point of view - did not contain any legal regime to provide an incentive for salvors in oil pollution casualties. Reason for this short-coming was, of course, that in 1910 the maritime pollution problem was not yet a matter of importance, because oil pollution disasters - as we know them today - did not occur these days. The biggest achievement of the 1989 London Salvage Convention, in comparison to the 1910 Brussels Salvage Convention, is the incorporation of the „special compensation“ regime²⁹ to encourage salvors to undertake risky salvage operations in pollution casualties³⁰.

Aside from these two Salvage Conventions, which are probably the central source of international salvage law, there are also other international conventions and other international agreements which may touch the salvage topic:

²⁹ Article 14 of the 1989 London Salvage Convention

³⁰ See: Chapter VI: Oil Pollution Casualties

- The Convention on Limitation of Liability for Maritime Claims 1976 which gives the salvor the right to limit his liability and which - on the other hand - excepts the claim for salvage from limitation³¹. The forerunner of this Convention was the Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels, 1957).
- As regards the state's powers to intervene in maritime pollution disasters, there is the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 („The 1969 Intervention Convention“).
- In the law of carriage there are the Hague-Visby-Rules (The 1924 Hague Rules as amended by the Brussels Protocol 1968) and the Hamburg Rules³² which exempt the carrier from certain liabilities if he becomes a salvor during the voyage³³.
- The Liens and Mortgages Convention of 1967 which confirms and codifies the maritime lien regime of the salvage claim.
- Last but not least, the United Nation Convention on the Law of the Sea of 1982 (UNCLOS III) which is now international Law. England, Germany, as well as South Africa comply with its provisions - for instance - with Article 98 UNCLOS III.

This list might not be complete, but it illustrates how far the legal ramifications of a salvage operation might spread.

³¹ Article 3 (a) of the 1976 Limitation Convention; See: Chapter III: Limitation of the Salvage Claim

³² Hamburg Rules = United Nations Convention on the Carriage of Goods by Sea, 1978; Note: Apparently, the Hamburg Rules are internationally not very accepted and it seems that they will fail to become a world-code for carriage

³³ See: Article IV (4) Hague-Visby-Rules; Article 5 (6) Hamburg Rules

Of quasi „conventional importance“ is Lloyd’s Open Form (LOF)³⁴ which is a standard salvage agreement form; its latest edition LOF 95 of 1995. The LOF contract is in operation world-wide and it is used in most of the professional salvage operations. The significance of LOF³⁵ is that many of its provisions later have become part of international salvage law or were reason for new developments in salvage law³⁶. Therefore, the Lloyd’s Open Form can also be seen as a source of salvage law.

a.) English law

The English salvage law is presumably the world’s most important body of national salvage law. One reason for this certainly is a historical one: the history of salvage law was actually written in England. More important, though, is an other reason: the most common salvage standard agreement form is the Lloyd’s Open Form³⁷ which is used in the majority of professional salvage operation and which chooses „the law of England, including the English law of salvage“³⁸ as the *lex contractus* although the English salvage law is not necessarily the most advantageous for salvors. In the United Kingdom, the central salvage law can be found in the Merchant Shipping (Salvage and Pollution) Act of 1994 which has incorporated the 1989 London Salvage Convention. Furthermore, provisions, belonging to the

³⁴ See: Chapter V, 2.) Lloyd’s Open Form & Appendix II, 1.) LOF 95

³⁵ In particular the 1980 edition of the Lloyd’s Open Form (LOF 80)

³⁶ For instance, LOF 80 introduced for the first time in its Clause 1 (a) a „safety net“ provision called „enhanced award“ for salvage in oil pollution casualties. The „safety net“, in an amended form, became conventional law in the 1989 London Salvage Convention in Article 14 and is now called „special compensation“; see also: G. Brice, *Maritime Law of salvage*, 4-218

³⁷ See: Chapter V, 2.) Lloyd’s Open Form

³⁸ See: Clause 1 (g) of Lloyd’s Open Form 1995 (LOF 95)

English salvage law, can be found in the Civil Aviation Act (1949) and the Larceny Act (1916) which are the relevant statutes exercising control over the execution of salvage work and the disposal of salvaged property. Last but not least, salvage might also touch the Protection of Wrecks Act (1973) as far as wrecks of scientific interest are concerned and the Protection of Military Remains Act (1896) as far as military wrecks are involved. England has also enacted most of the above mentioned international conventions: The Convention on Limitation of Maritime Claims (London, 1976) was directly enacted through the Merchant Shipping Act; the 1969 Intervention Convention was enacted in the Prevention of Oil Pollution Act, 1971; the Hague-Visby-Rules were enacted in the United Kingdom in the Carriage of Goods by Sea Act, 1971.

b.) South African law

The salvage law of South Africa is closely related to the English salvage law. Besides the fact that South Africa was part of the British Empire the reason for this close relationship is Section 6 (1) of the South African Admiralty Jurisdiction Regulation Act No. 105 of 1983 (AJRA) which reads:

6. Law to be applied and rules of evidence.

(1) Notwithstanding anything to the contrary in any law or common law contained a court in the exercise of its admiralty jurisdiction shall

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before commencement of this Act, apply the law which the High Court of

Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

This means for South African courts that in regard to salvage³⁹ English law, as it was in force up to the 1st of November 1983 including all judgements, applies provided that there are no deviant South African codes, provisions or judgements in regard to the matter concerned. Therefore, one has to look at South African salvage law first and - in case the matter in question is not regulated by South African laws or decided by South African courts - secondly one has to look at English law prior to the 1st of November 1983. In regard to salvage law, South Africa has regulated a sizable amount on its own. The central salvage provisions are now contained in the new Wreck and Salvage Act No. 94 of 1996 which gave „force of law“ to the 1989 London Salvage Convention in the „Republic“⁴⁰ and which provides also „interpretations“ for some legal terms in the Salvage Convention⁴¹. Other salvage related provisions can be found in the South African Merchant Shipping Act No. 57 of 1951 (MSA) which - for instance - contains, in its recently amended Section 261, provisions in regard to limitation. Section 261 MSA is based on principles taken from the Convention Relating to the

³⁹ See: Section 2 (2) of the Colonial Courts of Admiralty Act, 1890 together with Section 6 of the Admiralty Court Act, 1840

⁴⁰ See: Section 2 (1) of the Wreck and Salvage Act

⁴¹ Note: South Africa has not, and cannot, accede to the 1989 Salvage Convention because the Wreck and Salvage Act overrides the Convention in some respects. See: Section 2 of the Wreck and Salvage Act; see also Chapter VI, 2.) Article 14 and the *Nagasaki Spirit* litigation

Limitation of the Liability of Owners of Seagoing Ships (Brussels 1957). The above mentioned 1969 Intervention Convention⁴² was enacted in the Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981 (PACOPOSOA). The Hague-Visby-Rules apply also in South Africa, because they were enacted in the Carriage of Goods by Sea Act No. 1 of 1986⁴³.

c.) German law

The basic German salvage law is codified in the §§ 740 - 753 HGB⁴⁴ which are based on the old International Salvage Convention of 1910. It seems that Germany intends to adopt the new International Convention on Salvage, 1989, which shall then replace the provisions based on the 1910 Convention. But there are also other provisions in the German Commercial Law Code (HGB) which are related to salvage: For instance, § 486 (1) HGB, which enacts directly the Convention on Limitation of Liability for Maritime Claims of 1976. Germany is party to the Hague Rules, but has not yet ratified the Hague-Visby-Rules⁴⁵. Further, Germany is also a party to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 („The 1969 Intervention Convention“); for

⁴² The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969

⁴³ See: Section 1 of the South African Carriage of Goods by Sea Act

⁴⁴ Deutsche Handelsgesetzbuch (German Commercial Law Code)

⁴⁵ Rüßmann/Rabe, Seehandelsrecht, § 662 E. 3. a)

Germany, the provisions of the Intervention Convention came into force on the 5th of August 1975⁴⁶.

⁴⁶ According to the announcement from the 6th of August 1975 (BGBl. [German Government Gazette] II, page 1196)

Note: In Germany, the „Wasserhaushaltsgesetz“ (WHG) [German Water Management Law Code] which is applicable for all „German waters“ (rivers, lakes and also the territorial sea) contains provisions in regard to water pollution (eg.: §§ 3 (1) & 32b WHG) and liability for water pollution (§ 22 WHG) and provisions giving the authorities supervision powers (§ 21 WHG)

CHAPTER II

University of Cape Town

LEGAL REGIME OF THE SALVAGE CLAIM

Salvage is - in short terms - the voluntary rescue of maritime property from danger at sea⁴⁷. The salvage claim is a special feature of maritime law and is quite different from restitution. It involves an entitlement to a reward: much more than a mere reimbursement of expenses. The salvage claim arises as soon as the salvage service is successfully performed.

1.) SPECIAL LEGAL REGIME

Salvage is a peculiarity of maritime law⁴⁸. There are two legal aspects which seem to be an encouragement for a salvor:

- the lien status of the salvage claim and
- the ranking of the salvage claim in comparison to other claims against the ship.

But there are also other aspects of interest which slightly differ in the three legal systems examined here.

a.) Salvage might give rise to a claim based upon a **maritime lien**⁴⁹. The lien status is probably the most significant legal aspect of the salvage claim.

⁴⁷ See: Chapter I, 2.) Principles of Salvage; Hill, Maritime Law, page 313

⁴⁸ R. Grime, Shipping Law, page 277

⁴⁹ See: Chorley & Giles, Shipping Law, page 72; Kennedy, Law of Salvage, para. 1254; Article 4 (1) (v) of the Liens and Mortgages Convention of 1967; Article 4 (c) of the International Convention on Maritime Liens and Mortgages, 1993

In English and in South African⁵⁰ law, the maritime lien gives the salvor the right to seize the salvaged ship, or more generally the salvaged maritime property, against the unpaid salvage reward. A lien in general law is a rather limited right over someone else's property: namely to retain possession of that property, usually to secure a claim. Liens generally require possession before they come into effect⁵¹. But a maritime lien differs in one very important respect: A maritime lien does not require possession for its creation⁵². Thus, as soon as the salvage reward is due to the salvor, he has got a maritime lien over the salvaged maritime property whether he is (still) in possession thereof⁵³ or not⁵⁴. Furthermore, the maritime lien „travels with the ship“ through changes of ownership⁵⁵ which means that the enforcement of the lien is not dependent on the personal liability of the present ship owner for the salvage claim. The salvor can enforce this right by arresting the ship in a court proceeding *in rem*. Through this arrest the salvor „gains back the possession“ over the salvaged maritime property. Furthermore, a maritime lien is one of those liens which gives the right not only to retain possession until the owner pays off the debt, but also to realise what is owed from the property⁵⁶. In other words, in case the owner of the salvaged vessel fails to effect payment of the salvage reward or of the security, the salvor can satisfy

⁵⁰ In respect of „all claims and demands whatsoever in the nature of salvage“ (Section 6 of the Admiralty Court Act, 1840) South African Courts apply English law (Section 6 (1) Admiralty Jurisdiction Regulation Act No. 105 Of 1983 together with Section 2 (2) of the Colonial Courts of Admiralty Act, 1890)

⁵¹ Like the repairman's lien over the repaired goods which are still in his possession; or the innkeeper who has a lien over a guest's luggage against payment of the bill.

⁵² R. Grime, Shipping Law, page 15

⁵³ The salvor is in possession of the maritime property during the salvage operation.

⁵⁴ eg: The salvor „releases“ the salvaged ship (let her sail) so that she can continue her voyage to the port of destination.

⁵⁵ Chorley & Giles, Shipping Law, page 70; Hill, Maritime Law, page 143

⁵⁶ Hill, Maritime Law, page 143: One of the two definitions of a maritime lien: „(1) a right to a part of the property in the res;“

the debt owed to him (salvage reward) by selling the vessel through court sale. The money realised from that sale, though, is the upper limit of what the salvor can claim against the ship.

In **German** Law there is a statutory provision in respect of the salvage lien: § 752 HGB⁵⁷. Interesting to note, that German law grants different „types“ of liens in respect to the salvaged ship⁵⁸, on the one hand, and in respect to the other salvaged property⁵⁹, on the other. The lien in regard to the vessel - including her gear and equipment⁶⁰ - is a maritime lien accordingly to the Liens and Mortgages Convention of 1967⁶¹ which was enacted into German law⁶². This „type“ of lien is very closely related to the English and South African maritime lien.

In respect to the other salvaged property - for instance cargo - the salvor has an ordinary general lien according to the rules contained in § 1257 and §§ 1204 following of the German Civil law Code (BGB) with the only particularity of a higher ranking (§ 752a HGB⁶³). This lien is a possessory lien and does - in general - not travel through changes of ownership. Thus, salvors under German law would be well advised not to release salvaged cargo without obtaining sufficient security for their salvage reward.

⁵⁷ HGB = **H**andels **G**esetz**b**uch (German Commercial Law Code)

⁵⁸ See: § 752 (1) HGB (German Commercial Law Code)

⁵⁹ See: § 753 (2) & (3) HGB (German Commercial Law Code)

⁶⁰ See: § 756 (1) HGB (German Commercial Law Code)

⁶¹ Note: The Liens and Mortgages Convention of 1967 was never brought into force in English law

⁶² Rüßmann/Rabe, Seehandelsrecht, Vor § 754 III. B. 1.

⁶³ HGB is the German Commercial Law Code

The London Salvage Convention of 1989⁶⁴ ensures that the legal status of the maritime lien for salvage rewards is preserved. Article 20 of this Convention reads:

(1) Nothing in this Convention shall affect the salvor's maritime lien under any international convention⁶⁵ or national law.

This Article shows that the international maritime community has recognised the existence of the special legal regime of maritime liens and its outstanding importance for salvage. Furthermore, it was accepted by the 1989 Salvage Convention that the „maritime lien“ for salvage may slightly differ in its legal nature from nation to nation⁶⁶.

b.) Another aspect of the salvage claim is its **ranking** among other claims against the *res* (ship). The salvor might benefit from this legal aspect, if his salvage claim is high in ranking.

In **South Africa**, the ranking of the salvage claim is regulated in Art. 11 Admiralty Jurisdiction Regulation Act (AJRA)⁶⁷. Thereafter, the salvage claim ranks third behind preservation and sale costs (Art. 11 (4) (a) & (5) AJRA) and behind prior possessory lien claims (Art. 11 (4) (b) & (5) AJRA) and on the same level with claims for wreck removal and general average (Art. 11 (4) (c) (vi) & (5) (b) AJRA). Important to note, that Section 15 (2)

⁶⁴ International Convention on Salvage, 1989

⁶⁵ Note: There is an International Convention on Maritime Liens and Mortgages (1993) in existence. Article 4 of that Convention reads as follow: „(1) Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel: (c) claims for reward for the salvage of the vessel“

⁶⁶ In regard to the differences in national laws in respect of the maritime lien see:

Rußmann/Rabe, Seehandelsrecht, Vor § 754 V. (page 954 - 956)

⁶⁷ Admiralty Jurisdiction Regulation Act No. 105 of 1983

of the Wreck and Salvage Act provides that *the payment of salvage in respect of the preservation of life shall have priority over all other claims for salvage.*

Under **English** Law, the salient feature is that there is no general statutory provision⁶⁸ setting out the priorities for maritime claims⁶⁹. The ranking of maritime claims seems to be generally based on case law⁷⁰ and is therefore quite vague. But in principle, the salvage lien has priority over

1. earlier salvage,
2. earlier damage,
3. earlier wages,
4. earlier claims to forfeiture by the Crown,
5. subsequent possessory liens,
6. necessities, and
7. mortgages⁷¹.

The salvor's maritime lien ranks first in this row because without the salvage service there would be no funds preserved to serve the other maritime liens. If a reward for life salvage is due such salvage remuneration is payable as a priority to all other claims for salvage⁷².

The ranking of the salvage lien in **German** law is regulated in §§ 761, 762 & 754 German Commercial Law Code (HGB) as regards the maritime lien

⁶⁸ Note: Sometimes statutes give harbour authorities an express right to detain vessels for a variety of causes - for instance: damage to quays

⁶⁹ Chorley & Giles, Shipping Law, page 78

⁷⁰ See for instance: The *Lyrma* [1978] 2 Lloyd's Rep. 27

⁷¹ Hill, Maritime Law, page 149

⁷² G. Brice, Maritime Law of Salvage, 2-217; Kennedy, Law of Salvage, para. 260

against the salvaged ship and in § 752 a HGB⁷³ in regard to the general lien over the other salvaged property (e.g. cargo)⁷⁴. The salvage lien (maritime lien) against the ship ranks before all other ordinary liens (non-maritime liens)⁷⁵. Compared to other maritime liens it ranks fourth behind maritime liens in respect of seamen's wages, of port- harbour- and other waterway fees or pilotage dues, and of loss of life or personal injury or loss of or damage to property which occur during operation of the ship⁷⁶ provided the above mentioned maritime liens arose after the salvage maritime lien. If the salvage maritime lien is the last which arose, it ranks first according to § 762 (2) of the German Commercial Law Code (HGB). The provision of § 762 (2) gives the salvor ample security: his claim for salvage ranks first if he just has finished the salvage operation. The reason for this high ranking is - of course - that all other maritime liens could have become useless if the salvor had not saved the ship - for instance - from sinking⁷⁷. This first ranking is an effective contribution to the salvor's salvage motivation. The salvor's maritime lien expires after one year⁷⁸.

§ 752 (1) HGB states that the salvage lien against the other salvaged property shall rank ahead all other „general“ liens which exist in regard to the salvaged maritime property. Also the general lien over the salvaged property expires after one year.

⁷³ German Commercial Law Code (Handelsgesetzbuch)

⁷⁴ Note: There is a difference between the maritime lien against the ship and the possessory lien against the „other property“; see: Chapter II. 1.) a.) Liens status (above)

⁷⁵ § 761 HGB

⁷⁶ § 754 (1) HGB

⁷⁷ Rüßmann/Rabe, Seehandelsrecht, § 762 B.

⁷⁸ § 759 (1) HGB

c.) In English and South African Law the salvage reward is calculated in regard to the value of the salvaged maritime property, which includes the ship (as well as the wreck), the cargo and also **freight at risk**⁷⁹. A high value of the salvaged maritime property gives rise to a high remuneration⁸⁰. The fact that according to English and South African provisions freight at risk is also included in the calculation of the salvaged value constitutes an incentive for salvors, because in general it enlarges the value of the salvaged property. The fund out of which the salvage reward will be paid is bigger.

In German Salvage Law, the salvage calculation of the reward is also based upon the value of the salvaged property⁸¹ (ship or wreck, cargo and other assets). But the fund out of which the salvage reward will be paid does not include the freight at risk⁸². The salvaged freight will be considered only to determine the amount of the salvage remuneration⁸³, but will not be part of the salvage fund. Thus, the fund for the salvage reward might be lower than under South African or English law. But the fact that the „German salvage fund“ is smaller than the fund under English and South African salvage laws will only be a disadvantage for the German salvor if the fund is not sufficient to meet the complete claim for salvage.

⁷⁹ Hill, *Maritime Law*, page 314; Art. 1 (c) & Art. 13 (1) (a) of the London Salvage Convention, which is part of South African Law, with an even wider meaning of maritime property

⁸⁰ See Article 13 (1) (a) of the 1989 London Salvage Convention: the value of the ship and other property is the first mentioned criteria to fix the salvage reward

⁸¹ This is stated in § 745 (2) HGB; but note: the value of the salvaged property is a criteria for fixing the reward which ranks behind other criterias - for instance - skill and effort of the salvor, the degree of danger of the salvage operation, etc. (§ 745 (1) HGB); see also: BGH VersR 58, page 511

⁸² Rüßmann/Rabe. *Seehandelsrecht*, § 740 A.

⁸³ Rüßmann/Rabe. *Seehandelsrecht*, § 740 B 3.

d.) Another aspect having influence on the salvage fund is the extent of the meaning of the term **maritime property**.

Under German law, the salvage claim can only arise in respect of the salvaged ship and all other things on board (e.g. cargo, passenger luggage)⁸⁴

In the United Kingdom - which has enacted the 1989 London Salvage Convention - the meaning of „property“ is, according to Article 1 (c) of the 1989 Salvage Convention, as follows:

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

This meaning of „property“⁸⁵ is apparently wider. Cargo gone overboard a ship or fallen out of an aircraft or goods washed into the sea by a spring tide can be subject of salvage.

South Africa, too, has enacted the 1989 Salvage Convention, but additional interpretations and definitions were provided for the Convention⁸⁶. In Section 2 (6) of South Africa's Wreck and Salvage Act it is provided:

(6) Notwithstanding anything to the contrary in article 3 or any other article of the Convention, a subject of salvage shall include any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of seabed mineral resources.

Thereafter, the mentioned platforms and drilling units are subject to salvage. This is a further amplification of the meaning in comparison to the legal position in England in respect to „maritime property“, because Article 3 of

⁸⁴ § 740 HGB (German Commercial Law Code); Rüßmann/Rabe, Seehandelsrecht, § 740 B. 1.

⁸⁵ G. Brice, Maritime Law of Salvage, 3-04 - 3-13

⁸⁶ Sec: Section 2 of the Wreck and Salvage Act No. 94 of 1996

the 1989 Salvage Convention⁸⁷ excludes these facilities (platforms and drilling units) from the applicability of the Convention. The South African legal understanding of maritime property, compared to the other legal systems referred to above, seems to be the widest.

2.) LIFE SALVAGE

The legal regime of life salvage is different from the legal regime of salvage of maritime property. In general, there is no claim for a salvage reward against the rescued person. This particularity about life salvage is regulated, in quite similar terms, in English, South African, and German salvage law. But there are also differences:

In **English law**, if only human lives are saved from a ship in distress, and nothing else, than the salvor is not entitled to a salvage reward⁸⁸. As mentioned above, the salvor cannot claim a salvage reward for life salvage from the saved person concerned. This is stated in Article 16 (1) of the 1989 London Salvage Convention which is now part of English salvage law and which reads:

(1) No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law in this subject.

But the Convention provides space for national provisions. Such a provision is Section 544 of the British Merchant Shipping Act 1894 (as amended).

⁸⁷ See: Appendix I

⁸⁸ Note: In general, the rescuer of life might be entitled to recover his expenses (See: Lord Cullen, „The rescuer and the law“, Safety at Sea, December 1992, page 23). Contrary to a salvage reward, these expenses do not have any element of profit.

Section 544 provides for payment by the ship owner or cargo owner of the property saved of a reasonable amount of salvage where services are rendered in saving life from such vessel. If there has been saving of lives at some point of time in the salvage operation, then ship and/or cargo-owners as owners of the salvaged properties may find themselves liable to pay life salvage, but where life only is salvaged there is no binding legal obligation to pay⁸⁹. At least, the salvor might be entitled to reclaim for his expenses for the life salvage⁹⁰, which - on the contrary of a salvage award - do not contain any element of profit or salvage incentive.

In **South Africa**, the Wreck and Salvage Act of 1996 has adopted the London Salvage Convention of 1989 and its provision in regard to life salvage, including Article 16 (1), are now part of South African Law. Thus, there is no salvage claim against the saved person. But there is an interesting national regulation in Section 15 of the Wreck and Salvage Act which provides:

15 Salvage payable for saving life

(1) Salvage shall be payable to the salvor by the owner of the ship or the owner of any wreck, whether or not such ship or wreck has been saved, when services are rendered in saving life from any ship.

(2) Notwithstanding anything to the contrary contained in the Convention, the payment of salvage in respect of the preservation of life shall have priority over all other claims for salvage.

⁸⁹ G.Brice, Maritime Law of Salvage, 2-217, 2-220, 2-221; Hill, Maritime Law, page 315; see also: *The Cargo ex Schiller* (1877) 2 P.D. 145; 36 L.T. 714; Asp.M.L. 439, C.A.

⁹⁰ Lord Cullen, „ The rescuer and the law“, Safety at Sea, December 1992, page 23

(3) When the ship or wreck is lost or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister⁹¹ may, in his or her discretion, award to the salvor, out of moneys made available by Parliament for the purpose, such sum as he or she thinks fit, in whole or part satisfaction of any amount of salvage so left unpaid.

Under South African law, the salvor of human life only can claim salvage against the ship owner whether some maritime property was salvaged or not and on top of that - if the fund for salvage is too small or non-existent⁹² - he might have a (at least a legal) chance to receive money from the South African Minister of Transport.

Also under German salvage law saved persons do not owe any salvage reward to their life salvors. This is stated in § 751 III HGB⁹³. There is a legal instrument in the German Civil Law Code, which provides that the saved person, or the ship owner of the vessel on which the saved person has stayed before the life salvage, has to pay the salvor's expenses⁹⁴, which the salvor has necessarily incurred because of the life salvage operation. In this regard, the German High Court (BGH)⁹⁵ has held⁹⁶ that this legal instrument from

⁹¹ According to Section 1 of the Wreck and Salvage Act „Minister“ means the Minister of Transport

⁹² For instance, because all maritime property was lost at sea

⁹³ HGB = German Commercial Law Code (*Handelsgesetzbuch*)

⁹⁴ This legal instrument in the German Civil Law Code (BGB) is called „Geschäftsführung ohne Auftrag“ (Doing someones business without being authorised for doing so) and the claim for payment is regulated in §§ 683, 679 BGB (German Civil Law Code)

⁹⁵ BGH is the German High Court (*Bundes Gerichtshof*)

⁹⁶ BGH, NJW 77, 530

the German „Land“ Law is applicable to maritime life salvage. Thus, in the case decided the owner of the ship, from which life was salvaged, had to pay to the life salvor compensation for a dinghy, which was used and finally lost in the life salvage operation.

As a result one can say that South African law provides the biggest incentive for life salvage, because the salvor of life is entitled to claim a salvage reward not against the saved person but against the ship owner. Under English and German salvage law, there is only a comparatively small amount due to the life salvor (expenses) or there is no claim at all. The reason for this might be an ethical one: First of all, life salvage should not only be a legal obligation⁹⁷, but much more an ethical or moral duty⁹⁸. It has its roots not only in Christian religion (Love your neighbour as you love yourself⁹⁹) but also in the spirit of human society. Secondly, rewarding life salvage would mean that one would value human life in terms of „hard cash“, which is, on the one hand, impossible and, on the other hand, highly immoral¹⁰⁰. On the other hand side, there seems to exist a real danger that English and German salvors rank life salvage far behind salvage of maritime property - a quite unsatisfactory result¹⁰¹. To reduce this danger, there has to be a certain

⁹⁷ See for instance the South African Wreck and Salvage Act 94 of 1996 where it is stated in Sec. 6 (Duty to render assistance to persons in danger at sea): *(1) The master of a ship shall, so far as he or she can do so without serious danger to his or her ship or to any person on the ship, render assistance to every person who is found at sea in danger of being lost, even if that person is a citizen of a country at war with the Republic or with the country in which the ship is registered.*

Article 10 of the London Salvage Convention, 1989 reads: *(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.*

⁹⁸ Kennedy, Law of Salvage, para. 437

⁹⁹ Bible, Matthew 22 verse 39

¹⁰⁰ see also: Hill, Maritime Law, page 314

¹⁰¹ See also: Rüßmann/Rabe, Seehandelsrecht, § 751 A. 1.

additional encouragement for the salvor to rescue human life. This additional encouragement is given to the life salvor as soon as, in addition to the salvaged human life, there is also salvaged maritime property. As will be shown at a later stage¹⁰², the amount of the salvage reward will take into account that there was also life salvage and the life salvor is entitled to a fair share of the payment awarded¹⁰³. Thus, in certain circumstances there is also a financial incentive for life salvage. Another „legal encouragement“ for the life salvor is based on provisions like Article 10 of the London Salvage Convention (1989) establishing a legal obligation of a ship’s master for life salvage. The Article reads:

(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

(2) The State Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.

