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Environmental and Liability Salvage in 2010

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SYNOPSIS

What began as 'liability salvage' in the first half of the 20th century stalled before making a firm imprint in the law. However, increased concern for the environment during the second half of the 20th century gave rise to new calls in favour of the component of liability salvage known as 'environmental salvage'. Professional salvors are now seeking greater recognition of the value of environmental liabilities prevented in determining the size of salvage awards.

THE EARLY CASES INVOLVING LIABILITY SALVAGE

The earliest published legal decisions on the subject of liability salvage that received substantial attention were handed down in the English courts. In the case of ***Whippingham*** [1934] 48 Ll L Law Rep 49, salvors took control of a rogue vessel before it collided with other vessels. The court held that preventing a vessel from causing damage to other ships is a service which in itself would be grounds for a claim for salvage. In the case of ***Buffalo*** [1937] 58 Ll L Law Rep 302, salvors prevented barges that were adrift from causing damage for which the barge owners would have been liable. The court considered the liability prevented as a factor in determining the size of the salvage award.

The US courts did not pick up on the concept until much later. In the case of ***Markakis v S S Veendam***, 1981 AMC 2275 (SDNY 1981) the court included the value of the passengers' baggage in the salved values considered in determining the salvage award. However, the award for that value was assessed against the shipowner, who had no ownership interest in the baggage but would have been liable for its loss. Salvors were therefore rewarded for a liability they prevented, that is they engaged in liability salvage even though the court did not call it that.

In ***Allseas Maritime v Mimosa***, 820 F2d 129 (5th Cir 1987) the Fifth Circuit Court of Appeals acknowledged the merits of liability salvage. In that case, the salvor regained control of an abandoned ship that was still underway by throwing mooring lines into its turning propeller, stalling the engine and preventing it from colliding with nearby oil rigs and/or other structures. However, the Court declined to make an award for liability salvage because it believed the shipowner was protected by its right to limit its liability to the value of the vessel pursuant to the US Shipowners' Limitation of Liability Statute, 46 USC 183, and that had already been considered in determining the traditional salvage award. Whether the shipowner might have limited its liability was not actually tested.

Irrespective, one is left to wonder whether an award of liability salvage might have been made if the risk had been of oil pollution and was subject to a higher limitation scheme, such as the one incorporated in the US Oil Pollution Act of 1990 a decade after the underlying events in the ***Allseas Maritime*** case took place. However, in 2008 the US District Court for the Eastern District of Louisiana (which is subject to the Fifth Circuit Court of Appeals) cited the ***Allseas Maritime*** case while holding "[t]here is no statutory or jurisprudential foundation for granting [a purported salvor] an award of salvage because its actions prevented [a vessel] from damaging the property of third parties"[1].

THE MOVE TOWARDS ENVIRONMENTAL SALVAGE

It may be helpful to draw some distinctions between liability salvage and environmental salvage on the one hand, and between environmental salvage and the environmental protection regime of The International Convention on Salvage 1989 (the 1989 Convention) on the other. Liability salvage results when the salvor prevents or minimises the liability of the shipowner (or the owner of other property that is the subject of salvage) to a third party. It is "based on the concept that salvage rewards should reflect the value of the owner's assets preserved from liability claims, as well as the value of the recovered property"[2].

Liability salvage protects the economic assets of the party who would have been liable for a loss that was prevented by a salvor's efforts. The economic loss prevented may have been for damage that otherwise would have been caused to a waterfront facility, another vessel, a navigation aid, a bridge, a tunnel, submarine cable, a pipeline or to the environment.

If the damage prevented was to the environment, the service may be referred to as 'environmental salvage'. Environmental salvage does not typically include reclaiming damaged environmental areas by clearing them of pollution or repairing the damage that resulted,

ie 'salvaging the environment', at least not when the term is used in connection with a marine casualty response by salvors. Rather, it is the avoidance of those costs having to be incurred. Perhaps the most obvious example is the act of a marine salvor refloating a stranded oil tanker, thereby preventing or minimising damage caused by a spill of its cargo into the environment.

Environmental salvage should not be confused with the environmental regime set out in Articles 13 and 14 of the 1989 Convention. Nor should it be confused with the SCOPIC clause provisions when those are incorporated in the 2000 edition of the Lloyd's Standard Form of Salvage Agreement. Article 13 of the 1989 Convention provides for the salvor's skill and efforts at environmental protection to be considered in determining the salvage award, which still, however, remains limited by the value of the property saved. That is, the economic value of the liability prevented is not included in the salved values.

The special compensation referred to in Article 14 is based on the salvor's expenditures when damage to the environment is prevented but there is insufficient value in the property saved to enable a fair award. Compensation pursuant to SCOPIC (instead of Article 14) is not different in that respect. In neither Article 13, Article 14, nor SCOPIC is the economic value of the liability prevented considered in the salvor's award. Therefore, none of these constitutes 'environmental salvage'.

