LLOYD'S OPEN FORM 1980 AND 1990: BORN OF NECESSITY, HAS IT SUCCEEDED?

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INTRODUCTION

In earlier shipping days, salvage services were often provided to vessels and maritime properties in danger at sea by individual acts. This was done without salvage contract between the parties. The recent availability of instantaneous means of communication and especially motor driven vessels has resulted in services in the nature of salvage having come to be governed frequently by an agreement in which both the provider and the recipient have been held to owe duties to each other.[1]

A factor contributing to this development was the introduction of Standard Forms of Salvage Agreements.[2] These provided for quantification of the salvor's remuneration by arbitration if it could not be agreed upon by the parties.[3]

There exist several Standard Forms of salvage agreement.[4] However, pre-eminent is the universally familiar Lloyd's Standard form of Salvage Agreement commonly known as 'Lloyd's Open Form' or 'LOF'[5] approved and published by the Council of Lloyd's.

This Form was based on the belief that a widely accepted standard form of contract would be the best means to ensure the acceptance of salvage agreements under adverse conditions.[6] LOF embodied the 'no cure no pay' principle.

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1 Kennedy's Law of Salvage 5th edn 1983 para 1.
2 Ibid.
3 A Miller 'Lloyd's Standard Form of Salvage Agreement, LOF 1980: a commentary' 1981 2 JMLC 244.
4 See the Hamburg Form, the Paris Form, the Peking Form, the Japan Shipping Exchange (JSE) Form. Ibid. See also 'Alternative forms of salvage contract' 1989 8 ISU Bulletin 12-3.
5 D Thomas 'Lloyd's Standard form of Salvage Agreement: a descriptive and analytical scrutiny' 1978 2 LMCQ 276.
6 E Gold 'Marine salvage: towards a new regime' 1989 20 JMLC 488.

For many years, this contractual salvage regime based upon the long established traditional marine salvage concept served international shipping well. However, in recent years, it has become obvious that it is no longer adapted to developing conditions of modern shipping and salvage industries. Vessels have become larger and more sophisticated.[7] The increasing seaborne transport of oil and other hazardous substances such as gases, chemicals... have become a growing pollution risk to the seas.[8] Many maritime accidents have shown the effect of the loss of such cargoes on the environment.[9]

Moreover, salvage operations have become difficult and expensive both because of the size and sophistication of modern vessels and because of the coast of building and operating the large salvage craft necessary for services.[10] All of these changing conditions have made it essential that

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7 N Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) of Salvage Agreement 1990' 1991 16 TMLJ 5.

8 Hazardous cargoes represent 10-15%, oil and oil products account for a further 38% by volume of total seaborne trade. See O Grapow 'HNS the case for shared liability' 1991 Fairplay 30; Accidents represent 21% of the total oil pollution of seas and oceans. Operational dumping (tanker operation bilge and fuel oil) is responsible for 72% of the total. Furthermore, tankers are responsible for 15% of dumping; non-tankers for 84.4%. See European Parliament Report on the Environmental Damage Caused by Oil Spills from Ships: Europe Environment, Document Supplement to Europe Environment 1992 396 4. Also see P Wetterstein 'Trends in maritime environmental impairment liability' 1994 LMCLQ 230-1.

9 Take for instance the grounding of the Amoco Cadiz off the French coast in 1978. More than 220 000 tons of oil were released into the sea and nearly 180 miles of coastline in Brittany were badly polluted. More than six months was needed for clean-up which has involved a lot of equipment and resources. The catastrophe has had severe effects on the enviornment, the economy and the people of the region and has resulted in many law suits. See Matter of Oil Spill by the Amoco Cadiz 1992 954 F 2d 1279; also see the Torrey Canyon 1967: the Exxon Valdez 1989 and the Braer 1993. See P Wetterstein op cit 230.

10 G Brice Maritime Law of Salvage 1983 65.

the traditional contractual salvage system under the old LOF should be revised to bring it more in tune with the new requirements for marine salvage. LOF 1980 and 1990 was born of these necessities. Although these recent Forms have brought a significant improvement on the traditional salvage regime, a key issue arising from this development has Lloyd's Open form 1980 and 1990 succeeded? This dissertation will focus on this issue. Of particular importance in this question will be:

(i) the traditional concept of marine salvage;

(ii) the modern salvage system.