Furthermore, in national law one might find criminal provision to „enforce“ this duty of rendering assistance at sea. In Germany, for instance, it is § 323c StGB (German Criminal Law Code), which penalises in general „omission of assistance“ if someone fails to help in a distress and danger situations although help is necessary and reasonable to perform without being dangerous for the helping person¹⁰⁴. The provision is also applicable in cases

¹⁰² Chapter IV, 1.), b.) Life salvage particularity

¹⁰³ see Art. 16 (2) London Salvage Convention of 1989

¹⁰⁴ § 323 c StGB Strafgesetzbuch (German Criminal Law Code) reads in German:

Unterlassene Hilfeleistung

Wer bei Unglücksfällen oder gemeiner Gefahr oder Not nicht Hilfe leistet, obwohl dies erforderlich und ihm den Umständen nach zuzumuten, insbesondere ohne erhebliche eigene Gefahr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.

where there is no rendering of assistance to human life „in danger of being lost at sea“¹⁰⁵. An infringement will be punished with imprisonment of up to one year or a fine. Interesting to note, that neither South African nor English law contain such a criminal law provision¹⁰⁶.

3.) ENTITLEMENT FOR THE SALVAGE CLAIM

It seems simple: The wider the meaning of salvor or - in other words - the more persons entitled to claim a salvage reward, the higher is the incentive for salvage. Therefore, it has to be examined what individual or group of people have the right to claim salvage¹⁰⁷, what is the legal position of being a salvor and its protection¹⁰⁸, and what contractual regulations might influence the entitlement of claiming salvage and to perform salvage operations¹⁰⁹.

a.) Who can claim salvage?

A central issue of legal encouragement for salvage is the question what individual or what groups of persons are entitled to claim for salvage. One might assume that the salvor, the person who actually performs the salvage operation, is the only one who is entitled to claim a salvage reward. In fact, it is not that easy. There are a lot of question involved: Is every „rescuer“ also a „salvor“? Who is in fact „the salvor“? Is every salvor entitled to claim for a reward?

¹⁰⁵ Rüßmann/Rabe, Seehandelsrecht, § 751 A. 1.

¹⁰⁶ Lord Cullen, „The rescuer and the law“, Safety at Sea, December 1992, page 22

¹⁰⁷ See: a.) Who can claim for salvage

¹⁰⁸ See: b.) Preferred salvage rights

¹⁰⁹ See: c.) Contractual salvage clauses

As it will be shown, there are „rescuers“ at the margin of being a „salvor“, and the particular circumstances decide whether these „rescuers“ will participate in the privilege to claim for salvage or whether they are not entitled to do so.

Salvor. A salvor is someone who undertakes a salvage operation. 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 water whatsoever*“¹¹⁰.

Under common law in **England** and **South Africa** a claimant for salvage must prove the following essentials¹¹¹:

- that the property saved was in danger;
- that services were in fact rendered;
- that the services were voluntary;
- that the services rendered led to the saving of the property;
- that compensation depended upon the saving of the property;
- that the property saved was subject to salvage¹¹².

In **German** law these requirements similar are regulated in §§ 740 following HGB¹¹³.

But not only the persons performing the salvage operation in regard to the specific maritime property are salvors, but also those persons acting in the

¹¹⁰ Definition from Article 1 (a) of the International Convention on Salvage, 1989 (London Salvage Convention)

¹¹¹ See: Bamford, *The Law of Shipping and Carriage in South Africa*, page 68; Hill, *Maritime Law*, page 314

¹¹² See, for instance, Article 3 of the 1989 London Salvage Convention

¹¹³ German Commercial Law Code (Handelsgesetzbuch)

„background“ or in the „run-up“ to a salvage operation. The „background“ acting people are - for instance - the owner of the salvage vessel who puts his valuable asset at risk in an salvage operation. To encourage those owners they are entitled for salvage as well. People acting in the „run-up“ of an salvage operation are, for example, surveyor of or the operator of a radio station receiving and re-transmitting a distress signal from a stricken ship. They share the salvage reward according to equity principles and in regard to the importance of their participation in relation to the whole salvage operation¹¹⁴. There is a wide range of people who might be salvors entitled to claim salvage (or a portion thereof); all the interests involved in a salvage operation will normally be entitled to a reward.

Disposed / Superseded Salvor. A disposed or superseded salvor is an earlier salvor who was disposed / superseded by a later salvor. Unless dispossession of the earlier salvor by the later salvor was due to some „reasonable“ cause, a claim based on wrongful dispossession may prove successful. If such reasonable cause is not factual, then it must at least be evident. A salvor who is dismissed or superseded should not forcibly resist but should rely on the assistance of a court¹¹⁵. The courts, as *The Loch Tulla* case¹¹⁶ and *The Unique Mariner* case¹¹⁷ show, tend to protect the superseded salvor by giving him the right to claim compensation.

¹¹⁴ See § 744 (I) & (II) HGB in regard to German law; R. Grime, Shipping Law, page 291-293 in regard to Common Law; Article 13 of the 1989 Salvage Convention

¹¹⁵ Kennedy, Law of Salvage, para. 641; Hill, Maritime Law, page 346

¹¹⁶ *The Loch Tulla* (1950), 84 Ll.L.Rep. 62

¹¹⁷ *The Unique Mariner* (1979), 1 Lloyd's Rep. 37

In the *Loch Tulla* case, a steam trawler of limited tonnage attempted, initially unsuccessfully, to refloat the *Loch Tulla* in an Scandinavian harbour at a time of very adverse weather. The trawler by to wait for another tide. In the meanwhile, the master of the *Loch Tulla* and an insurance representative engaged a larger vessel which successfully refloated the *Loch Tulla*. The court took the view that the first assisting vessel should not go unrewarded and emphatically stated that the law of salvage was to be interpreted, in this particular set of circumstances, as supportive of an act of assistance, even if unproductive of benefit. The reward should include an element of compensation for the loss which a salvage claimant has sustained in being prevented from attempting to complete the service which he originally agreed to render.

In the *Unique Mariner* case two salvage tugs were engaged - by mistake or misunderstanding - for the same salvage operation. The first tug arriving was engaged by the master of the ship in distress under a LOF¹¹⁸ salvage contract. It then was superseded by a second tug which was engaged by the ship owners. The Admiralty Court judge helped the disposed first salvor and held:

- Salvors engaged without any express agreement are entitled to salvage remuneration for services actually rendered before being superseded and compensation for lost opportunity to complete their

¹¹⁸ LOF = Lloyd's Open Form (eg.: The Lloyd's Open Form 90 is a standard form of salvage agreement, approved and published by the Council of Lloyd's)

services but not to the full extent comparable to damages for breach of contract or duty on a *restitutio in integrum* basis.

- The Lloyd's Open Form (LOF) did have a term implied into it that the owners of the property being saved should not act in such a way as to prevent the salvors from performing the services which they had undertaken so long as they were willing and able to do so; this should include not to dismiss or supersede them.

Thus, the dispossessed salvor's claim for some remuneration (whether it is a part of the salvage reward or whether it is a claim for damages) is recognised by the courts. His legal position¹¹⁹ as the „first acting salvor“¹²⁰ is well protected under English law and South African law¹²¹.

Under German law the salvor enjoys the same protection: A salvor, who was first on the scene of distress and has started to perform the salvage service, keeps his entitlement for the full salvage reward if a second salvor dispossesses or supersedes the first salvor against his will¹²². Insofar, the German law follows the English legal position¹²³.

Crew. All examined legal systems are unanimous in that the crew of a ship in distress is basically exempted from becoming a salvor and claiming a salvage

¹¹⁹ See: R. Grime, *Shipping Law*, page 300

¹²⁰ See: *Union-Castle Steamship Co v. Herbst* (1901) 18 SC 332 at 337: The first salvor will normally be more favourably considered

¹²¹ It seems that South Africa will apply English law in this respect (Section 6 (1) of South Africa's Admiralty Jurisdiction Regulation Act)

¹²² Rüßmann/Rabe, *Seehandelsrecht*, § 744 C. 2. a); SeeSchG VersR 83, 1058, 1059

¹²³ See: SeeSchG VersR 83, page 1059 where the judge quotes Chorley & Giles, *Shipping Law*, page 267: „... the first salvor who take possession have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the face of manifest incompetence ...“

reward for „salving their own ship“¹²⁴. The main reason for this principle seems to be, that „salvage services“ - or more correctly: „rescue services“ - rendered by crew members are special efforts, which are already compensated within their seamen's wages. The other, no less important, reason is that it has to be avoided that crew members intentionally cause a distress situation to become salvors. Thus, German law is strict in providing that the crew cannot claim for salvage¹²⁵. This codified provision might be too inflexible in to special circumstances and in the face of equity. In this question, English salvage law is more flexible: In principle, a crew member is not entitled¹²⁶, but there may be an exception if the crew member did more for the safety of his ship than required by his employment contract or if the vessel, upon which he had served, has been finally abandoned he then shall be entitled to claim for salvage¹²⁷. The first situation may be very difficult to prove, because of uncertainties in regard to the extent or scope of the obligations of a seafarer under his employment contract. The second variant of the final abandonment has been already subject to court decisions¹²⁸. Thereafter, the requirements for the final abandonment are very strict: The vessel upon which the crew member served must have been finally abandoned, by proper order of the master, with no hope of returning¹²⁹. It looks as if the more flexible English approach might enhance a crew member's motivation for salvage efforts in favour of his own ship. On the

¹²⁴ Hill, *Maritime Law*, page 316; R. Grime, *Shipping Law*, page 285; Rüßmann/Rabe, *Seehandelsrecht*, § 742 B. 1.

¹²⁵ § 742 II HGB (German Commercial Law Code)

¹²⁶ See also: Kennedy, *Law of Salvage*, para. 460

¹²⁷ R. Grime, *Shipping Law*, page 285

¹²⁸ *The San Demetrio* (1941), 69 Ll.L.Rep. 5; *The Albion* (1941), 70 Ll.L.Rep. 257; *The Portreath* (1923), 92 L.J.P. 116 or 129 L.T. 475 or 39 T.L.R. 356

¹²⁹ R. Grime, *Shipping Law*, page 285; see also: Kennedy, *Law of Salvage*, para. 473

other hand, in a situation of abandonment the danger to the crew member's life might be enough motivation to rescue the vessel. Furthermore, it should be annotated that, after abandonment, a crew member is, in fact, not anymore a crew member of the ship concerned, because legally abandonment is the termination of all legal relations regarding the ship. Thus, the „ex-crew member“ can become a salvor like everybody else.

Passenger. Also a passenger can become a salvor, but only in very exceptional circumstances. Ordinarily, a passenger of the ship in distress¹³⁰, who, by instinct, will have his own safety foremost on his mind, is precluded from making a salvage claim, because pure self-interest is never a sound basis for claiming a salvage remuneration¹³¹. Nevertheless, there might be a situation where a passenger could justify his claim to a salvage reward if, when an alternative means of safety for himself and his property was offered to him, he chose to remain with „his“ stricken ship to assist in her preservation. This scenario was subject of the *Newmann v. Walters* case (1804)¹³².

A sailing ship stranded on a shoal off the English coast and was abandoned by her master and the majority of the crew. The pilot was too intoxicated to be capable of any action. The ship was brought to safety through the efforts of a passenger who was a qualified merchant captain. The court held that the passenger was entitled to claim

¹³⁰ Note: A passenger travelling on another ship, eg. the salving vessel, will be treated in the same way as any other volunteer salvor (Hill, Maritime Law, page 318; see also: *The American Farmer* (1947), 80 L.I.L.Rep. 672)

¹³¹ G. Brice, Maritime Law of Salvage, 1-257; Hill, Maritime Law, page 318

¹³² *Newman v. Walters* (1804), 3 Bos & P 612

salvage, because in acting as he did he ceased to be a passenger altogether and certainly did more than was expected of him under the circumstances.

The possibilities for a passenger to become a salvor are limited, because he has to prove that his „salvage performance“ was not only motivated by self-interest. In this respect the English, the South African, and the German salvage laws seem to be concurring¹³³.

Towage tug. A towing vessel might become a salvage vessel. Usually, there is a towing contract¹³⁴ between the tug owner and the owner of the tow for towage from point A to point B. While towing, the work is based on contractual obligations and is therefore not „voluntary“ and, therefore, cannot be salvage¹³⁵. In the *Princess Alice* case¹³⁶ towage was defined as being „the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating of her progress“. Thus, in cases where something more is required, the ordinary towage might become an extraordinary towage or might convert to salvage. In an extraordinary towage, the tug and the tow meet with a problem not initially envisaged but which carries with it an agreed „engraft“ of reward onto the original price; whereas the threshold to salvage is crossed when further

¹³³ In regard to German Salvage Law see the hint at Rüßmann/Rabe, Seehandelsrecht, § 742 B. 1. at the end; South Africa will presumably adopt the case law in respect of the passenger, Section 6 (1) Admiralty Jurisdiction Regulation Act No. 105 of 1983 (AJRA)

¹³⁴ Usually a towing contract is based on standard forms like UKSTC (UK Standard Towing Conditions), TOWCON or TOWHIRE (The later two being published by the Baltic and International Maritime Council [BIMCO])

¹³⁵ Chorley & Giles, Shipping Law, page 435; G. Brice, Maritime Law of Salvage, 1-259; R. Grime, Shipping Law, page 284

¹³⁶ *The Princess Alice* (1849) 3 W.Rob 138

difficulties, not envisaged in the tow contract, arise which in themselves give rise to a salvage service¹³⁷. One criterion for whether a towing vessel has become a salving vessel or not might be the following: have there been supervening circumstances which would justify her (the tug) in abandoning her towage contract¹³⁸?

If the services that eventually were rendered by the tug were of such a nature as to have been beyond the reasonable contemplation of the parties when they originally negotiated the towage contract, then the towage contract might be abandoned and salvage services might be started¹³⁹. In *The Homewood* (1928)¹⁴⁰ it was established that for the tug owner to consider rightly that he had taken on the role of salvor two requirements must be met:

1. The service he performed were of such an extraordinary nature that they could not have been within the reasonable contemplation of the parties to the original towage contract.
2. The services in fact performed and the risk in fact run would not have been reasonably remunerated if only the contractual remuneration was paid.

The burden of proof, though, is heavy and lies upon the party claiming the salvage reward. The tug owner often will face difficulties to substantiate his salvage claim against the tow owner, particularly when the purpose or scope of the towage was not sufficiently defined with precision in the towing

¹³⁷ This classification into (a) ordinary towage, (b) extraordinary towage and (c) salvage was made by Dr. Lushington who was an admiralty judge in England

¹³⁸ Hill, *Maritime Law*, page 355

¹³⁹ Note: What must be beyond doubt is that towage and salvage services cannot be performed concurrently (Hill, *Maritime Law*, page 355)

¹⁴⁰ *The Homewood* (1928), 31 Ll.L.Rep. 336

contract¹⁴¹. The provisions in a towage contract may exclude salvage rights¹⁴². Conversely, the salvage right might be expressly be preserved by a towage contract, for instance, in clause 6 of the UKSTC (United Kingdom Standard Towage Conditions [1986]) which reads:

Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the Tug owner may have against the Hirer including, but not limited to, any rights which the Tug owner or his servants or agents may have to claim salvage remuneration or special compensation for any extraordinary services rendered to vessels or anything aboard vessels by any tug or tender. ...

The South African point of view is similar¹⁴³. Where a tug has entered into a towage contract, the tug owner is entitled to claim for salvage services under altered circumstances which placed the ship in danger not anticipated when the contract of towage was entered into¹⁴⁴. The situation under German law is the same as well, but is regulated by statute: § 742 (III) HGB¹⁴⁵ states under which circumstances a tug owner is entitled to claim for salvage¹⁴⁶.

Likewise, in Article 17 of the London Salvage Convention (1989) it is stated:

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

The tug owner's right to claim for salvage in certain circumstances seems to be internationally and nationally recognised and well established. Thus, the

¹⁴¹ R. Grime, *Shipping Law*, page 308

¹⁴² See: *The Queen Elizabeth* (1949), 93 S.J. 425; 82 Lloyd's Rep. 803

¹⁴³ Bamford, *The Law of Shipping and Carriage in South Africa*, page 69

¹⁴⁴ See: *Mayton v. Harry Escombe* 1920 AD 187 at 199

¹⁴⁵ HGB = *Handelsgesetzbuch* (German Commercial Law Code)

¹⁴⁶ See: Rüßmann/Rabe, *Seehandelsrecht*, § 742 C.

tug owner seems to be sufficient legally encouraged for salvage if circumstances arise which surpass the scope of towage.

Pilots, Lifeboat, Navy, Coast Guard. When pilots or the crews of lifeboats, Navy or Coast Guard ships are involved in a salvage operation the question arises whether their salvage performance is voluntary, as it is required for a salvage reward, or whether they are obliged by statute or common law or contract to render assistance to the ship in distress.

Pilots, for instance, are obliged, by contract or regulation, to see to the safety of the ships they pilot. To claim salvage, they must show that the obligation had ended or that they had acted in excess of their duties¹⁴⁷. These requirements are essential under all three examined law systems. An English case, *The Sandefjord (1953)*¹⁴⁸, indicates what a pilot has to do to be entitled for salvage:

The *Sandefjord* stranded when her steering gear suddenly failed. At that time she was in charge of a pilot. The master asked the pilot to advise him how to perform a salvage attempt. The salvage operation according to the pilot's advice was successful and the pilot was held to be entitled for salvage, because the pilot „took upon himself exceptional responsibility“ (for if he were wrong, he might be liable).

„Exceptional performance“ is required also under German law if the pilot in charge of the endangered ship wants to claim a salvage reward¹⁴⁹.

¹⁴⁷ Chorley & Giles, Shipping Law, page 436; R. Grime, Shipping Law, page 286

¹⁴⁸ *The Sandefjord* [1953], 2 Lloyd's Rep. 557

¹⁴⁹ Rüßmann/Rabe, Seehandelsrecht, § 742 B. 2.

More uncertainty in regard to the entitlement for salvage exists in respect to crews of naval vessels, Coast Guard ships and lifeboats. This uncertainty is reflected in Article 4 of the London Salvage Convention (1989) which reads:

Art. 4. State-owned vessels

(1) Without prejudice to article 5 [Salvage Operations Controlled by Public Authorities], this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise.

(2) Where a State Party decides to apply the Convention to its warships or other vessels or other vessels described in paragraph (1), it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

Thereafter, it seems that in respect to its warships and other non-commercial state-owned vessels every state is entitled to establish its own legal regime in regard to salvage. Another important aspect is the state's obligation under Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS) which reads as follow:

Art. 98. Duty to render assistance.

(1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any persons found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

For South Africa, England, and Germany, the UNCLOS provisions became binding international law.

The Royal Navy of the United Kingdom was regarded as being under a duty to carry out salvage services because they were under standing instructions to assist British vessels in distress¹⁵⁰. Later the Crown Proceeding Act 1947 entitled officers and men of a UK warship to claim salvage rewards¹⁵¹. But it seems that naval personal will not be entitled if the service is no harder and involves no more risk than the work in which they would normally be

¹⁵⁰ R. Grime, Shipping Law, page 287

¹⁵¹ In short, subsection 8 (2) of the Crown Proceedings Act 1947 provides that where salvage services are rendered by or on behalf of Her Majesty, whether in right of Her Government in the United Kingdom or otherwise, Her Majesty shall be entitled to claim salvage in respect of those services to the same extent as any other salvor, and shall have the same rights and remedies in respect of those services as any other salvor.

engaged¹⁵². The British Coast Guard, by the Merchant Shipping Act 1894, Section 568, are responsible for „watching or protecting shipwrecked property“. For ordinary rescue services they are (only) entitled to payment under a fixed scale. A salvage reward might be claimed if the Coast Guards show that they have done more than „watch or protect“ - whatever this might be. The British lifeboat-men have the function of life salvage, for which they have no claim to remuneration, even if maritime property is salvaged. If property is to be recovered by the lifeboat, the RNLI¹⁵³, as owners of the lifeboat concerned, regard the crew as having borrowed the boat, with their consent, on the terms that the crew remain strictly responsible for its safety, making good any damage, but making any salvage claims strictly on their own account¹⁵⁴. The RNLI (The Royal National Lifeboat Institution) itself makes no claim.

In Germany it is disputed whether the crew of German war and state ships are entitled to salvage. Leading academical opinion gives these crews the right to claim salvage¹⁵⁵. The German Society for the Rescue of People Lost

¹⁵² See: *The Gorlitz* [1917] 119 L.T. 123; 14 Asp.M.L.C. 282; see also: G. Brice, *Maritime Law of Salvage*, 1-184

¹⁵³ RNLI = The Royal National Lifeboat Institution

¹⁵⁴ See: The Royal National Lifeboat Institution Regulations where it is stated:

2.4.4.1 General Conditions. *The Committee of Management, Officials and Honorary Officials of the Institution, as such, will take no part in any claim against the Master, owner or underwriters of any vessel in respect of property salvage. (...), the Coxswain of a lifeboat which has been launched on a lifesalving service, is at liberty, on behalf of his crew, to accept an engagement from the Master of a casualty to save his vessel and to make use of the lifeboat and her gear for this purpose. (...)*

2.4.4.2 Status of Crew. *When an engagement as above, has been accepted, the position of the lifeboat crew becomes that of a party of men who have borrowed a boat for the purpose of effecting property salvage and they must, therefore, look at the Master of the casualty and not to the Institution for their remuneration for the service.*

See also: R. Grime, *Shippinglaw*, page 288

¹⁵⁵ Rüßmann/Rabe, *Seehandelsrecht*, § 740 B. 4. b)

at Sea (DGzRS¹⁵⁶) is a privately financed and organised rescue service¹⁵⁷. The lifeboat-men are not entitled to claim salvage, even if property is salvaged. But in case of such maritime property being salvaged, the DGzRS may raise a claim against the property owner for a *pro rata* „cost share“, the amount of which will be fixed with regard to the time spent for the salvage operation and the size of the „rescue unit“ (small lifeboat or big lifeboat)¹⁵⁸.

In South Africa, the lifeboat organisation is called National Sea Rescue Institute (NSRI)¹⁵⁹ and is financed by donations, private sponsorships and public bodies (e.g.: Reconstruction and Development Fund [RDP])¹⁶⁰. Apparently, the NSRI never claims for salvage or charges for a refund of costs whether in respect of life salvage or in respect of salvage operations where property is salvaged. But, of course, rescued people or owners of salvaged property are free to support the NSRI with donations.

It seems that the South African Navy has legally the right to claim for salvage, but the Navy do not exercise this salvage right with due regard to the local private salvage industry. The South African Navy, as a state entity, do not want to enter competition with private salvage companies in regard to commercial salvage operations. Nevertheless, the Navy will act according to

¹⁵⁶ DGzRS = Deutsche Gesellschaft zur Rettung Schiffbrüchiger

¹⁵⁷ See above: Chapter I, 1.) Historic Background

¹⁵⁸ See the brochure „Seenotretter und Wassersportler - Partner auf See und an Land“ from the DGzRS (Deutsche Gesellschaft zur Rettung Schiffbrüchiger [German society for the rescue of people lost at sea])

¹⁵⁹ The NSRI was founded in 1967 and started operation with a small 4,7 meter rescue craft which was launched from Three Anchor Bay in Cape Town. Having grown considerably since then, the NSRI now boasts 50 rescue crafts, situated at 25 different rescue stations, with over 600 volunteer crewmen and women on call 24 hours a day, 7 days a week, as well as 15 full-time workers. During the short history of South Africa's NSRI 8.930 operations, to date 1.522 lives have been saved.

¹⁶⁰ See: South Africa's National Sea Rescue Service Information Brochure (1998)

the duties stated in Article 98 (1) of the United Nations Convention on the Law of the Sea (UNCLOS). For an assistance described in Article 98 (1) UNCLOS¹⁶¹, the Navy might claim for a refund of the expenses which have occurred (e.g.: damaged equipment, extra fuel, etc.).

As general observation, it seems to be uncertain if pilots, Navy, Coast Guard and lifeboats are subject to the common legal regime of salvage as it is conventional codified in the 1989 London Salvage Convention. Most of these „rescuers“ have their own statutory or common law regime to „deal“ with salvage situations and to determine „payment“ for their rescue operation.

Charterer or owner. A charterer may under English law as well as under South African law, under limited circumstances, claim salvage; those circumstances being:

- if he is a charterer by demise¹⁶² in a owner-like position employing also master and crew and/or
- if in the express terms of the relevant charterparty it is stipulated that the charterer becomes the owner in the context of and with reference to salvage¹⁶³.

The owner-like position of a demise charterer seems to be sufficient to entitle him to salvage claims¹⁶⁴. This is the essence of the court judgement in the *Conqueror* and the *Worrior* case¹⁶⁵, decided in 1921:

¹⁶¹ UNCLOS = United Nations Convention on the Law of the Sea

¹⁶² G. Brice, *Maritime Law of Salvage*, 1-163

¹⁶³ Hill, *Maritime Law*, page 322

¹⁶⁴ See: G. Brice, *Maritime Law of Salvage*, 1-163

Two tugs, the *Conqueror* and the *Warrior*, were requisitioned by the Admiralty during the First World War, by compulsory charterparty. The Court held that, at a stage when the master and the crew were directly paid by the Government, the Government and not the owner was entitled to a salvage reward for salvage service rendered to a merchant ship.

Owner and charterer are of course free to agree on charterparty provisions in regard to the salvage claim¹⁶⁶. Charterparties are regularly effected by means of standard forms. One which is commonly used is BARECON A, adopted by BIMCO in 1974¹⁶⁷ which is a demise charterparty or bareboat charterparty. The central provision is perhaps clause 8 (a), which begins:

The vessel shall during the charter period be in full possession and at the absolute disposal for all purposes of the charterers and under their complete control in every respect.

Under such a charterparty the charterer is entitled to claim salvage. But there is no reason why a charterparty should not contain a provision in it stipulating for salvage to be shared between the ship owner and the charterer¹⁶⁸.

The German approach is different: A charterer, also a demise charterer, is not entitled to claim a salvage reward¹⁶⁹. The right to claim salvage refers to the ship owner, even if there is an agreement in the charterparty stating that

¹⁶⁵ *Elliott Steam Tug Co. Ltd. v. Admiralty Commissioners; Page v. Admiralty Commissioners* [1921] 1 A.C. 137; 64 S.J. 634; 89 L.J.K.B. 977; 123 L.T. 754; 15 Asp. M.L.C. 81, H.L.