Whether the salvor prevents structural damage or damage to the environment, it will be necessary to measure the economic benefit. That may be the saved cost of repairing damage to structures or other property, or, in the case of pollution prevention, the cost that would otherwise have been incurred in responding to a spill, cleaning and protecting the environment, remediation of the damage, and perhaps legal penalties or fines that would have been imposed.

The law of marine salvage has evolved over the centuries by adapting to changed notions of equitable risk allocation as well as to changes in technology and political concerns. Those changes often affect the salvor's response to casualties, the manner in which he prioritises the several elements of his response, and the compensation he will receive for his services. At least since the 1967 ***Torrey Canyon*** disaster in the British Isles, increasing emphasis has been placed on pollution prevention or control as an early priority in the salvor's response. Subsequent casualties, such as the grounding of ***Amoco Cadiz*** in1978 and oil spill off the coast of France, increased that emphasis and led to the 1989 Convention.

This, along with coastal state legislation and the right of coastal state intervention, has made environmental protection in most cases the first priority of the salvor after the saving of human life. Professional salvors are seeking increased compensation commensurate with the true economic value of that service to the salved interest as the next step in the evolutionary process. Salvors may also seek awards against coastal states or other third party beneficiaries of their services, but that is a more difficult concept and not the subject of this paper.

THE CASE FOR LIABILITY AND ENVIRONMENTAL SALVAGE

The salvor's greatest contribution to the shipowner often takes the form of liabilities prevented. By preventing a vessel from breaking up on a beach or reef, the salvor may also save the owner the costs of wreck removal and pollution clean up and remediation. By taking a drifting vessel in tow, the salvor protects its owner from liability for the damage that would otherwise have resulted from the vessel striking fixed structures, such as oil rigs, bridges, navigational aids, or anchored vessels.

However, oil and chemical spills appear to be more common, and they usually attract more widespread public attention. That gives environmental salvage a boost in recognition over other types of liability salvage. Moreover, Article 8 of the 1989 Convention imposes on the salvor the duty to exercise the same level of care in preventing or minimising damage to the environment as he must in rescuing property, ie 'due care'. Article 8 imposes a similar burden on the owner of the vessel that is subject to salvage, but that burden existed before the 1989 Convention.

The Article 8 burden placed on the salvor is also different in at least one other important respect. Salvage, whether performed voluntarily or under contract, is traditionally a no cure/no pay service. The harsh result for the salvor in a failed attempt has been softened by Article 14 (or SCOPIC), but the salvor's right to stand down and move on to a more profitable venture has all but been eliminated by the duty imposed by Article 8 so long as risk of pollution from the casualty exists.

Restructuring salvage awards to take into account the mandated priorities and economic values will benefit salvors and others in the maritime and marine insurance industries alike. The dearth of vessel casualties has reduced the number of opportunities for professional salvors to earn the awards that keep them in business. At the same time, the need for highly skilled experienced salvors to respond to casualties has increased because of higher ship and cargo values, the evolution of some highly vulnerable vessel types, and the escalating costs of oil and chemical spill response. Greater consideration given to the successful environmental salvage component of the salvor's services may provide the professional salvage community with the larger awards they require, and enable salvors to expand their resources sufficiently to provide broader coverage.

The salvor, by prioritising protection of the environment, provides an important public service that should be encouraged. Had the service not been provided, the public (through its government) would have borne the resulting clean-up and remediation

costs, or would have imposed those costs on the vessel owner or other responsible party, at least up to the amount of their statutory limit. No matter how those costs are borne, experience has shown that even the most expensive spill response cannot undo all of the harm suffered by the environment or the public's right of enjoyment. The salvor, by preventing the spill from happening, provides that protection.

The salvor is indeed the 'first line of defence' against pollution because he is there to 'keep the oil in the ship'. That works only if the salvor is able to reach the casualty with adequate resources in sufficient time to prevent or minimise a partial or total spill. His award for keeping the oil in the ship is not based solely on the values saved, but also on the other Article 13 factors such as his skill, promptitude, and his state of readiness and efficiency in rendering the service. Those factors require adequate response capabilities, such as having suitable equipment and personnel strategically placed to enable promptitude of the skilled and efficient response.

The greater the salvage award, the more likely the salvor will station salvage assets in strategic locations to enable early response, enhancing his chances of success and the probability of protecting not only the environment and the public interest, but also the assets of the shipowner and its insurers. Everyone benefits. In the US this has been recognised in the recently adopted US Coast Guard Salvage and Marine Firefighting Regulations. However, it is yet to be seen whether those regulations, in the absence of environmental salvage awards, will provide added income to the salvage community sufficient to enable suitable geographic coverage to ensure prompt responses to all casualties.

