LIABILITY SALVAGE – ENVIRONMENTAL AWARD: A NEW NAME FOR AN OLD CONCEPT

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For a long time the principal of "no-cure no-pay" prevented the assessment of the salvage award where no property has been salved. However, the practice has shown that a blind adherence to that principle may and will jeopardize the protection of the marine environment, especially in the cases were a disaster of a laden tanker (spills of oil and LNG carried as cargo) or large (over 10.000 TEU) vessel (bunker and HNS spills) is likely. The professional salvors, alerted by a number of unfavorable cases, were not anymore prepared to risk their lives and high operational costs of salvage, in situations where a chance of successful recovery of at least a part of property was small. When a number of major oil-spill disasters occurred, the maritime community finally reacted, at first through the industry means of specialized salvage contract forms, followed by a modern regulation of the law of salvage. These legal instruments enabled the salvors to seek remuneration of costs even when the salvage has been unsuccessful, provided that they have used their skill and efforts to protect the marine environment. The status of the salvage industry is furthermore strengthened by the appropriate norms regarding the right to limit the liability, and the exclusion of liability in cases of damage caused by oil pollution (oil carried as cargo). However, no such provisions are ensured regarding the possible spills of bunker oil, or in the case of the criminal sanctions for ship-source pollution. The International Salvage Union reacted strongly against

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such regulations, threatening to stop the salvage operations until appropriate guarantees have been secured. In the meantime, a CMI questionnaire has been distributed to the Member States to the 1989 Salvage Convention, asking for opinions on, among other things, the possibility of creating a parallel, Environmental Award. So far, the initial Governmental response has been largely unsupportive of the notion.

***Key words**: environmental award, International Salvage Union, salvage, insurance, special compensation.*

A. INTRODUCTION

The Paper will try to examine the continuous demands from the professional salvage industry in regard to a more rewarding scheme of salvage awards. The focus of this campaign is the proposed establishment of a separate *Environmental Salvage Award*, intended to award salvors who aid in prevention of, or efforts to minimize the marine environmental pollution. Having in mind the ever-growing size and technological complexity of modern shipping fleets, continuous decline of maritime accidents, and significant liability issues arising from environmental pollution, the salvage industry demands international recognition and support regarding this additional element of compensation and incentive.

During the last few decades the number of salvage cases has declined drastically. International Salvage Union (ISU) data shows that the number of invoked Lloyd's Open Form (*see below*) cases was reduced from 279 cases in 1981, to 72 cases in the last quarter of 2008[1]. At the same time, the salvage industry increased its revenue by 58% in the period from 1992 to 2005[2]. The number and size of oil spills has also achieved a significant decline, making them thirteen times smaller than the ones in 1970s[3]. Thus, the number of oil spills larger then 7 tonnes has dropped below 10 per year, with a record amount of seaborne oil trade, reaching the levels of almost

[1] Data available at the International Salvage Union website: www.marine-salvage.org, last visited on the 1st of August, 2010.

[2] T. Cooper/ B. Browne, "*Environmental Salvage: The Hull Underwriters' View*", ISU Salvage Conference, London, 2008.

[3] ITOPF Statistics, available at: http://www.itopf.com/information-services/data-and-statistics/statistics/, last visited on the 1st of August, 2010.

13000 billion tonne-miles in 2008[4].

The salvage market is highly competitive, with around 5 to 6 global salvage operators dominating the scene[5]. The ISU represents the global salvage industry, whose members conduct over 90% of all salvage activity. Professional salvors offer their services through the standard salvage contract forms, out of which, the Lloyd's Open Form (LOF) stands out as a most frequently used form. This comes as no surprise, having in mind its 100 years of existence, London based specialized salvage arbitration, and English (maritime) law as the valid law. The lack of skill and specific knowledge of salvage reality, often observed when salvage cases are presented before the judges and arbitrators unaware of maritime and salvage law and peculiarities, may result in surprising and damaging results. Thus, it is in the interest of all concerned parties to present their case in the form and forum capable of swift and knowledgeable response[6].

One of the main arguments of the salvage industry is the supposed low income of the salvage enterprise, thus making it very hard to invest into new equipment and training of the personnel (despite the figures presented earlier). However, this data can only be obtained through the salvors themselves, having in mind the non-disclosure nature of the arbitral awards. Should the salvors however decide to make their records publicly available, especially having in mind the arbitral proceedings and awards' sums[7], it would be easier for the public to understand their troublesome position, and offer more support in finding a proper solution.

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4 Seaborne oil trade and number of tanker spills over 7 tonnes, 1970-2008; Fernresearch, 2007, data available at: http://www.itopf.com/information-services/data-and-statistics/statistics/, last visited on the 1st of August, 2010.

5 The examples of market mergers in 2008: "*Meanwhile, the process of consolidation now under way in the salvage industry is likely to continue in 2008. Over the past 12 months alone – following on from Crowley's purchase of Titan – SVITZER has acquired Adsteam, Boluda has acquired the port towage services of the Les Abeilles organization, Semco is now a wholly – owned subsidiary of Pacific Carriers Ltd and the Government of Malta has sold its majority stake in Tug Malta to Rimorchiatori Riuniti of Italy*", "*Focus on Environmental Awards as LOF reaches centenary*", Maritime Risk, December 2007.

6 In 1978 the ISU began to publish annual salvage statistics. In the 1978-2005 period, ISU members performed 5,135 salvage operations – 2,701 of which were carried out under LOF contracts, data available at: www.marine-salvage.org, last visited on the 1st of August, 2010.