¹⁶⁶ See: Capter II, 3.), c.) Contractual salvage clauses

¹⁶⁷ R. Grime, *Shipping Law*, page 65

¹⁶⁸ Hill, *Maritime Law*, page 322

¹⁶⁹ Rüßmann/Rabe, *Seehandelsrecht*, § 749 C. 2. a)

the salvage reward belongs to the charterer. The charterer, in this case, can only claim for compensation against the ship owner because of breach of contract (charterparty). He can only claim salvage on his own after cession of that right by the ship owner¹⁷⁰. Compared to English and South African law, the German approach is not convincing: A demise charterer, who is in full control and responsibility of the vessel, must, as a salvor, ask the ship owner either to claim the reward or to transmit to him the right to do so. If the ship owner does not co-operate, the charterer must sue him. The German approach has basically two short-comings. First of all the charterer as a salvor is deprived of the right to claim directly from the debtor of the salvage reward. He has to involve the owner, which might cause delay and/or a multiplication of court proceedings. Furthermore, the owner's „claiming motivation“ might be low if the charterparty states that a salvage reward belongs to the charterer¹⁷¹. Secondly, in a charterparty, particularly in a bareboat charterparty, the owner is not as „close“ to the salvage operation as the charterer, who employed master and crew, controlled the ship operations and gave orders to the master.

Asides from the right of the charterer or the owner to claim a salvage reward, it should be noted that owners and/or charterers, as carriers, are also encouraged by the law of carriage to perform salvage services. The „Hague-Visby-Rules“¹⁷², which are part of English¹⁷³, South African¹⁷⁴ and German¹⁷⁵ law, provide in Article IV (4):

¹⁷⁰ Rüßmann/Rabe, Seehandelsrecht, § 749 C. 2. a)

¹⁷¹ See: Clause 8 (a) of the BIMCO charterparty („the absolute disposal for all purposes“)

¹⁷² The „Hague-Visby-Rules“ are the 1924 Hague Rules including the amendments of the Brussels Protocol of 1968: see: R.Grime, Shipping Law, page 160

(4) Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

The carrier, owner or charterer, is exempted by the Hague-Visby-Rules from liability for deviation resulting from a salvage operation - successful or unsuccessful. A salvage reward, earned by the carrier, will not be „reduced“ - for instance - by claims in respect of damage, loss, etc. caused by deviation from the voyage resulting in a delay.

b.) Preference salvage rights.

As mentioned above, the disposed or superseded salvor's **possessory right** for a salvage reward¹⁷⁶ is recognised and protected by the courts¹⁷⁷. This matter was also touched by *The Tubantia* case (1924)¹⁷⁸:

The *Tubantia* was sunk by a German warship in the North Sea in 1916. Salvage operations were commenced in 1922 after the wreck had been located 50 miles off the English coast. Marker buoys were positioned and work continued for two seasons, weather permitting. The parts of the ship and cargo brought to the surface were only of small value and

¹⁷³ The „Hague-Visby-Rules“ were enacted in the United Kingdom in the Carriage of Goods by Sea Act 1971, which came into force in 1977

¹⁷⁴ South Africa has enacted the „Hague-Visby-Rules“ in its Carriage of Goods by Sea Act No.: 1 of 1986 (COGSA), which came into force on the 4th of July 1986

¹⁷⁵ See: Rübmann/Rabe, Seehandelsrecht, § 662 E. 3.; Art. 6 EGHGB

¹⁷⁶ See: Chapter II, 3.) a.) Disposed / Superseded salvor

¹⁷⁷ G. Brice, Maritime Law of Salvage, 2-243 - 2-245; see also: SeeSchG VersR 83, page 1058 - 1061

¹⁷⁸ *The Tubantia* (1924), 18 L.I.L.Rep. 158

could not cover the salvors' expenses which amounted to 40,000 Pounds or more. At that stage, a well-equipped salvage vessel arrived at the scene to take possession of the wreck. They deliberately tried to prevent the existing salvors from carrying out further operations. The latter sued for damages for trespass or wrongful interference. It was held that the first salvors were in possession of the wreck and entitled to prevent other potential salvors from interfering. An injunction was granted.

The salvors' possessory rights can be protected by injunction. This privileged possessory right of the first salvor on the scene seems to be a well established principle in salvage law and is, therefore, also recognised by South African courts. In the South African case *The Antipolis* (1988)¹⁷⁹ the court held that justice required that a person engaged in salvaging parts from an abandoned wreck is entitled to an interdict preventing an intervening person from interfering provided he is still working on the wreck. The court of appeal in this case¹⁸⁰ held that an interdict requires the physical control of the privileged first salvor over the object of salvage; attaching parts with a rope (under water) was not enough to have „physical control“. It seems that the requirement of „physical control“ is met if the salvor has positioned marker buoys¹⁸¹.

¹⁷⁹ Mills v. Reck (*The Antipolis*) 1988 (3) SA 92 (C)

¹⁸⁰ Reck v. Mills 1990 (1) SA 751 (A)

¹⁸¹ See the English case *The Tubantia* (1924) 18 L.L.Rep. 158; see the South African case *The Hypatia* 1968 (4) SA 190 (C)

Another preference salvage right is the **right of ownership**. A salvor taking possession of an abandoned wreck or parts thereof may gain ownership. This right is confirmed in the English case *The Lusitania*¹⁸²:

The *Lusitania*, a passenger liner, was sunk by a German submarine on the 7th of May 1915 south of the Head of Kinsale, out of the territorial waters of Britain and Ireland. During salvage operations in 1982, a dispute arose as to whether certain items recovered were the property of the Crown or of those who recovered them. The court held that the property belonged to the salvor who had acquired title by occupation, because the previous owners had abandoned their property rights and the Crown had no residual „droit of admiralty“ outside territorial waters.

In the South African case *The Hypatia*¹⁸³ the court held that a salvor could acquire ownership by *occupatio*. Precondition to the right of ownership by *occupatio* is, however, that the former owners abandoned their property right. Not only the ship owner of the wreck must waive his property right but also the underwriter. The ownership of a wreck is usually transferred to the insurers by notice of abandonment (of the previous ship owner). As long as the underwriters have not abandoned their property right, a salvor cannot establish ownership by *occupatio*. An interesting United States case which touched on this subject was *The Central America*¹⁸⁴:

The *SS Central America* sunk in 1857 carrying passengers and a substantial quantity of gold. After years of research, a salvor

¹⁸² *The Lusitania* (1986), 1 Lloyd's Rep. 132

¹⁸³ *The Hypatia* 1968 (4) SA 190 (C)

¹⁸⁴ *The SS Central America* [1992] (Columbus America Discovery Group v. Atlantic Mutual Insurance) 974 F. 2d 450S Federal Court; 1992 AMC 2705

(Columbus America) located the wreck and applied for a salvage reward or ownership. Notice of the application was given to representatives of the surviving syndicates who had insured the ship and to whom ownership thereof had been abandoned. The lower court awarded the ownership to the salvor under the law of finds. The court of appeal held that the salvor would be entitled to no more than a salvage reward, and that the ownership, albeit 130 years later, remained vested in the underwriters by subrogation.

Salvors are benefiting from these two preference salvage rights: the possessory right and the right of ownership by *occupatio*. These rights are well established not only in the United Kingdom and South Africa but also in Germany where these preference salvage rights of a salvor are recognised in total correspondence with English and South African salvage law¹⁸⁵.

c.) Contractual salvage clauses.

As mentioned above, there might be a number of persons entitled to claim a salvage reward¹⁸⁶. Some of them, though, might face difficulties establishing or proving their salvage right. The following exemplary collection of „salvage clauses“ is to show in how far these clauses improve the salvor’s position to claim salvage.

¹⁸⁵ See: SeeSchG VersR 83, 1058; Rüßmann/Rabe, Seehandelsrecht, § 744 C. I.

¹⁸⁶ See under Chapter II. 3.) a.) Who can claim salvage?

The towage tug, as explained above, can only claim for a salvage reward if it is proved that the service performed was beyond the scope of the towage contract. To improve the position of proof, the towage tug owners usually draw more attention on defining the exact scope of the towing contract and add salvage clauses in their standard towing contracts. In the towing standard form „Towcon“¹⁸⁷ and „Towhire“¹⁸⁸ the „salvage clause“ reads:

15 Salvage

(a) Should the Tow break away from the tug during the course of the towage service, the Tug shall render all reasonable service to re-connect the towline and fulfil this Agreement without making any claim for salvage.

(b) If at any time the Tugowner or the Tugmaster considers it necessary or advisable to seek or accept salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorised servant or agent including the Tugmaster have the full actual authority of the Hirer to accept such services on behalf of the Tow on any reasonable terms.

The purpose of this clause is quite clear: Re-connecting tug and tow falls within the scope of the towing contract and will not give rise to any salvage claim. Further, the tug owner obtains the right to bind the tow owner legally to an salvage agreement.

¹⁸⁷ Towcon is a recommended international ocean towage agreement on a lump sum basis which is published by the Baltic and International Maritime Council (BIMCO)

¹⁸⁸ Towhire is a recommended international ocean towage agreement based on daily hire and is published by the Baltic and International Maritime Council (BIMCO)

The salvage clause in South African *Pentow*'s towage contract form¹⁸⁹ goes even a step further:

(9) SALVAGE

(a) In the event of the tow breaking away from the tug during the course of this service, the tug shall stand by and render all reasonable service in reconnecting the towline and saving the tow without making any claim for salvage. However, if circumstances arise beyond the contemplation of this towage service, the tug will render appropriate salvage assistance.

With this clause *Pentow* tries to preserve the tow's right to claim salvage for services outside the scope of the towage contract, and further it seems that *Pentow* intends to achieve a sort of exclusive (and well protected) position of an „first - at - scene salvor“:

Because of the legal principles and provisions in English, South African and German law, the nature of these salvage clauses in towage contracts¹⁹⁰ is, though, more declaratory; as shown above, case law has established the principles under which the tug can claim salvage from the tow.

As mentioned above¹⁹¹, the bareboat charterer might also be entitled to claim salvage although he is not the legal owner of the salvage ship; but he is the „commercial owner“ and the salvage reward is a commercial income of the

¹⁸⁹ *Pentow Marine* is a South African salvage and towage operator using its own towage contract forms which are available for lump sum and daily hire

¹⁹⁰ The Smit International Ocean Towage and Salvage Company Contract contains also a good example of a salvage clause: Article 9 reads: (...) *In case the Tug Owners have rendered any extraordinary services, which cannot be considered to be in performance of the towage contract, the Tug Owners shall be entitled to separate remuneration.*

¹⁹¹ See: Chapter II, 3.) a.) [The charterers' right to claim salvage]

ship. To avoid any doubts about the legal position of the demise charterer in this respect, one will find clarifying clauses in a bareboat charterparty. For instance, in the „BARECON A“¹⁹², a standard bareboat charterparty form, clause 16 provides:

16. Salvage

All salvage and towage shall be for the charterers' benefit and the cost of repairing damage occasioned thereby shall be borne by the charterers.

This clause is corresponding with English case law and the South African legal position of a bareboat charterer.

But also in a time charterparty one can find a salvage clause. In the NYPE¹⁹³ time charterparty form, a very common and often used standard form¹⁹⁴, clause 24 reads:

24 Salvage

All derelicts and salvage shall be for the Owners' and the Charterers' equal benefit after deducting Owners' and Charterers' expenses and crew's proportion.

Having in mind that the time charterparty is a maritime contract of its own kind (contract *sui generis*)¹⁹⁵, the entitlement to the salvage remuneration is

¹⁹² The Baltic and International Maritime Conference Standard Bareboat Charter. Code Name: „BARECON A“ (Copyright, published by the Baltic and International Maritime Conference, Copenhagen)

¹⁹³ Time charterparty standard form NYPE 93 (New York Produce Exchange 1993) is recommended by the Baltic and International Maritime Council (Bimco) and the Federation of National Associations of Ship Brokers and Agents (FONASBA)

¹⁹⁴ This time charter form is used also in Germany. According to *Hapag-Lloyd Container Linie GmbH* (a big German carrier company) there is no particular German standard charter form in use or existence. Because of the international dimension of charterparties, *Hapag-Lloyd* concludes charterparties on the basis of the NYPE form, but adds certain amendments

¹⁹⁵ See: *The Maria K* 1985 (2) SA 476 (C)

quite doubtful: does the salvage reward belong to the legal ship owner, who is always in command and control of his ship (through his servants: master and crew) or does it belong to the time charterer, who is the „commercial owner“ during the time the ship is on hire? Thus, this salvage clause in the NYPE which shares the right to claim salvage between owner and charterer in an equitable way¹⁹⁶ is not just a declaratory provision; it also seems to constitute the salvage right of both which otherwise would be doubtful under a time charterparty.

Under German law, the right to claim salvage refers to the ship owner¹⁹⁷. In case of a contractual arrangement in the charterparty stating that salvage is for the charterers' benefit, this provision concerns only the legal relationship between ship owner and charterer. The charterer under German law - notwithstanding any salvage clause in the charterparty - is only entitled to claim the salvage remuneration or the agreed share therefrom from his contractual party, the ship owner; in case the right to claim was assigned or ceded to him by the ship owner, the charterer can claim salvage directly from the owner of the salvaged vessel or the maritime property¹⁹⁸.

Another place to find salvage clauses is the Bill of Lading, which evidences the contract and the terms of carriage between the shipper and the carrier¹⁹⁹. The salvage clause usually exempts - in line with Article VI (4) of the

¹⁹⁶ See: Kennedy, *Law of Salvage*, page 777 for more examples for salvage clauses in time charterparties: the „equal“ share of the salvage remuneration between ship owner and time charterer seems to be a standard in all time charter salvage clauses.

¹⁹⁷ Rüßmann/Rabe, *Seehandelsrecht*, § 749 C. 2. a)

¹⁹⁸ Rüßmann/Rabe, *Seehandelsrecht*, § 749 C. 2. a)

¹⁹⁹ Chorley & Giles, *Shipping Law*, page 177; R. Grime, *Shipping Law*, page 150

„Hague-Visby-Rules“²⁰⁰ - the carrier from liability if he becomes salvor. For instance, in the Bill of Lading form of *SafBank*²⁰¹ it is stated in clause 12:

12 (...). The vessel may ... salve or attempt to salve life, vessels in distress or other property, and all of the foregoing are deemed to be included in the contract voyage. (...).

By this clause, the carrier ought to be encouraged to undertake salvage operations, because he has not to be afraid of claims from the shipper based on breach of the contract of carriage because of deviation from, or delay in, the voyage route.

4.) LEGAL PROCEEDINGS

The value of a claim - in general - depends on its enforceability. There are certain legal proceedings and institutions which might assist the salvor to get his right and the salvage reward at the end of the day.

a.) Arbitration tribunals

Most salvage claims will be settled by arbitration, because it is this form of settlement that standard salvage agreements usually refer to. The most common salvage contract, the Lloyd's Open Form²⁰², - for instance - refers the settlement of the salvage award to arbitration in London: *The Contractor's remuneration shall be fixed by Arbitration in London (...)*²⁰³. It seems, therefore, that the most important arbitration tribunal in salvage

²⁰⁰ See above under Chapter II, 3.), a.)

²⁰¹ „Bill of Lading for Combined Transport or Port to Port Shipment“ from *Safbank Line Limited* (Dexter House, 2 Royal Mint Court, London EC3N4)

²⁰² See: Chapter V, 2.) Lloyd's Open Form

²⁰³ See: Clause 1 (c) of the 1995 edition of Lloyd's Open Form (LOF 95)

matters is the Lloyd's Council arbitration tribunal²⁰⁴. But there is also a permanent arbitration tribunal in Germany: the Deutsche Seeschiedsgericht, Hamburg²⁰⁵ (German maritime arbitration tribunal). Salvage claims under the standard agreement of the Deutsche Seeschiedsgericht²⁰⁶ or of the Bugsier-, Reederei- und Bergungs-Gesellschaft mbH, Hamburg²⁰⁷ are referred to this German maritime arbitration tribunal. South Africa, apparently, does not have a permanent maritime arbitration tribunal because all professional South African salvage operations are performed under Lloyd's Open Form (LOF) referring the settlement of the salvage reward to London arbitration. But if there is a need for such a tribunal it will be constituted. South African maritime arbitration tribunals may gain more importance in the future, because there are legislative plans to make South African arbitration compulsory for the settlement of salvage claims if all involved interests in a salvage operation (salvors and owners of the salvaged property) are South African.

b.) Admiralty courts

In regard to maritime matter - including all matter in respect of salvage - the United Kingdom and South Africa have a long tradition to provide special admiralty courts²⁰⁸. Although nowadays the English High Court of Admiralty no longer exists as a separate court, the Queens Bench Division of the High

²⁰⁴ See: Clause 7 - 14 of the LOF 95 for the arbitration proceedings (Appendix II 1.)

²⁰⁵ Deutsches Seeschiedsgericht (Baumwall 7, D-20403 Hamburg)

²⁰⁶ See: Clause 4 of the salvage agreement of the Deutsches Seeschiedsgericht (Appendix II 3.)

²⁰⁷ See: Clause 5 of the salvage agreement of Bugsier-, Reederei- und Bergungs-Gesellschaft mbH, Hamburg (Appendix II 2.)

²⁰⁸ See: G. Hofmeyr, „Admiralty Jurisdiction in South Africa“, Acta Juridica 1982, page 30 - 50

Court maintains an Admiralty Court in which, in a more modern form, the time-honored procedures of the High Court of Admiralty are generally carried out²⁰⁹. In South Africa, the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (AJRA) vests in the Provincial and Local Divisions of the Supreme Court the powers and jurisdiction of the Courts of Admiralty in the Republic. Section 2 (1) of the AJRA reads:

2. Admiralty jurisdiction of Supreme Court

(1) Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

In Germany, the German Constitution of Courts Act (GVG) provides in § 14 GVG:

§ 14 GVG (Special courts of law)

As special Admiralty Courts courts for the matters defined in the international treaties are admitted²¹⁰.

Thereafter, it would be legally possible in Germany to establish special Admiralty Courts. But this power has not been used. Hence, there is no special admiralty jurisdiction in Germany. Instead, the normal civil courts

²⁰⁹ R. Grime, Shipping Law, page 12

²¹⁰ English translation from: M.P. Schlichting, The Arrest of Ships in German and South African Law, page 322

have jurisdiction in maritime matter. According to § 23 GVG, the ordinary local courts have jurisdiction in disputes between carriers, masters and men handling floating logs; the jurisdiction about other (maritime) disputes depends on the value of the matter in dispute: either the local courts (Amtsgericht) or the higher district courts (Landgericht) have to deal with the matter. Claims for salvage usually have a high value, so that the civil district court would have jurisdiction. The translated²¹¹ § 23 of the GVG reads:

§ 23 GVG (Jurisdiction in civil cases)

The jurisdiction of the local Courts encloses the following civil cases, unless they are transferred to the Higher District Courts (Landgericht) due to the value of the matter in dispute:

(1) (...)

(2) regardless of the value of the matter in dispute:

(a) (...)

(b) disputes between travellers and landlords, carrier (charterer), master, men handling floating logs, or emigration shipping clerks in ports of embarkation that started over restaurant bills, freight, passage money, transport of travellers and their belongings and over loss or damage of the latter, as well as disputes between travellers and craftsmen that started on the occasion of the journey;

It is interesting to note that none of the maritime countries - neither England, nor South Africa, nor Germany - have an independent Admiralty Court. The

²¹¹ English translation from: M.P. Schlichting, *The Arrest of Ships in German and South African Law*, page 323

main reason for this seems to be that there is no need for Admiralty Courts, because most maritime disputes anywhere are settled by arbitration and only a small number of these disputes are „reaching“ the courts.

c.) „Arrest“ proceedings

As mentioned above, the claim for salvage enjoys, under English law and under South African law, the legal status of a maritime lien over the salvaged ship and other property; in German law, the salvage claim (only) against the ship is also secured by a maritime lien called „Recht eines Schiffsgläubigers“²¹². The salvage lien ranks quite high in comparison to other claims against the ship (e.g.: mortgage claims and claims for the supply of goods)²¹³.

The usual way to enforce a salvage claim in the maritime world of England and South Africa is to proceed in an action *in rem*²¹⁴ against the ship; in other words: the salvor might arrest the salvaged ship. The action *in rem* is a special admiralty proceeding in England and South Africa²¹⁵ and has the following advantages²¹⁶ in comparison to an ordinary attachment:

²¹² See: § 752 (1) HGB (German Commercial Law Code); see also: Chapter II 1.) a.) Lien status

²¹³ See: South Africa's AJRA, Art. 11; § 761, 762, 764, 754 HGB (German Commercial Law Code); see further Chapter II 1.) b.) Ranking

²¹⁴ The action *in rem* is a legal term used in England and South Africa but not in German. In German law there is no special maritime action *in rem*, the used terms are „arrest“ and „foreclosure“ and the proceeding runs in accordance with the attachment rules of the „land law“.

²¹⁵ Section 3 (4) & (5) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983

²¹⁶ Hill, Maritime Law, page 126

- Maritime property can be sued without concern as to the identity or location of the owner²¹⁷.
- The action *in rem* is not subject to jurisdictional limitations, which might exist in ordinary actions *in personam*.
- The arrest *in rem* gives the claimant a pre-judgement security for the claim.
- The arrested ship cannot be affected by occurrences prior to the judgement, which may otherwise makes it ineffective (but the *res* is subject to other preference rights!).
- The court has powers to order a court sale of the maritime property before judgement in special circumstances, for instance deterioration of the value of the arrested ship.

Also other maritime property may be arrested, for instance, the cargo that was salvaged²¹⁸.

In German law, there is no split in an admiralty arrest proceedings and attachment proceedings of the „land law“; the „arrest“ of a ship proceeds in accordance with the rules of levy of execution against movable property of the German Code of Civil Procedure (ZPO) with only a few deviations²¹⁹.

²¹⁷ In particular, the ownership of vessels which are several times sub-chartered is hard to find out

²¹⁸ Kennedy, Law of Salvage, para. 1254; R. Grime, Shipping Law, page 20

²¹⁹ See for instance: § 931 ZPO (German Code of Civil Procedure) which states:

§ 931 ZPO (Execution against registered ships)

(1) The execution of an order of anticipatory seizure against a registered ship or a ship under construction is effected according to the provisions of levy of execution against movable property, with the following deviation:

(2) The execution gives rise to a right of pledge over the seized ship or ship under construction; the right of pledge gives the creditor the same rights as a ship mortgage in proportion to other rights.

(3) On application of the creditor the execution is ordered by the Court competent for arrest proceedings acting as a Court competent for enforcement matters; the Court

But under the bottom line, the arrest proceedings in all three legal systems (English²²⁰, South African²²¹ and German²²²) are basically the same and come to the same results. To secure a maritime claim, like the salvage claim, and for liquidation purposes of such a claim, the claimant may arrest the ship if the cause of the claim has arisen in connection with that ship and the person who would be liable in an action in personam is or was the owner of the ship concerned at the time the claim arose²²³.

simultaneously has to request the Registry Court to have a priority caution (Vormerkung) entered in the ships register or register of ships under construction; the priority caution expires if the enforcement of the arrest becomes inadmissible.

(4) The bailiff, when undertaking the execution, has to take the ship under guard and custody.

(5) If at any time of enforcement of the arrest the execution sale is instituted by public auction, then the arrest of the ship or ship under construction which took place under this procedure is deemed to be the first levy of execution in terms of § 826; the copy of the bailiff's return has to be filed with the court competent for enforcement matters.

(6) On application of the creditor the attachment lien will be entered into the ships register or register of ships under construction; the amount determined in accordance with § 923 has to be denoted as the maximum amount for which the ship or the ship under construction is liable. For the rest, § 867 and § 870a(3) are applicable mutatis mutandis provided the aforesaid provisions do not determine otherwise.

(Translation of § 931 ZPO from: M.P. Schlichting, *The Arrest of Ships in German and South African Law*, page 254)

Note, that German law distinguishes between ships registered in a German register and ships registered in a foreign register. The execution against a German registered ships runs in accordance with § 931 ZPO; the execution against foreign registered runs in accordance with § 930 ZPO (Execution against movables without ship-specific deviations) provided the state of the ships' flag is not party to the 1952 Arrest Convention, in which case the execution against that foreign vessel will be in accordance with the provisions of the 1952 Arrest Convention.

²²⁰ Note: The action *in rem* proceeding is regulated in the English Supreme Court Act of 1981 in which provisions of the 1952 Arrest Convention (to which the UK is party) were incorporated

²²¹ Note: In South Africa the action *in rem* is regulated in the Admiralty Jurisdiction Regulation Act No. 105 of 1983 (AJRA) and the Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa (April 1997)

²²² Note: Beside § 482 HGB (German Commercial Law Code) which deals with the place and time frame of an allowable arrest, there are no special provisions relating to the arrest of ships in German maritime law. What is applicable however is the general law relating to civil procedure and the Code of Civil Procedure (ZPO). The ZPO with its latest amendments dates back to the Code of Civil Procedure of 1877. In 1898 a supplementary law brought into use a special provision on the enforcement of a civil arrest against marine registered ships (§ 931 ZPO). This provision takes into account the particularities of ocean traffic and, thus, regulates certain specifics in respect of the execution.

²²³ R. Grime, *Shipping Law*, page 20/21

But - of course - there are certain differences in the arrest proceedings of the three legal systems²²⁴. Two particular aspects should be focused in respect of the maritime claim which might be of interest for salvors:

In the „arrest proceedings“ there is the possibility of a **Sister-ship** arrest under English and German law and the arrest of an **associated ship** under South African jurisdiction.

English and German law provide a proceeding which is called „sister-ship arrest“²²⁵ in the United Kingdom. Both countries, England and Germany, are party to the 1952 Arrest Convention²²⁶. The 1952 Arrest Convention introduced statutorily the idea that the right to arrest an alternative vessel, as opposed to the offending vessel, rested on the determination as to whether the selected alternative ship was owned, as respects all its shares, by the person who would be the addressee of the claim²²⁷. Art. 3 (1) of that Convention reads:

(1) Subject to the provisions of para 4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the

²²⁴ For a detailed examination of the arrest proceedings in German and South African law see: Mathias P. Schlichting, „The Arrest of Ships in German and South African Law“, European University Studies, Series II Law

²²⁵ Note: There is no proceeding in Germany called „sister-ship arrest“ but „sister-ships“ might be arrested because under German law it is possible, because the whole property of the debtor is subject to the arrest, to take execution against every ship that the debtor owns. See further: M. P. Schlichting, The Arrest of Ships in German and South African Law, page 5

²²⁶ International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952

²²⁷ Hill, Maritime Law, page 131

owner of the particular ship, even though the ship arrested be ready to sail;

The actual wording in English law after the enactment of the 1952 Arrest Convention of the sister-ship provision may be found in section 21 (4) of the Supreme Court Act 1981:

In the case of any such claim as is mentioned in section 20 (2) (e) to (r), where -

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam („the relevant person“) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship

an action in rem may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against -

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise;

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respect all the shares in it.