CHAPTER I

THE TRADITIONAL CONCEPT OF MARINE SALVAGE

It would hardly be an exaggeration to assert that Lloyd's Open Form 1980 and 1990 (hereinafter LOF 80 and 90) is a necessary answer to the issues of modern marine salvage. They have introduced major changes in the contractual salvage law.

In order to perceive the context of necessity in which LOF 80 and 90 were born and have transformed marine salvage, it is important to examine first of all the traditional philosophy of marine salvage. This will focus on two essential topics, namely: (i) salvage under the traditional approach; (ii) salvage under standard agreement: LOF contract.

1.1 SALVAGE UNDER THE TRADITIONAL APPROACH

It is universally acknowledged that the traditional law of salvage is fundamentally based on the 1910 Convention.[11] Together with the Collision Convention, the Brussels Convention, one of the first in shipping law, was universally accepted.[12] For many years this codified system, based on long accepted customary legal principles and assisted by a relatively simple standard form contract, served international shipping extremely well. This is reflected in the fact that marine salvage has neither been particularly contentious nor, certainly in the past half century, the subject of excessive litigation.[13]

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11 Commonly known as the Brussels Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels 1910.

12 See the CMI Report to IMO on the Draft International Convention on Salvage (Montreal 1981), CMI Newsletter (September 1984) 4.

13 E Gold op cit 488.

From the above assumption, what should be established at the very outset is that the traditional philosophy of marine salvage is to be found in the basic rules of the Brussels Convention. Accordingly, the concept is that a service undertaken to save property in danger at sea gives a right to equitable remuneration if, and only if, it has had a beneficial result. Although it happens sometimes, clearly, in the case of a successful result such remuneration is not fixed or a compensation for labour expended. But it is usually more generous for the result achieved. However, the remuneration must not exceed the value of the property salved[14] (ie the salved fund).

This line of thinking leads to a similar approach adopted by the doctrine in shipping law. Accordingly, the traditional logic or idea behind the concept of marine salvage running through all the codes of maritime law, ancient and modern, has always been to compensate a salvor for saving maritime property in peril at sea.[15]

An individual volunteer who has successfully rendered services at sea to endangered property is not only entitled to a reward based to some extent on the salved value of the rescued property, but he is also entitled to a lien.[16]

In other words, the right to an award arose through an equitable concept of implied contract based on the salvor's understanding and the resultant benefit to the owners of the

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14 See CMI Report (1984) 4.

15 The origins of this right can be traced to The Se Law of Byzantum and the Mediterranean Seaport Cities. For details, see A Norris Benedict on Admiralty, 7ed 1983, paras 5-13; E Gold Maritime Transport, the Evolution of International Marine Policy and Shipping Law, 1981.

16 By continuous possession or the commencement of proceedings in rem. Rhodian law provided for both an award of 20% of the salved value and the lien (to ensure that such award is recoverable ahead of other claimants or creditors); see D Kerr 'The past and future of "no cure - no pay"' 1992 23 JMLC 411.

rescued property.[17] In contrast to the common law, this is very unusual as a legal principle. Generally, one has no right to be compensated for voluntary action, no matter what benefit one may have conferred upon the property of others.[18]

To reduce the range of claims based on the equitable doctrine, the necessary elements of marine salvage were strictly limited in shipping law. Under the traditional approach, the formal elements of a valid salvage service are well recognized as follows:

(i) there must be a marine peril, commonly referred to as 'danger', placing the property at risk of loss, damage (destruction) or deterioration;

(i) the salvage service must be voluntarily rendered and not required by an existing duty or by special contract;

(iii) the salvage effort must be successful in whole or in part.[19]

From the above requirements, especially of 'success', was born the principle of 'no cure - no pay'. This concept was followed in the 1910 Convention. It was also incorporated in the Lloyd's Open Form of Salvage Agreement, thereby reflecting its acceptance in the commercial practice[20] of the shipping industry.

This section will deal with: (i) fundamental basic principles of marine salvage; (ii) formal requisites for salvage service.

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17 P Coulthard 'A new cure for salvors? Comparative analysis of the Lloyd's Open Form 1980 and the CMI Draft Salvage Convention' 1983 14 JMLC 45.

