

## **SALVAGE LAW AND THE PREVENTION OF ENVIRONMENTAL DAMAGE**

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### **Abstract**

Salvage is fundamentally concerned with preservation. By virtue of the no cure, no pay principle the salvage operation must be successful to some degree in order for the salvor to be entitled to a salvage award. Subsequent developments in shipping necessitated the introduction of the ‘enhanced award’ and ‘safety net’ concepts in the Lloyd’s Open Form in order to encourage salvors to aid vessels in distress. The safety net concept is an exception to the no cure, no pay principle. The International Convention on Salvage 1989 incorporated these concepts and also introduced novel provisions on the protection of the environment during the conduct of salvage operations. The salvage industry has called for the International Convention on Salvage 1989 to be amended in order for salvors to be appropriately rewarded for their efforts in protecting the environment. This paper discussed the degree and adequacy of the law of salvage in protecting the environment. It further examined the elements that qualify a salvor to be entitled to a salvage award, discussed the development of salvage law, analysed the provisions of the International Convention on Salvage 1989 and their adequacy in providing sufficient remuneration for salvors. The proposed amendments to the 1989 Convention were also highlighted.

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## 1.1 Introduction

Salvage is a subject which is limited to maritime law.<sup>1</sup> It has been described as a right which arises when a person voluntarily preserves or contributes to preserving any vessel, cargo, freight or other recognised subject of salvage from danger at sea.<sup>2</sup> Article 1 of the International Convention on Salvage 1989 (1989 Convention) provides that salvage ‘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’. The basis of a salvage award is to induce the rescue of vessels in danger. A consequence of saving the endangered property is that the salvor acquires the right to a salvage award and the amount paid to the salvor must not be more than the property’s value. This is to ensure that the salvors’ efforts confer a benefit on the owner of the salvaged property.<sup>3</sup> Prior to 1875, salvage was non-contractual and professional salvors were non-existent, salvors expended personal skills and efforts to carry out salvage operations without express salvage contracts.<sup>4</sup> The rise of the professional salvage industry began at the end of the nineteenth century, these days salvage operations are often carried out by experts under express contracts.<sup>5</sup> The Lloyd’s Open Form (LOF) is one of the most widely used type of salvage

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<sup>1</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 282.

<sup>2</sup> John Reeder, *Brice on Maritime Law of Salvage* (5<sup>th</sup>edn, Sweet and Maxwell 2011) 1.

<sup>3</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 282.

<sup>4</sup> Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (Cavendish Publishing, 2001) 651.

<sup>5</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 282.

agreements which provides for the determination of the appropriate award due to the salvor by arbitration.<sup>6</sup>This paper considers whether the law of salvage provides adequate protection against environmental damage. It analyses whether the current salvage regime provides sufficient remuneration for the salvor and proffers recommendations for the improvement of the salvage legal framework.

## **1.2 Elements of Salvage**

In order to qualify as a salvage operation and thereby lead to an entitlement to a reward certain elements must be present. These fundamental elements which are voluntariness, danger, success and the rescue of a 'recognised subject of salvage' are of particular significance in understanding the subject of salvage.

### **1.2.1 Danger**

The rescue of the property from danger is a vital factor which will enable the salvor obtain an award for salvage. The maritime property must be in danger when the salvage operation is carried out.<sup>7</sup> Danger with respect to maritime salvage generally involves 'physical danger to the maritime property'.<sup>8</sup>The danger must not be immediate, it will suffice if there is a probability that as a result of the damage it has sustained the subject of salvage will be destroyed in the absence of the salvors' assistance. In *The Charlotte*<sup>9</sup> it was noted that:

It is not necessary, ... that the danger should be imminent and absolute; it will be sufficient if, at the

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<sup>6</sup>ibid.

<sup>7</sup> ibid 286.

<sup>8</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 286.

<sup>9</sup> (1848) 3 W Rob 68 (as cited in Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2<sup>nd</sup>edn, informa 2009) 648).

time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.<sup>10</sup>

The onus of proof lies on the salvor to show that a reasonable person would not have refused the salvage services. The shipowner will not be allowed to claim that the rescued vessel was not in danger where a Lloyd's Open Form (LOF) has been signed by the parties.<sup>11</sup> In *The Beaverford (Owners) v The Kafiristan (Owners)*<sup>12</sup> it was contended that the appellants were not entitled to a salvage award because the salving vessel was the property of the owners of the vessel which was responsible for a substantial degree of the collision. It was held that in accordance with the terms of the LOF a reward for salvage was due to the appellants.

### 1.2.2 Voluntariness

It is important that the salvor seeking an award for rendering salvage services, carried out the action voluntarily without being required to do so by virtue of the terms of a previous arrangement.<sup>13</sup> In *The Neptune*<sup>14</sup> a salvor was described as:

A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that

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<sup>10</sup> *ibid* 71.

<sup>11</sup> Francis D Rose, Kennedy and Rose: Law of Salvage (8<sup>th</sup>edn, Sweet and Maxwell 2013) 167.

<sup>12</sup> [1938] AC 136.

<sup>13</sup> Francis D Rose, Kennedy and Rose: Law of Salvage (8<sup>th</sup>edn, Sweet and Maxwell 2013) 237.