Without going into details, one has to recognise that the salvor, having a salvage claim against a vessel can arrest another vessel, provided there is a common property ownership between the two vessels²²⁸. Thus, the salvor has an additional possibility to enforce his salvage claim by arresting a sister-

²²⁸ See: Hill, Maritime Law, page 131

ship. Nevertheless, this is only of little legal advantage²²⁹ considering that in ordinary attachment proceedings a creditor or claimant can attach whatever property of the debtor he wishes to. Furthermore, one has to be aware that one may arrest a sister-ship, but not ships belonging to a sister-company. Thus, to protect vessels from a sister-ship arrest and to avoid ownership links between ships, vessels today are usually legally „owned“ by a single ship company.

To prevent the short coming mentioned above, South African law²³⁰ goes its own way and allows the arrest of a - so called - „associated ship“. Section 3 (6) and (7) (a) & (b) of South Africa’s AJRA²³¹ reads as follow:

(6) Subject to the provisions of subsection (9), an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of „maritime claim“ [claim for, arising out of or relating to mortgages, hypothecation, etc.], may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

(7) (a) For the purpose of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose

(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

²²⁹ The legal advantage of an action *in rem* in general: see above

²³⁰ Note: Despite the fact, that the Admiralty Jurisdiction Regulation Act (aside from other sources) is based on the principles set out in the 1952 Arrest Convention, South Africa has, up to now, not ratified the Arrest Convention of 1952.

²³¹ AJRA = Admiralty Jurisdiction Regulation Act No. 105 of 1983

(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or

(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

(b) For the purpose of paragraph (a)

(i) ships shall be deemed to be owned by the same person if the majority in number of, or of voting rights in respect of, or in great part, in value, of, the shares in the ship are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;

(iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.

There is no doubt that the meaning of an „associated ship“ is much wider than the meaning of „sister-ship“²³². Therefore, under South African admiralty jurisdiction a salvor has a better position to secure his salvage claim, because with his claim he can fall back on an associated ship²³³. In this

²³² See also: *The Berg* 1984 (4) SA 647 (N): In this case the court held that it is even possible to bring an action *in rem* against an associated ship where there is neither a maritime lien nor personal liability, provided the owner of the „guilty“ ship is the owner of the associated ship (read section 3 (6) & (7) together with 3 (4) AJRA)

²³³ Note: The burden of prove (proving on balance of probabilities) lays on the claimant to establish that the ship he intends to arrest is an associated ship in the meaning of Sec. 3 (6) & (7) AJRA; see: *The Kyojo Maru* 1984 (4) SA 210 (D). In fact, it is not easy to prove

case, though, the arresting salvor must be aware of Section 11 (11) AJRA²³⁴. Thereafter his salvage claim ranks behind claims „which arose directly in respect of the [associated] ship“.

Another interesting procedural aspect which might have an influence on the arrest of a ship is the question **when and where** a ship or a sister / associated ship can be arrested.

English and South African law allow the arrest of a vessel if she is within the territorial waters of the country²³⁵. The breadth of the territorial sea is usually 12 nautical miles²³⁶. The coastal state has full sovereignty over its territorial sea²³⁷. Thus, the coastal states court have jurisdiction over these waters and can order an arrest of a ship. The only exception of this jurisdiction seems to be stated in the United Nation Convention on the Law of the Sea and seems to apply only to foreign ships. In Article 24 (1) of the UNCLOS (United Nations Convention on the Law of the Sea) it is stated:

The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention.

And Article 28 UNCLOS reads:

the requirements for an associated ship, because ownership or control over a vessel are very often uncertain.

²³⁴ AJRA = Admiralty Jurisdiction Regulation Act No. 105 of 1983

²³⁵ For South Africa see: Mathias P. Schlichting, „The Arrest of Ships in German and South African Law“, European University Studies, Series II Law & The Territorial Waters Act (Act 87 of 1963); for English law see: Kennedy, Law of Salvage, para. 1257

²³⁶ See: Art. 3 United Nations Convention on the Law of the Sea

²³⁷ Art. 2 United Nations Convention on the Law of the Sea

Art. 28. Civil jurisdiction in relation to foreign ships

(1) The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

(2) The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

(3) Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

In theory, English and South African courts can order an arrest of their „national“ ships (English and South African ships) wherever the ship can be found within the sovereign territory, including the territorial sea. Foreign ships can be arrested in accordance with Art. 28 UNCLOS when they are not protected by the legal regime of „innocent passage“, for instance, when they leave the harbour or if they wait at an anchorage outside the harbour. Thus, the claiming salvor who applies for an arrest does not have to wait till the ship concerned is berthed inside the harbour; he can already arrest the vessel while she is - for instance - waiting at an anchorage for a berth inside the harbour.

This is different under German law: § 482 HGB (German Commercial Law Code) provides:

§ 482 HGB No execution to be levied when ship is at sea

An order for the compulsory auction by way of execution of a ship, as well as placing her under distraint/arrest, is not permitted if the ship is on voyage and is not lying in a port²³⁸.

Thus, a ship cannot be arrested if she is sailing or if she is outside the harbour. The ship starts her voyage if she casts off the quay by loosening the first hawser and she ends her voyage if she gets tied to the quay in a harbour²³⁹. In the meantime, a salvor who wants to enforce his salvage claim cannot arrest the ship. Furthermore, no arrest is possible if the ship concerned is at an anchorage outside the harbour waiting to enter the harbour²⁴⁰. This provision applies for all ships, German and foreign²⁴¹.

This short comparison of the arrest proceedings in English, South African, and German law clearly indicates South African law as the one to provide the most advantageous proceedings for a salvor seeking to arrest a ship in order to enforce his salvage claim: The salvor can arrest the ship within the territorial waters of South Africa (with some exceptions mentioned above) and furthermore he can arrest an associated ship instead of the salvaged ship.

²³⁸ Translation of § 482 HGB from: M.P. Schlichting, *The Arrest of ships in German and South African Law*, page 267

²³⁹ Rüßmann/Rabe, *Seehandelsrecht*, § 482 B.

²⁴⁰ Rüßmann/Rabe, *Seehandelsrecht*, § 482 B. 2. a)

²⁴¹ See: Art. 6 of the 1952 Arrest Convention in which it is stated:

The rules of procedure relating to the arrest of a ship, ... , shall be governed by the law of the Contracting State in which the arrest was made or applied for.

CHAPTER III

University of Cape Town

LIMITATION OF THE SALVAGE CLAIM

The salvage claim might be limited for factual or legal reasons. To achieve a high salvage reward, the salvor should see to it that neither limitation occurs. What reasons limit the salvage claim and in how far they differ in English, South African and German law will be discussed in this chapter.

1.) LOW SALVAGE REWARDS

The salvage reward will be paid from the salvaged property which is held as a fund²⁴². The fund - and nothing more - is the maximum possible amount payable as salvage reward²⁴³. In England as in South Africa, the amount of the salvage reward is usually expressed as a percentage of the value²⁴⁴ of the salvaged property²⁴⁵. A hundred years ago there was the rule that no salvage reward should exceed „a moiety“ of, or half the salvaged value²⁴⁶. Today, very few awards exceed 40 %²⁴⁷.

Presumably, because of the difficulty to determine the value of the salvaged maritime property, German law prohibits by statute to fix the salvage reward on a percentage base of the salvaged value, unless „all persons involved“

²⁴² Kennedy, Law of Salvage, para. 142 & 1031; R. Grime, Shipping Law, page 280

²⁴³ R. Grime, Shipping Law, page 293: *There can, of course, be no salvage award greater than the total value of the salvaged property, ...*

²⁴⁴ G. Brice, Maritime Law of Salvage, 2-142 - 2-146; see: Hill, Maritime Law, page 341 for the valuation of ship, cargo and freight; see also: Kennedy, Law of Salvage, Chapter 11 (Salved Values)

²⁴⁵ R. Grime, Shipping Law, page 292/293; Bamford, The Law of Shipping and Carriage in South Africa, page 75

²⁴⁶ It seems that in the early nineteenth century the courts were prepared to award half the value of a ship which had been abandoned (*Associated Boating Cos v. Baardsen* [1895] 12 SC 330 at 334)

²⁴⁷ R. Grime, Shipping Law, page 293. Note: A big exception in this respect was the case of *The Central America* 1992 AMC 2705

(salvor and owner(s) of the salvaged property) agree to do so. § 744 (3) HGB (German Commercial Law Code) favours a fixed sum of money as salvage reward²⁴⁸. But the amount of this sum has to be determined also with respect to the value of the salvaged property²⁴⁹.

Besides the value of the salvaged maritime property, the value of the salvor's equipment and his skills are also criteria which have - under English, South African, and German²⁵⁰ law - an influence on the amount of the reward²⁵¹. Today's professional salvors are very well prepared for their job and the equipment which is used (e.g.: salvage tugs with fire fighting facilities, semi-submersible heavy-lifters, floating cranes [„sheerlegs“] and deep-sea survey equipment) is of tremendously high value. Thus, one might expect that the salvage rewards in relation to the value of the salvaged property would increase in accordance to the increasing value of the salvage equipment. In fact, the contrary was (and is) the case particularly in the late 80's. The International Salvage Union (ISU), as the lobbying organisation of professional salvors from all over the world, has published the following data²⁵²:

²⁴⁸ See also: SeeSchG, VersR 1989, page 173

²⁴⁹ See: § 745 (2) HGB (German Commercial Law Code)

²⁵⁰ Note: In German Law, the effort and skill of the salvor and the degree of danger are the main criteria for fixing the reward; the value of the salvaged property is a criteria which will be considered in second place (Deutsches SeeSchG, Schiedsspruch vom 27.11.1986, VersR 1989, page 174)

²⁵¹ English Law: Article 13 (1) (e) of the 1989 Salvage Convention; R. Grime, Shipping Law, page 292

South African Law: Article 13 (1) (e) of the 1989 Salvage Convention; Bamford, The Law of Shipping and Carriage in South Africa, page 75

German Law: § 745 (1) HGB; See furthermore Rüßmann/Rabe, § 745 B. 2. & 8.

²⁵² From the ISU Bulletin 16, page 14; Source of datas: ISU

Year	Total salvaged values all „no cure - no pay“ contracts in US \$ Millions:	Settlements and awards expressed as a percentage of total salvaged values:
1987	\$ 1,146	7.95 %
1988	\$ 912	4.77 %
1989	\$ 1,187	4.63 %
1990	\$ 1,331	5.07 %
1991	\$ 1,247	4.70 %
1992	\$ 1,692	4.90 %
1993	\$ 1,506	5.28 %
1994	\$ 1,185	6.13 %
1995	\$ 1,744	4.78 %
1996	\$ 1,159	7.79 %

As can be seen, the average salvage rewards in relation to the value of the salvaged property are far behind those which were granted hundred years ago. On the other hand, one has to recognise that the salvaged property have an extremely high value (e.g.: in 1995 the salvaged values amounted to an all-time high of US. \$ 1,744 million²⁵³). Therefore, at the end of the day, even „small percentage rewards“ will earn the salvor some hundredthousand US \$: In 1996, salvors performed 257 salvage operation salvaging a value of US \$ 1,159 million. With an average 7.79 % reward the single salvor received US \$ 348.000 (as an average).

Nevertheless, it seems that - even though today's rewards are a far cry of formerly granted percentages - the salvors are in general not concerned about the amount of the salvage rewards. The slight increase of the percentage in the 90's (except 1995) might be one of the reasons for this.

²⁵³ ISU Bulletin 16, page 14

2.) SALVORS NEGLIGENCE

In English, South African, and German salvage law, the skill of the salvor and his skilful conduct of the salvage operation are circumstances which will be taken into account in assessing the salvage reward²⁵⁴. Thus, it must follow that incompetence and carelessness should feature negatively in determining the salvage reward. In extreme cases, where salvors have performed particularly badly, by being wilful or criminally unskilful, or, more importantly, by resorting to extortion or other forms of misbehaviour, they may be deprived of any reward at all. Less serious negligence can be taken into account simply by reducing the amount awarded²⁵⁵.

But not every careless act should lead to a reduction in the reward: There might be circumstances making the courts overlook a certain degree of unskilfulness or clumsiness, provided that the salvor has tried his best and acted in good faith²⁵⁶.

For many years, it was thought that the only remedy under English law (and presumably also under South African Law) available to the owners of salvaged property against negligent salvors was a reduction of the salvage reward²⁵⁷.

In 1971, the House of Lords decided in the *Tojo Maru* case²⁵⁸ that negligent salvors had no special immunity to actions for damages. The salvors liability was established.

²⁵⁴ Article 13 (1) (e) of the 1989 Salvage Convention; R. Grime, Shipping Law, page 292; Bamford, The Law of Shipping and Carriage in South Africa, page 75; § 745 (1) HGB (German Commercial Law Code)

²⁵⁵ See: § 748 HGB (German Commercial Law Code); R. Grime, Shipping Law, page 294

²⁵⁶ See: *The St. Blane* (1974) 1 Lloyd's Rep. 557

²⁵⁷ R. Grime, Shipping Law, page 295

²⁵⁸ *The Tojo Maru* (1971) 1 Lloyd's Rep. 341

3.) SALVORS LIABILITY FOR NEGLIGENCE

Under German law, the salvage contract is classified as being a works contract²⁵⁹ with the particularity that payment of a salvage reward is due only if the salvage operation was successful (No Cure - No Pay)²⁶⁰. In regard to the liability of the performing party of the salvage contract (salvor) the general liability rules of the German Civil Code (BGB²⁶¹) apply²⁶². Thus, in German law there was always the remedy available for the owner of the salvaged property to claim damages from the negligent salvor.

English and South African law are now in line with the German legal position as regards liability of the negligent salvor.

Prior to the *Tojo Maru* decision²⁶³ of the House of Lords, there was a distinction between the negligent salvor in a successful and in an unsuccessful salvage operation: against the negligent unsuccessful salvor (would-be salvor) one could bring a simple action in tort for damages²⁶⁴; the negligence of the successful salvor - as mentioned earlier - could only lead to a reduction of the amount of the salvage reward.

The *Tojo Maru* case²⁶⁵ - one of the very important cases in salvage law - changed this situation:

The *Tojo Maru*, a 25,000-ton tanker, was damaged in a collision in the Persian Gulf. Bureau Wijsmuller, a firm of professional salvors, started

²⁵⁹ BGH Hansa 58, 1822; Rüßmann/Rabe, Seehandelsrecht, Vor § 740 IV. A.

²⁶⁰ See: § 741 HGB (German Commercial Law Code) establishing the statutory „No Cure - No Pay“ principle

²⁶¹ BGB = Bürgerliches Gesetzbuch

²⁶² The German Supreme Court (BGH [Bundesgerichtshof]) held that a professional salvor must perform his salvage service in accordance with his special skill and knowledge; if he fails to do so he is liable (BGH VersR 58, page 511)

²⁶³ *The Tojo Maru* (1971) 1 Lloyd's Rep. 341

²⁶⁴ R. Grime, Shipping Law, page 295

²⁶⁵ *The Tojo Maru* (1971) 1 Lloyd's Rep. 341

to perform a salvage operation under Lloyd's Open Form standard salvage contract. For a successful salvage, it was necessary to fix of a steel patch over the hole in the ship's side. Before the holds had been properly „degassed“, a salvage diver employed by Wijsmuller fired an explosive fixing-bolt into the side of the *Tojo Maru*, causing a damaging explosion in the tanker. The vessel was later towed to Kobe and successfully repaired. The salvage arbitrator took as salved value of the *Tojo Maru* her market value at Kobe minus the cost of repairs and awarded US. \$ 125,000 as salvage reward which was a low award (less than 10 per cent), bearing in mind the technical difficulty of the salvage. Presumably, the salvage reward was reflecting the salvage diver's negligence. The owners of the *Tojo Maru* counterclaimed damages (cost of the repair plus damages for the delay and loss of profit) for negligence. The Court of Appeal rejected this counterclaim. Salvor's negligence could only lead to a reduction of the award: negligence could be used „as a shield against paying a high salvage award, not as a sword to pierce the salvors to the heart.“

The House of Lords disagreed. The counterclaim was valid, but the salvage award needed reconsideration: the case was remitted to the arbitrator to fix the reward at the level appropriate if there had been no negligence ((1) the cost of repairs should not be deducted from the salved value, (2) the salvors negligence should not be considered in determining the salvage reward).

The case shows that a negligent salvor now might face claims for damages because of his negligence. But it indicates also that negligence of a salvor can

only be considered once: either in determining the amount of the appropriate salvage reward or in a counterclaim for damages. Where the salvor's negligence will be considered depends on the behaviour of the owner of the salvaged but negligently damaged property: as soon as a counterclaim for damages because of negligence is launched, the negligence of the salvor can only be considered there.

The *Tojo Maru* case had also an influence on the International Convention on Salvage, 1989 (London Salvage Convention). The principles contained in the *Tojo Maru* case were underscored in Article 8 (1) (a) which reads:

(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; (...)

The Salvor is, therefore, obliged to carry out the operation with reasonable care and skill, the implication being that failure to do so will saddle him with legal liability for the consequences of such failure²⁶⁶. The degree of „due care“ expected depends upon whether a professional or an „amateur“ salvor is undertaking the salvage operation. The latter will not be burdened with the same high degree of care as a professional salvor²⁶⁷.

The salvor, facing a potential counterclaim because of negligence, will be highly interested to limit his liability. As the owner of the salvage vessel, the tonnage limitation for ships might also apply to the salvor. Two tonnage limitation systems were introduced by the following international conventions:

²⁶⁶ Kennedy, Law of Salvage, para. 887, 888, 891, 892; Hill, Maritime Law, page 331

²⁶⁷ See: Rüßmann/Rabe, Seehandelsrecht, § 745 B. 2.; Hill, Maritime Law, page 331

- The Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels 1957) and
- The Convention on Limitation of Liability for Maritime Claims (London 1976).

The United Kingdom gave direct effect²⁶⁸ to the Convention on Limitations of Liability for Maritime Claims (London 1976) through the provisions of the Merchant Shipping Act 1979. Germany, too, enacted the 1976 London Limitation Convention directly through § 486 (1) HGB (German Commercial Law Code); the provision declares the Convention directly applicable in German law. Thereafter, a ship owner is able to limit maritime claims which he has to meet by limiting his liability to certain „Units of Account“²⁶⁹ per tonnage of the ship²⁷⁰. The Convention also remedied limitation problems for salvors set out in the *Tojo Maru*²⁷¹ case. There, the owner of the salvage tug (Bureau Wijsmuller) was not able to limit his liability, because the salvage diver who caused the damage was not „on board“ the salvage tug, nor was he engaged in the navigation or management of the tug; these requirements were needed under the old provisions in the UK Merchant Shipping Act 1958 which enacted the 1957 Brussels Limitation Convention²⁷². Under the new English law (and German law), the salvor legal position in regard to limitation has improved: Article 1 (1) of the 1979 London Limitation Convention reads:

²⁶⁸ Direct effect means without re-writing the Convention into English statutory language

²⁶⁹ See: Article 8 of the 1976 London Limitation Convention: (1) *The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. (...)*

²⁷⁰ See: Article 6 of the Convention on Limitation of Liability for Maritime Claims (1976)

²⁷¹ *The Tojo Maru* (1971) 1 Lloyd's Rep. 341

²⁷² The Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels 1957)

Persons entitled to limit liability

(1) Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2. (...)

And in Article 2 (1) (a) of this Convention it is stated:

Claims subject to limitation

(1) Subject to Article 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability;

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom; (...)

Under German and the new English law the salvage operator in the *Tojo Maru* case would have had the right to limit his liability, because his employed salvage diver was working in „direct connection“ with the salvage operation when he caused the damage.

The South African tonnage limitation system is not that advanced: South Africa has - up to this date - only adopted the basic principles of the Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels 1957) in its Merchant Shipping Act²⁷³. But the tonnage limitation only applies to damages caused by collisions and accidents at

²⁷³ Merchant Shipping Act 57 of 1951 (MSA)

sea²⁷⁴. Section 261 MSA limits the liability of the owner of a ship for any loss or damage of any kind caused without his actual fault or privity²⁷⁵. Section 261 MSA was amended recently²⁷⁶: the monetary unit is not any longer the gold franc²⁷⁷ but is now replaced by the unit of special drawing rights²⁷⁸ (SDR). Section 261 (1) MSA now reads:

261. When owner not liable for whole damage

(1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity -

(a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage²⁷⁹; or

(b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; or

(c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to

²⁷⁴ The limitation provision (Section 261 MSA) are to be found in Part IV of the MSA: *Collisions, Accidents at Sea, and Limitation of Liability*

²⁷⁵ Bamford, *The Law of Shipping and Carriage in South Africa*, page 64

²⁷⁶ Through the Shipping General Amendment Act 1997

²⁷⁷ The gold franc caused difficulties in transferring it to South African currency (Rand)

²⁷⁸ Special Drawing Rights (SDR) is a monetary unit which is defined by the International Monetary Fund and will be determined by selected world currencies (to avoid exchange rates fluctuations and inflation) and will be updated on a daily base by the banks

²⁷⁹ Note: The calculation of the tonnage is regulated in Section 262 MSA

property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first -mentioned claims shall rank pari passu with the last-mentioned claims.

Under South African limitation law, the salvor in the *Tojo Maru* case could not limit his liability; the damage caused to the *Tojo Maru* was not caused by a salvage vessel.

In this respect, English and German law give wider possibilities for limitation. On the other hand, the 1976 London Limitation Convention²⁸⁰ provides much higher limitation funds²⁸¹, so that, from the point of view of a liable (salvage) ship owner, the South African limitation provisions - if applicable - are more pleasant, because the amount of money to be paid at the end of the day is less.

These different limitation approaches mean that limitation is a matter for which parties may well go „forum shopping“, i.e. seeking the system which

²⁸⁰ The Convention on Limitation of Liability for Maritime Claims 1976 (London)

²⁸¹ See: Article 6 of the 1976 London Limitation Convention

best fits their own interests²⁸². The parties can choose the forum by arresting a ship²⁸³ or by establishing a limitation fund²⁸⁴. This situation might lead to confusion about the proper forum and might induce legal proceedings just to determine which forum and which limitation law is the appropriate one²⁸⁵. In the end, it depends on the circumstances in each particular case which limitation law is the most advantageous for the salvor.

4.) LIMITATION PROHIBITIONS

Thinking now the other way around: the salvor, having a maritime claim for the salvage reward against the salvaged ship, might face an attempt from the ship owner of the salvaged ship to limit his liability as regards the salvage claim. This attempt would presumably fail under English and German²⁸⁶ law, because the 1976 London Limitation Convention would apply²⁸⁷ where it is stated in Article 3:

Claims excepted from limitation

The rules of this Convention shall not apply to:

(a) claims for salvage or contribution in general average; (...)

²⁸² R. Grime, Shipping Law, page 264

²⁸³ See for instance Article 4 (4) (d) of South Africa's Admiralty Jurisdiction Regulation Act No. 105 of 1983 (AJRA): *(d) A court may make an order for the arrest or attachment, to found jurisdiction, of any ship which, if the action concerned had been an action in rem, would be an associated ship with regard to the ship in respect of which the maritime claim concerned arose.*

²⁸⁴ See: Article 13 of the 1976 London Limitation Convention

²⁸⁵ The *Boss 400* case is a good example for the necessity of extra legal proceedings just to determine which forum and which limitation law is the appropriate (and without any regard to the matter of substance): English law and forum (where a limitation fund was established) or South African law and forum (where the tug *Tigr* was arrested); see: „Limited liability in dispute“ (Benefits of London and Cape contested). Fairplay, 31st of July 1997

²⁸⁶ See: Rüßmann/Rabe. Seehandelsrecht, LondonÜ 1976 Art. 3 B. 1. (page 99)

²⁸⁷ The UK and Germany have directly enacted the Convention on Limitation of Liability for Maritime Claims 1976 (London)

The salvage claim is declared not to be limitable²⁸⁸. While the salvor might limit a damage claim against himself, the owners of the salvaged vessel have no possibility to limit the salvage claim.

Although under South African law, the salvage claim is not expressly mentioned as being exempted from limitation, it seems that the salvage claim is also not limitable, because Section 261 of the South African MSA just limits the liability of the ship owner for any loss or damage²⁸⁹. The liability of the owner of a ship for the salvage reward falls not into this category and is therefore - like in English and German law - not limitable.

5.) STATE INTERFERENCE

A salvor might „lose“ the whole salvage claim if a state interferes in the salvage operation.

The first time the problem became apparent was the *Torrey Canyon* incident:

On the 18th of March 1967, the *Torrey Canyon*, a 61,263 GRT tanker, carrying 119,000 tons of crude oil from the Persian Gulf to Milford Haven, went aground on the Seven Stones Reef between Land's End and the Isles of Scilly. Despite strenuous salvage efforts, she could not be got off and there was no possibility of transferring her cargo. She broke her back and the risk of substantial oil pollution at the west coast of England and at the Atlantic coast of France was enormous. The government of England eventually responded: with the consent of the interested parties (owners and salvors) it ordered that the broken ship

²⁸⁸ G. Brice, *Maritime Law on Salvage*, 7-103, 7-104; R. Grime, *Shipping Law*, page 266

²⁸⁹ See: Bamford, *The Law of Shipping and Carriage in South Africa*, page 64

be bombed by the airforce to set her on fire. The vessel was attacked by aircraft for two days and caught fire. Nevertheless, the pollution was considerable.

Because prior consent of owners and salvors of the *Torrey Canyon* was obtained, the incident did not end up in a court case, although the legal position of the English Government at that time was not clear at all. Without such consent, a government could only rely upon its general power, recognised by international law²⁹⁰, to take an „Act of State“. An „Act of State“, however, cannot, under normal circumstances, legally be used against a state's own subjects (own ships)²⁹¹.

The consequence of this lack of legal clarity was the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (The Intervention Convention) which was enacted in the United Kingdom in the Prevention of Oil Pollution Act 1971²⁹² and in South Africa in the Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981 (PACOPOSOA).

For Germany, also a party to this Convention, the provisions of the Intervention Convention came into force on the 5th of August 1975²⁹³.

²⁹⁰ See for instance: The United Nations Convention on the Law of the Sea (UNCLOS): **Art. 192. General obligation.** *States have the obligation to protect and preserve the marine environment.*

Art. 193. Sovereign right of States to exploit their natural resources. *States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.*

²⁹¹ R. Grime, *Shipping Law*, page 327

²⁹² Kennedy, *Law of Salvage*, para. 1420

²⁹³ According to the announcement from the 6th of August 1975 (BGBl. [German Government Gazette] II, page 1196)

Note: In Germany, the „Wasserhaushaltsgesetz“ (WHG) [German Water Management Law Code] which is applicable to all „German waters“ (rivers, lakes, and also the territorial sea) contains provisions in regard to water pollution (eg.: §§ 3 (1) & 32b WHG)

A Protocol dated 2. November 1973 extended the intervention powers to polluting substances other than oil²⁹⁴.