7 Lecture of the Appellate Arbitrator, John Reeder, ISU Salvage Conference, London, 2008.

B. PRIVATE LAW AND PUBLIC LAW REGULATION OF SALVAGE

Before tackling the issue of the Environmental Award, it is necessary to briefly address the crucial elements of modern salvage regulation, together with historical analysis of key legal instruments that led to a globally recognized system of salvage legislation.

I. LOF and the Salvage Convention

As the traditional concept of "*no-cure no-pay*"[8] prevented the salvors from making an attempt to salve the ships where the chance of successful salvage of at least a part of the property was questionable, there existed a great lack in the internationally based system of salvage. Two cases are usually brought forward to illustrate this. In 1979, following a collision, the heavily stricken tanker *Atlantic Empress*, caught on fire and leaking oil, was towed 300 miles from the coast before disappearing in the havoc of fire and explosion. As no property was saved, the salvor was left empty handed regarding his right to a salvage award. At the same time, the other tanker, *Aegean Captain*, suffered minimal cargo loss, and was successfully towed to safety (thus, the salvor did manage to get some compensation based on the salved property of the other tanker). Regardless the fact that the *Atlantic Empress* salvor produced a vast range of beneficiary effects (no [significant] pollution to the coastline, and, in regard to the lack of pollution, the absence of liability of the shipowner, insurers and underwriters), the "*no-cure no-pay*" principle caused an unfair result, that has risen eyebrows of the salvage industry and other concerned parties, and made similar attempts to salve questionable. The second case is the *Torrey Canyon* incident, where the salvors, at the price of one salvage crewmember dead and considerable time and effort spent on salvage operation, were left without a proper remuneration, since the public demand led to a naval air-force bombardment and destruction of the tanker, which resulted in no property left standing. Thus, the obvious problem of the "*maritime leper*" came to the spotlight of international attention, since the salvage industry was no longer prepared to face great expense and risks, when the chances of success-

8 *The 1910 Convention for the Unification of Certain rules of Law respecting Assistance and Salvage at Sea*, 23 September, Brussels; was an attempt to codify the existing customary maritime law; Principle "*no-cure no pay*" is derived from the Article 2: "*Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result. In no case shall the sum to be paid exceed the value of the property salved*".

ful salvage of even a portion of the property in danger were small. Who would then go out and try to save the tankers that face total demise?

This problem needed to be addressed fast. The first reaction came from the business community itself, in the form of the LOF 1980's "*safety-net*". The "*safety-net*" referred to the partially laden or laden tankers, and enabled a remuneration in the case of the unsuccessful salvage, consisting of "*reasonably incurred expenses plus an increment up to a maximum of 15% of expenses*"[9]. These payments were to be settled by the shipowners, or more precisely, their liability insures, the P&I clubs. Having in mind the *Tojo Maru* case, and the inability of the salvor in that case to limit his liability, the LOF enabled the salvors to limit their liability in accordance with the 1976 Limitation of Liability Convention (*see below*).

However, as Redgwell[10] observes, the LOF 1980 only presented a partial solution in regard to oil pollutants, with a limited significance placed on the environmental value of the salvage service. And, perhaps more importantly, the LOF 1980 was a voluntary scheme outside of the scope of the 1910 Brussels Convention, thus making its implementation in the practice open for negotiations.

The drafters of the new 1989 International Convention on Salvage[11] (Salvage Convention) continued where the LOF 1980 ended[12]. The international community recognized the existing threat to the marine environment by providing a special incentive for the salvors to preform to the best of their capability to prevent or minimize marine environmental pollution. The drafters proposed to widen the scope of the "*safety-net*" into a "*special compensation*" paid for all salvage efforts that prevent or minimize the damage to the environment, where the "*damage to the environment*" definition is not limited to oil or any other type of cargo, not any specific type of vessel that is preforming the carriage. The draft and the Convention did not accept the notion of "*environmental salvage*" *per se*, and all the additionally recognized benefits were seen as a part of a standard salvage operation. Thus, the traditional

9 "*LOF 1980, Lloyd's Nautical Yearbook 1980*", Lloyd's of London Press, London, 1989.

10 Redgwell, C., *"The greeining of salvage Law",* Marine Policy, March 1990, at 147.

11 *International Convention on Salvage, 1989* done at London on 28 April 1989.

12 For an extensive comparison and analysis of the private law and public law regulations, see the following articles: Gaskell, N.J.J., *"The International Convention on Salvage 1989",* 4 Int'l J. Estuarine & Coastal L. 268 1989; Gaskell, N.J.J., "*The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990"*, 16 Tul. Mar. L.J. 1 *1991-1992*; Kerr, M., "*The International Convention on Salvage 1989 – How it Came to Be*", 39 Int'l & Comp. L.Ql. 530 1990; Miller, A.R., *"Lloyd's Standard Form of Salvage Agreement – "LOF 1980": A Commentary",* 12 J. Mar. L. & Com. 243 1980-1981*;* Coulthard, P.*, "A New Cure for Salvors? – A Comparative Analysis of the LOF 1980 and the C.M.I. Draft Salvage Convention",* 14 J. Mar. L. & Com. 45 1983; and, Allen, M., "*The International Convention on Salvage and LOF 1990"*, 22 J. Mar. L. & Con. 119, 1991.

concept and crucial elements of the salvage operation have not been alerted. The Article 13 of the Salvage Convention determines the main criteria for assessing the salvage award: the value of the salved property, the nature and level of peril, the skill of the salvor, and, amongst other things, the skill and the effort of the salvor in preventing or reducing the damage to the environment. However, the strict adherence to the "*no-cure no-pay*" principle had to give way to the exceptional circumstances of the environmental protection requirement. Whereas the Article 13 of the Salvage Convention is based on the "*no-cure no-pay*" principle, allowing the salvage award to be rewarded only where at least some property has been saved, the Article 14 of the Salvage Convention enables remuneration up to 30%, or in exceptional cases, up to 100% of the salvage costs, where the salvor exhibits efforts to prevent or reduce damage to the environment, even if in doing so he fails to save any property related to the ship and/or cargo in peril. The special compensation comes into play only in the case when the amount of compensation available under the Article 14 of the Salvage Convention exceeds the amount calculated under the Article 13 of the Salvage Convention.