<sup>14</sup>(1824) Hagg 227 (as cited in Francis D Rose, Kennedy and Rose: Law of Salvage (8<sup>th</sup>edn, Sweet and Maxwell 2013) 239).

connected him with the duty of employing himself for the preservation of that ship.<sup>15</sup>

A salvor who undertakes salvage operation under a salvage contract, such as LOF is regarded as a volunteer because at the time the contract of salvage was concluded the salvor had no 'prior duty to assist the ship in distress'.<sup>16</sup> Where a contract exists for towing a vessel, a reward for salvage will not be due unless the activities undertaken are far greater than what is required under the existing contract.<sup>17</sup> In *Dover Harbour Board v Owners of the Star Maria (The Star Maria)*<sup>18</sup> it was held that a steering tug whose services were secured to guide a vessel into the harbour was entitled to a salvage award because it carried out activities which were more than those required of it at the time it was hired.

The master and crew of a vessel are ordinarily not entitled to salvage because by virtue of their contracts of employment they are expected to take care of the vessel and property on board.<sup>19</sup> In the *North Goodwin (No 16)*<sup>20</sup> it was held that the master and crew of the tug were not entitled to an award for salvage because they were employed to tow the vessel. However, in *The San Demetrio*<sup>21</sup> it was held that the members of the crew who after abandoning the ship on the orders of the master,

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<sup>15</sup> *ibid* 236.

<sup>16</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 288.

<sup>17</sup> *ibid*.

<sup>18</sup> [2003] 1 Lloyd's Rep 183.

<sup>19</sup> Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2<sup>nd</sup>edn, informa 2009) 652.

<sup>20</sup> [1980] 1 Lloyd's Rep 71, 74.

<sup>21</sup> [1941] 69 Lloyd's Rep 5, 12.

subsequently boarded the burning ship and got her to a safe place were entitled to a salvage reward. A salvage award will be due to a person who acts in his own self-interest provided that in rendering such services the person acted in a manner which was beyond what was ordinarily expected of them.<sup>22</sup> In *Lomonosoff*<sup>23</sup> it was held that soldiers who prevented the seizure of a ship and used it to flee were entitled to a salvage award even though they had also saved their own lives.

### 1.2.3 Success

The success of the salvage operation carried out in respect of a vessel in distress is a vital element in determining whether a salvage reward will be due or not. By virtue of the ‘no cure-no pay’ principle an award will not be due where the salvage activities are unsuccessful or the salvor’s efforts do not aid in the recovery of the endangered property.<sup>24</sup> The justification for this principle is that a salvage award arises from the maritime property which has been saved. However, Article 14 of the 1989 Convention contains the exception to this principle.

The importance of the requirement of success was emphasised in *The Melanie (Owners) v The San Onofre (Owners)*<sup>25</sup> where Lord Phillimore stated that the success of salvage activities embarked on is the basis on which a salvage award is made. In *The Owners of The Motor Vessel Tojo Maru and N v Bureau Wijsmuller (The Tojo Maru)*<sup>26</sup> it was stated that, ‘...the person

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<sup>22</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 290.

<sup>23</sup> [1921] P 97.

<sup>24</sup> John Reeder, *Brice on Maritime Law of Salvage* (5<sup>th</sup>edn, Sweet and Maxwell 2011) 1.

<sup>25</sup> [1925] AC 246, 262-263.

<sup>26</sup> [1972] AC 242.

rendering the salvage services is not entitled to any remuneration unless he saves the property in whole or part. This is what is meant by “success” in cases about salvage’.<sup>27</sup> A salvage award will not be due where the vessel to which help is rendered is destroyed.<sup>28</sup> In *The Renpor*<sup>29</sup> the master of a damaged ship agreed to pay another shipmaster to remain by the damaged ship until it got to a place from which it could reach the port. When the damaged ship was about to sink, its crew was taken on board the other ship. It was held that even though the lives of the master and members of the crew had been saved, no reward was due because the ship sank. Article 12 of the 1989 Convention provides that only salvage activities which have provided a ‘useful result’ are to be rewarded.

#### **1.2.4 Maritime Property**

The classification of property as a ‘recognised subject of salvage’ is required for the purpose of determining the property in respect of which a salvage award may be made, the party or parties who are to provide the required sum and the amount to be put up by each party.<sup>30</sup> In *Wells v Gas Float Whitton No 2 (Owners of) (The Gas Float Whitton No 2)*<sup>31</sup> it was held by Lord Esher MR that the subjects of salvage are a ‘...ship, her apparel and cargo ...and the wreck of these and freight...’. A vessel under Article 1(b) of the 1989 Salvage Convention refers to any structure capable of being navigated, a ship or any craft whatsoever. It has been posited that the report by the Comite

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<sup>27</sup> *ibid* 293.

<sup>28</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 290.

<sup>29</sup> (1883) 8 PD 115, 118.

<sup>30</sup> Francis D Rose, Kennedy and Rose: *Law of Salvage* (8<sup>th</sup>edn, Sweet and Maxwell 2013) 87.

<sup>31</sup> [1897] AC 337.

Maritime International (CMI) which facilitated the drafting of the 1989 Convention anticipated that the phrase ‘structure capable of navigation’ would include mobile offshore structures, such as large automatic navigation buoys.<sup>32</sup> Article 3 of the 1989 Convention clearly excepts fixed or floating platforms or mobile offshore drilling units when ‘on location and engaged in exploration, exploitation or production of sea bed mineral resources. Property has been defined as ‘any property not permanently or intentionally attached to the shoreline and includes freight at risk’.<sup>33</sup> Cargo and freight are also regarded as maritime property. Cargo is subject to salvage regardless of whether it is owned by a ship owner or by a third party. Freight will be considered when calculating the value of the property saved.<sup>34</sup>

### 1.3 The Development of the Law of Salvage

The 1960s ushered in a new era in maritime law with the increase in the size of oil tankers being used to transport oil raising awareness of the potential harmful effect a spill of such cargo could cause as evidenced by the *Torrey Canyon*<sup>35</sup> and *Amoco Cadiz*<sup>36</sup> oil spills in 1967 and 1978 respectively. The effect of these events was the heightened awareness of the importance of salvors as it became clear that ‘In addition to their historical role as salvors of property, they were to become the guardians of the marine environment, and thereby also serve the

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<sup>32</sup> Richard Shaw, ‘The 1989 Salvage Convention and English Law’ [1996] Lloyd’s Maritime and Commercial Law Quarterly 202,208.