The powers of the state are extensive²⁹⁵: The state can take actions against its own vessel anywhere and foreign vessels within the territorial sea, but also outside the territorial waters when there is a grave and imminent danger of pollution. The powers are, in the first instance, to give directions to the owners, the master, the salvor, or any other person in possession of the vessel to take, or not to take, certain measures. Although these powers have not been used very often (but they remain powerful in the background), the

and liability for water pollution (§ 22 WHG) and provisions giving the authorities supervision powers (§ 21 WHG)

²⁹⁴ See: BGBI [German Government Gazette] 1985 II., page 593 & 1986 II., page 402

²⁹⁵ See for instance: Section 4 (1) of South Africans PACOPOSOA (The Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981) which reads:

Section 4: Powers of Minister to take steps to prevent pollution of the sea where oil is likely to be discharged

(1) If any oil is being discharged or is in the opinion of the Minister likely to be discharged from a ship or tanker the Minister may, with a view to preventing the pollution or further pollution of the sea by such oil, require the master or the owner of such ship or tanker or both such master and owner -

(a) (i) to unload the oil from the ship or tanker or oil from a specified part of the ship or tanker;

(ii) to transfer oil from a specified part of the ship or tanker to another specified part of the ship or tanker;

(iii) to dispose of any oil so unloaded or transferred, in such manner and within such period as the Minister may direct if he deems fit to do so;

(b) to move the ship or tanker or cause the ship or tanker to be moved to a place specified by the Minister;

(c) not to move the ship or tanker from a place specified by the Minister, except with the approval of the Minister and in accordance with the conditions subject to which such approval was granted;

(d) not to unload any cargo or oil, or any cargo or oil specified by the Minister, from the ship or tanker except with the approval of the Minister and in accordance with the conditions subject to which such approval was granted;

(e) to carry out such operations for the sinking or destruction of the ship or tanker, or any part thereof, or the destruction of the oil on the ship or tanker, or such quantity thereof, as the Minister may specify;

(f) to steer such course, while the ship or tanker is within the prohibited area, as the Minister may specify;

(g) to obtain the services of one or more suitable vessels to stand by such ship or tanker during the period determined by the Minister;

(h) to take such other steps in regard to the ship or tanker or its cargo or the oil therein or both the ship or tanker and its cargo or the oil therein as may be specified by the Minister, to prevent the discharge or further discharge of oil from the ship or tanker.

salvor should be aware of them, because there is no obligation of the government to compensate those who might be damaged by the exercise of intervention powers²⁹⁶. If a state orders a polluting tanker to be sunk, the salvor on the spot might lose his complete salvage fund as a basis for his salvage claim; or in other words, the state interference might turn a so far successful salvage operation into an unsuccessful salvage operation with the consequence of „No Cure - No Pay“²⁹⁷.

It seems that some states are demanding even more extensive intervention powers. For instance, after the *Amoco Cadiz* incident off Brittany on the 16th of March 1978 (where 221,000 tons of light crude oil were polluting the Brittany coast over a 60-mile stretch after salvors tried unsuccessfully to salvage the ship), France suggested to the IMO²⁹⁸ that a new Intervention Convention should be adopted giving the state, whose shores are threatened by pollution, even more and greater powers to fight pollution²⁹⁹.

²⁹⁶ R. Grime, *Shipping Law*, page 329; Kennedy, *Law of Salvage*, para. 1424

²⁹⁷ Abecassis & Jarashow, *Oil Pollution from Ships*, page 145

²⁹⁸ IMO = International Maritime Organisation

²⁹⁹ Abecassis & Jarashow, *Oil Pollution from Ships*, page 148

CHAPTER IV

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DISTRIBUTION OF THE REWARD

If maritime property is successfully salvaged the salvor is entitled to claim a reward. Usually a number of salvors are involved in a salvage operation, whether the master and the crew of a single ship have salvaged property or whether different ships or other salvors were, with different intensity, involved in the salvage operation. Thus, the question arises how the reward is to be distributed between all salvors? This question has to be examined under different points of view: First, one might look at the distribution of the reward between different „salvage units“ with special regard to the topic of life salvage; secondly, one might have to look closer at the distribution within one „salvage unit“, which means the distribution between master, ship owner and crew of a salvage vessel.

1.) DISTRIBUTION BETWEEN DIFFERENT „SALVAGE UNITS“

In a salvage operation often several „salvage units“ are working hand in hand. In this context, the meaning of the term „salvage unit“ has a wide interpretation and it includes not only two or more vessels working together in a salvage operation like in the *Melanie and the San Onofre case (1925)*³⁰⁰, where two ships, the San Onofre and the Urania, tried (unsuccessfully) to perform a salvage service together to secure the Melanie. But there are also „salvage units“ like life salvors, who do not succeed to save³⁰¹ or do not

³⁰⁰ *The Melanie and The San Onofre*; *Melanie (Owners) v. San Onofre (Owners)* [1925] A.C. 246

³⁰¹ eg.: *Cargo ex Sarpedon* (1877) 3 P.D. 28; 37 L.T. 505; 26 W.R. 375; 3 Asp.M.L.C. 509; *Cargo ex Schiller* (1877) 2 P.D. 145; 36 L.T. 714; 3 Asp.M.L.C. 439, C.A.

care about the maritime property³⁰². Further, there are units which are not directly involved in the salvage operation like a land based hobby radio operator who receives a distress signal and transmits it to a lifeboat, the coast guard or a professional salvage operator.

a.) The **general principles** in English and South African law concerning the apportionment amongst various independent joint sets of salvors or salvaging ships are that:

- (1) there is priority in time³⁰³. The first salvors, in the absence of any fault on their part, tend to be treated with more generosity than later ones; but
- (2) if there is no question of wrongful dispossession of the first salvor by any subsequent salvor and if second or subsequent salvors have given more meritorious service, they will be treated with more generosity than the first salvors³⁰⁴.

Furthermore, Article 15 (1) (Apportionment between salvors) of the 1989 London Salvage Convention³⁰⁵ states:

(1) The apportionment of the reward under article 13 between salvors shall be made on the basis of the criteria contained in that article.

Thereafter, one have to consider for the distribution the salvaged value, the skill and effort of the single salvor, the measure of success, the degree of

³⁰² Organisations like the South African NSRI or the German DGzRS (Deutsche Gesellschaft zur Rettung Schiffbrüchiger) are focusing their salvage service more on life salvage.

³⁰³ Concerning the time factor one of the leading cases in South African dispensation is the case *Mills v. Reck*, where the the court had to decide about a preference salvage right of a first comming wreck salvor.

³⁰⁴ Hill, Maritime Law, page 345

³⁰⁵ Note: The International Convention on Salvage, 1989, is national salvage law in England since its incorporation in the Merchant Shipping Act (Salvage and Pollution) 1994; South Africa has incorporated the 1989 Salvage Convention in its new Wreck and Salvage Act 94 of 1996

danger and risk undertaken by the different salvors, the promptness of the salvor's service and the state of readiness and efficiency of the salvor's equipment and the value thereof³⁰⁶.

In general, German salvage law seems to follow the same principles³⁰⁷. Differences exist concerning the definition and meaning of „various sets of salvors / different salvage units“. As regards German law, there is only one „salvage unit“ if two or more ships of the same ship owner are performing the salvage service, even if they work together coincidental without pre-existing agreement for combined salvage³⁰⁸. Thus, only ships from different ship owner can be treated as „various sets of salvors“, if there is no combined salvage agreement. It seems that the requirement of the „independence“ of „different salvage units“ is stricter than in English and South African law. The practical relevance of this stricter requirements is that, according to German law, there is in most of the cases only one „salvage unit“ and, thus there is only one person entitled to claim the salvage reward³⁰⁹.

b.) In regard to distribution, **life salvage** becomes an interesting aspect: As mentioned above³¹⁰, the life salvor is not entitled to claim a reward for his salvage service from the saved and rescued person³¹¹.

As a further financial encouragement for life salvors, who are already legally „encouraged“ to perform life salvage - for instance - by Art. 10 (1) of the

³⁰⁶ See: Article 13 (1) of the 1989 London Salvage Convention (Appendix I)

³⁰⁷ Rüßmann/Rabe, Seehandelsrecht, § 744 C. 2. a); see also SeeSchG VersR 83, 1058

³⁰⁸ Rüßmann/Rabe, Seehandelsrecht, § 744 C. 2. a) & b)

³⁰⁹ see above; Rüßmann/Rabe, Seehandelsrecht, § 744 C. 2. c)

³¹⁰ See: Chapter II, 2.) Live Salvage

³¹¹ See Art. 16 (1) of the London Salvage Convention (1989); in German law this is provided by statute: § 751 III HGB

London Salvage Convention and criminal law provision like § 323 c StGB³¹², they are entitled to claim „(...) a fair share of the payment awarded to the salvor for salvaging the vessel or other property (...)“³¹³. Even if a life salvor has not salvaged a single piece of maritime property he can claim a fair share from the independent other salvor, who managed to salvage property out of the same maritime casualty. This particularity about life salvage is a matter of distribution, because the life salvor claims his fair share from the other salvor and not from the ship owner or the cargo owner³¹⁴. Ship- and cargo owner are, in fact, additionally financially burdened: If life and property are saved in one and the same operation, it is custom and practice to award a greater remuneration than if property alone had been salvaged³¹⁵.

This distribution principle between life salvor and property salvor is not new to maritime law: The leading cases in English law are *Cargo ex Sarpendon*³¹⁶ and *Cargo ex Schiller*³¹⁷ both decided in 1877. In German law the principle is laid down in § 751 HGB; Art. 16 of the London Salvage Convention (1989) confirms that principle internationally, which, through the

³¹² § 323 c StGB: provision of the German criminal law code, which penalises the default of rendering aid in an accident/distress situation

³¹³ Art. 16 (2) of the London Salvage Convention (1989)

³¹⁴ In Art. 16 (2) of the London Salvage Convention (1989) it is stated, that „a salvor of human life, ..., is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property ...“; in German law, this is stated in § 751 I HGB (German Commercial Law Code); see further Rüßmann/Rabe, *Seehandelsrecht*, § 751 C. 4; Note: In South Africa's Wreck and Salvage Act it is stated in Section 15 (1): *Salvage shall be payable to the salvor by the owner of the ship or the owner of any wreck, whether or not such ship or wreck has been saved, when services are rendered in saving life from any ship.* (It seems to be, that South Africa has a new legal regime in respect of life salvage)

³¹⁵ G. Brice, *Marine Law of Salvage*, 4-06; Hill, *Maritime Law*, page 314/315

³¹⁶ *Cargo ex Sarpendon*; *The Sarpendon (Cargo Ex)* (1877) 3 P.D. 28; 37 L.T. 505; 26 W.R. 375; 3 Asp.M.L.C. 509

³¹⁷ *Cargo ex Schiller*; *The Schiller (Cargo Ex)* (1877) 2 P.D. 145; 36 L.T. 714; 3 Asp.M.L.C. 439, C.A.

incorporation of the Wreck and Salvage Convention³¹⁸, became also part of the present South African salvage law.

There is unity in English, South African and German law in regard to that principle. Also internationally, that legal concept of life salvage is widely recognised and accepted as the London Salvage Convention (1989) shows. The reason for this might be, that this principle strikes a proper - in the sense of basic justice - balance between the interests of life salvors to obtain a remuneration for their efforts and, on the other side, the ethic approach not to attach value to human life by rewarding life salvage³¹⁹.

2.) DISTRIBUTION WITHIN ONE „SALVAGE UNIT“

The distribution of the salvage reward between master, crew, and owner of the salving vessel - the distribution *within* the „salvage unit“ - is an important factor for the encouragement of a potential salvor. It is the amount of money, which the individual member of a salvage team will receive at the end of the day that makes him taking certain risks. There has to be a just balance between all the participating salvors within the „unit“, which encourages them to perform a salvage service. It has to take in consideration that the ship owner puts his very valuable capital asset at a high risk, that the master has to perform a high degree of seamanlike skill and judgement, and that the crew members have to show personal bravery and consistent hard work³²⁰. The International Convention on Salvage, London 1989, contains no provision in regard to the distribution within one „salvage unit“; on the

³¹⁸ The London Salvage Convention (1989) is part of South African law since the enforcement of the Wreck and Salvage Act of 1996

³¹⁹ see also: Hill, Maritime Law, page 314

³²⁰ R. Grime, Shipping Law, page 292

contrary, the Convention provides in Article 15 (2) (Apportionment between salvors):

(2) The apportionment between the owner, master and other persons in the service of each salvaging vessel shall be determined by the law of the flag of that vessel. (...).

Thus, apportionment within the „salvage union“ is subject to the national law concerned.

a.) In the **English** legal system, the question of distribution is still subject to a long-established tradition, although today salvage claims are rarely taken to court but are usually settled by private agreement or by submission to arbitrators, who do not normally publish the details of distribution.

According to this tradition, the ship owner will get three-quarters of the total reward. The remaining quarter goes to the master and the crew. The master gets one-third of that quarter. The remainder is shared among the officers and seamen in proportion to their rates of pay³²¹. This traditional distribution may not apply to professional salvage tugs as the crew is specially qualified and hired to perform „state of the art“ salvage services.

But this traditional apportionment formula is just a guideline for distribution.

In any case, English courts have wide discretionary powers in apportioning the salvage reward³²².

³²¹ Kennedy, Law of Salvage, para. 1223, 1224; Hill, Maritime Law, page 343; R. Grime, Shipping Law, page 292

³²² Hill, Maritime Law, page 345

b.) It seems that the **South African** salvage law does not follow the English approach of a dividing formula as mentioned above³²³. Courts in South Africa have a wide discretion how to apportion the total reward between all interested parties (ship owner, master & crew). Thus, the courts can take into consideration all circumstances of the particular case and the individual contribution of each party involved. Interesting to note, that this regulation only applies to South African ships; as regards foreign ships the amount shall be apportioned in accordance with the law of the country in which the ship is registered³²⁴.

c.) The distribution of the reward between ship owner, master and crew according to **German** law is regulated by statute and therefor inflexible. The paragraph regulating that matter is § 749 HGB³²⁵. In subparagraph (I) of that provision it is stated, that first of all the ship owner gets compensation for any damage of the vessel while salvaging and the additional costs for the salvage operation. The remainder of the reward will be divided as follow: two-thirds belong to the ship owner (as a reward for the risk for the ship³²⁶), one-sixth is for the master (as reward for his effort) and the remaining one-sixth is for the crew. Subparagraph (II) provides, that the master is in charge to apportion the one-sixth between the crew. He has to take in consideration the efforts undertaken by every crew member. An apportionment plan has to

³²³ Bamford, *The Law of Shipping and Carriage in South Africa*, page 72

³²⁴ Bamford, *The Law of Shipping and Carriage in South Africa*, page 73; this regulation is internationally confirmed in Art. 15 (2) of the London Salvage Convention (1989), which is enacted in South Africa since the enforcement of the Wreck & Salvage Act (1996)

³²⁵ *Handelsgesetzbuch (German Commercial Law Code)*

³²⁶ Rüßmann/Rabe, *Seehandelsrecht*, § 749 C 2. b)

by drafted by the master and he has to give notice thereof to the crew before the end of the journey. If a crew member does not agree with the apportionment plan, he may lodge a complaint - before involving the courts - to the „Seemannsammt“³²⁷, which is an administrative body with certain inquisitive and judicial powers specially for seafarer. The distribution formula provided in § 749 HGB is a strict one; subparagraph (IV) states that agreements contrary to subparagraphs (I) and (II) are null and void if the agreement disadvantages master and crew. An agreement which gives a higher quota to the master and the crew is valid³²⁸. The distribution provision of § 749 HGB only applies for non professional salvage ships and crews; it is not applicable for master and crew of a professional salvage tug³²⁹ because, in general, master and crew of such tugs get higher wages compensating the risk, skill and effort of their salvage performance³³⁰.

d.) From the different approaches of distribution the English approach seems to be the most encouraging one for salvors.

The rigid German system gives the salvor certain security, because he knows in advance which quota he will obtain. But there are only limited possibilities to take special circumstances into account like personal involvement and effort of a crew member. This is only possible within the apportionment of the one-sixth of the reward for the crew.

The South African approach on the other hand is quite vague and quotas are not foreseeable. The individual salvor, who is performing a salvage service

³²⁷ see: § 749 (III) HGB; Rüßmann/Rabe, Seehandelsrecht, § 749 D 3.

³²⁸ Rüßmann/Rabe, Seehandelsrecht, § 749 E

³²⁹ see: § 749 (V) HGB

³³⁰ Rüßmann/Rabe, Seehandelsrecht, § 749 A

does not know which quota of the salvaged property he will obtain at the end of the day. Thus, because of this uncertainty he might not be willing to perform a salvage operation at the highest risk level. On the other hand, courts have a full discretion concerning the apportionment and they can take every circumstance of the particular case into account.

Therefore, it seems that the most reasonable approach is the English distribution system, which is a combination of the two former approaches. The traditional apportionment formula gives a guide line, and the court's discretion allows to take all relevant circumstances into account.

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CHAPTER V

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SALVAGE CONTRACTS

1.) GENERAL OBSERVATIONS

The salvage contract is a special feature of maritime law and is subject to special rules:

The salvage contract breaks an important principle of English, South African, and German law, namely the principle of **sanctity of contracts**³³¹. As a general rule, a contract once agreed can never be re-opened. However unfair the terms of the contract, the contracting parties are bound by what has been agreed as long as there are no exceptional occurrences like physical duress, material misrepresentation, or operative mistake. But salvage contracts may be re-opened and be struck down or be fixed by court till the contract is based on equity³³².

In Germany, the salvage contract is qualified to be a contract of work and labour („Werkvertrag“)³³³ which makes the salvage contract an ordinary civil contract subject to the provisions of the German Civil Law Code (BGB³³⁴).

The re-opening of a salvage contract is also possible under German law³³⁵, but this is regulated by statute. For salvage contracts, the provisions of the

³³¹ See: Kennedy, Law of Salvage, para. 754; see also: R. Grime, Shipping Law, page 296

³³² See: *The Medina* (1876) 2 P.D. 5; 35 L.T. 779; 3 Asp. M.L.C. 305, C.A. as the leading English case where the court re-opened a salvage contract and reduced the agreed sum (which was held to be excessive) to an equitable amount;

See further: Article 7 of the London Salvage Convention (1989)

³³³ BGH VersR 58, 511; Rüßmann/Rabe, Seehandelsrecht, Vor § 740 IV A.

³³⁴ BGB = Bürgerliches Gesetzbuch (German Civil Law Code)

³³⁵ Schrock, Das Internationale Übereinkommen über Bergung vom 28. April 1989, TranspR 89, page 302

HGB (German Commercial Law Code) apply. § 747 HGB³³⁶ provides that a salvage contract may be cancelled or amended in court if the contract was concluded under the influence of present danger and the terms of the contract are unfair, or if the contract was concluded under the influence of deception, or if the service rendered and the reward agreed are totally out of line.

Another typical feature of the salvage contract is the „no cure - no pay“ principle upon which a salvage contract is based. This principle is embed in English³³⁷ and South African law³³⁸ as well as in German law³³⁹. Payment is only due in case of a successful salvage. The salvor is not in breach of contract if he fails to salve maritime property, but he might be liable if he gives up³⁴⁰.

It used to be assumed that salvage contracts were, like contracts of marine insurance, contracts *uberrimae fidei*, of the **utmost good faith**, imposing on the parties the duty to make full disclosure of all material facts, before and during the contract³⁴¹. This matter is now governed by the decision of *The*

³³⁶ § 747 HGB reads: *Eine über die Bergung oder Hilfeleistung geschlossener Vertrag kann von dem Gericht auf Antrag geändert oder für nichtig erklärt werden, wenn der Vertrag zur Zeit und unter dem Einfluß der Gefahr geschlossen ist und die vereinbarten Bedingungen unbillig sind. Das gleiche gilt, wenn einer der Vertragschließenden zu dem Vertragschluß durch arglistige Täuschung bestimmt worden ist oder der Berge- oder Hilfslohn in einem außerordentlichen Maße nach der einen oder anderen Richtung außer Verhältnis zu den geleisteten Diensten steht.*

³³⁷ Chorley & Giles, Shipping Law, page 454; R. Grime, Shipping Law, page 297

³³⁸ See: South Africa's Wreck and Salvage Act 94 of 1996 which gives the force of law to the International London Salvage Convention (1989) in South Africa; see further: Article 12 (1) of the London Salvage Convention (1989) where it is stated: *(1) Salvage operations which have a useful result give right to a reward.*

³³⁹ § 741 (1) HGB (German Commercial Law Code); Rüßmann/Rabe, Seehandelsrecht, Vor § 740 IV A

³⁴⁰ Rüßmann/Rabe, Seehandelsrecht, § 747 B. 3.; R. Grime, Shipping Law, page 300

³⁴¹ R. Grime, Shipping Law, page 298

Unique Mariner (No.1) (1978)³⁴². The court held that salvage contracts, although governed by the ordinary rules of mistake and misrepresentation, were not subject to the extra principles based upon good faith. Thus, the present English and South African legal position seems to be that there is no duty on the contractors of a salvage agreement to make full disclosure based on *uberrimae fidei*³⁴³. This position seems to be also the German one as the salvage contract is qualified as a work and labour contract³⁴⁴ which obliges the contractors to disclose only matter relevant for the work and labour contract. Further disclosure, as it is required for insurance contracts, is not necessary for the salvage contract.

An essential question in regard to salvage contracts is the question **who is bound by salvage agreements?** The salvage reward, as a matter of general maritime law, is payable by all those who have benefited from the salvage operation. Those who have to face the salvage claim are usually the ship- and cargo owners and the owners of the freight.

A salvage contract clearly overrides, or supplements, those liabilities in respect of those parties who are bound by the agreement³⁴⁵. For instance, the Lloyd's Open Form (LOF) salvage contract³⁴⁶ may burden persons who are bound by it with the additional liability for „safety net“ payments or „special compensation“ whereby persons who are not bound face liability in accordance with the general maritime salvage laws. Thus, it might be of

³⁴² *The Unique Mariner* (No.1), [1978] 1 Lloyd's Rep. 438

³⁴³ Chorley & Giles, Shipping Law, page 455; R. Grime, Shipping Law, page 298 - 300

³⁴⁴ Rübmann/Rabe, Seehandelsrecht, Vor § 740 III. A.

³⁴⁵ R. Grime, Shipping Law, page 301

³⁴⁶ The Lloyd's Open Form (LOF) contract will be discussed in detail below

interest for a salvor that as many of the involved interests as possible are bound by a salvage agreement which contains additional liabilities. A salvage contract may be made by the ship owners, or the ship managers on their behalf, or by and with the assent of the underwriters³⁴⁷ who often have to pay the bill of an salvage operation at the end of the day anyway. Mostly, though, the contract is physically signed by the master of the ship which is in need of the salvage service. Who is bound by his signature?

The master, as authorised agent, usually binds his principal: the ship owner or the demise charterer of the ship concerned. Furthermore, he might have the authority to bind the cargo owners and the owner of other „property on board the vessel“³⁴⁸.

The master's „binding authority“, under English salvage law, was originally based on the principles of agency. As expressly authorised agent, or with „implied“ or „ostensible“ authority, he binds his principal who might be the ship owner or the demise charterer. The cargo owners might be bound under the doctrine of agency of necessity³⁴⁹, which was developed in the context of shipping for situations of emergency and urgency where real practical difficulties stood in the way of contacting the cargo owners for proper instructions. Nowadays, in times of world-wide telecommunications, the requirements for an agency of necessity are increasingly hard to achieve and, in the absence of agency of necessity, cargo was not bound by the salvage contract³⁵⁰. This legal situation has changed since the 1989 Salvage

³⁴⁷ See: *The Unique Mariner*, (No.1) [1978] 1 Lloyd's Rep. 438, (No.2) [1979] 1 Lloyd's Rep. 37, where the underwriters made a salvage contract with a professional salvor

³⁴⁸ Article 6 (2) of the International Convention on Salvage, London 1989

³⁴⁹ See: *The Choko Star* [1990] 1 Lloyd's Rep. 516

³⁵⁰ See: G. Brice, *Maritime Law of Salvage*, 5-34; see also: *The Choko Star* [1990] 1 Lloyd's Rep. 516

Convention was incorporated into the English Merchant Shipping (Salvage and Pollution) Act 1994 and became national law of the United Kingdom. Article VI (2) of that Convention expressly authorises the master to bind cargo on board the vessel and reads as follow:

(2) The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owners of the property on board the vessel.

This provision gives the master wide legal authority: he can bind ship- and cargo owner, but also the owner of other property on board, for instance, the owner of the bunkers. This is a convenient solution for salvors; the owners of the ship and of all property thereon are subject to the same legal regime of the salvage contract and might, all together, be bound by the „special compensation“ or other „enhanced awards“ provisions. Furthermore, arbitration proceedings regarding the salvage award do not get split up: there is no longer the potential „danger“ of parallel arbitration under the salvage agreement (between salvor and ship owner), on the one side, and arbitration under the general principles of salvage law (between salvor and cargo owner), on the other.

South Africa has also enacted the London salvage Convention of 1989 in its Wreck and Salvage Act 94 of 1996³⁵¹. The legal situation in respect to the „binding“ authority of the ship’s master, therefore, corresponds with the present English situation.

³⁵¹ Section 2 (1) of the Wreck and Salvage Act 94 of 1996 reads: *The Convention shall, subject to the provisions of this Act, have the force of law and apply in the Republic.*

The authority of a master under German law is regulated by code in the German Commercial Law Code (HGB³⁵²), provision §§ 527 & 535 HGB. § 527 (1) HGB provides that the ship's master is invested with the authority to conclude contracts on behalf of the ship owner which are related to the voyage of the ship, but only if the vessel is outside her home port³⁵³. Inside the home port, the master has no legal authority to bind the ship owner by contracts³⁵⁴, but he might be expressly authorised³⁵⁵ by the ship owner to do so. Salvage contracts are related to the voyage of the vessel and, therefore, the master has authority to conclude these kind of contracts³⁵⁵. Also the cargo owners can be bound by the salvage contract concluded by the master³⁵⁶. The requirements for this „binding authority“ are stated in § 535 HGB (German Commercial Law Code). On this basis, the master has the authority to take, in his discretion, all measures needed - also: conclusion of salvage agreements³⁵⁷ - on behalf of the cargo owners to save cargo from loss or damage provided the circumstances are making it impossible to request proper instructions from the cargo owners³⁵⁸. In regard to the cargo owners the legal position seems to be close to the old English position. The master has to contact the cargo interests first and ask if they agree with the intended

³⁵² HGB = **H**andels**g**esetz**b**uch (German Commercial Law Code)

³⁵³ § 527 (1) of the German Commercial Law Code (HGB) reads in German: *(1) Befindet sich das Schiff außerhalb des Heimathafens, so ist der Kapitän Dritten gegenüber kraft seiner Anstellung befugt, für den Reeder alle Geschäfte und Rechtshandlungen vorzunehmen, welche die Ausrüstung, die Bemannung, die Verproviantierung und die Erhaltung des Schiffes sowie überhaupt die Ausführung der Reise mit sich bringen.*

³⁵⁴ Rüßmann/Rabe, Seehandelsrecht, § 747 B. 1.

³⁵⁵ RGZ 70, 274; RGZ 165, 166; Rüßmann/Rabe, Seehandelsrecht, § 527 B. 3.