The problem regarding the Special Compensation Award has arisen in the *Nagasaki Spirit* case[13]. The Article 14/1 of the Salvage Convention states the following:

> "*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 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*".

This Article made a huge difference in regard to afore described scenario, where a potential salvor is reluctant to invest time and money into a dubious "*no-cure no-pay*" salvage operation. With the "*special compensation scheme*" in place, the salvor is to be ensured that, providing that the ship in an emergency situation constitutes an environmental hazard, his efforts to prevent or minimize such pollution will be duly rewarded, in terms of compensation in the name of the salvor's expenses involved. According to the Article 14/3 of the Salvage Convention, the expenses are defined as follows:

> "*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*

[13] *Semco Salvage & Marine PTE. Ltd. v. Lancer Navigation Co.,* [1997] 1 Lloyd's Rep. 323, 327 (H.L. 1997) (*The Nagasaki Spirit*).

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 the above named case, the salvors argued that the term "*fair rate*" encompasses not merely the expenses as mentioned in the Article 14/3 of the Salvage Convention, but also, within the sphere of common logic of the incentive-friendly environment for salvage attempts, a *profit* element. The shipowner simply responded by referring to the "*safety-net*" purpose of the special compensation scheme, arguing that the Law of Salvage is still predominately based on a no-cure-no-pay principle.

The House of Lords concluded the following:

"*… if a profit element were included in the calculation for compensable expenses under article 14, it would in essence create a separate environmental salvage award. This award would "finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment*"[14].

The Lords held that paragraphs 1 through 3 of article 14 of the Salvage Convention link the special compensation to salvage operations. Salvage operations are defined as operations to assist a vessel in distress. Thus, the Court held that while the purpose of article 14 of the Salvage Convention is to encourage professional salvors to keep vessels readily available, "*this is still for the purpose of a salvage, for which the primary incentive remains a traditional salvage award*"[15]. It is necessary to observe that, according to the House of Lords, the Environmental Award does not fit into the traditional concept of the Salvage Award, even having the Special Compensation in mind. However, as Gilligan points out, having in mind the recent South African legislation's reaction to the Nagasaki Spirit judgement, putting in place the market rate as a relevant factor[16], *"… while the House of Lords decision is final for purposes of English law, the issue may still be undetermined within the international community*"[17].

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14 *Ibid.*

15 Ibid.; For a thorough analysis of the case, see: Gilligan, A., *"Nagasaki Spirit: A recent Decision Affecting Marine Salvage and Environmental Concerns"*, 22 Tul. Mar. L.J., 619, 1997-1998, at 622.

16 "*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 a similar nature*", Wreck & Salvage Act of 1996 (BSRSA 1997), §2(8)).

17 Gilligan, *supra note* 15.

The term "*fair rate*" was finally interpreted as an "*amount attributable to the equipment and personnel used*"[18].

As visible from the judgment, the House of Lords have therefore neglected the possibility of introducing an additional parallel type of salvage award. This may prove to be detrimental in putting the idea of the Environmental Award into practice, but more on this in the next section.

The SCOPIC[19] clause is an industry response to the special compensation scheme in the Salvage Convention, providing for a voluntary and alternative way of calculating special compensation, offering predetermined rates and tariffs for personnel, tugs and other salvage equipment. Having in mind the House of Lords' decision over the definition of the term "*fair rate*" in the *Nagasaki Spirit* case, the industry decided to propose its own scheme of special compensation on a voluntary basis. The SCOPIC scheme is triggered in the same way that the Salvage Convention's special compensation operates, that is, in the case when the SCOPIC value exceeds that calculated under the Article 13 of the Salvage Convention[20]. It is invoked by a salvor, and can be applied in any circumstance, regardless of the existence of a threat to environment. The practice so far does not favor the use of the SCOPIC clause, as the number of around 200 cases in the 10 years of the existence barely recognizes the clause's usability[21].

II. ISU Agenda

Having in mind the role and importance of the salvage industry in the maritime community, it is understandable why the salvors enjoy special treatment in the maritime circles. As it becomes more and more clear that the likely method of introducing some form of a specialized environmental remuneration can only come through a private-contract-form (most likely the revised edition of LOF), it is prudent to analyze the previous attempt of the ISU to push their agenda.

Following the dramatic debate between the shipowners and salvors in the *Tojo Maru* case[22], and the final adjudication of the House of Lords rendering the salvor

18 *The Nagasaki Spirit*, *supra note* 13.

19 Special Compensation P&I Club Clauses, part of the LOF 2000.

20 For a thorough explanation of the SCOPIC clause, see: Chen, L., "*Recent Developments in the Law of Salvage of the Marine Environment*", 16 Int'l J. Marine & Coastal L, 2001, 686.

21 According to the ISU statistics, the SCOPIC clause is utilized in less then 20% of the cases, data available at: www.marine-salvage.com, last visited on the 1st of August, 2010.

22 The salvor was held not to be entitled to limit his liability under the 1957 Limitation Convention, due

both liable and unable to limit his liability, the ISU made a firm stand during the drafting discussions, ensuring that the 1976 International Convention on Limitation of Liability for Maritime Claims[23] incorporates special provisions regarding the limitation of liability of the salvage operations conducted outside of the salvage tug, and the exception of limitation of salvage claims[24]. In addition, practically "*un-breakable*" limitation of liability as decided upon by the London assembly, contributes to the sound financial environment of salvage industry, seemingly untroubled with high compensations counterclaims.