<sup>33</sup> International Convention on Salvage 1989, art 1(c).

<sup>34</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 284.

<sup>35</sup> About 119,000 tonnes of crude oil were spilled.

<sup>36</sup> The vessel carrying Iranian light crude oil spilled about 1,300,000 barrels.



public interest'.<sup>37</sup>The Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910 (1910 Convention) which was in operation, was inadequate to deal with the advances witnessed in shipping owing to the size of ships being used and the types of goods being transported on the said ships.<sup>38</sup> The 1910 Convention provided for the 'no cure no pay' principle under which if the maritime property is not successfully salvaged, the salvor earns no reward. Under the Convention, there were no provisions on the prevention of pollution to the environment. As long as there had been no successful salvage operation a salvor was not entitled to a salvage award regardless of the extent of his exertions. Therefore, there was no motivation for a salvor to engage in an activity which was likely to be unsuccessful.<sup>39</sup> It became clear that the salvage regime in place was not suitable as there was nothing to induce salvors to render assistance to ships when there was hardly any hope of receiving an award proportionate to their efforts to prevent environmental damage.<sup>40</sup>

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<sup>37</sup>Rhidian D Thomas, 'Marine Salvage and the Environment: Developments, Problems and Prospects' in Richard Caddell and Rhidian D Thomas (eds), *Shipping, Law and the Marine Environment in the 21<sup>st</sup> Century: Emerging Challenges for the Law of the Sea—Legal Implications and Liabilities* (Lawtext Publishing Limited 2013) 156.

<sup>38</sup>Nicholas Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991) 16 *Tulane Maritime Law Journal* 3, 5.

<sup>39</sup>Kiran Khosla 'Salvage Law-Is it working? Does it protect the environment?' *Comite Maritime International Yearbook* (2010) 479. < <https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf> > accessed 16 May 2020.

<sup>40</sup> *ibid.*

In an effort to address some of the shortcomings of the 1910 Convention and following the occurrence of the major oil spill incidents, the LOF 1980 which contained ‘enhanced award’ and ‘safety net’ provisions was published by the Committee of Lloyd’s with support received from the International Group of Protection and Indemnity Clubs who undertook to pay the amount due from the tanker owners.<sup>41</sup> Clause 1(a) of the LOF 1980 provided that a successful prevention of oil pollution during the salvage operation would lead to the enhancement of the salvage award. It also provided that in the event that a salvage operation was diligently carried out on a tanker loaded with oil and salvage was either a total failure, partly effective or the salvor was unable to complete the operation, the salvor would be entitled to recover his expenses and an additional 15 per cent increase of the said expenses from the tanker owners. The safety net provisions set out in clause 1(a) of LOF 1980 covers only vessels carrying a cargo of oil. The LOF 1980 required the salvor to use his ‘best endeavours’ to ensure that in carrying out salvage activities there would be no leakage of oil from the ship. In *Rhodia International Holdings Limited and Another v Huntsman International LLC (Rhodia)*<sup>42</sup> explaining what reasonable endeavours involve, it was noted that the requirement to use best endeavours would require ‘the sacrificing of a party’s commercial interests’. Therefore, it may be argued that a duty to use his best endeavours requires that a

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<sup>41</sup> Richard Shaw, ‘The 1989 Salvage Convention and English Law’ [1996] Lloyd’s Maritime and Commercial Law Quarterly 202, 205; Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 292.

<sup>42</sup> [2007] 2 Lloyd’s Rep 325 [35].

salvor in the course of salvage operations exhausts all possible avenues to achieve his objective.<sup>43</sup>

#### **1.4 The 1989 Salvage Convention**

The clauses in the LOF 1980 were instrumental in shaping the provisions of the 1989 Convention.<sup>44</sup> During consultations for the review of the salvage regime, the importance of encouraging salvors to render assistance to distressed ships in order to avoid environmental damage was recognised as vital.<sup>45</sup> In 1981, during the CMI conference, the concept of liability salvage under which a salvage award would be paid for the prevention or reduction of damage to the environment regardless of whether the salvage operation was successful or not, was debated.<sup>46</sup> The concept was rejected and instead a compromise was reached under which a salvage award would be enhanced in line with the expertise and exertion that the salvor used in the prevention or reduction of environmental damage.<sup>47</sup> The compromise reached is referred to as the ‘Montreal Compromise’. The ‘Montreal Compromise’ was a resolution by

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<sup>43</sup>Rhidian D Thomas, ‘The “best endeavours” Obligation of Salvors’ [2012] *Journal of International Maritime Law* 18(3) 179,180.

<sup>44</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup>edn, Routledge 2015) 282.

<sup>45</sup> Kiran Khosla ‘Salvage Law-Is it working? Does it protect the environment?’ *Comite Maritime International Yearbook* (2010) 479. < <https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf> > accessed 16 May 2020.