³⁵⁶ Rüßmann/Rabe, Seehandelsrecht, § 747 B. 1.

³⁵⁷ Rüßmann/Rabe, Seehandelsrecht, § 747 B. 1.

³⁵⁸ The relevant subsection of § 535 HGB reads in German: *(2) Werden zur Abwendung oder Verringerung eines Verlustes besondere Maßregeln erforderlich, so liegt ihm ob, das Interesse der Ladungsbeteiligten wahrzunehmen, wenn tunlich ihre Anweisungen einzuholen und, soweit es den Verhältnissen entspricht, zu befolgen, sonst aber nach eigenem Ermessen zu verfahren und überhaupt tunlichst dafür zu sorgen, daß die*

salvage contract; only if the cargo owners agree the master has the authority to sign the salvage contract on their behalf as well. In exceptional circumstances, where advice from the cargo owners cannot be reached the master can bind the cargo interests in a salvage agreement. The authority provisions mentioned above are applicable only if all involved interests are German³⁵⁹. The legal situation will change when the 1989 London Salvage Convention will be incorporated into national German Law. Up to this point, German law will be, in regard to the master's conclusion authority, one step behind the South African and English law which has adopted the International Salvage Convention of 1989. Because of the clear conclusion authority of the ship's master granted in this Convention, a professional salvor will be aware that his salvage agreement is governed by the provisions of the London Salvage Convention of 1989.

2.) LLOYD'S OPEN FORM

Because of the shortage of time for negotiation in situation where salvage services are needed, salvage agreements are usually based on forms in which only a few factual information, like the ship's name, the master, the owner of the ship, and the salvor („the contractor“), has to be added. The world-wide most used and accepted form of a salvage agreement is the „Lloyd's Form“ or „Lloyd's Open³⁶⁰ Form“ which is coded „LOF“. The LOF is a standard form of agreement which both the salvaged party and the rescuer

Ladungsbeteiligten von solchen Vorfällen und den dadurch veranlaßten Maßregeln schleunigst in Kenntnis gesetzt werden.

³⁵⁹ See: SeeSchG VersR 89. 173

³⁶⁰ The name *Lloyd's Open Form* is reflecting the fact that remuneration is not fixed by the contract but referred to arbitration.

(salvor) will sign or agree to. It is, in essence, an agreement to „use best endeavours“³⁶¹ to save the vessel and other property and to take them to a „place of safety“³⁶², as specified or agreed, for a sum to be „fixed by arbitration in London“³⁶³. The services are declared to be „rendered and accepted as salvage services upon the principles of *no cure - no pay*“³⁶⁴, which phrase is printed in large letters across the top of the contract's front page. The signing of the LOF does not change the nature of the salvage operation; in particular, the conclusion of the salvage agreement does not affect the voluntary nature of the service³⁶⁵. Lloyd's form of salvage agreement dates back from the 1890s and was changed several times during the past century by adding or replacing clauses which were intended to secure the salvor's incentive for salvage. Whenever shortcomings in salvage law became obvious, a clause was added to the LOF to fix the gap.

For instance, the „LOF 80“, the edition of 1980 which was widely used around the world until relatively recently, broke new ground by incorporating a clause departing from the „no cure - no pay“ principle as a result of the experiences in the oil pollution disasters during the 1970s, like the *Amoco Cadiz* and the *Cristos Bitas* casualties. Application of the „no cure - no pay“ principle in these oil pollution disasters gave salvors little incentive to undertake difficult and costly salvage operations the success of which - and therefore the payment of a salvage reward - was often very unlikely. To encourage salvors to take on casualties which caused or

³⁶¹ See: Clause 1 (a) of LOF 95

³⁶² See: Clause 1 (a) (i) of LOF 95

³⁶³ See: Clause 1 (c) of LOF 95

³⁶⁴ See: Clause 1 (b) of LOF 95

³⁶⁵ Hill, *Maritime Law*, page 323

threatened oil pollution, the LOF 80 introduced, as an exception to the fundamental principle of „no cure - no pay“, the „safety net“ clause (clause 1 (a) of the LOF 80) which reads:

1. (a) (...) The services shall be rendered and accepted as salvage services upon the principle of „no cure - no pay“ except that where the property being salvaged is a tanker laden or partly laden with a cargo of oil and without negligence on the part of the Contractor and/or his Servants and/or 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 per cent 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 exception to the principle of „no cure - no pay“ expenses shall in addition to actual out of pocket expenses include a fair rate for all tugs craft personnel and other equipment used by the Contractor in the services (...).

Thus, in limited circumstances, the salvor could claim against the tanker owner his reasonably incurred expenses plus an increment of not more than 15 per cent of those expenses as the arbitrator consider fair³⁶⁶.

The next edition of the Lloyd's salvage agreement standard form was the **LOF 90** of the year 1990. The LOF 90 incorporated parts of the London

³⁶⁶ See: Chorley & Giles, Shipping Law, page 464; see also: Hill, Maritime Law, page 324

Salvage Convention of 1989³⁶⁷ which was in 1990 neither part of international law³⁶⁸ nor part of any national law. The London Salvage Convention contains a number of provisions which give strong incentives to the salvors, for instance, the new regulation in regard to a „special compensation“. The aim of the Convention was to provide the shipping industry with an effective and economically viable international salvage fleet³⁶⁹. Thus, it became advantageous for salvors to ensure that the salvage agreement is governed by (probably the best parts of) the Convention. The relevant clause in the LOF 90 is clause 2 which reads:

2. Articles 1 (a) to (e), 8, 13.1, 13.2 first sentence, 13.3 and 14 of the International Convention on Salvage 1989 („the Convention Articles“) set out hereafter are hereby incorporated into this Agreement.

With the incorporation of parts of the London Salvage Convention of 1989 the LOF 90 has replaced the LOF 80's „safety net“ by the conventional provision called „special compensation“³⁷⁰. Special compensation is the salvor's expenses plus, if he has successfully prevented damage to the environment, up to 30 per cent. of those expenses³⁷¹.

The latest edition is the **LOF 95** of 1995 which had to take into account that the London Salvage Convention of 1989 had been incorporated into the English Merchant Shipping Act of 1994. As the Lloyd's Open Forms always

³⁶⁷ International Convention on Salvage, IMO, London, April 28, 1989

³⁶⁸ See: Schrock, Internationales Übereinkommen über Bergung, TranspR 89, page 307; former Article 29 (1) of the London Salvage Convention 1989

³⁶⁹ Schrock, Das Internationale Übereinkommen über Bergung vom 28. April 1989, TranspR 89, page 301

³⁷⁰ Article 14 of the London Salvage Convention of 1989 deals with the legal regime of „Special Compensation“

³⁷¹ R. Grime, Shipping Law, page 305

have been „governed by the law of England, including the English law of salvage“³⁷², the whole Salvage Convention is now applicable in the framework of the LOF 95 agreement. But besides from that fact, there were not many amendments in comparison with the LOF 90. Most of the clauses of LOF 95 have a corresponding provision in the 1989 Salvage Convention. Important stipulations, like the duties and obligations of the contractors (co-operation, carrying out the salvage operation with due care, etc.) are stated in Clause 1 (a) and 3 of LOF 95 and similarly in Article 8 of the 1989 Salvage Convention.

Another important matter for the salvor are the provisions regarding security. In this respect, the LOF 95 is more detailed and gives more rights and powers than the Article 21 of the London Salvage Convention. The *Provisions as to Security* are contained in Clauses 5 and 6 of the LOF 95. In essence they provide for security for the salvage reward. The salvor has the right to demand „reasonable“ security and, if a security is provided, the salvor undertakes not to arrest the salvaged property³⁷³. In case Article 6 (2) of the Salvage Convention (authority of the master to bind also the cargo owners in the salvage contract) does not apply and, therefore, the cargo owners are not bound by the security provisions in the LOF 95 contract, the ship owners shall *use their best endeavours to ensure that the cargo-owners provide their proportion of security*³⁷⁴. Furthermore, the salvage arbitrator has the power to include in the salvage reward expenses reasonably incurred by the salvor in

³⁷² See: Clause 1 (g) of LOF 95 and of LOF 90 and Clause 1 (d) of LOF 80

³⁷³ As mentioned above (Chapter II, 1.), a.) the salvor has got a maritime lien over the salvaged property; see also: Article 20 of the London Salvage Convention

³⁷⁴ See: Clause 5 (d) of the LOF 95

- (1) *ascertaining demanding and obtaining the amount of security reasonably required (...)*³⁷⁵ and
- (2) *enforcing and/or protecting by insurance or otherwise or taking reasonable steps to enforce and/or protect his lien*³⁷⁶.

As mentioned earlier, the London Salvage Convention is now part of the English salvage law which governs the LOF 95. Therefore, the legal regime of „special compensation“ stated in Article 14 of the London Salvage Convention applies automatically. No wonder then, that the „special compensation“ is only briefly mentioned in Clause 1 (b) of the LOF 95: *Subject to the statutory provisions relating to special compensation the services shall be rendered and accepted as salvage services upon the principle of „no cure - no pay“*. A closer look at the legal regime of „special compensation“ will be taken later, in connection with oil pollution casualties, in chapter VI.

The „Lloyd’s Open Form“ in its latest edition of 1995 (LOF 95) is the worldwide most frequently used standard form of salvage agreement. The reason for this is obvious: LOF provides the salvor (the „Contractor“) with strong incentives to undertake salvage operations and the necessary rights and powers to secure the payment of the salvage reward, on the one hand, or, as the case may be, „special compensation“ payment, on the other. Furthermore, the LOF clauses are not unfair in respect of the other party or parties to the agreement, the owner(s) of the salvaged property. Thus, LOF 95 is a widely accepted standard salvage agreement.

³⁷⁵ See: Clause 6 (d) (i) of LOF 95

³⁷⁶ See: Clause 6 (d) (ii) of LOF 95

The Lloyd's Form will always be amended as soon as a number of gaps or a number of short-comings in international or English salvage law become apparent. Already now, there are a few short-comings which may necessitate further amendments to LOF 95. For instance, the reference to London arbitration is now recognised as a short-coming, because it causes costly and lengthy proceedings. The International Salvage Union (ISU) and P & I Clubs are busy working out an improved wording for the form³⁷⁷ which provides for an easier way to settle the salvage reward or the special compensation award³⁷⁸ by mediation as a first resort, prior to arbitration proceedings in London. Because of immense problems³⁷⁹ as regards the salvor's special compensation award caused by Article 14 of the 1989 London Salvage Convention which is part of the LOF 95 agreement, salvors are seeking the right to invoke a new special compensation scheme at any point of the contract. This will probably be assessed on a time and material basis, at predetermined rates for tugs, agreed tariffs for personnel and equipment, and other out of the pocket expenses. Also a „25 % bonus payment“ is under discussion. Ship owners and P & I Clubs want the incorporation of a clause which gives them the right to appoint a salvage manager, though control of the salvage *operation* shall remain with the salvor. Another gap to be closed in a new LOF edition is the establishment of a precise definition of the „area“ where damage to the environment can take place under Article 14 (1) of the 1989 Salvage Convention and which is defined in Article 1 (d) of the Convention as „*costal or inland waters or areas adjacent thereto*“. The

³⁷⁷ Apparently, the new form will be called LOF 98

³⁷⁸ See: Article 14 of the 1989 London Salvage Convention

³⁷⁹ See: Chapter VI, 2.) Article 14 and the *Nagasaki Spirit* Litigation

expression „adjacent areas“ contains an uncertainty as to whether, for instance, the high seas also belong to this area³⁸⁰.

Time will tell if these attempts will reach a final consensus which then will be the basis of a new LOF edition. If a new LOF edition will come into operation, LOF will be, once again, one step ahead of international and national salvage law and salvors will try to place their salvage operation under the legal regime of the latest LOF edition.

3.) OTHER SALVAGE CONTRACTS

Although the „Lloyd’s Open Form“ is the leading standard salvage agreement, there are also other salvage contract forms in use³⁸¹:

- The Japan Shipping Exchange, Inc. Salvage Agreement (no cure - no pay);
- The Turkish Maritime Organisation Salvage and Assistance Agreement;
- The China Council for promotion of international trade and salvage; no cure - no pay;
- The Conditions of the German Court of Marine Arbitration (Deutsches Seeschiedsgericht), Hamburg³⁸²;
- Le Contract d’Assistance Maritime;
- United States Navy Salvage Agreement;
- and others.

³⁸⁰ The problem involved in the „adjacent areas“ topic is discussed later in Chapter VI under 2.) Article 14 and the *Nagasaki Spirit* litigation

³⁸¹ Examples taken from the list in: Brice, *Maritime Law of Salvage*, page 502/503

³⁸² See: Appendix II

The main difference between these other salvage contract forms and the LOF is that the contract is not governed by English law³⁸³ and the fixing of the salvor's remuneration is not referred to arbitration in London³⁸⁴. Where the involved interests (salvor, ship-, cargo owner and owner of the freight) in a salvage operation are from one country which is not the United Kingdom, there is no need in the salvage contract to agree to a foreign (English) law and arbitration tribunal. Instead, it makes more sense to conclude a salvage agreement which is subject to the particular law of that country and which refers arbitration to a tribunal in the country concerned.

In **South Africa** there is no South African standard salvage agreement in operation. It seems that South African salvors rely completely on the Lloyd's Open Form in its actual edition. For instance, *Pentow Marine (Pty) Ltd*³⁸⁵ of South Africa uses the LOF even when they salvage a South African ship in South African waters. To avoid the costly and lengthy arbitration proceedings in London, *Pentow* tries to negotiate the salvage reward with the other parties involved without reporting the salvage operation to London. In case negotiations fail, all the „South African salvage interests“ have to go to the expensive London arbitration. There are two ways to avoid these superfluous proceeding costs:

- (a) By law it could be provided that South African arbitration is compulsory in case of an entirely South African salvage operation where

³⁸³ See: Clause 1. (g) of LOF 95

³⁸⁴ See: Clause 1. (c) of LOF 95

³⁸⁵ *Pentow Marine (Pty) Ltd* is a South African, Cape Town based (31 Carlisle Street, 7405 Paarden Eiland), professional salvage operator and member of the International Salvage Union (ISU)

no foreign interests are involved. As it seems, this is already a matter of discussion in South Africa's maritime circles.

- (b) South African salvage operators could draft their own salvage agreement form in which arbitration is referred to a South African arbitration tribunal.

For instance in **Germany**, one of the biggest German professional salvage companies, the *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH & Co.*³⁸⁶, of Hamburg, has adopted the second course and uses for operations in German waters, its own salvage contract form³⁸⁷, which is quite short containing only 6 clauses and which is - of course - also based on the „no cure - no pay“ principle. Clause 6 of that form states that *„This agreement shall be governed by and arbitration thereunder shall be in accordance with German Law (...)“*. Clause 5 of that standard contract reads:

5. The remuneration due to „Bugsier“³⁸⁸ shall be fixed between the parties concerned by mutual agreement. Failing this, remuneration to be fixed by „Deutsches Seeschiedsgericht in Hamburg“ (German Maritime Court of Arbitration). (...)

The salvor's right to use the vessel's gear, anchors, chains, etc. is contained in Clause 1. Provisions in regard to remuneration and special compensation can be found in Clause 2 which refers to Article 13 and 14 of the International Convention on Salvage 1989 and their common understanding.

³⁸⁶ The headoffice of this salvor can be addressed under: *Johannisbollwerk 10, 20459 Hamburg*

³⁸⁷ See: Appendix II

³⁸⁸ „Bugsier“ is the short form of *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH & Co.*

Clause 3 regulates the salvor's indemnification against liabilities and Clause 4 contains provisions as to the payment of the remuneration, security and maritime lien.

Not very different from this standard salvage agreement is the form of the „Deutsches Seeschiedsgericht Hamburg“³⁸⁹ which was already mentioned earlier. Nevertheless, this form contains a particularity in respect of the remuneration in Clause 4 which reads:

4. The remuneration for the service rendered shall be fixed between the parties concerned by mutual agreement. Failing this, remuneration to be fixed by „Deutsches Seeschiedsgericht in Hamburg“ (Maritime Arbitration court). This court shall also settle all disputes between the parties interested in the salvaged property. (...).

The particularity of this provisions is actually what is **not** regulated and stated in it: the „special compensation“ award in accordance with the legal regime of Article 14 of the 1989 London Salvage Convention.

³⁸⁹ The „Deutsches Seeschiedsgericht Hamburg“ is the German maritime arbitration tribunal

CHAPTER VI

University of Cape Town

OIL POLLUTION CASUALTIES

1.) GENERAL OBSERVATIONS

Since transportation of crude oil and other hazardous chemicals by tankers through the world's oceans increased during this century, it became obvious that these tankers are a danger potential not only to the maritime environment. Oil pollution disasters like the *Exxon Valdez* spill³⁹⁰ or the *Braer* spill have shown to the maritime community that the prevention of such disasters is an important challenge and a major concern. An outstanding role in the prevention of oil spills is played by professional salvage operators, that have the knowledge, the skill, and the equipment to undertake the performance of salvage services to a tanker in distress laden with crude oil. The data published by the ISU³⁹¹ in its annual publication named „ISU Bulletin“ underlines the important role of salvors: In the *ISU Annual Pollution Prevention Survey*³⁹² it is stated that, in 1996, members (salvors) of the ISU have recovered in 169 salvage operations 1,866,930 tonnes of pollutants (1,746,541 tonnes of crude oil; 58,437 tonnes of bunkers; 61,952 tonnes of hazardous chemicals). In the period 1994-96 ISU members have recovered 5,344,930 of pollutants (crude oil, bunkers, and chemicals). The volume of this recovery - and the dimension of the disasters if such recovery

³⁹⁰ In 1989, the *Exxon Valdez*, a VLCC tanker, ran aground and 37,000 tonnes crude oil were released into the sea polluting Alaska's Prince William Sound. The damage of this disaster, including the damage to the environment, was claimed to be more than 5 billion US \$.

³⁹¹ The ISU (International Salvage Union) is the most important lobbying organisation for professional salvors

³⁹² See: ISU Bulletin 16 (July 1997), page 4

would have failed - become vivid if compared with the *Braer* spill where (only) 85,000 tonnes crude oil polluted the maritime environment or with the *Exxon Valdez* spill where even less oil (only 37,000 tonnes crude oil) flowed into the sea.

But what is the incentive for a salvor to undertake a salvage operation where a tanker is involved keeping in mind that the salvage reward is only granted in case of a successful operation? The case in point being that tanker salvors run a great risk of being unsuccessful, because the coastal state - for instance - might interfere³⁹³, as this was the case in the *Torrey Canyon* spill off the coast of England where the United Kingdom decided to bomb the spilling tanker to avoid further pollution. Also in the *Cristos Bitas* casualty in 1978 where, to avoid further risks, the vessel was towed out into the Atlantic and deliberately sunk with her underwriter's blessing, there was nothing left to salvage. Furthermore, the salvor, in performing his service, might be exposed to liabilities because of damages caused by pollution from the leaking tanker. In other words, there is a lot to lose in salvaging a spilling tanker and professional salvors become very wary of rendering risky service³⁹⁴. In this matter, a man named Mr. Bent Nielsen prepared a report summarising the discussion of that problem at the „International Maritime Association“ (IMO) with ship owners, salvors, insurers, P & I Clubs and others, for the consideration of the „Comité Maritime International“ (CMI) in 1984. In that report Mr. Nielsen focused the problem as follow:

³⁹³ See above under Chapter III, 5.) State Interference

³⁹⁴ R.Grime, Shipping Law, page 305

It also became clear that the existing rules did not offer sufficient incentives to induce the salvor to render salvage services in cases where there is very little prospect of succeeding in saving the property while, on the other hand, major salvage operations might be urgently needed to prevent or minimize damage to the environment.

A partial solution of that problem was PIOPIC, a clause approved by the ISU³⁹⁵, requiring indemnity from the owners of any laden or partly-laden tanker to which salvage service were rendered³⁹⁶. A clause like this can still be found in the German standard salvage contract of *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH (Hamburg)*³⁹⁷. Clause 3 of that form reads:

3. (...). „Bugsier“ shall not be responsible for any environmental pollution damage, air- or water pollution by oil, poison or other harmful substances. „Bugsier“ shall be indemnified by their partner to this contract in respect of all claims for such pollution damages howsoever arising. (...).

A really decisive remedy in this respect was the introduction of LOF 80 salvage contract form³⁹⁸ which contain the so-called „enhanced award“ as part of the „safety-net“ provisions. Under LOF 80, the salvor has the obligation to use his best endeavours not merely to save the vessel and the cargo, but also to prevent spillage of oil into the sea. Such endeavours to prevent oil pollution were rewarded with an „enhanced award“. In case the salvage operation in respect of a tanker was unsuccessful, or not successful enough to provide sufficient salvaged property, the „safety net“ clause of LOF

³⁹⁵ ISU = International Salvage Union

³⁹⁶ R. Grime, Shipping Law, page 305

³⁹⁷ See: Chapter V, 3.) Other Salvage Contracts & Appendix II

³⁹⁸ See: Chapter V, 2.) Lloyd's Open Form

80³⁹⁹ provided that the salvor would get a refund of his expenses plus an additional 15 % of such expenses. This „safety net“ payment has its justification in the fact that the salvors might prevent the ship (tanker) owners from becoming liable for the damage resulting from oil pollution (e.g.: clean-up costs); the salvor’s service might avoid or minimise liability for such environmental and other pollution damage. The phrase „liability salvage“⁴⁰⁰ was born and it was recognised that there was more to „avoid“ in a salvage operation than the loss of or damage to life and/or property.

The LOF 80 „safety net“ was superseded by the „special compensation“. The „special compensation“ is a legal regime introduced by the International Convention on Salvage in 1989. This legal regime is regulated in Article 14 of that Convention which reads as follow:

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

³⁹⁹ See the wording of the „safety net“ clause in Chapter V, 2.) Lloyd’s Open Form

⁴⁰⁰ G. Brice, *Maritime Law of Salvage*, 4-69, 4-75 & 4-76

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

(4) The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

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

(6) Nothing in this article shall effect any right of recourse on the part of the owner of the vessel.

The salvor might get - as „special compensation“ - his expenses if he fails to earn a salvage reward for the services rendered to a vessel which by itself or its cargo threatened damage to the environment plus, if he has successfully prevented damage to the environment, up to 30 % of those expenses. The scheme of the special remuneration provisions work in this way: First the salvor has to establish and satisfy the basic requirements of Article 14 (1) so

as to be entitled in principle to his expenses under Article 14 (3). If in addition the salvor establishes that he also protected the environment in respect of Article 14 (2) then he may be entitled to an increment under Article 14 (2). By virtue of Article 14 (4), in a case where salvage has been earned under Article 13 (which has to be paid in a *pro rata* share by all interests involved of the salvaged property: ship, cargo, freight), the total figure assessed under Article 14 (namely „expenses“ plus increment) is set against the Article 13 award. If the Article 14 total exceeds the salvage reward, then the balance is payable as „special compensation“ to the salvor by the ship owner alone (or in reality by his P & I Club). This legal regime of „special compensation“ applies not only for oil pollution or tankers laden with crude oil, it covers all possible threats of damage to the environment by ships⁴⁰¹. The „special compensation“ provisions of the London Salvage Convention of 1989 were incorporated in LOF 90 and are now part of the English salvage law which is governing the LOF 95⁴⁰². But also other salvage contract forms, for instance the German form of the *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH (Hamburg)*⁴⁰³, have incorporated the legal regime of the „special compensation“. In England and in South Africa, the Provisions of Article 14 of the 1989 London Salvage Convention (Special compensation) are governing all salvage operation concerned, because the Salvage Convention is part of the national salvage law in these countries. But also in Germany most salvage operation will presumably be subject to the „special

⁴⁰¹ See Article 14 (1) of the London salvage Convention (1989); R.Grime, Shipping Law, page 305

⁴⁰² LOF 95 = Lloyd's Open Form 1995 edition; See Chapter V. 2.) Lloyd's Open Form & Appendix II

⁴⁰³ Clause 2 of the salvage form of the *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH (Hamburg)* refers to the „special compensation“ regime

compensation“ regime, because of incorporation of that regime into the salvage agreements. Actually, one can say the legal regime of „special compensation“ is in „world wide use“ and salvors are benefiting from this provisions. But there are also major problems involved:

2.) ARTICLE 14 AND THE *NAGASAKI SPIRIT* LITIGATION

The provisions contained in Article 14 of the 1989 London Salvage Convention („special compensation“) caused some disputes between the salvage industry, the ship owners, and the P & I Clubs. The root-cause of these disputes is the fact that Article 14 contains some vagueness.

For instance, the „special compensation“ regime of Article 14 applies only „in respect of a vessel which by itself or its cargo threatened damage to the environment“⁴⁰⁴. What „damage to the environment“ means is stated in Article 1 (d) of the London Salvage Convention, 1989 which reads:

(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 uncertainty lies in the expression „**adjacent areas**“: In which waters do the provisions of „special compensation“ apply? No question that Article 14 applies in coastal waters, and it seems clear that the „special compensation“ regime does not apply to the high seas. The exclusion of the high seas from

⁴⁰⁴ See: Article 14 (1) of the 1989 London Salvage Convention

the benefits of Article 14 is based on the argument⁴⁰⁵ that no claim can be envisaged from „no man’s land“. Furthermore, this exclusion could prevent the possibility of speculative or artificially inflated response from salvors to an incidentally damage based on assertions that it has caused major damage to the surrounding marine environment or to natural resources (fish population). On the other hand, the salvors argue that on the high seas, too, commercial interests can be at stake (at least ship and cargo) and that, thus, there is the need for an „special compensation“ incentive also for high seas salvage operations. And what about the waters in-between (between „coastal waters“ and the high sea)? What about the „Contiguous Zone“ (24 nautical miles from the baseline)⁴⁰⁶ or the „Exclusive Economic Zone“⁴⁰⁷ (200 nautical miles from the baseline)⁴⁰⁸ as they are defined by the United Nations Convention on the Law of the Sea (UNCLOS) and where the bordering coastal state has certain sovereign rights⁴⁰⁹? Or is the term „adjacent areas“ more a geographical than a legal one? The uncertainty about the „adjacent areas“ are not settled yet, but there are efforts to find a solution by amending the present Lloyd’s Open Form edition (LOF 95)⁴¹⁰.

In South Africa, the legislator was aware of the uncertainty contained in the expression „adjacent areas“. Thus, South Africa’s Wreck and Salvage Act No.: 94 of 1996 which incorporates the London Salvage Convention into national South African law contains a provision defining the relevant „area“

⁴⁰⁵ This argument finds support from the P & I Clubs which have to pay for „special compensation“ at the end of the day

⁴⁰⁶ See: Article 33 of the United Nations Convention on the Law of the Sea

⁴⁰⁷ Articles 55 - 75 of the United Nations Convention on the Law of the Sea

⁴⁰⁸ See: Article 57 of the United Nations Convention on the Law of the Sea

⁴⁰⁹ See for the „Contiguous Zone“ Article 33 (1) and for the „Exclusive Economic Zone“ Article 56 of the United Nations Convention on the Law of the Sea

⁴¹⁰ See: Chapter V. 2.) Lloyd’s Open Form

for „damage to the environment“ and application of Article 14 of the 1989 Salvage Convention. Section 2 (7) of the Wreck and Salvage Act reads:

(7) „Damage to the environment“ as defined in article 1 of the Convention⁴¹¹ shall for the purpose of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.