Even more visible protection of the salvage industry comes in a form of the exclusion of salvor's liability for damages resulting in the matters regulated by the CLC Regime[25]. When the German delegation, during the drafting assembly of the Convention, asked for a legal rationale of such a provision, no answer could be furnished[26]. Such a norm came as a result of a political decision, based on an assumption that the successful salvage of a fully laden tanker about to collapse a few miles off the coast, provides enough good reasoning to "*forgive the misgivings*" of those who normally contribute significantly to the welfare of all. Especially supportive of

to the fact that the negligence committed by the salvor was not found to be in the relation to the management or control of the salvage tug. The limitation of liability is however still an issue, as the 1989 Salvage Convention leaves open for the Coastal States to regulate this field, and to decide whether they wish to become part of the 1976 Limitation of Liability Convention (and its 1996 Protocol); *The Owners of the Motor Vessel Tojo Maru v. Bureau Wijsmuller* (*The Tojo Maru*), [1972] A.C. 242.

23 1975 Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976, as amended by the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976, London, 2 May 1996.

24 Article 6/4: "*The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons*"; Article 2(a): "*The rules of this Convention shall not apply to: (a) claims for salvage, including, if applicable, any claim for special compensation under article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average*".

25 *International Convention on Civil Liability for Oil Pollution Damage* done at Brussels on 29 November 1969, and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* done at Brussels on 18 December 1971, amended by the *1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage*, the *1992 Protocol to amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, and *2003 International Oil Pollution Compensation Supplementary Fund*; Article 3/4(d) of the 1992 Protocol: "*No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against: (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority*".

26 "*Denkschrift zu dem Ölhaftungsübereinkommen von 1969 und dem Fondsübereinkommen von 1971*", Deutscher Bundestag, 7. Wahlperiode, Drucksache 7/2299.

this "*channeling provision*" were the third world countries, which were ready to meet any requirements sought upon the ISU, in order to attract their services when called upon. The text of the HNS Convention[27], still not in force, contains the same provision.

The 2001 Bunkers Convention[28] holds no such exclusion provisions. The ISU reacted bitterly, suggesting the withdrawal of salvage services if the Coastal States accept such regulation. The International Maritime Organization was, however, not prepared to suggest changes in the text of the Convention. Instead, a special Resolution[29] was prepared to follow the main body of the Convention text, pleading the ratifying countries to prepare, during the implementation of the Convention norms into their national legislations, special rules regarding the protection of the salvors from liability. Keeping in mind that the resolution is not binding, the salvors still object the Convention's, in their view, serious lack of salvage protection.

The EU Directive on the Ship-Source Pollution[30] that introduces criminal sanctions for ship-source pollution was met with fierce resistance from a number of influential maritime players[31], including the ISU. Even though their claims were not adhered to, an open warning of a complete withdrawal of salvage enterprise from those European waters where no appropriate Governmental guarantee of exclusion from liability is issued. Keeping in mind cases like *Hebei Spirit*, where the master and chief officer were detained (according to the maritime community, due to the political pressure), only to be later released, the maritime industry fears scenarios where "*trigger-happy*" local governments are prepared to take any measures, including the unnecessary and ill-founded detention of seamen, in order to appeal to the public outcry for quick and

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27 *International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996* done at London on 3 May 1996.

28 *2001 International Convention on Civil Liability for Bunker Oil Pollution Damage*, London, 23 March 2001.

29 *Resolution on protection for persons taking measures to prevent or minimize the effects of oil pollution – "The resolution urges States, when implementing the Convention, to consider the need to introduce legal provision for protection for persons taking measures to prevent or minimize the effects of bunker oil pollution. It recommends that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result. It also recommends that States consider the relevant provisions of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as a model for their legislation*", available at www.imo.org, last visited on the 1st of August, 2010.

30 *Directive 2005/35/EC of the European Parliament and of the Council of 7th September 2005 on oil pollution and on the introduction of penalties for infringements*, OJ L 255/11.

31 ECJ, C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, [2008] ECR I-4057.

sound punishment of those responsible for marine pollution.

Both "*Bunkers*" and "*Ship-Source*" salvage "*threats*" so far have not been implemented in the practice. It would suggest that the salvage industry, stressed by the high competition between 5 to 6 global, and a few dozen smaller salvage companies, could not afford to miss out a salvage operation and an opportunity to earn profit, no matter what the potential legal hazards might be. Hopefully, either the ISU fears are over-estimated, or the international and regional regulation will soon be supplemented in order to avoid scenarios like the *Amoco Cadiz* or *Atlantic Empress*, where the salvors were left empty-handed, creating the change in the international regime *post factum*. Some form of "*responder immunity*" from civil and criminal liability would be a welcome step forward, but within reasonable standards[32].

Overall, keeping in mind that the successful salvage operations protect the shipowners', cargo owners', underwriters', P&I' and Coastal States' interests, it is fair to conclude that the salvors usually implement their ideas with success.