<sup>46</sup> Hugh Hurst, ‘Amending the Salvage Convention 1989- The International Group of P&I Clubs’ View’ in *Comite Maritime International Yearbook* (2010) 500. <<https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf> > accessed 16 May 2020.

<sup>47</sup> *ibid.*

shipowners and cargo owners under which they agreed to increase their liability in order to prevent damage to the environment.<sup>48</sup> After intense deliberations, the provisions of the 1989 Convention were agreed upon and the Convention came into force internationally in July 1996.<sup>49</sup> A fundamental aspect of the 1989 Convention is that its provisions successfully merge the law of salvage with environmental law.<sup>50</sup> Damage to the environment is defined as in Article 1(d) as ‘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’. Therefore, an incident which causes minimal damage to the environment will not fall under the provision. It has been noted that limiting environmental damage to a particular area as in the above definition has the effect of disregarding other areas of the sea which may be polluted.<sup>51</sup> Damage to the environment must be damage of a physical character. Therefore, a claim for compensation for economic losses for instance in the ‘fishing and tourist industries’ will not be regarded as damages covered

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<sup>48</sup> *ibid.*

<sup>49</sup> Richard Shaw, ‘The 1989 Salvage Convention and English Law’ [1996] *Lloyd’s Maritime and Commercial Law Quarterly* 202, 206-207.

<sup>50</sup> Rhidian D Thomas, ‘Marine Salvage and the Environment: Developments, Problems and Prospects’ in Richard Caddell and Rhidian D Thomas (eds), *Shipping, Law and the Marine Environment in the 21<sup>st</sup> Century: Emerging Challenges for the Law of the Sea—Legal Implications and Liabilities* (Lawtext Publishing Limited 2013)160.

<sup>51</sup> John Reeder, *Brice on Maritime Law of Salvage* (5<sup>th</sup>edn, Sweet and Maxwell 2011) 424.

under Article 1(d) of the 1989 Convention.<sup>52</sup> It has been noted that with:

the use of the words ‘substantial’ and ‘major’ as well as the reference to ‘pollution, explosion, contamination, fire’ it is intended to make it clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned and it must be a risk of substantial damage.<sup>53</sup>

The environmental provisions of the 1989 Convention are set out in Articles 8, 13 and 14. Article 8 (1)(b) of the 1989 Convention provides that the salvor has an obligation to the shipowner or cargo owner to ensure that when carrying out salvage, he takes ‘due care’ to avoid or reduce damage to the environment. This obligation referred to in Article 8 (1)(a) and(1)(b) is only owed to the shipowner or cargo owner and only arises in the course of carrying out salvage operations.<sup>54</sup> Article 8(2)(a) and (b) provide that the shipowner and master of the ship or the cargo owner are required to co-operate with the salvor in order to avoid or reduce damage to the environment. It has been posited that the obligation to take ‘due care’ in Article 8 when compared with the demand to carry out salvage with ‘best endeavours’ under the LOF does not call for the salvor to

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<sup>52</sup> Colin De la Rue and Charles B Anderson, *Shipping and the Environment: Law and Practice* (2<sup>nd</sup>edn, Routledge 2015) 550.

<sup>53</sup>Comite Maritime International, *The Travaux Préparatoires of the Convention on Salvage 1989*(2003)111 <<https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Convention-on-Salvage-1989.pdf>> accessed 14 May 2020.

<sup>54</sup> Colin De la Rue and Charles B Anderson, *Shipping and the Environment: Law and Practice* (2<sup>nd</sup>edn, Routledge 2015) 553-554.

exert himself and do all he possibly can.<sup>55</sup> The words ‘due care’ appear to introduce a form of restraint with regards to the efforts to rescue property at risk.

The obligation to have regard to the environment is a consequence of the duty to perform salvage carefully.<sup>56</sup> In an attempt to identify which is more important between the duty to protect the environment and the duty to diligently conduct salvage it has been asserted that the overriding duty of the salvor is to ‘exercise due care in saving property, and that duty to exercise due care to prevent or minimize damage to the environment arises as an incident of that primary duty’.<sup>57</sup> This assertion is supported with reference to the provisions of Article 8(1) and Article 1(a) of the 1989 Convention.<sup>58</sup>

Articles 13 and 14 are regarded as the most vital parts of the 1989 Convention. The Articles contain provisions which are similar in some respects to the ‘enhanced award’ and ‘safety net’ contained in the LOF 1980.<sup>59</sup> Contrary to the position under the LOF 1980, the application of Articles 13 and 14 is not

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<sup>55</sup> Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990’ (1991) 16 *Tulane Maritime Law Journal* 3, 41.

<sup>56</sup> Rhidian D Thomas, ‘Marine salvage and the environment: developments, problems and prospects’ in Richard Caddell and Rhidian D Thomas (eds), *Shipping, Law and the Marine Environment in the 21<sup>st</sup> Century: Emerging Challenges for the Law of the Sea—Legal Implications and Liabilities* (Lawtext Publishing Limited 2013) 161.

<sup>57</sup> *ibid* 162.

<sup>58</sup> *ibid*.