This provision extends the „adjacent area“ far out to the high seas and thereby the application of the „special compensation“ regime of Article 14 of the Salvage Convention. Under the Wreck and Salvage Act salvors have the right to claim an Article 14 award wherever damage to the environment occurs. Under South African law oil pollution prevention far out on the high seas entitles to „special compensation“. Thus, salvors have a legal incentive to prevent pollution damage also on the high seas. But this extension of the application of the „special compensation“ regime may also be an invitation for abuse: salvors may undertake costly prevention measures out on the high seas to earn a high „special compensation“ award whereas the threat of damage to the environment out there is extremely hard to assess. Furthermore, it can be expected that the P & I Clubs will refuse payment for „special compensation“ awards earned in „areas“ which are more extensive than those defined in the 1989 London Salvage Convention, because - as it will be discussed later - P & I Clubs are already „restrictive“ when it comes to a „special compensation“ claim⁴¹². Although the Wreck and Salvage Act is

⁴¹¹ International Convention on Salvage. London 1989

⁴¹² See: Chapter VI, 3.) The P & I Club Dispute

intended as an extra encouragement for salvors, it seems doubtful that the South African way will work in regard to the present stage of discussion around Article 14 of the Salvage Convention. Furthermore, one has to keep in mind that the relevance of the South African Wreck and Salvage Act on South African salvage operation is fairly small, because South African salvage operators⁴¹³ usually operate under LOF 95⁴¹⁴ and therefore all legal aspects are subject to English law⁴¹⁵.

But the „special compensation“ provisions of Article 14 of the London Salvage Convention are also ground for other disputes and were recently subject of court litigation in the United Kingdom; namely in the *Nagasaki Spirit* case⁴¹⁶.

On the 19th of September 1992, the partly laden tanker *Nagasaki Spirit* collided in the northern part of the Malacca Straits with the container ship *Ocean Blessing*. As a result of the collision, about 12,000 tonnes of the *Nagasaki Spirit*'s cargo were released into the sea and caught fire. Both vessels were engulfed by the blaze and all crew members - except two - of the ships died in that incident. The next day, the ship owners of the *Nagasaki Spirit* and a professional salvage operator⁴¹⁷ agreed to salve the *Nagasaki Spirit* and her cargo on the terms of LOF 90⁴¹⁸. The two month lasting salvage operation

⁴¹³ See: Chapter V, 3.) Other Salvage Contracts

⁴¹⁴ LOF 95 = The 1995 edition of the Lloyd's Open Form standard salvage agreement

⁴¹⁵ See: Clause 1 (g) of LOF 95 [Appendix II]

⁴¹⁶ See: *The Nagasaki Spirit* (1997), 1 Lloyd's Rep. 323

⁴¹⁷ The professional salvage operator in this case was *Semco Salvage & Marine PTE LTD*

⁴¹⁸ LOF 90 = the 1990 edition of the Lloyd's Open Form; Note that „Article 1 (a) to (c), 8, 13.1, 13.2 first sentence, 13.3 and 14 of the International Convention on Salvage 1989

was successful: The *Nagasaki Spirit* was brought to a place of safety and damage to the environment was minimised. After unsuccessful litigation at the arbitrator and the appeal arbitrator the case landed at the High Court of Justice, Queen's Bench Division, Commercial Court. The point in dispute in that court case was the meaning of Article 14 (3) of the 1989 London Salvage Convention which was - by incorporation - part of the LOF 90 agreement.

First, the House of Lords had to decide about what is the meaning of the expression „fair rate“ in Article 14 (3) of the Convention. The matter in dispute was as to whether a „fair rate“ includes an element of profit for the salvor or not. The judge, Mr. Justice Clarke, pin-pointed the problem in the Judgement of the High Court of Justice as follow:

Is a „fair rate“ under article 14.3 -

- (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 article 13.1 (h) (i) and (j) insofar as those criteria resulted in additional direct or indirect expenses to the salvor?*

To the salvor's dismay, the High Court of Justice held that the „fair rate“ does not include an element of profit for salvors⁴¹⁹. The reason given was that the expression „fair rate“ has to be construed in the context of Articles 13 and 14 of the London Salvage Convention. The Convention draws a distinction between remuneration or reward, on the one hand, and compensation or expenses, on the other. The natural meaning of „compensation“ and „expenses“ is to reimburse for actual expenditure or losses but does not include any additional remuneration for gainful activity - in short: profit. Therefore, the „fair rate“ read in the context of „compensation“ and „expenses“, does not contain an element of profit either. Arguments to support the opinion that the „fair rate“ includes a profit element, like

- the „natural meaning“ of the expression „fair rate“, or
- the reference in Article 14 (3) to Article 13 (1) (h), (i) and (j) and
- the paragraph in the preamble of the London Salvage Convention stating *„The States Parties to the present Convention, (...) convinced of the need to ensure that adequate incentives are available to persons who undertake salvage operation in respect of vessels and other property in danger, have agreed as follow...“*. (An „adequate incentive“ in respect of the „fair rate“ would be a profit element)

were, in the opinion of the High Court, not convincing enough. Thus, under English salvage Law, the „fair rate“ in Article 14 (3) of the 1989 London Salvage Convention does not contain any profit for salvors.

In South Africa, the legal position in respect of the interpretation of the expression „fair rate“ seems to be different. The South African Wreck and Salvage Act 94 of 1996 which incorporates the London Salvage Convention into national South African law contains a section providing interpretations for certain expressions in the Convention. Section 2 (8) of the Wreck and Salvage Act reads:

(8) 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 similar nature.

In South Africa, this coded interpretation replaces the *Nagasaki Spirit* interpretation; the *Nagasaki Spirit* judgement is, in respect to the „fair rate“ interpretation, not applicable in South Africa. The wording „prevailing market rate“ in Section 2 (8) Wreck and Salvage Act indicates that the „fair rate“ includes a margin of profit under South African salvage law, because rates on a (free) market always include or - at least - try to include an element of profit. In comparison to salvors under English law, this is - undoubtedly - an additional incentive for salvors under South African salvage law to undertake risky salvage operations described in Article 14 of the Salvage Convention and to prevent or minimise damage to the environment⁴²⁰. One of the reason to introduce Section 2 (8) of the Wreck and Salvage Act into South African law is that South African's long shores, and its unique fauna and flora, are extremely sensitive to pollution and, at the same time, are adjacent to a major world tanker route around the Cape.

⁴²⁰ See: Article 14 (2) of the London Salvage Convention, 1989

Another reason might be the growing environmental consciousness in South Africa expressed in Section 24 of South Africa's new Constitution which states:

Everyone has the right -

(a) to an environment that is not harmful to their health or well-being;

and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It was within the spirit of Section 24 of the Constitution that Section 2 (8) was drafted⁴²¹

The other important question decided by the House of Lords in the *Nagasaki Spirit* case⁴²² regards the **period** a salvor is entitled to special compensation under Article 14 (3) of the London Salvage Convention, 1989. The salvors were of the opinion that the whole period of the salvage service had to be taken into consideration whereas the ship owners said that it is only the initial period during which a threat to the environment exists. As to this aspect, the

⁴²¹ Statement of Prof. Hilton Staniland, Director of the Institute of Maritime Law, University of Natal, Durban, South Africa

⁴²² See: *The Nagasaki Spirit* (1997), 1 Lloyd's Rep. 323

judges decided in favour of the salvors: The whole period of the salvage operation is covered by Article 14 of the London Salvage Convention. In the judgement, Mr. Justice Clarke gave reason for the court's point of view as follow:

Article 14 seems to me to be intended to deal primarily with the case where a ship sustains a casualty such that both she or her cargo needs salvage assistance and there is a threat of damage to the environment. In such a case article 14.1 provides that the salvor is to be entitled to his expenses. Article 14.3 defines the expenses to which he is to be entitled. Those are the expenses to be incurred „by the salvor in the salvage operation“ including a fair rate for equipment and personnel actually and reasonably used „in the salvage operation“. There is nothing in the wording of article 14.3 or indeed of article 14.1 or article 14.2 which suggests that those expenses are to be limited to any particular part of the salvage operation, let alone that part of the salvage operation during which there remained a threat to the environment.

This part of the decision will presumably also have effect on the South African salvage law. As the South African Wreck and Salvage Act 94 of 1996 contains no definition for the above mentioned salvage operation period⁴²³, Section 2 (5) of the Wreck and salvage Act provides:

(5) Notwithstanding anything to the contrary in any other law or the common law contained, a court of law or any tribunal may, in the

⁴²³ See in particular Section 2 of the Wreck and Salvage Act 94 of 1996

*interpretation of the Convention*⁴²⁴, consider the preparatory texts to the Convention, decisions of foreign courts, and any publication.

It can be presumed that South Africa will adopt the opinion of the UK High Court of Justice in this respect. South African salvage law is closely connected to English salvage law⁴²⁵ and furthermore, the Lord's decision is in line with the „pro salvor regime“⁴²⁶ of the Wreck and Salvage Act.

The president of the International Salvage Union (ISU) - Mr. Arnold Witte - described the decision as holding something for everyone. Furthermore he commented: „Although there are elements to the ruling which are a disadvantage to the salvage industry in the short-term, we applaud the fact that a decision has been handed down. The International Salvage Union and its members will adjust to the findings of the decision, and we look forward to working with the marine industry towards finding an expeditious way to achieve a fair and equitable basis for compensating salvors“⁴²⁷. The professional salvage industry has recognised that the *Nagasaki Spirit* decision⁴²⁸ - particularly in respect of the „fair rate“ - is not encouraging salvors to undertake salvage operation „in respect of a vessel which by itself or its cargo threatened damage to the environment“⁴²⁹. As the statement of Mr. Arnold Witte indicates, the ISU⁴³⁰ will examine possibilities to

⁴²⁴ *Convention* means the 1989 London Salvage Convention; see Section 1 (Definitions) of the Wreck and Salvage Act No.: 94 of 1996

⁴²⁵ See: Section 6 (1) (a) of the South African Admiralty Jurisdiction Regulation Act No.: 105 of 1983 (AJRA) together with Section 6 of the United Kingdom's Admiralty Court Act, 1840

⁴²⁶ See: Section 2 (8) of the Wreck and Salvage Act 94 of 1996 as discussed above

⁴²⁷ From: Lloyd's List, *Nagasaki Spirit* ruling goes against salvors, by Liz Shuker, 7th of February 1997

⁴²⁸ See: *The Nagasaki Spirit* (1997), 1 Lloyd's Rep. 323

⁴²⁹ See: Article 14 (1) of the London Salvage Convention, 1989

⁴³⁰ ISU = International Salvage Union

counteract this lack of legal encouragement for salvors. One way to solve this shortcoming could be to add a clause to a new Lloyd's Open Form edition. As it seems, this possibility is already under discussion in salvage industry circles. An other way could be to negotiate special arrangements with the P & I Clubs for extra payment as an encouragement to perform salvage operations in respect of Article 14 of the London Salvage Convention, 1989. As will be shown later, the relationship between salvors and P & I Clubs is currently in a state of flux and under intensive discussion.

3.) THE P & I CLUB DISPUTE

Oil pollution incidents cause immense costs which - in general - have to be met, at the end of the day, by the so called P & I Clubs. Today, these Protection and Indemnity Clubs are mutual insurance companies, run on a non-profit basis with little capital, usually „limited by guarantee“ rather than financed by the issue of shares, whose members, or guarantors, are the ship owners, who are also the club members whose ships are covered, and the Club's governing body represents them⁴³¹. Historically, P & I Clubs were established in England by the ship owners in the late Eighteenth and early Nineteenth Century as mutual insurance associations as a result of a very limited insurance market where insurance cover for ship owner's liabilities was hard to achieve at the only two allowed insurance companies - the Royal Exchange Assurance and the London Assurance. In the beginning, the „Clubs“ were of doubtful legality, but - now established on proper legal ground - they continued to operate till this date and they cover the ship

⁴³¹ R. Grime, Shipping Law, page 414

owner's main liabilities: cargo claims, crew and passenger claims, collision claims not covered under the three-fourth collision liability clause in the „Hull and Machinery Policy“, pollution and clean-up costs, life salvage and much else⁴³². P & I insurance is indemnity insurance and not liability insurance. The „pay and be paid“ rule, which all P & I Clubs have adopted, provides that a member (ship owner) will be indemnified only if he has met his liabilities first⁴³³.

Nevertheless, at the end of the day, P & I Clubs have to meet the costs of the ship owner's liabilities in respect of pollution resulting from a member's vessel. As the *Exxon Valdez* disaster showed, the ship owner's liability in respect of a pollution casualty can easily exceed US \$ 5 billion⁴³⁴. The ship owner's liabilities also include the costs of the salvage operation of the polluting ship as well as the „special compensation“ provided for by Article 14 of the London Salvage Convention, 1989. In the insurance business, risks can normally be estimated with some certainty, but this seems different at the P & I Clubs regarding payments in respect of maritime pollution casualties. Thus, the „Clubs“ are facing demands by their ship owner members that something be done to reduce - at least - the uncertainty of payments under Article 14 of the London Salvage Convention, 1989. The Article 14 reward is, at the present stage, the main topic discussed between salvors, P & I Clubs and ship owners⁴³⁵. As it seems, it is furthermore a growing conflict within the involved interests, because opinions how to solve this problem

⁴³² R. Grime, *Shipping Law*, page 415

⁴³³ Confirmed by *The Fanti* (1990), unreported

⁴³⁴ See: Lloyd's List, *Exxon states case on Alaska spill damages*, by Joel Glass, 21st of June 1997

⁴³⁵ In regard to this discussion, see: Witte, „P & I pollution threats and the provision of salvage“, P & I International, April 1997

differ essentially, although all parties do see the necessity of efficient salvage response to pollution threats⁴³⁶. Even the amount per annum of Article 14 claims is in dispute: The ISU is advocating an amount of around of US. \$ 5 million per annum and blames the „Clubs“ to raise a storm over figures that do not currently appear worthy of concern; while the P & I Clubs are talking about US. \$ 35 million per annum and are concerned that the amount will increase year on year⁴³⁷. The issue came into the open at a conference held at the IMO by the International Salvage Union on the 19th of March 1997.

Obviously, the opinion of the P & I Clubs and ship owners is that the „Clubs“ should have control over the salvage operation⁴³⁸. There is a proposal by leading P & I Clubs that they take a greater role in salvage operations by forming an elite group of salvors, working under contract for an enhanced daily hire scheme with preagreed rates, which would agree beforehand the costs and the benefits⁴³⁹. Furthermore, the „Clubs“ believe that the LOF system is outdated; ship owners today try to avoid the Lloyd's Open Form, because it contains too many uncertainties. Even changes and amendments to the 1989 London Salvage Convention were under discussion⁴⁴⁰.

⁴³⁶ See: Porter, „Salvors challenge P & I Club' proposals“, *Journal of Commerce*, March 1997; see also: P & I International, *Salvage and Pollution Prevention: new code*, September 1996, page 172; Lloyd's List, *Salvors seeking spill talks with P & I clubs*, by Liz Shuker, 15th of February 1997

⁴³⁷ From: *Fairplay (The International Shipping Weekly)*, Clubs rock the salvage boat, 27th of March 1997

⁴³⁸ Lloyd's List, *Salvors seeking spill talks with P & I clubs*, by Liz Shuker, 15th of February 1997; Porter, „Salvors challenge P & I Club' proposals“, *Journal of Commerce*, March 1997

⁴³⁹ See: *Fairplay (The International Shipping Weekly)*, Clubs rock the salvage boat, 27th of March 1997

⁴⁴⁰ Note: The secretary general of the International Maritime Organisation (IMO), Mr. William O'Neil, expressed the opinion of the IMO that more experiences of the working of the 1989 Salvage Convention is necessary before any amendments could be considered by the organisation's legal committee. (Schucker, „Salvage Convention changes ruled out“, *Lloyd's List*, 20th of March 1997)

The International Salvage Union agrees that there are uncertainties in the present LOF system as it became apparent in the *Nagasaki Spirit* litigation, but besides of that, the ISU argues, the system which is in existence is a good one⁴⁴¹. Furthermore, professional salvors would prefer to keep the „Clubs“ out of their salvage operation, because this involvement of the P & I Clubs would reduce the speed of responding to a pollution threat⁴⁴². Therefore, the ISU proposes to reform the LOF system⁴⁴³ by possibly using a new compensation tariff⁴⁴⁴.

The dispute is not solved yet. New editions of the LOF salvage agreement are circulating within the salvage industry for comment. P & I Clubs try further to achieve more control over salvage operations.

One step towards a solution which fits all interests involved - salvors and P & I Clubs - might be the „Code of Practice between ISU and International Group of P & I Clubs“⁴⁴⁵. This joint measure was agreed in regard to Article 14 of the London Salvage Convention, 1989, and designed to avoid the delays and uncertainties which have arisen in some Article 14 cases. The ISU and the International Group of P & I Clubs are to recommend their respective membership to apply the „Code of Practice“ in future LOF cases

⁴⁴¹ See: Lloyd's List, Salvors seeking spill talks with P & I clubs, by Liz Shuker, 15th of February 1997; Porter, „Salvors challenge P & I Club' proposals“, Journal of Commerce, March 1997

⁴⁴² See: Witte, „P & I pollution threats and the provision of salvage“, P & I International, April 1997

⁴⁴³ Fairplay (The International Shipping Weekly), Clubs rock the salvage boat, 27th of March 1997

⁴⁴⁴ Lloyd's List, Salvors seeking spill talks with P & I clubs, by Liz Shuker, 15th of February 1997

⁴⁴⁵ See: „ISU and P & I Clubs agree new code“, Skipsrevyen, February 1997

where Article 14's special compensation provisions may come into effect. The „Code of Practice“, which shall provides financial incentives for salvors, reads:

In the spirit of co-operation, the following Code of Practice is agreed between the ISU and the International Group of P & I Clubs in relation to future salvage services to which Article 14 of the 1989 Salvage Convention may be applicable.

- 1. The salvor will advise the relevant P & I Club at the commencement of the salvage service, or as soon thereafter as is practical, if they consider that there is a possibility of a Special Compensation claim arising.*
- 2. The P & I Club may appoint an observer to attend the salvage and the salvors agree to keep him and/or the P & I Club fully informed of the salvage activities and their plans. However, any decision on the conduct of the salvage service remains with the salvor.*
- 3. The P & I Club, when reasonably requested by the salvor, will immediately advise the salvor whether the particular Member is covered, subject to the Rules of the P & I Club, for any liability which he may have for Special Compensation.*
- 4. The P & I Clubs confirm that whilst a Club Letter will generally be provided, it is not automatic. The P & I Clubs will reply to any request by the salvors regarding security as quickly as reasonably possible.*
- 5. The salvors will accept security for Special Compensation by way of a P & I Club letter of undertaking in the attached form and they*

will not insist on the provision of security to Lloyd's as required under LOF 95.

6. *This is a Code of Practice which the ISU and the International Group of P & I Clubs will recommend to their Members and it is not intended that it should have any legal effect.*

One of the main issues of this Code is that the salvors still have total control over their salvage operation; on the other hand, the P & I Clubs will have the right to appoint an observer to attend the salvage operation. Furthermore, it is notable that the legal regime of providing security for a „special compensation“ claim is different to the one regulated in the LOF 95. It seems that ISU salvors are benefiting from this agreement, because they can now respond to pollution threats with greater confidence without, delays and uncertainties⁴⁴⁶. In the future, an even closer co-operation between the salvage industry and the international P & I community for the purpose of reducing damage to the maritime environment is intended.

But not all professional salvors are that patient and co-operative as the ISU salvors. For instance, the Greek salvor *Tsavliris*, which is not a member of the ISU, is „vexing“ about the 4-years-delay in payment of the Article 14 award (which they have earned in the salvage operation of the bulk carrier *Nicol* outside the Mexican port of Vera Cruz) and has taken the P & I Club concerned to court for failure to pay the Article 14 award⁴⁴⁷.

⁴⁴⁶ See: P & I International, Salvage (Salvage and Pollution Prevention: new code), September 1996, page 172

⁴⁴⁷ See: Lloyd's List, Newcastle P & I Club is sued by *Tsavliris*, by Nigel Lowry, 1st of October 1997

Thus, it seems to be interesting to follow the future development in this respect, specially because salvors and P & I Clubs have basically the same goal: an effective salvage system with sufficient incentives for salvors to minimise the pollution of the marine environment.

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CHAPTER VII

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CONCLUSION

The above outline of the main issues of legal encouragement for salvors in the salvage laws of England, South Africa, and Germany is leading to the following conclusions:

Apparently, it is the **South African salvage law** which provides the most legal advantages for salvors. Although the South African salvor might have some disadvantages in limiting a possible counterclaim for damages launched by the ship owner against the salvor's claim for salvage, there are clear legal benefits for the salvor, like

- the salvor's right to claim salvage for saving life in accordance with Section 15 of the Wreck and Salvage Act No.: 94 of 1996,
- the salvor's possibility to arrest an „associated ship“ to enforce his salvage claim,
- the enforcement of the modern 1989 London Salvage Convention with its Article 14 legal regime of „special compensation“ in respect of pollution casualties in the South African Wreck and Salvage Act,
- and, in particular, the South African „interpretations“ of the 1989 London Salvage Convention in Section 2 of the Wreck and Salvage Act as regards the „fair rate“ (Section 2 (8))⁴⁴⁸, „damage to the environment“ (Section 2 (7)) and the extension of the meaning of „property“ being subject to salvage (Section 2 (6)).

⁴⁴⁸ See: Chapter VI, 2.) Article 14 and the *Nagasaki Spirit* Litigation

These legal benefits are predominating and make South African salvage law one of the worlds most „salvor-friendly“ laws. Nevertheless, it should be noted that (even) South African salvage operators, like *Pentow Marine*⁴⁴⁹, subject their salvage operations by agreement (LOF⁴⁵⁰) to the English legal system including English salvage law, even though only South African interest may be involved in the salvage operation⁴⁵¹. In other words: South African salvors, apparently, do not „use“ the South African salvor-friendly salvage law. The reason for this might be that South African salvage law is too one-sided, focusing mainly on the salvor’s needs and demands and, thereby, neglecting the other interest (ship owners, P & I Clubs, etc.) which are involved in salvage operations. South African salvors in negotiating a salvage agreement do not seem to have the muscle to impose South African salvage law as *lex contractus*. Therefore, it is not possible to rate South Africa’s salvage law as being the comparatively best salvage law, because, although it is so salvor-friendly, its application to salvage operation will be rather rare. A law which only few people use but replace, by mutual consent, by some other law (*lex contractus*), is - even if the intentions of the lawmaker are good - not a viable law. If it is public policy of South Africa to give all those benefits - mentioned above - to the salvor, the South African legislator should (at least) provide for the compulsory application of the South African salvage law for salvage operations in which only South African interests are involved.

⁴⁴⁹ South Africa’s biggest salvage operator: *Pentow Marine (Pty) Ltd* (31 Carlisle Street, 7405 Paarden Eiland, Cape Town), which is also member of the International Salvage Union (ISU)

⁴⁵⁰ LOF = Lloyd’s Open Form standard salvage agreement

⁴⁵¹ See: Chapter V, 2.) & 3.)

The English salvage law strikes a more equitable balance between all parties and interests involved. The English legislator enacted the 1989 London Salvage Convention without incorporating „interpretations“ that deduct from the letter and spirit of the Convention. The adoption of the Convention as it stands ensure that the broad consent of all parties to the Convention⁴⁵², which also reflects a wide consent of the lobbying interests (salvors [ISU], ship owners, underwriters [P & I Clubs], etc.), is being preserved under English salvage law. But the enactment of the Salvage Convention is not the chief reason for the dominance of English salvage law on the international scene; there are other reasons for this:

- First of all, as a historical aspect, salvage law was developed basically in the United Kingdom.
- Furthermore, the English Admiralty Courts have the biggest experience in salvage law, because over the centuries no other jurisdiction has decided so many maritime salvage cases.
- Last but not least, English salvage law is the world-wide most used salvage law because of the wide circulation of the Lloyd's Open Form (LOF) salvage agreement⁴⁵³ which stipulates English law as *lex contractus*⁴⁵⁴.

Nevertheless, it became obvious in the *Nagasaki Spirit* litigation⁴⁵⁵ that English salvage law, in particular as regards oil casualty salvage, still has some short-comings and uncertainties for the professional salvage industry. For instance, according to the *Nagasaki Spirit* judgement, the salvor is

⁴⁵² Otherwise the 1989 London Salvage Convention would never have come into force

⁴⁵³ See: Chapter V, 2.) Lloyd's Open Form

⁴⁵⁴ See: Clause 1 (g) of LOF 95

⁴⁵⁵ See: *The Nagasaki Spirit* (1997), 1 Lloyd's Rep. 323

deprived of any profit in case a „fair rate“, in the meaning of Article 14 (3) of the 1989 London Salvage Convention, is due to him from the ship owner⁴⁵⁶. Furthermore, the applicability of the „special compensation“ regime of Article 14 of the London Salvage Convention is doubtful as regards certain waters⁴⁵⁷. But not only salvors are unhappy with Article 14, but also P & I Clubs who are interested in avoiding, or limiting, claims they might face under the „special compensation“ rule⁴⁵⁸. At the present stage, all parties involved are looking for solutions and advancing proposals for new legal regimes⁴⁵⁹ to overcome these short-comings of the English salvage law.

German salvage law is nearly completely codified in the German Commercial Law Code. Therefore, it is - on the one hand - clear and predictable, - on the other hand - it is rigid inflexible. It, therefore, cannot, in all cases, give due regard to the principles of equity which is a short-coming, because the law of salvage, in particular, is based on equity (For instance, under German salvage law, the crew is strictly exempted from becoming a salvor⁴⁶⁰; whereas under English and South African salvage law, crew members might become salvors under equitable principles⁴⁶¹). On top of that, German salvage law is „old fashioned“, because it is still based on the Brussels Salvage Convention of 1910 and - among others - does not provide a „special compensation“ regime in oil pollution incidents. Because of this shortage in German salvage law, the German salvage operator *Bugsier-*

⁴⁵⁶ See: Capter VI. 2.) Article 14 and the *Nagasaki Spirit* Litigation („fair rate“)

⁴⁵⁷ See: Capter VI. 2.) Article 14 and the *Nagasaki Spirit* Litigation („adjacent areas“)

⁴⁵⁸ See: Capter VI. 3.) The P & I Dispute

⁴⁵⁹ For instance, a new edition of the Lloyd's Open Form standard salvage agreement

⁴⁶⁰ See: Rübmann/Rabe, Seehandelsrecht, § 740 B 4. a)

⁴⁶¹ See: Chapter II. 3.) a.) Who can claim for salvage (Crew)

Reederei- und Bergungs-Gesellschaft mbH (Hamburg) incorporates the „special compensation“ regime in its standard salvage agreement form⁴⁶². The „rest“ of this salvage agreement is governed by German salvage law⁴⁶³. The German legislator would be well advised to adopt, as soon as possible, the 1989 London Salvage Convention and to incorporate its provisions into national German salvage law. Otherwise, the cleavage between German salvage law and international standards and developments in salvage law will become even more apparent. Furthermore, it seems extremely negligent if one of the world's biggest oil importer does not provide any legal incentive - like the „special compensation“ regime - for salvors in salvage operations in regard to oil pollution casualties. Another disadvantage of German Salvage Law is the fact that only the legal ship owner is entitled to claim for salvage; the demise charterer, as the „commercial owner“ is not entitled to do so⁴⁶⁴. Considering further that freight at risk, under German law, does not form part of the fund out of which the salvage reward is awarded⁴⁶⁵, the narrow interpretation of „maritime property“ (Only the ship in distress and all the things on board are subject to salvage)⁴⁶⁶, and the German particularities of ship arrest in regard of time and place (Under German law the ship can only be arrested if she is tight to the quay in the harbour)⁴⁶⁷, it becomes apparent that German salvage law provides comparatively the fewest legal incentives for salvage.