III. Other relevant documents

Other relevant international conventions include the United Nations Convention on the Law of the Sea 1982[33] (UNCLOS) that provides for a number of articles relevant for the rights and obligations of the Coastal States in respect to the Environment. The Article 56 determines the obligation of the Coastal State regarding the protection and preservation of the marine environment in the Exclusive Economic Zone. The Article 145 requires necessary measures to be taken to ensure effective protection for the marine environment from harmful effects that may arise from activities conducted in the maritime areas. Finally, the Article 221 gives right to the Coastal States whereby to take and enforce measures beyond the territorial sea to protect their coastline from pollution. These measures create an obligation of the Coastal States to, if necessary, interfere with the salvage operations. Similar provisions can be found in the International Convention relating to Intervention on the High Seas in Cases of Oil

32 The recent case *Turtle Offshore SA and another v Superior Trading Inc*, [2008] EWHC 3034 (Admlty), exhibited a situation where a tug/salvage company can and, contrary to the view taken by the court in that particular case, perhaps should bear the consequences of its negligent behavior.

33 United Nations Convention on the Law of the Sea of 10th December 1982 (UNCLOS) (BHBl. 1994 II 1799) (UN Doc. A/CONF. 62/122 with Corr. 3 and Corr. 8; UNCLOS III, Official Records, Vol. XVII (1984) 151-221; ILM Vol. 21 (1982) 1261-1354), signed in 1982 and came into force in 1994 after 60 countries ratified the Convention.

Pollution Casualties 1969 (Intervention Convention)[34], which enables the right to take measures on the high seas to prevent, mitigate or eliminate grave and imminent danger to the coastline.

One comment regarding these rights and obligations deserves a mention. Makins and others, during the drafting procedure of the Salvage Convention, have warned that the:

> *"Intervention by coastal states is also manifested in the "maritime leprosy" or "Flying Dutchman" problem which occurs when a stricken tanker which is under tow is unable to find a port willing to accept the tanker for fear of risk of pollution. LOF 80 gives recognition to this problem by placing upon the vessel an obligation to co-operate fully with the salvors in obtaining entry to a place of safety".*

However, in the cases of Erika and Prestige, it was the Coastal States who, unwilling to accept the stricken ships into a port of refuge within their waters, caused the dramatic consequences[35].

C. ENVIRONMENTAL AWARD

The proposed "*Environmental Salvage Award*" assumes the establishment of a special parallel category of salvage award[36]. One of the criteria for the current salvage award under the Article 13 of the Salvage Convention, the prevention or reduction of threat of damage to the environment, thus becomes a separate ground for a separate reward. At the same time, it would cease to serve as one of the criteria for the assessment of the traditional salvage award.

The legal nature of the environmental award is a new name to an old concept, the so-called "*liability salvage*", or to be more precise, "*the salvage of liability towards others*", viciously debated during the 1981 discussions of CMI Subcommittee in charge of preparing a draft text of a new salvage convention. During the drafting process of the

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34 *1969 International Convention Relating to Intervention on the High Sea in cases of Oil Pollution Casualties*, Brussels, November 29, 1969.

35 The salvors estimate that, had the tanker Prestige been allowed to take refuge, to the overall cost of $1.5 billion would have been reduced to around €40 million, "*Thoughts on the future of salvage remuneration*", ISU Bulletin 24, September 2005, p. 7; See also: Makins, B., McQueen P., White B., "*Salvage and the Environment*", (1987) 4 MLAANZ Journal, at 6.

36 See: *ISU Policy Paper 2 - Rewards for Environmental Salvage International Salvage Union*, International Salvage Union, 2006.

1989 Salvage Convention, one of the proposals[37] called for a creation of a special "*pollution fund*" with a purpose of compensating salvors who prevent, minimize or control the pollution regardless of whether any property has been saved. The so-called "*liability salvage*", defined as *"…extension of salvage to reward those who prevent or minimize damage to the environment from vessel pollution…*" proposed that "*The potential pollution liability becomes an object of salvage itself*"[38]. This concept was attacked from a number of viewpoints. The shipowners argued that the potential liability can not be quantified, thus, making it impossible to calculate the amount of damages. The cargo owners argued that they should not be held liable to contribute to such a payment having in mind that they receive no benefit from such an action. Finally, the biggest issue resolved around the fact that it was questionable if the insurance industry, whether it be Hull & Machinery underwriters (H&M underwriters) or the Protection & Indemnity clubs (P&I clubs), would be willing to participate in the insurance and payment. The so-called "*Montreal compromise*" between the salvors, shipowners, insurers and Coastal States, accepted the "*special compensation scheme*" instead of further pursuing the "*liability salvage*" concept. "*Montreal compromise*" rejected the notion of manipulation/speculation over possible amounts of liability towards others, as separate criteria for assessing a salvage award[39].

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37 Presented by the chairman of the CMI Subcommittee tasked with preparing a draft text of the new Convention, prof. Selving.

38 Makins, *supra note* 35.

39 The US jurisdiction dealt with the question of liability salvage. According to the traditional concepts, the salvor has no possibility of claiming for the averted liability of the shipowner due to the successful salvage; see: *Hendricks v Tug GORDON GILL* - 737 F.Supp. 1099, 1104 and *Westar Marine Service v. Heerema Marine Contractors* - 621 F.Supp 1135, 1988; *Allseas Maritime S.A. v. M/V MIMOSA* - 812 F.2d. 243, 247, however: "… (t)*here is considerable merit, nonetheless, in the position that salvors should be compensated for liability avoided. Whether the salvor protects a shipowner's vessel or his other assets, the economic benefits are equally valuable*"; *Trico Marine Operator Incorporated v. Dow Chemical Company* - 809 F.Supp 440, 441; For the UK case-law, see: The Whippingham, Lloyd's List Law Reports, Vol 48, 1934, p 49; - Mr. Justice Bateson: "*The mere saving of a vessel from damage to other ships might result in claims as a service, to my mind, because although the claim may not be a good one there is considerable damage attached to successfully defending a claim, because there are all the expense which you do not recover even when you are successful defendant. I must think that in itself would be a ground of claim for salvage*" (this paragraph is however part of the *obiter dictum*); In the case *United Salvage Pty Limited v Louis Dreyfrus Armateurs S.N.C.* (2006) 263 FCR 151, a detailed analysis is made on the subject of acceptability of the concept of "*liability salvage*": "*57. Having considered the authorities, the Travaux, the 1989 Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors and, in appropriate circumstances, this may inform a fixing of the reward as an enhancement without any determination, detailed investigation, consideration of*