18 R Grime Shipping Law 1978 185. This is a unique concept particular to shipping law.

19 T Schoenbaum Admiralty and Maritime Law, Practioners' edn 1987 502.

20 P Coulthard op cit 46.

A. Fundamental basic principles of marine salvage

The principles that apply to marine salvage are ancient in origin as the practice of salvage is rooted in long-standing tradition.[21] In essence under the ordinary law of salvage, long established principles stipulate that:

(i) a right to salvage remuneration arises when a salvor preserves or contributes to preserving at sea any vessel, cargo, freight or other property recognized as subject to marine salvage from peril;

(ii) the total mount of salvage remuneration is borne by the salved interests pro rata to their salved values;[22]

(ii) The amount of salvage remuneration may not exceed the salved fund[23] (ie the value of the salved property).

All marine salvage is therefore subject to the same basic principles, generally classified as equity and public policy.

1. Equity

The shipping law allows individuals who save endangered property to claim a reward. The reason is to encourage seafarers to assist each other in time of trouble and distress, also to give a measure of orderly legitimation to needs which otherwise in earlier times might have led to theft and disorder[24] and eventually even to piracy.

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21 See ISU Bulletin (1986) 6 8.

22 Assessed as at the date and place of the termination of the salvage operations.

23 G Brice 'The enhanced award and the safety net' (1988) 7 ISU Bulletin 7. See also G Gilmore & C Black The Law of Admiralty 2ed 1975 581.

24 R Grime op cit 185.

In other words, marine salvage principles are based on the simple premise that any one who contributes to saving maritime property is entitled to a reasonable reward for the effort expended. Those who have benefitted from such efforts should contribute to the reward in proportion to the value of their property or interests[25] salved.

The principle of rewarding the salvor has been developed to encourage and benefit international maritime commerce. In the words of Pelaez[26] 'Salvage quite clearly, also works to further maritime commerce both by preserving property used in such pursuits that might otherwise be lost, and by encouraging additional investments in the maritime industry by decreasing the chance of property loss. But salvage, as is true of many maritime concepts, is not premised solely upon a desire to enhance and perpetuate a vitally important aspect of world commerce. It is based largely upon a recognition of the peculiar nature of marine perils and of the need to develop a body of laws that is most likely to minimize that peril'.

As held in Blackwall v The Sance Lito Water and Steam Tug Co 'Compensation as a salvage is not viewed by the admiralty courts merely as pay on the principle of a quantum meruit, or as a remuneration pro opere et labore, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property...'.[27]

Rewarding a salvor in principle has been a central feature of shipping law since time immemorial. Today, as a result of commercial and environmental pressures, the concept has been extended to rewarding the salvor who prevents and minimizes

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25 E Gold op cit 497.
26 A Pelaez 'Salvage - a new look at an old concept' (1976) 7 JMLC 507.
27 See Blackwall v the Santicelito Water and Steam Tug Co (1870) 10 Wall (77 US) 19 L Ed 870-875.

damage to the environment from vessel pollution[28] ie oil, nuclear or chemical waste...

It is open to the parties in salvage agreement to vary the principle of equity. The court will enforce such an agreement unless it is inequitable.[29] In this case, the agreement will be set aside. Rewarding a salvor is justifiable on humanitarian grounds. It is derived from the general equitable notion[30] that motivates the admiralty court which also recognizes public policy.

2. Public policy

As noted previously, on land the person who rushes in to save another's property from danger is an intermeddler, a volunteer whom equity will not even aid. Although he may incur liability if he damages the property in the course of saving it, he has no right to a reward. At sea the person who saves property receives a reward[31] which is generously computed in the light of 'the fundamental public policy to the basis of awards of salvage, the encouragement of seamen to render or promote service in future emergencies.[32]

'Public policy', said Justice Clifford[33], encourages the handy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from the salvor every temptation to embezzlement and dishonesty, allows him, in case he is successful, a liberal compensation.

It is obviously in the public interest that a salvor should be encouraged to act promptly to prevent danger

28 D Abecassis & R Jarashow Oil Pollution From Ships 2edn 1985 141.
29 G Brice op cit 7.
30 Kennedy op cit para 19.
31 G Gilmore & C Black op cit 532.
32 See J Clark in Kimes v United States 207 F 2 d 60, 63 1953 MC 1335, 1338 (2nd cir 1953).
33 See The Blackwall 189 supra.

materializing. He should be encouraged to act efficiently without having first to consider who may be liable in tort to any damage sustained by third parties and for what amounts.[34] According to Kerr[35] the above justification recognizes that the perils of the sea differ from those on land both in nature and degree for the following reasons: (i) they often carry with them extreme danger to human life; (ii) those who attempt salvage at sea expose themselves to danger as great as those facing the beneficiaries of their efforts and that an unsuccessful salvor, as heroic as his efforts may have been, runs the risk of recovering nothing.