OBSTACLES AND OBJECTIONS

Some will inevitably object to the implementation of significant changes in the law. In addition, operational challenges usually occur when changes are made in the way things are done. The concept of either liability salvage as a whole, or environmental salvage alone, is not immune to these problems. As is often the case, the operational challenges will most likely be easier to address than the objections to change raised by those opposed to it. Not all operational challenges will be readily identifiable, but those that readily come to mind do not seem insurmountable.

The method of calculating and apportioning a salvage award that includes liability (or environmental) salvage must vary from the traditional calculation in two ways. Firstly, the court or arbitrator must consider the value of the liability prevented in addition to the traditional factors. That value will be determined by applying the same techniques used in other situations to determine subjective values. That value may then be added to salved property values, or two awards may be separately derived and then added together.

Secondly, it may require a different method of apportionment of responsibility for payment of the salvage award amongst the salved interests. If cargo would not have been liable for the damages prevented by the salvage effort, and therefore is not a beneficiary of that component of the salvage, then the usual apportionment of the salvage award based pro rata on salved property values would be inappropriate. The court must distinguish between its award for property salvage and its award for liability salvage, and separately apportion each among the respectively benefited parties. The apportionment may be further complicated by the shipowner's defences or limitations, and whether others may be liable in part for the liability that was prevented.

Liability or environmental salvage is, therefore, conceptually possible. It is for the interested parties – salvor, salved interests (including their insurers) and third parties – to decide whether liability salvage, whatever its equities, is practicable if it requires that the court or arbitrator depart from well-developed common formulae, making a simple salvage matter more complex and expensive to adjudicate. The added complication is one of the objections raised by some to adopting a liability or environmental salvage regime.

Another frequently raised objection is what is referred to as 'the speculative nature of the value of the liability prevented'. However, the determination required is no more speculative than other value determinations made by courts and arbitrators. That has been reinforced in recent years, especially in respect of environmental salvage. In a recent presentation on the subject, Dr Dagmar Schmidt Etkin of Environmental Research Consulting addressed this very topic.

According to Dr Etkin, state-of-the-art computer modelling techniques based on sound science and empirical cost and damage data collected from numerous spills takes speculation out of the equation. She suggested that, in most cases, computer modelling of simulated spills may be as accurate a measure of the spill costs prevented as letting the spill happen and then adding up the response, clean up, remediation, and other costs. No doubt, all concerned would prefer the spill be prevented, and would even tolerate some range of possible error in the modelling to encourage or enable salvors to respond. In any event, the burden of proof would be on the salvor to present a reasonably convincing engineering study and analysis to make his case.

In 1983, The Honorable Sir Barry Sheen delivered a paper before the Admiralty Seminar at Tulane University addressing the 1981 Draft Convention on Salvage. B Sheen, *Convention on Salvage*, 57 Tul L Rev 1387 (1983). Mr Justice Sheen briefly addressed the subject of liability salvage, and eloquently set forth the common arguments against it. Those included the now outdated argument that rewarding a salvor for liabilities prevented forces the arbitrator or court to engage in speculation. Sheen also expressed concern that the salvor will have difficulty collecting his award for liability salvage when there is no property against

which to assert a maritime lien. That argument may also be outdated. The P&I Club Rules have been modified to provide for payment of special compensation, whether pursuant to Article 14 or SCOPIC. They could just as well be modified to provide for payment of liability or environmental salvage awards. In any event, the prospect of difficulty in recovery of an award or judgment should not stand in the way of incorporating into the law a right of recovery that benefits all interested parties.

In support of his arguments, Sheen used as an example two ships of identical value carrying two cargoes of identical value drifting towards some rocks. He asked whether the salvor, extending the same effort, should obtain a greater reward on one because that vessel contained a cargo of oil than on the other because it contained a cargo of lumber. That question has been answered affirmatively by the 1989 Convention. The salvor of the oil-laden vessel will receive a greater award pursuant to Article 13 in the case of a successful effort, or pursuant to Article 14 (or SCOPIC) if the salvage effort fails to save property.

The answer to his question is even more easily answered by financial analysis and common sense. Suppose both ships belonged to the same owner who would be strictly liable, as in many jurisdictions, for any damage resulting from oil pollution. That owner would certainly be willing to pay more for the salvage of the ship with the oil cargo than for the salvage of the other. If only one ship could be rescued, that owner would surely choose to rescue the ship with the oil cargo, even if it was of less value than the other, and even if the cargo of oil was of less value than the cargo of lumber.

If the vessels were entered in the same P& I Club, it too would urge the salvor to first save the ship with the cargo of oil. In such a case as that suggested by Sheen, the question of how the salvor's resources could be put to most valuable use would surely be answered by the determination of where the greatest liability could be prevented.