The cost of the pollution to the environment deserves more attention. As the ex-ISU president, Hans van Rooij correctly noted, "*The current reward system barely recognizes the environmental benefits of salvage. A salvor who intervenes and prevents a pollution catastrophe that could cost a billion dollars or more can earn no more than the value of ship and cargo*" (normally, a certain percentage of the value of the ship and/or cargo). To put this into a context (bearing in mind that the 1989 Salvage Convention is not relevant for the off-shore platforms), had there been a salvor successful to prevent the Gulf of Mexico (Deepwater Horizon oil-spill) catastrophe, already assumed billions in damage would have been averted, whereas the salvor would only receive a certain percentage of the actual value salved, plus the probable bonus through the Special Compensation/SCOPIC scheme. The ever-growing technological improvement in ocean navigation, and more complex and ever-increasing tonnage seaworthy vessels, require constant education and self-improvement of the salvage crews, to be ready to successfully assists the ships in need. This process however requires significant funding. As the Coastal States are not prepared or capable of running such services themselves, it is up to the professional salvage industry to meet these challenges. However, the same industry is not bound by the salvage operations, and instead, places more and more focus on the towing, harbour/port and other sea-related operations, where their expertise and equipment is required and well paid. If the balance is not struck, and all major not satisfied, the salvage industry might lose interest to maintain the global operational readiness, a factor that might seriously jeopardize the marine environment.

Three decades later, the debate over "*liability salvage*" still occupies the maritime debating floors, with the same, slightly modified questions, still unanswered:

1. How to define damage to the marine environment?
2. What type of damage should be taken into consideration?
3. How to predict the size and severity of the potential damage?
4. Which conditions need to be met, in order to be certain that the potential damage would (most likely) occur?
5. Can the salvor claim serious threat to the environment for every ship salved, is this to be decided on an individual case basis by the court/arbitration, or will there be a strict set of criteria established?
6. The most important question is, as expected, who will pay for the Environmental Award?

detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor"; For an alternative view over this issue, seeing the "*liability salvage*" as a logical step in the salvage remuneration, see: Clift, R., Gay, R., "*The Shifting Nature of Salvage Law: A View from a Distance*", 79 Tul. L. Rev. 1355 2004-2005.

I. Insurance Stand-Point – Who will pay?

In order to calculate the size of the environmental award, it would have to be possible to determine the expected scope and severity of the environmental pollution that might result, and thus determine all the possible liability claims resulting from the same. How this is to be done, without reverting to an "*absurd level of speculation*"[40], is not presented.

Another important element is dubious subject that will bear the responsibility to pay for the environmental award. According to the ISU, the responsibility to pay the environmental award should be shared between the shipowners, cargo owners, insurers (to the extent that they are currently liable), with an addition of the Coastal States, the final beneficiaries of the successful prevention or minimization of the pollution[41]. This proposal therefore assumes the State responsibility as a necessary factor to be included into the salvage remuneration. The idea as such is not without fair rationale behind it. The Spanish Government would have surely, at the aftermath of the great tanker disasters, preferred to have been able to pay a relatively acceptable Environmental Award to the salvor who would have successfully prevented the catastrophe, rather then to assume the troublesome role of numerous domicile liability claims, coupled with the (unsuccessful) court proceedings against the ABS classification society in the United States. Some Coastal States have shown their readiness to be financially liable in maritime matters, such as is the example of the IOPC Supplementary Fund, where the Member States assume the responsibility of covering a minimum amount of contribution, or, if they themselves choose so, the full amount in case of non-compliance by the oil and oil-related industry[42]. Having in mind the existence of the IOPC funds, the OPA fund, and the general shipowner's limitation fund as defined by the 1996 Protocol to the Limitation of Liability Convention, and others, it is possible to imagine such national and international "*instruments*" as sources of coverage of the environmental awards. However, any inclusion of the existing international liability funds into the environmental award remuneration scheme would require a revision of the current system, a procedure that could

40 Hare, J., "*Shipping Law and Admiralty Jurisdiction in South Africa*", 1999, at 316.

41 ISU Articles, "*Salvors seek due rewards for global spill defence services*", Lloyd's Ship Manager: December 2005, available at www.marine-salvage.org, last visited on the 1st of August, 2010.

42 See: "*The Annual Report 2007*", International Oil Pollution Compensation Funds, at 37, available at www.iopcfund.org, last visited on the 1st of August, 2010.

create more problems then solving them[43]. As regards to the creation of a special international fund responsible for the payment of the environmental award, which would be funded by the Coastal States, this idea bears the least chance of success, as will be seen through the analysis of the initial response of the Governments to the CMI questionnaire.

One of the proposals the ISU placed forward was the establishment of a European Fund for Environmental Awards that would be used to reward the salvors who successfully prevent pollution in the European waters. According to the ISU memo[44], the assets of the Fund could also be used to compensate coastal communities, which provide ports of refuge to the ships in need, and suffer damage in the process. This compensation would not interfere with the current international system of compensation. The same criticism applied for the already established or proposed international liability funds can be applied here.