<sup>59</sup> Simon Baughen, *Shipping Law* (6<sup>th</sup> edn, Routledge 2015) 282, 293.

restricted to vessels carrying oil as cargo. The factors which are taken into consideration in making a salvage award are contained in Article 13(1) of the 1989 Convention.<sup>60</sup> Article 13(1) (b) provides that the ‘skill and efforts of the salvor in preventing or minimizing damage to the environment’ will be considered when making the salvage award. This provision acts as an incentive for salvors to render assistance to ships in danger with the knowledge that avoiding or reducing pollution will have an impact on the reward due to them.<sup>61</sup> The additional amount due to the salvor where Article 13(1)(b) has been satisfied depends on the relevant situation taking into consideration the result of the salvors’ efforts and his competence during salvage.<sup>62</sup> It is important for the salvor to show that because of his actions pollution did not occur.<sup>63</sup>

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<sup>60</sup> Article 13 (1) of the 1989 salvage convention provides that:

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.

<sup>61</sup> Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) *Tulane Maritime Law Journal* 37(1) 65, 68.

<sup>62</sup>Rhidian D Thomas, ‘Marine Salvage and the Environment: Developments, Problems and Prospects’ in Richard Caddell and

The enhanced award is provided by the shipowner and cargo owners based on the value of their property which has been saved.<sup>64</sup> Bishop avers that the salvage award does not measure up to the extent of environmental damage which is avoided.<sup>65</sup> Using *The Prestige* spill<sup>66</sup> to support this assertion, he states that had salvage been carried out liability for pollution which was within the range of US\$1 billion would not have arisen but in such an instance the salvor's reward would be considerably lower than the above figure.<sup>67</sup> He notes that the introduction of environmental salvage awards will make salvors more eager to carry out salvage operations.<sup>68</sup> Article 13(2) provides that a salvage award is to be paid by the owners of all the property saved in proportion to their respective salvaged values. The

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Rhidian D Thomas (eds), *Shipping, Law and the Marine Environment in the 21<sup>st</sup> Century: Emerging Challenges for the Law of the Sea—Legal Implications and Liabilities* (Lawtext Publishing Limited 2013)163.

<sup>63</sup> Archie Bishop, 'The Development of Environmental Salvage and Review of the London Salvage Convention 1989' (2012) *Tulane Maritime Law Journal* 37(1) 65, 68.

<sup>64</sup> International Convention on Salvage 1989, art 13(2).

<sup>65</sup> Archie Bishop 'Places of Refuge: Environmental Salvage' in Norman Gutierrez (ed), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (Taylor and Francis 2009) 352, 357.

<sup>66</sup> About 63,000 tonnes of heavy fuel oil was spilled after the tanker *Prestige* sank off northern Spain.

<sup>67</sup> Archie Bishop 'Places of Refuge: Environmental Salvage' in Norman Gutierrez (ed), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (Taylor and Francis 2009) 352, 357.

<sup>68</sup> *ibid* 357-358.



owners are to pay irrespective of whether they could have been liable for pollution.<sup>69</sup> Additionally, article 13(3) provides that a salvage award ‘exclusive of any interest and recoverable legal costs’ should not be greater than the value of the property salvaged.

Article 14(1) provides that where a salvor has conducted salvage with regards to a ship which presents a threat to the environment and is unable to obtain an award under Article 13 equal to the special compensation due under article 14, the salvor may obtain special compensation equal to his expenses. By virtue of the above provision special compensation will be due to a salvor who has not successfully protected the environment from damage. The shipowner pays the special compensation.<sup>70</sup> Article 14(2) provides that where the salvor succeeds in avoiding or reducing environmental damage a 30 per cent increase of the special compensation due to the salvor may be paid to him. An additional increase may be made to the amount of special compensation if it is deemed necessary by the arbitration tribunal having regard to the provisions of Article 13(1), but the said increase must not exceed 100 per cent of the salvors’ expenditure.<sup>71</sup> In order to gain special compensation under Article 14(2) the salvor must establish that the salvage carried out averted damage to the environment.<sup>72</sup> The magnitude of the

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<sup>69</sup> Colin De la Rue and Charles B Anderson, *Shipping and the Environment: Law and Practice* (2<sup>nd</sup>edn, Routledge 2015) 555-556.

<sup>70</sup> International Convention on Salvage 1989, art 14(1).

<sup>71</sup> *ibid* art 14(2).

<sup>72</sup> Rhidian D Thomas, ‘Marine Salvage and the Environment: Developments, Problems and Prospects’ in Richard Caddell and Rhidian D Thomas (eds), *Shipping, Law and the Marine Environment in the 21<sup>st</sup> Century: Emerging Challenges for the Law*

damage which would have occurred would also have to be shown and as a result professionals such as ‘naval architects, drift experts and environmental experts’ would be employed.<sup>73</sup> Article 14(3) provides that salvor’s expenses under Article 14 refer to:

...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).

In *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd (The Nagasaki Spirit)*<sup>74</sup> the House of Lords held that ‘fair rate’ in Article 14(3) refers to ‘a fair rate of expenditure and does not include any element of profit’. The consequence of this decision and the referral to the provisions of Article 13(1) (h), (i) and (j) in Article 14(3) is that when calculating special compensation, the courts must be aware of the price of the equipment used while salvaging the vessel and in addition the price and condition of all the salvors’ other salvage equipment.<sup>75</sup> The application of Article 14 of the 1989 Convention is

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of the Sea—Legal Implications and Liabilities (Lawtext Publishing Limited 2013)166.

<sup>73</sup> Report of the International Working Group on Review of the Salvage Convention 1989, *Comite Maritime International Yearbook* (2011-2012) 146 <[https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook\\_2011\\_12.pdf](https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook_2011_12.pdf)>accessed 14 May 2020.

<sup>74</sup> [1997] 1 Lloyd’s Rep 323, 334.