⁴⁶² Clause 2 of the *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH* standard salvage agreement form; see: Appendix II, 2.

⁴⁶³ Clause 6 of the *Bugsier-, Reederei- und Bergungs-Gesellschaft mbH* standard salvage agreement form; see: Appendix II, 2.

⁴⁶⁴ See: Chapter II, 3.) a.) Who can claim for salvage

⁴⁶⁵ See: Chapter II, 1.) c.) Freight at risk

⁴⁶⁶ See: Chapter II, 1.) d.) Maritime property

⁴⁶⁷ See: Chapter II, 4.) c.) „Arrest“ proceedings

APPENDICES

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APPENDIX I: THE INTERNATIONAL CONVENTION ON SALVAGE

International Convention on Salvage, 1989 (London, April 28., 1989)

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

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 follow:

CHAPTER I: GENERAL PROVISIONS

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.

(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.

(e) Payment means any reward, remuneration or compensation due under this Convention.

(f) Organization means the International Maritime Organization.

(g) Secretary-General means the Secretary-General of the Organization.

Article 2 (Application of the Convention)

This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

Article 3 (Platforms and drilling units)

This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in exploration, exploitation or production of sea-bed mineral resources.

Article 4 (State-owned vessels)

(1) Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.

(2) Where a State Party decides to apply the Convention to its warships or other vessels described in paragraph (1), it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

Article 5 (Salvage operations controlled by public authorities)

(1) This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

(2) Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the right and remedies provided for in this Convention in respect of salvage operations.

(3) The extent to which a public authority under a duty to perform salvage operation may avail itself of the right and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

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.

(2) The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.

(3) Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.

Article 7 (Annulment and modification of contracts)

A contract or any terms thereof may be annulled or modified if:

- (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or
- (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

CHAPTER II: PERFORMANCE OF THE SALVAGE OPERATION

Article 8 (Duties of the salvor and 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.

Article 9 (Rights of coastal States)

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

Article 10 (Duty to render assistance)

(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

(2) The State Parties shall adopt the measures necessary to enforce the duty set out in paragraph (1).

(3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph (1).

Article 11 (Co-operation)

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.

CHAPTER III: RIGHTS OF SALVORS

Article 12 (Conditions for reward)

(1) Salvage operation which have had a useful result give right to a reward.

(2) Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.

(3) This chapter shall apply, notwithstanding that the salvaged vessel and the vessel undertaking the salvage operation belong to the same owner.

Article 13 (Criteria for fixing the reward)

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

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

(2) Payment of a reward fixed according to paragraph (1) shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the

payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective share. Nothing in this article shall prevent any right of defence.

(3) The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged values of the vessel and other property.

Article 14 (Special compensation)

(1) If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

(2) If, in the circumstances set out in paragraph (1), the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph (1) may be increased up to a maximum of 30 % of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph (1), may increase such special compensation further, but in no event shall the total increase be more than 100 % of the expenses incurred by the salvor.

(3) Salvor's expenses for the purpose of paragraph (1) and (2) means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably

used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph (1) (h), (i) and (j).

(4) The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

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

(6) Nothing in this article shall effect any right of recourse on the part of the owner of the vessel.

Article 15 (Apportionment between salvors)

(1) The apportionment of a reward under article 13 between salvors shall be made on the basis of the criteria contained in that article.

(2) The apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel, the apportionment shall be determined by the law governing the contract between the salvor and his servants.

Article 16 (Salvage of persons)

(1) No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.

(2) A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of

the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.

Article 17 (Services rendered under existing contracts)

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

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.

Article 19 (Prohibition of salvage operations)

Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel shall not give rise to payment under this Convention.

CHAPTER IV: CLAIMS AND ACTIONS

Article 20 (Maritime lien)

(1) Nothing in this Convention shall affect the salvor's maritime lien under

any international convention or national law.

(2) The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

Article 21 (Duty to provide security)

(1) Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

(2) Without prejudice to paragraph (1), the owner of the salvaged vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

(3) The salvaged vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.

Article 22 (Interim payment)

(1) The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms including terms as to security where appropriate, as may be fair and just according to the circumstances of the case.

(2) In the event of an interim payment under this article the security provided under article 21 shall be reduced accordingly.

Article 23 (Limitation of actions)

(1) Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operation are terminated.

(2) The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. The period may in the like manner be further extended.

(3) An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

Article 24 (Interest)

The right of the salvor to interest on any payment due under this Convention shall be determined according to the law of the State in which the tribunal seized of the case is situated.

Article 25 (State-owned cargoes)

Unless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings in rem against, non-commercial cargoes owned by a

State and entitled, at the time of the salvage operation, to sovereign immunity under generally recognized principles of international law.

Article 26 (Humanitarian cargoes)

No provisions of this Convention shall be used as a basis for the seizure, arrest or detention of humanitarian cargoes donated by a State, if such State has agreed to pay for salvage services rendered in respect of such humanitarian cargoes.

**ATTACHMENT 1: COMMON UNDERSTANDING CONCERNING
ARTICLES 13 AND 14 OF THE INTERNATIONAL CONVENTION
ON SALVAGE 1989**

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 salvaged value of the vessel and other property before assessing the special compensation to be paid under article 14.

APPENDIX II: STANDARD SALVAGE CONTRACTS

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H.6 LLOYD'S OPEN FORM 95

LOF 1995

LLOYD'S



STANDARD FORM OF

SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COUNCIL OF LLOYD'S)

NO CURE - NO PAY

On board the.....
Dated.....

NOTES

1. Insert name of person signing on behalf of Owners of property to be salvaged. The Master should sign wherever possible.
2. The Contractor's name should always be inserted in line 4 and whenever the Agreement is signed by the Master of the Salvaging vessel or other person on behalf of the Contractor the name of the Master or other person must also be inserted in line 4 before the words "for and on behalf of". The words "for and on behalf of" should be deleted where a Contractor signs personally.
3. Insert place if agreed in clause 1(a)(i) and currency if agreed in clause 1(e).

* See Note 1 above

IT IS HEREBY AGREED between Captain +.....
for and on behalf of the Owners of the "....." her
cargo freight bunkers stores and any other property thereon (hereinafter collectively called "the Owners")
and.....for and on behalf of.....
.....(hereinafter called "the Contractor"*) that:-

* See Note 2 above

1. (a) The Contractor shall use his best endeavours:-

* See Note 3 above

(i) to save the "....." and/or her cargo freight bunkers stores and any other property thereon and take them to #..... or to such other place as may hereafter be agreed either place to be deemed a place of safety or if no such place is named or agreed to a place of safety and
(ii) while performing the salvage services to prevent or minimize damage to the environment.

(b) Subject to the statutory provisions relating to special compensation the services shall be rendered and accepted as salvage services upon the principle of "no cure - no pay."

(c) The Contractor's remuneration shall be fixed by Arbitration in London in the manner hereinafter prescribed and any other difference arising out of this Agreement or the operations thereunder shall be referred to Arbitration in the same way.

(d) In the event of the services referred to in this Agreement or any part of such services having been already rendered at the date of this Agreement by the Contractor to the said vessel and/or her cargo freight bunkers stores and any other property thereon the provisions of this Agreement shall apply to such services.

* See Note 3 above

(e) The security to be provided to the Council of Lloyd's (hereinafter called "the Council") the Salvaged Value(s) the Award and/or any Interim Award(s) and/or any Award on Appeal shall be in #..... currency.

(f) If clause 1(e) is not completed then the security to be provided and the Salvaged Value(s) the Award and/or Interim Award(s) and/or Award on Appeal shall be in Pounds Sterling.

(g) This Agreement and Arbitration thereunder shall except as otherwise expressly provided be governed by the law of England, including the English law of salvage.

11.1.02
3.12.24
11.10.30
12.6.30
10.6.51
20.12.47
21.2.72
21.5.00
5.0.00
1.1.05

PROVISIONS AS TO THE SERVICES

2. *Definitions:* In this Agreement any reference to "Convention" is a reference to the International Convention on Salvage 1989 as incorporated in the Merchant Shipping (Salvage and Pollution) Act 1994 (and any amendment thereto). The terms "Contractor" and "services"/"salvage services" in this Agreement shall have the same meanings as the terms "salvor(s)" and "salvage operation(s)" in the Convention.

3. *Owners Cooperation:* The Owners their Servants and Agents shall co-operate fully with the Contractor in and about the salvage including obtaining entry to the place named or the place of safety as defined in clause 1. The Contractor may make reasonable use of the vessel's machinery gear equipment anchors chains stores and other appurtenances during and for the purpose of the salvage services free of expense but shall not unnecessarily damage abandon or sacrifice the same or any property the subject of this Agreement.

4. *Vessel Owners Right to Terminate:* When there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Convention Article 13 the owners of the vessel shall be entitled to terminate the services of the Contractor by giving reasonable notice to the Contractor in writing.

PROVISIONS AS TO SECURITY

5. (a) The Contractor shall immediately after the termination of the services or sooner notify the Council and where practicable the Owners of the amount for which he demands salvage security (inclusive of costs expenses and interest) from each of the respective Owners.

(b) Where a claim is made or may be made for special compensation, the owners of the vessel shall on the demand of the Contractor whenever made provide security for the Contractor's claim for special compensation provided always that such demand is made within two years of the date of termination of the services.

(c) The amount of any such security shall be reasonable in the light of the knowledge available to the Contractor at the time when the demand is made. Unless otherwise agreed such security shall be provided (i) to the Council (ii) in a form approved by the Council and (iii) by persons firms or corporations either acceptable to the Contractor or resident in the United Kingdom and acceptable to the Council. The Council shall not be responsible for the sufficiency (whether in amount or otherwise) of any security which shall be provided nor the default or insolvency of any person firm or corporation providing the same.

(d) The owners of the vessel their Servants and Agents shall use their best endeavours to ensure that the cargo owners provide their proportion of salvage security before the cargo is released.

6. (a) Until security has been provided as aforesaid the Contractor shall have a maritime lien on the property salvaged for his remuneration.

(b) The property salvaged shall not without the consent in writing of the Contractor (which shall not be unreasonably withheld) be removed from the place to which it has been taken by the Contractor under clause 1(a). Where such consent is given by the Contractor on condition that the Contractor is provided with temporary security pending completion of the voyage the Contractor's maritime lien on the property salvaged shall remain in force to the extent necessary to enable the Contractor to compel the provision of security in accordance with clause 5(c).

(c) The Contractor shall not arrest or detain the property salvaged unless:-

- (i) security is not provided within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of the termination of the services or
- (ii) he has reason to believe that the removal of the property salvaged is contemplated contrary to clause 6(b) or
- (iii) any attempt is made to remove the property salvaged contrary to clause 6(b).

(d) The Arbitrator appointed under clause 7 or the Appeal Arbitrator(s) appointed under clause 13(d) shall have power in their absolute discretion to include in the amount awarded to the Contractor the whole or part of any expenses reasonably incurred by the Contractor in:-

- (i) ascertaining demanding and obtaining the amount of security reasonably required in accordance with clause 5.
- (ii) enforcing and/or protecting by insurance or otherwise or taking reasonable steps to enforce and/or protect his lien.

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PROVISIONS AS TO ARBITRATION

7. (a) Whether security has been provided or not the Council shall appoint an Arbitrator upon receipt of a written request made by letter telex facsimile or in any other permanent form provided that any party requesting such appointment shall if required by the Council undertake to pay the reasonable fees and expenses of the Council and/or any Arbitrator or Appeal Arbitrator(s).
- (b) Where an Arbitrator has been appointed and the parties do not proceed to arbitration the Council may recover any fees costs and/or expenses which are outstanding.
8. The Contractor's remuneration and/or special compensation shall be fixed by the Arbitrator appointed under clause 7. Such remuneration shall not be diminished by reason of the exception to the principle of "no cure - no pay" in the form of special compensation.

REPRESENTATION

9. Any party to this Agreement who wishes to be heard or to adduce evidence shall nominate a person in the United Kingdom to represent him failing which the Arbitrator or Appeal Arbitrator(s) may proceed as if such party had renounced his right to be heard or adduce evidence.

CONDUCT OF THE ARBITRATION

10. (a) The Arbitrator shall have power to:-
- (i) admit such oral or documentary evidence or information as he may think fit
 - (ii) conduct the Arbitration in such manner in all respects as he may think fit subject to such procedural rules as the Council may approve
 - (iii) order the Contractor in his absolute discretion to pay the whole or part of the expense of providing excessive security or security which has been unreasonably demanded under Clause 5(b) and to deduct such sum from the remuneration and/or special compensation
 - (iv) make Interim Award(s) including payment(s) on account on such terms as may be fair and just
 - (v) make such orders as to costs fees and expenses including those of the Council charged under clauses 10(b) and 14(b) as may be fair and just.
- (b) The Arbitrator and the Council may charge reasonable fees and expenses for their services whether the Arbitration proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the Arbitration.
- (c) Any Award shall (subject to Appeal as provided in this Agreement) be final and binding on all the parties concerned whether they were represented at the Arbitration or not.

INTEREST & RATES OF EXCHANGE

11. *Interest:* Interest at rates per annum to be fixed by the Arbitrator shall (subject to Appeal as provided in this Agreement) be payable on any sum awarded taking into account any sums already paid:-
- (i) from the date of termination of the services unless the Arbitrator shall in his absolute discretion otherwise decide until the date of publication by the Council of the Award and/or Interim Award(s) and
 - (ii) from the expiration of 21 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of publication by the Council of the Award and/or Interim Award(s) until the date payment is received by the Contractor or the Council both dates inclusive.

For the purpose of sub-clause (ii) the expression "sum awarded" shall include the fees and expenses referred to in clause 10(b).

12. *Currency Correction:* In considering what sums of money have been expended by the Contractor in rendering the services and/or in fixing the amount of the Award and/or Interim Award(s) and/or Award on Appeal the Arbitrator or Appeal Arbitrator(s) shall to such an extent and in so far as it may be fair and just in all the circumstances give effect to the consequences of any change or changes in the relevant rates of exchange which may have occurred between the date of termination of the services and the date on which the Award and/or Interim Award(s) and/or Award on Appeal is made.

PROVISIONS AS TO APPEAL

13. (a) Notice of Appeal if any shall be given to the Council within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of the publication by the Council of the Award and/or Interim Award(s).

(b) Notice of Cross-Appeal if any shall be given to the Council within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after notification by the Council to the parties of any Notice of Appeal. Such notification if sent by post shall be deemed received on the working day following the day of posting.

(c) Notice of Appeal or Cross-Appeal shall be given to the Council by letter telex facsimile or in any other permanent form.

(d) Upon receipt of Notice of Appeal the Council shall refer the Appeal to the hearing and determination of the Appeal Arbitrator(s) selected by it.

(e) If any Notice of Appeal or Cross-Appeal is withdrawn the Appeal hearing shall nevertheless proceed in respect of such Notice of Appeal or Cross-Appeal as may remain.

(f) Any Award on Appeal shall be final and binding on all the parties to that Appeal Arbitration whether they were represented either at the Arbitration or at the Appeal Arbitration or not.

CONDUCT OF THE APPEAL

14. (a) The Appeal Arbitrator(s) in addition to the powers of the Arbitrator under clauses 10(a) and 11 shall have power to:-

- (i) admit the evidence which was before the Arbitrator together with the Arbitrator's notes and reasons for his Award and/or Interim Award(s) and any transcript of evidence and such additional evidence as he or they may think fit.
- (ii) confirm increase or reduce the sum awarded by the Arbitrator and to make such order as to the payment of interest on such sum as he or they may think fit.
- (iii) confirm revoke or vary any order and/or Declaratory Award made by the Arbitrator.
- (iv) award interest on any fees and expenses charged under paragraph (b) of this clause from the expiration of 21 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of publication by the Council of the Award on Appeal and/or Interim Award(s) on Appeal until the date payment is received by the Council both dates inclusive.

(b) The Appeal Arbitrator(s) and the Council may charge reasonable fees and expenses for their services in connection with the Appeal Arbitration whether it proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the Appeal Arbitration.

PROVISIONS AS TO PAYMENT

15. (a) In case of Arbitration if no Notice of Appeal be received by the Council in accordance with clause 13(a) the Council shall call upon the party or parties concerned to pay the amount awarded and in the event of non-payment shall subject to the Contractor first providing to the Council a satisfactory Undertaking to pay all the costs thereof realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the amount awarded to him together with interest if any. The Contractor shall reimburse the parties concerned to such extent as the Award is less than any sums paid on account or in respect of Interim Award(s).

(b) If Notice of Appeal be received by the Council in accordance with clause 13 it shall as soon as the Award on Appeal has been published by it call upon the party or parties concerned to pay the amount awarded and in the event of non-payment shall subject to the Contractor first providing to the Council a satisfactory Undertaking to pay all the costs thereof realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the amount awarded to him together with interest if any. The Contractor shall reimburse the parties concerned to such extent as the Award on Appeal is less than any sums paid on account or in respect of the Award or Interim Award(s).

(c) If any sum shall become payable to the Contractor as remuneration for his services and/or interest and/or costs as the result of an agreement made between the Contractor and the Owners or any of them the Council in the event of non-payment shall subject to the Contractor first providing to the Council a satisfactory Undertaking to pay all the costs thereof realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the said sum.

(d) If the Award and/or Interim Award(s) and/or Award on Appeal provides or provide that the costs of the Arbitration and/or of the Appeal Arbitration or any part of such costs shall be borne by the Contractor such costs may be deducted from the amount awarded or agreed before payment is made to the Contractor unless satisfactory security is provided by the Contractor for the payment of such costs.

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(e) Without prejudice to the provisions of clause 5(c) the liability of the Council shall be limited in any event to the amount of security provided to it.

GENERAL PROVISIONS

16. *Scope of Authority:* The Master or other person signing this Agreement on behalf of the property to be salvaged enters into this Agreement as agent for the vessel her cargo freight bunkers stores and any other property thereon and the respective Owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

17. *Notices:* Any Award notice authority order or other document signed by the Chairman of Lloyd's or any person authorised by the Council for the purpose shall be deemed to have been duly made or given by the Council and shall have the same force and effect in all respects as if it had been signed by every member of the Council.

18. *Sub-Contractor(s):* The Contractor may claim salvage and enforce any Award or agreement made between the Contractor and the Owners against security provided under clause 5 or otherwise if any on behalf of any Sub-Contractors his or their Servants or Agents including Masters and members of the crews of vessels employed by him or by any Sub-Contractors in the services provided that he first provides a reasonably satisfactory indemnity to the Owners against all claims by or liabilities to the said persons.

19. *Inducements prohibited:* No person signing this Agreement or any party on whose behalf it is signed shall at any time or in any manner whatsoever offer provide make give or promise to provide demand or take any form of inducement for entering into this Agreement.

<p>For and on behalf of the Contractor</p> <p>.....</p> <p>(To be signed by the Contractor personally or by the Master of the salvaging vessel or other person whose name is inserted in line 4 of this Agreement)</p>	<p>For and on behalf of the Owners of property to be salvaged.</p> <p>.....</p> <p>(To be signed by the Master or other person whose name is inserted in line 1 of this Agreement)</p>
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INTERNATIONAL CONVENTION ON SALVAGE 1989

The following provisions of the Convention are set out below for information only.

Article 1

Definitions

- (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
- (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
- (e) *Payment* means any reward, remuneration or compensation due under this Convention

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
2. The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel

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

Article 13

Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:
 - (a) the salvaged value of the vessel and other property;
 - (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
 - (c) the measure of success obtained by the salvor;
 - (d) the nature and degree of the danger;
 - (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
 - (f) the time used and expenses and losses incurred by the salvors;
 - (g) the risk of liability and other risks run by the salvors or their equipment;
 - (h) the promptness of the services rendered;
 - (i) the availability and use of vessels or other equipment intended for salvage operations;
 - (j) the state of readiness and efficiency of the salvor's equipment and the value thereof
2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values
3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property

Article 14

Special Compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Article 13 at least equivalent to the special compensation assessable in accordance with this Article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined
2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the Tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in Article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor
3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in Article 13, paragraph 1(h), (i) and (j)
4. The total special compensation under this Article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under Article 13
5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this Article
6. Nothing in this Article shall affect any right of recourse on the part of the owner of the vessel

BUGSIER-, REEDEREI- UND BERGUNGS-GESELLSCHAFT mbH

HAMBURG

Tel.: 31 11 10 (24 hours)

I, (print name the undersigned Master
of the vessel hereby engage the
BUGSIER-, REEDEREI- UND BERGUNGS-GESELLSCHAFT mbH, HAMBURG
to undertake and try to save the ship and/or her cargo, bunkers and stores and take them to a
place of safety if necessary.

Operations to be executed on the principle of

„NO CURE – NO PAY“

subject to conditions printed on back.

Dated on board

For and on behalf of Bugsier:

Master

Printed: 2.91

1. „Bugsier“ undertakes to use their best endeavours and to execute the operation by all means at their disposal on the principle of „no cure – no pay“. The „Bugsier“ may make reasonable use of the vessel's gear, anchors, chains and other appurtenances during and for the purpose of the operation free of costs, and the master agrees to render all possible assistance with the vessel's engines and crew, free of costs.

2. Should „Bugsier“ not succeed in salvaging the ship and/or her cargo, bunker and stores, or parts thereof they are not entitled to any remuneration for their expenditure. „Bugsier“ shall be free however to withdraw from this contract if in the course of the operation it becomes apparent to „Bugsier“ that the work involves „Bugsier“ in certain loss or is without prospect of success. If during the salvage operation the vessel itself or its cargo threatened damage to the environment and „Bugsier“ has failed to earn a reward under Article 5 at least equivalent to their expenditure, „Bugsier“ shall be entitled to special compensation from the owners of the vessel for their out-of-pocket expenses reasonably incurred and a fair rate for equipment and personnel actually used. If damage to the environment is prevented or minimized the special compensation will be increased by 30 per cent to maximum 100 per cent. The total special compensation shall be paid only if such compensation is greater than any reward recoverable by „Bugsier“ under Article 5. (In accordance with Articles 13 and 14 of the international Convention on Salvage 1989 and their common understanding.)

3. „Bugsier“ shall not be responsible for any negligence or want of ordinary skill and care on the part of any person by them employed in the operation nor for any damage and/or loss which the vessel and/or her cargo may suffer during the operation and/or, if necessary, on the way to a place of safety. „Bugsier“ shall not be responsible for any environmental pollution damage air- or water pollution by oil, poison or other harmful substances. „Bugsier“ shall be indemnified by their partner to this contract in respect of all claims for such pollution damages howsoever arising. Liabilities of „Bugsier's“ managing directors, as provided by German law, shall remain unaffected.

4. It is hereby further agreed that the salvaged values, the salvage security, the salvage award and payment of the salvage remuneration shall be in German currency (DEUTSCHE MARK). Promptly after termination of the salvage services a salvage security in a form approved by „Bugsier“ shall be lodged with „Bugsier“. Pending the completion of the salvage security, respectively final receipt of the salvage remuneration (inclusive of costs, expenses and interest) „Bugsier“ shall have a maritime lien on the salvaged property for their salvage claim.

5. The remuneration due to „Bugsier“ shall be fixed between the parties concerned by mutual agreement. Failing this, remuneration to be fixed by „DEUTSCHES SEESCHIEDSGERICHT in Hamburg“ (German Maritime Court of Arbitration). The decision of the „DEUTSCHES SEESCHIEDSGERICHT“ comes into force immediately after its verbal publication to the parties or their attorneys and shall be final and binding on all parties concerned. The remuneration will yield interest in the amount of 3 per cent above the official rate of discount as fixed by the Deutsche Bundesbank (Federal Bank of the Federal Republic of Germany) from the date of termination of the salvage operation until the date the final payment has been received and credited for value to „Bugsier's“ account.

6. This agreement shall be governed by and arbitration thereunder shall be in accordance with German Law and the German wording of this contract shall prevail.

DEUTSCHES SEESCHIEDSGERICHT

Baumwall 7

D - 20403 HAMBURG

Telefon (040) 36 97 96 - 0 · Fax (040) 36 20 88

I, the undersigned master of the hereby engage the

.....
- here inafter called "the contractor" -

to undertake and try to save the ship and/or her cargo and to take her into the nearest harbour if necessary.

Operations to be executed on the principle of

"NO CURE - NO PAY"

subject to conditions printed on back.

Dated on board

For and on behalf of the contractor:

Master:

1. The contractor undertakes to use his best endeavours and to execute the operations by all means at his disposal on the principle of "no cure - no pay". The contractor may make reasonable use of the vessel's gear, anchors, chains and other appurtenances during and for the purpose of the operations, free of costs, and the master agrees to render all possible assistance with the vessel's engines and crew, free of costs.

2. Should the contractor not succeed in salvaging the ship and/or her cargo or parts thereof he is not entitled to any remuneration for his expenditure. But the contractor shall be free to withdraw from this contract if in the course of the operations it becomes apparent that the work involves the contractor in certain loss or is without prospect of success.

3. The contractor shall not be responsible for any negligence or want of ordinary skill and care on the part of any person by him employed in the operations nor for any damage and loss which the vessel and/or her cargo may suffer during the operations and afterwards on the way to a harbour. The contractor shall not be responsible for any environmental pollution damage (air- or water pollution by oil, poison or other harmful substances) unless guilty of personal willful misconduct and the contractor shall be indemnified by his partner to this contract in respect of all claims for such pollution damages howsoever arising. Salvaged values have to be ascertained in accordance with the contractor.

4. The remuneration for the services rendered shall be fixed between the parties concerned by mutual agreement. Failing this, remuneration to be fixed by "Deutsches Seeschiedsgericht in Hamburg" (Maritime Arbitration court). This court shall also settle all disputes between the parties interested in the salvaged properties. All decisions to be final and to be complied with forthwith. The remuneration will yield interest in the amount of 2 percent above the official rate of discount as fixed by the Deutsche Bundesbank from the date of termination of the salvage operation.

5. The contractor shall have a lien on the salvaged property until security has been given.