The H&M underwriters readily accept the introduction of the environmental award, as long as their obligations towards the original salvage award are to be removed[45], and as long as no new liability obligation is created in respect to the environmental award. It is important to keep in mind the growing dissatisfaction of the H&M underwriters who are, although mainly occupied with the property damage that does not include the salvage liability, responsible for paying-up the measures to mitigate pollution and other liabilities insured by others (such as the removal of bunker oil). Having in mind the benefit that the Governments and the P&I Insurers receive from the environmental salvage services, the H&M underwriters believe that those two should participate in this particular part of salvage remuneration. According to the Thomas Cooper's analysis of the H&M underwriters' concerns[46], the following set of criteria are, however, necessary to be fulfilled before any serious contemplation of the Environmental Award is to proceed:

a. When is an environmental salvage award to be made?

b. How does an environmental salvage interact with Article 14/SCOPIC?

c. How is an environmental salvage award to be capped?

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43 The experts warn that it would not be possible to use the CLC Regime Funds for anything else apart the allocation already set, thus making it impossible to include the remuneration to a possible environmental award into the Funds coverage; see: Oral presentation of Mr. Jacobsson, "*Report of the IWG on the Salvage Convention meeting held in London*", 18th September 2009.

44 "*ISU proposals for protecting EU Waters from major spills*", Maritime Journal, January 2007, available at: www.marine-salvage.com, last visited on the 1st of August, 2010.

45 The H&M underwriters are responsible for the compensation of salvage claims based on the Article 13.1(b) of the Salvage Convention, the very same criterion that serves as the basis of the new environmental award.

46 T. Cooper/ B. Browne, *supra note* 2.

d. How is an environmental salvage award calculated? – Guidelines?
e. Can an environmental salvage award be recovered in general average?
f. How can we ensure the extra income is used for investment in training and salvage craft and equipment?

The P&I clubs are, as they were 30 years ago, still not interested in accepting any form of "*liability salvage*", since they would, as the liability insures, suffer the burden of this additional coverage. In their mind, the Articles 13 and 14 of the Convention are sufficient to provide enough incentive for salvors[47]. The unwillingness of the P&I clubs to accept the proposed concept may prove to be detrimental regarding the outcome of this debate. Therefore, the ISU will have to seek consent and approval of the P&I clubs before they make any concrete moves in regard to the environmental award scheme.

II. CMI Questionnaire – Coastal States' responses

As the time for the possible revision of the Salvage Convention draws near, the Comité Maritime International (CMI) prepared a questionnaire[48] for the Member States to the Salvage Convention, devoting a part of the questionnaire to the issue of environmental protection and possible environmental award. The ISU has used this opportunity to present its case in front of the CMI. Judging from the initial response of the Coastal States, it is likely that some change might occur regarding the Article 14, but it is unlikely that this change will occur in the form of the additional Environmental Salvage Award.

The following question (5.2) referred to the possible inclusion of the environmental award in the revised text of the Salvage Convention:

> "*Do you consider that consideration should be given to amending article 14 in order to create an entitlement to an environmental award? (It is recognized that there are "political" issues involved as to who would pay for such an award but the IWG would be interested to know whether your MLA would be in favour of an investigation of this issue. It is also recognized that if you answer this question in the affirmative, consequential changes may need to be made to the definition of "damage to the environment" in article 1(d), to article 13, article 15 and article 20)*".

47 "*Defending the salvor's ability to prevent pollution*", Marine News, 2007, available at: www.marine-salvage.com, last visited on the 1st of August, 2010.

48 Comité Maritime International, "*Questionnaire prepared by the Working Group to consider the Salvage Convention 1989*", Singapore, 2009.

The Italian response favored the non-disturbance of the current "*status-Montreal-compromise-quo"*, as they saw the possible inclusion of the environmental award scheme as a too a radical change that could bring deformity regards the adoption of any future Protocols or changes to the Salvage Convention[49]. The most obvious question was immediately raised by the Argentinean response: "*Who will be paying this reward*"?[50] Denmark is strongly opposed to the drastic change of the current concept of compensation, as they see the inclusion of the environmental award as dangerous, bringing too much uncertainty[51]. Others were of the view that the Article 14 is ready to be amended, but with the previous consultation and negotiation with the maritime industry[52]. In conclusion, the early responses indicate the will of the Member States to the Salvage Convention to hear out the argumentation and all the different suggestions to change, bearing in mind that the final say has to lie with the maritime industry, especially the part of the industry that is normally responsible for payments. Since the questionnaire was careful not to include the financial side of the proposed revision, no responses were yet received regarding the Coastal States' opinions on the Coastal States' financial responsibility.

III. Implementation

The ISU has been campaigning for an inclusion of the Environmental Salvage Award both on an international, as well as on a European level[53]. As the time for the possible revision of the Salvage Convention comes nearer, it can be expected that the salvors will do their best to push their initiative through to the international level, with a hope of a radical change in the international legislation. Current perspectives show inclinations towards the change regarding the Article 14 of the Salvage Convention, but not necessarily in the direction the ISU would have preferred.

Another possibility is the private-industry implementation method, through a revised edition of LOF, with the environmental salvage award included as a standard part of the contract, or a voluntary clause. If this implementation occurs, the

49 "*Responses of the Italian Maritime Law Association to the Questionnaire to Member Associations*", Associazione Italiana di Diritto Marittimo, Roma, 2009.

50 IWG Report, *supra note* 43, at 10.

51 *Ibid*.

52 *Ibid*.