<sup>75</sup> Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) *Tulane Maritime Law Journal* 37(1) 65, 73.

considered challenging for various reasons.<sup>76</sup> In order to calculate the amount due as special compensation it is necessary to determine the price of all the equipment used in salvaging the vessel and the salvors' equipment capable of being used.<sup>77</sup> This has been described as 'time-consuming, cumbersome, expensive and uncertain'.<sup>78</sup> The availability of special compensation under Article 14 which is supposed to motivate salvors to perform salvage has turned out to be quite problematic because of the requirements and process for determining the relevant issues under Articles 14(2) and (3). In this instance, it is evident that the law of salvage is inadequate.

Article 14(4) provides that the salvor will only receive special compensation if the entire amount calculated under Article 14 is more than the sum which may be awarded under Article 13. By virtue of Article 14(5) of the 1989 Convention where a salvor has been unable to avoid or reduce damage to the environment due to his inability to carry out salvage diligently he may not be entitled to special compensation. A salvor will not be entitled to

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<sup>76</sup> John Reeder, *Brice on Maritime Law of Salvage* (5<sup>th</sup>edn, Sweet and Maxwell 2011) 531,612; Colin De la Rue and Charles B Anderson, 'Environmental salvage-plus ca change?' (2012) 18 *JIML* 279, 285. The shipowners do not agree that the amount due as special compensation should be calculated to cover the salvors expenditure throughout salvage while the salvors believe that a 'fair rate' should be inclusive of profit.

<sup>77</sup> Archie Bishop, 'The Development of Environmental Salvage and Review of the London Salvage Convention 1989' (2012) *Tulane Maritime Law Journal* 37(1) 65, 75.

<sup>78</sup> *ibid.*

any amount under the Convention where his actions or failure to act have contributed to the need for salvage to be carried out.<sup>79</sup>

## 1.5 SCOPIC

The acronym SCOPIC means Special Compensation Protection and Indemnity Clause (SCOPIC). It came into existence in 1999 owing to the disappointment of salvors with the decision in *The Nagasaki Spirit* and the provisions of Article 14 of the 1989 Convention.<sup>80</sup> SCOPIC was created to cure the defects of Article 14 and similar to the above-mentioned article to act as incentive for salvors to go to the aid of ships which are in danger of causing pollution.<sup>81</sup> The SCOPIC is an option available to salvors who do not want to be regulated by the provisions of Article 14 of the 1989 Salvage Convention<sup>82</sup> although the main salvage award under Article 13 is not affected.

In order for the SCOPIC to be applicable it must be indicated on the LOF, the clause will become operative whenever the salvor

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<sup>79</sup>International Convention on Salvage 1989, art 18.

<sup>80</sup> Francis D Rose, Kennedy and Rose: Law of Salvage (8<sup>th</sup>edn, Sweet and Maxwell 2013) 189. The clause was developed by the International Salvage Union, International Group of Protection and Indemnity Clubs, London property underwriters and the International Chamber of Shipping.

<sup>81</sup> Archie Bishop, 'The Development of Environmental Salvage and Review of the London Salvage Convention 1989' (2012) Tulane Maritime Law Journal 37(1) 65, 77-78.

<sup>82</sup> Archie Bishop, 'The Mystery of SCOPIC Unravelling' 2010 <<http://www.marine-salvage.com/media-information/articles/archive/the-mystery-of-scopic-unravelling/>> accessed 10 June 2020.

informs the vessel owner in writing that this is intended.<sup>83</sup> This is quite different from the position under Article 14 where a possibility of pollution occurring will make the article become operative.<sup>84</sup> Clause 2 of the SCOPIC provides that any salvage activity carried out before the SCOPIC becomes applicable will be calculated under Article 13 of the 1989 Salvage Convention. The amount due under SCOPIC is the sum of the tariff rates for staff, tools and ‘out of pocket expenses’ in addition to a 25 per cent bonus of the rates.<sup>85</sup> Clause 6(i) provides that the SCOPIC sum will be paid only if it is more than the Article 13 reward for salvage. Where the reward under Article 13 is more than the amount due under SCOPIC the difference between the salvage reward and the SCOPIC amount will be deducted from the reward by 25 per cent.<sup>86</sup>

**1.5 Salvage Law in Nigeria:** The importance of a robust legal framework on salvage and the attendant prevention of environmental damage cannot be overemphasised in Nigeria which is an oil and gas producing and trading nation<sup>87</sup> as well as a major importer.<sup>88</sup> Before the ratification of the 1989 Salvage

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<sup>83</sup> SCOPIC 2020 cl 2.

<sup>84</sup> Archie Bishop, ‘The Development of Environmental Salvage and Review of the London Salvage Convention 1989’ (2012) *Tulane Maritime Law Journal* 37(1) 65, 79.

<sup>85</sup> SCOPIC 2020 cl 5(i) and (iv).

<sup>86</sup> SCOPIC 2020 cl 7.

<sup>87</sup> Organization of the Petroleum Countries, ‘Nigeria facts and figures’ <[https://www.opec.org/opec\\_web/en/about\\_us/167.htm](https://www.opec.org/opec_web/en/about_us/167.htm) > accessed 3 October 2020.

<sup>88</sup> Observatory of Economic Complexity, ‘Nigeria’ <<https://oec.world/en/profile/country/nga/> > accessed 3 October 2020. In 2018, the

Convention, salvage in Nigeria was governed by the 1910 Convention.<sup>89</sup> By virtue of section 216 of the Merchant Shipping Act (MSA) 2007, the 1989 Salvage Convention is applicable in Nigeria. Part XXVII (sections 387 to 405) of the MSA 2007 is largely a reproduction of the provisions of the 1989 Convention.