ITS 2008: EVERYTHING OLD IS NEW AGAIN

At *ITS 2008* in Singapore there were several lively discussions on the subject of liability salvage, with most emphasis by far on environmental salvage. In reviewing the papers of that conference, and in particular the recorded questions, answers, and comments addressed to the papers, one is reminded of the adage, 'the more things change, the more they stay the same'. The comments and arguments for and against the concept were put forward with considerable eloquence, but none was truly new.

In his paper entitled *A Hundred Years of Lloyd's Form - A Vehicle for Change,* Lloyd's Appeal Arbitrator John C Reeder presented what seems to be such a balanced view that one is left with the query, "why does it appear Reeder is opposed to the concept of liability or environmental salvage?" Perhaps that is because Reeder readily acknowledges that "[s]alvage is all about benefit" and "[s]uch a benefit would include the avoidance of third party claims arising from oil pollution", but then compares that service to the saving of human life to conclude: "it is apparent that damage to the environment can never be at the core of a court's or arbitrator's approach to a salvage award" (para 31-33).

One cannot criticise that comparison for the purpose for which it was made. However, the duty to save human life at sea is one imposed on all mariners above all else except their duty to their own lives and those of their own crew and passengers. The duty to give priority to protecting the environment is imposed only on the imperiled vessel's interests, who cannot escape it, and the salvor who volunteers to take it on.

Reeder also suggested that where preventing environmental damage is simply coincidental with saving the ship and cargo, with no special additional action being required of the salvor, nothing more should be considered. That is, "if no special measures are needed to avoid pollution how far can a tribunal realistically go in ratchetting up the award because pollution has been avoided – the liability for which may far exceed the value of ship and cargo?" (para 40).

For centuries tribunals have awarded salvage for the rescue of cargo, freight, and bunkers when that was coincident with saving the ship and no special or additional measures were required. While the cargo and bunkers are property, they, like the freight, are eventually reduced to their monetary value for purposes of determining the award. It would seem equally valid to do the same in respect of third party liabilities that were prevented.

A number of other obstacles and concerns were addressed by Reeder, including the difficulty and the expense of proving what the economic liability would have been for something that was prevented, the fairness – or not – to one or the other sets of insurers, and the current lack of any scheme for assessing such awards that would be familiar to arbitrators. He concluded by suggesting such matters can only be addressed by consensus among the interested parties, such consensus does not yet exist, and when it does the proper vehicle for change will be the LOF. No argument there, unless the process is so slow that it forces the courts or the diplomats to take the lead.

Picking up at that point, former International Salvage Union president Joop Timmermans, in his paper *The Future of Lloyd's Form from the Salvor's Perspective,* observed that: "Pollution prevention is more important than ever. It is this that holds the key to the continuity of salvage and pollution prevention services in future years". He suggested, similarly to Reeder before him, that it is perhaps time for a "new LOF that takes full account of society's zero tolerance of marine pollution".

Timmermans goes on to identify the benefits of a greater salvage presence that would be enabled by

an environmental salvage scheme written into a new LOF. It seems fair to impose this burden on the working groups who are called upon from time to time to jointly revise the LOF if they wish it to maintain its dominant position amongst salvage contracts. Leadership requires shaping the consensus that Reeder says is required, not simply responding to whatever consensus already exists.

Much of the discussion among the attendees at the various sessions revolved around the same old issues about the difficulty of ascertaining what liabilities and environmental damage had been prevented, the difficulties of proof, the question of where one draws the line, ie what liabilities prevented should be excluded, and the complications involved in the mechanism for payment. None of these should be allowed to stand in the way of a change that will benefit all – the environment, the public, the salvors, vessels and cargo interests, and marine insurers.

CONCLUSION

Change is inevitable. The issue is who takes the lead and shapes the change. Is it truly less expensive to respond to spills than to prevent them, or is the resistance to change based on something else? Is it wrong to fairly reward salvors for all the benefits of the services they are called upon to provide? If justice, not to mention benefit to the environment and mankind, requires a solution, is it right to avoid that solution because it will be difficult or costly to implement, or because it will require all interested parties to become familiar with a new scheme?

The professional salvage community has been forced by the 1989 Convention and coastal state edicts to seek compensation for what they have long done for free but must now prioritise above the basic work of their calling. This effort, even though it is based on old arguments, is a new position for them. The time may have come for the other interests to also take a fresh look, unburdened by outdated positions.

REFERENCES

[1] *Crescent Towing & Salvage Co v M/V* **Chios Beauty**, 2008 A.M.C. 2535, 2555 (ED La 2008).

[2] *Protecting the Environment with Salvage Law: Risks, Rewards and the 189 Salvage Convention*, 65 Wash L Rev 639, 646 (1990).