53 "*Marine Salvage: Reinforcing pollution defence in EU waters - Salvors to press the case for environmental awards*", International Salvage Union Press Release, October 3rd 2005, available at: www.marine-salvage.com, last visited on the 1st of August, 2010.

environmental scheme would provide the additional burden to the shipowners and their insurers. In addition, without a clear ratification of the terminology and methodology used to assess the "*potential damage to the environment that was successfully prevented or minimized*", it would be up to every single judge/arbitrator to make judgments that could vary, having in mind the lack of the same, considerably. Furthermore, it is questionable whether the P&I industry, having in mind their firm opposition to this concept, would be prepared to offer additional coverage for the environmental awards. Finally, and bearing in mind that one of the core ideas of both the "*liability salvage*" and "*environmental award*" was to include the Coastal States into the remuneration scheme, the private-law regulation can not impose any obligations on the States.

D. CONCLUSIONS

Other proposals submitted to the European Commission as a part of the ISU "*Action Plan for Spill Risk Reduction in EU waters*"[54] include the establishment of the "*Emergency Towing Vessels Service on the EU Level*", which would ensure a necessary number of tug vessels on stand-by, ready to assist and protect the European waters. This plan however requires considerable funds, and is unlikely to be accepted anytime soon. There are however some examples of bilateral cooperation in this field, such as is the so-called "*Manche Plan*", the joint-effort of the UK and French Governments to protect their common coastlines (Dover Strait/Pas de Calais). If this initiative could be implemented on an EU level, ensuring that the profits of the salvage industry coming out of these Public-Private ventures are directed towards the training of the salvage personnel, and acquisition of the new equipment and modern technology, two very important interests would be satisfied: *round-the-clock* watch over the European waters, and, constant flow of income to the salvor's pockets, necessary to keep them *healthy* and *up-to-date*. Perhaps this method deserves more consideration.

The change in the international system may occur, but it is questionable whether the Article 14 of the Salvage Convention will be changed to make room for a parallel special compensation in the form of the environmental award, or it will be simply modified to take into consideration the existence of SCOPIC and similar suggestions from the maritime industry.

[54] ISU Policy Paper 2, *supra note* 36.

The new edition of the LOF might include the environmental award, either as a standard part of the contract, or as a voluntary clause, but, as any other major change in the LOF text, this will need to be preceded by a common understanding between different sectors of the maritime industry, especially the insurance part.

Whether through a public or private law instrument, it is however without a doubt that the "*environmental factor*" will have to be enhanced, as it deserves more attention and significance then the current systems allows. The historical analysis shows the continuous willingness of the maritime community to adapt to the needs of the present, and there is no reason to suspect that the same thing will not occur regarding the issue of "*environmental salvage*". The only question is whether such a change will occur in time to prevent some new catastrophic disaster, or the catastrophic disaster will be the stimulus for that change.

Sažetak:

SPAŠAVANJE ODGOVORNOSTI – EKOLOŠKA NAGRADA: NOVI NAZIV ZA STARI KONCEPT

Princip "no-cure no-pay" dugo je vremena sprječavao dodjeljivanje nagrade za spašavanje u slučaju izostanka spašene imovine. No praksa je pokazala kako slijepo pridržavanje tog principa može ugroziti zaštitu morskog okoliša u slučajevima kada prijeti potonuće tankera i velikih brodova, te izlijevanje nafte kao tereta ili pogonskog goriva u more. Profesionalni spašavatlji na moru nisu bili spremni izlagati se troškovima i rizicima spašavanja ukoliko je prijetila realna opasnost potonuća broda s malom šansom spašavanja imovine. Nakon nekoliko velikih tankerskih katastrofa, pomorska industrija i zajednica reagirale su na ovaj problem, te najprije kroz Lloydov standardni obrazac ugovora za spašavanje, zatim putem Međunarodne konvencije o spašavanju iz 1989., te naposljetku uz mogućnost ugovaranja posebne klauzule o Posebnoj naknadi P&I klubova, omogućile su spašavateljima posebnu naknadu troškova spašavanja u slučajevima kada nije moguće potraživati standardnu nagradu za spašavanje. Istovremeno, pozicija spašavatelja dodatno je zaštićena putem Londonske konvencije o ograničenju odgovornosti iz 1979. s Protokolom iz 1996., gdje se nudi posebna mogućnost ograničenja odgovornosti spašavateljskih brodica. Konvencija o građanskoj odgovornosti za štetu od onečišćenja naftom iz 1969. s Protokolom iz 1992. potpuno isključuje odgovornost spašavatelja. Takva odluka rezultat je političke volje zemalja članica te Konvencije, kako bi se dodatno potaknulo spašavatelje na što bolji učinak kod akcija spašavanja gdje potencijalno prijeti velika ekološka šteta. Takva odredba međutim nedostaje u Konvenciji o građanskoj odgovornosti za štetu od onečišćenja naftom iz brodskih spremnika za gorivo iz 2001. godine. Slična je situacija i s Europskom direktivom o onečišćenju s brodova iz 2005., gdje se također ne ističe nikakav zaštićeni status spašavatelja. Međunarodna udruga spašavatelja oštro je reagirala na posljednje dvije navedene regulative, te zaprijetila prestankom spašavanja u vodama pod nadležnošću zemalja članica navedene Konvencije, odnosno Europske Unije, koje prethodno u svom nacionalnom zakonodavstvu ne usvoje posebne norme kojima se isključuje odgovornost spašavatelja unutar polja primjene tih regulativa. U međuvremenu, Međunarodni pomorski odbor, na prijedlog Međunarodne udruge spašavatelja,

započinje s preliminarnim radovima na reviziji Konvencije o spašavanju iz 1989., pri čemu spašavatelji inzistiraju na dugo najavljivanoj Posebnoj ekološkoj nagradi za spašavanje, koja bi neovisno o nagradi za spašavanje dodatno osnažila položaj profesionalne spašavateljske industrije.

***Ključne riječi**: ekološka nagrada, Međunarodna udruga spašavatelja, spašavanje, osiguranje, posebna naknada.*