## 1.6

Section 391(3) of the MSA 2007 provides that the master of every vessel who without causing serious harm to his vessel and persons on the vessel has the capacity to render assistance to any person in danger of being lost at sea but fails to do so commits an offence and on conviction is liable to a fine not less than ₦500,000.00 or to imprisonment for a term not exceeding two years or both. By virtue of section 396(4) of the MSA 2007 the Government is entitled to a salvage award like any other salvor and has the same rights and remedies as any other salvor where salvage operations are carried out by or on behalf of the Federal Government. Section 400(1)(a) and (1)(b) of the MSA 2007 provides that salvage operations under the Act exclude those which take place in inland waters of Nigeria and in which all the vessels involved are of inland navigation, and salvage operations which take place in inland waters of Nigeria and in which no vessel is involved.

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Nigerian economy ranked 53rd in total imports according to the Economic Complexity Indicator.

<sup>89</sup>Comite Maritime International, 'Implementation of the Salvage Convention 1989'(2007) 4 <<https://comitemaritime.org/wp-content/uploads/2018/05/Implementation-of-the-Salvage-Convention-1989-synopsis-of-the-responses-to-the-questionnaire.pdf>>accessed 3 October 2020.

### **1.7 Proposed Amendments to the 1989 Salvage Convention**

The International Salvage Union (ISU) has made a number of suggestions for the amendment of some provisions of the 1989 Convention.<sup>90</sup> In support of these suggestions it has been stated that the amendments are necessary because the SCOPIC while beneficial is ‘a method of compensation when an award to cover cost cannot be made. It is not a method of remuneration...Salvors would not be in the salvage business if their remuneration was restricted to an Article 14 or SCOPIC award’.<sup>91</sup> Consequently, the ISU has based the proposed reforms on three grounds. Primarily, the heightened awareness of the importance of protecting the environment which has led to the exposure of salvors to possible liability.<sup>92</sup> Additionally, the salvage award does not adequately cover the salvors actions to protect the environment.<sup>93</sup> Lastly, the shipowners liability insurers should be required to provide a proportion of the salvage award since the prevention of pollution is also in their interests.<sup>94</sup>

It has been recommended that Article 14 of the 1989 Convention should be amended to provide for an environmental

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<sup>90</sup>International Salvage Union, ‘Position Paper on the 1989 Salvage Convention’ (2012) <<https://comitemaritime.org/wp-content/uploads/2018/05/2012-04-ISU-Final-Position-Paper-on-Environmental-Salvage-Awards-.pdf>> accessed 2 June 2020.

<sup>91</sup> Todd Busch, ‘Fair Reward for Protecting the Environment- The Salvor’s Perspective’ Comite Maritime International Yearbook (2010) 494. <<https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf>> accessed 17 May 2020.

<sup>92</sup> *ibid* 494-495.

<sup>93</sup> *ibid* 495.

<sup>94</sup> *ibid*.

salvage award to be made in addition to the Article 13 award if necessary.<sup>95</sup> The proposed Article 14(1) provides that a salvor will receive an environmental award as well as the salvage award under Article 13 where a salvage service has been performed with regard to a ship which was in danger of causing pollution.<sup>96</sup> The proposed environmental award will be made taking into consideration, the amended article 13 award, the factors listed in article 13(1) (b)-(i), and the degree to which the salvor has avoided or reduced environmental damage and the outcome of his efforts.<sup>97</sup> Contrary to what is obtainable under the existing Article 14 (1) of the 1989 Convention where the amount of special compensation is based on the salvor's expenditure, the proposed amendment provides for the tribunal to decide on the amount of award to be made to the salvor.<sup>98</sup> It has been stated that the effect of the proposed Article 14(1) (c) is that 'if there was a threat of pollution in waters that would impose a liability on the owner, the award would be more than if it had been in waters which did not impose such a liability, for the benefit conferred would be that much greater'.<sup>99</sup> De La Rue and Anderson<sup>100</sup> point out that the proposed Article 14(1) (c) reintroduces the concept of 'liability salvage' which was

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<sup>95</sup>International Salvage Union, 'Position Paper on the 1989 Salvage Convention' (2012) 4 <<https://comitemaritime.org/wp-content/uploads/2018/05/2012-04-ISU-Final-Position-Paper-on-Environmental-Salvage-Awards-.pdf>> accessed 2 June 2020.

<sup>96</sup> *ibid* 5-6.

<sup>97</sup> *ibid* 6.

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid*.

<sup>100</sup>Colin De la Rue and Charles B Anderson, Environmental salvage-plus ca change? (2012) 18 *Journal of International Maritime Law* 279, 286.



proposed and rejected before the coming into effect of the 1989 Convention, the difference here being that the salvor will be rewarded where there is a possibility of environmental damage even if the damage is not averted. They aver that determining the extent of damage caused by oil pollution is no easy task and an investigation of what the consequences would have been if an actual oil spill had taken place would be impractical and unrealistic.<sup>101</sup>

The proposed Article 14(2) provides a limit for the salvage award due from a shipowner not taking into account the amount which may be due as interest and legal fees.<sup>102</sup> Although the proposed article provides for the amount due according to the gross tonnage of ships there are no specific amounts set.<sup>103</sup> It is proposed that the environmental award will be paid regardless of any liability to third parties which the shipowner may have incurred and this is to ensure that the salvor receives his due.<sup>104</sup> The shipowner is required to pay the environmental salvage award under the amended article 14(4).<sup>105</sup> It has been noted that in the event of the proposed Article 14 coming into force the salvor would be adequately rewarded where there is a significant likelihood of pollution occurring.<sup>106</sup> Furthermore, it has been

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<sup>101</sup> *ibid* 289.

<sup>102</sup>International Salvage Union, 'Position Paper on the 1989 Salvage Convention' (2012) 6 <<https://comitemaritime.org/wp-content/uploads/2018/05/2012-04-ISU-Final-Position-Paper-on-Environmental-Salvage-Awards-.pdf>> accessed 2 June 2020.

<sup>103</sup> *ibid*.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* 7.

<sup>106</sup>Michael N Howard, Environmental Salvage: Opinion 2012 <<http://www.marine->

suggested that Article 13 of the 1989 Salvage Convention be amended by removing Article 13 (1) (b) which provides for the consideration of the salvor's actions in avoiding or reducing damage to the environment when making the salvage award.<sup>107</sup>

Additionally, it has been proposed that the word 'substantial' in the definition of damage to the environment should be substituted for 'significant' and the tribunal will decide what is 'significant' having regard to the facts of a particular case.<sup>108</sup> This proposal was considered during the 2012 CMI Beijing Conference and while it was noted that there is a likelihood that the word 'substantial' may be difficult to interpret, it was retained as most delegates were convinced that the courts or tribunals will interpret the word adequately.<sup>109</sup> It has also been suggested that the area in which damage to the environment can be said to have occurred as provided in Article 1(d) should not be limited to 'coastal or inland waters or areas adjacent thereto', rather there should be no limit although a restriction to the

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[salvage.com/environmental/Michael%20Howard%20QC%20Opinion.pdf](https://salvage.com/environmental/Michael%20Howard%20QC%20Opinion.pdf)>accessed 20 May 2020.

<sup>107</sup> *ibid* 5.

<sup>108</sup> International Salvage Union, 'Position Paper on the 1989 Salvage Convention' (2012) 4 <<https://comitemaritime.org/wp-content/uploads/2018/05/2012-04-ISU-Final-Position-Paper-on-Environmental-Salvage-Awards-.pdf>> accessed 2 June 2020.

<sup>109</sup> Report of the International Working Group on the Review of the Salvage Convention, in *Comite Maritime International Yearbook* (2011-2012) 156 <[https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook\\_2011\\_12.pdf](https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook_2011_12.pdf)> accessed 14 May 2020.

exclusive economic zone will not be opposed.<sup>110</sup> A large number of delegates at the CMI Beijing Conference were in support of extending the geographical scope of environmental damage to territorial waters and to the exclusive economic zone in line with existing international conventions and in States without the exclusive economic zone ‘in an area beyond and adjacent to the territorial sea of the State, determined by that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured’.<sup>111</sup>

The proposals for amendment put forward by the ISU were considered during the CMI Beijing Conference in 2012 and it was decided by the maritime law associations that there was no need to amend Articles 13 and 14 of the 1989 Salvage Convention.<sup>112</sup> It was however suggested using SCOPIC as an example that a way to address the perceived problems of the Convention identified by the ISU is for the stakeholders in the

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<sup>110</sup> International Salvage Union, ‘Position Paper on the 1989 Salvage Convention’ (2012) 4 <<https://comitemaritime.org/wp-content/uploads/2018/05/2012-04-ISU-Final-Position-Paper-on-Environmental-Salvage-Awards-.pdf>> accessed 2 June 2020.

<sup>111</sup> Stuart Hetherington and Diego Chami, Report on Discussions and Decisions Related to the 1989 Convention CMI Yearbook (2013) 246 <<https://comitemaritime.org/wp-content/uploads/2018/06/CMI-YEARBOOK-2013.pdf>> accessed 24 May 2020.

<sup>112</sup> Stuart Hetherington and Diego Chami, Report on Discussions and Decisions Related to the 1989 Convention CMI Yearbook (2013) 245 <<https://comitemaritime.org/wp-content/uploads/2018/06/CMI-YEARBOOK-2013.pdf>> accessed 24 May 2020.

shipping industry to work together and come to a resolution by way of a 'voluntary agreement'.<sup>113</sup>

## 1.8 Conclusion

The provisions of the 1989 Convention relating to the prevention of pollution were developed in recognition of the importance of salvors in protecting the environment. These provisions are regarded as inadequate by the salvage industry. Although Article 13(1)(b) takes into account the salvor's exertion in avoiding or reducing pollution, the salvage award must be no more than the value of the property which has been rescued. Special compensation provided for under Article 14 with its requirements for proof of the environmental damage avoided and rigorous process of calculating the value of the salvor's equipment has been described as costly and ambiguous. While it has been established that Article 14 of the 1989 Convention is inadequate it is doubtful that the environmental award proposed by the ISU is the solution. The danger of such an environmental award lies in the fact that the computation of the degree to which the salvor has avoided or reduced damage to the environment and the advantage resulting from his actions may become as problematic as what has been decreed by the salvors under Article 14 of the 1989 Convention.

It is recommended that the relevant stakeholders in the shipping industry reach a consensus on the way forward. It is important to find a solution that balances the interests of all the stakeholders. The advantage of such a solution is that it has the potential to influence a change in the current salvage legal framework in the

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<sup>113</sup> *ibid* 243.

same way that the LOF 1980 impacted the provisions of the 1989 Convention.