In one of the leading cases in this matter, Falcke v Scottish Imperial Insurance[36] Bowen LJ summarized the consideration of public policy in shipping law as follows:

> 'The general principle is, beyond all questions, that the work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefitted, nor even if standing alone, create any obligation to pay the expenditure. Liabilities are not to be forced upon people behind their backs anymore than you can confer a benefit anymore than you can confer a benefit upon a man against his will'.

There is an exception to this proposition in shipping law:

> '[...] The maritime law, for the purposes of public policy and for the advantages of trade, imposes in these cases liability upon the things saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in perils at sea'.

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34 G Brice 'Salvage and enhanced awards' (1985) LMCL 34.

35 D Kerr 'The past and future of "no cure-no pay"' (1992) 23 JMLC 420.

36 See Falcke v Scottish Imperial Insurance Co 1886 34 Ch D 234, 248-9; 56 LT 220.

We now turn to the formal requisites of marine salvage.

B. Formal requisites of salvage

Before salvage service can be deemed to exist, three essential elements are basically required viz:

(i) marine peril[37]
(ii) voluntariness
(iii) success.

For many years these requirements have been the feature of the traditional law of marine salvage. Now they have become customary law and adopted by most legal systems.[38] Each of these components merit discussion. But before doing so, it is important to comment on what property can be salved in terms of shipping law.

1. Property subject to salvage: maritime in nature

There is some conflict as to whether any property which is found on navigable water may be subject to salvage or whether the property must be so called 'maritime property'.[39]

One court proclaimed that 'it is probably unwise to attempt any general statement concerning the property which may be subject to salvage'.[40] But since all the salved interests are in principle liable to contribute to payment of salvage reward, it makes sense to know which of the salved property is salvageable in terms of shipping law.

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37 Well known as 'danger' or 'distress'.
38 E Gold op cit 487.
39 J Donovan & G Doyle 'The legal rights and liabilities of cargo in a salvage situation' (1980) 5 The Maritime Lawyer 4.
40 See Broere v Two Thousand One Hundred Thirty Three Dollars (Ed Ny 1947) F Supp 115, 118.

A maritime lien for salvage arises from rescue and is only enforceable against property that is subject to salvage. Any property in peril at sea can be salved. But not any property salved can be subject to marine salvage. Salvage can only be claimed for saving certain types of property.[41] Normally this restriction causes no problems since the imperilled property is usually a vessel in navigation that is foundering or otherwise in need of immediate assistance.[42]

Under the traditional approach of marine salvage it is a long standing principle that property, in order to be subject to salvage, must be maritime in nature, ie basically a vessel in navigation, including her appurtenances and pending freight.[43]

It is clear that virtually everything pertaining to or part of a ship is marine property.[44] It is agreed that cargo was salvageable, whether it was recovered from the ship or saved along with the ship, or picked up from the water as jetsam, flotsam or found on the shore. According to this doctrine, however, cargo was salvageable because, through its association with the ship, it had become maritime property.[45]

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41 N Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991) 16 Tulane Maritime Law Journal 29.

42 A Pelaez op cit 505.

43 See Robinson 'The admiralty law of salvage' 23 Cornell LQ 229 1938; also A Norris Benedict on Admiralty 7th edn 1983 51 et seqq. Traditionally, this referred to a type of property including a vessel, her equipment, cargo and freight. The extent to which other things are included varies between legal systems. See N Gaskell op cit 29.

44 Nineteenth century case law (both in England and in the US) required a court to find that the property salved must have been connected with the ship before its rescue became entitled to a salvage reward. See Donovan & Doyle op cit 4.

45 See Robinson op cit 1939.

The 1989 Salvage Convention[46] in contrast with Brussels Convention, extends the scope of salvageable property to a vessel or any property in danger where the salvage operations take place. 'Vessel' is defined as any ship, craft or structure capable of navigation.[47] 'Property' is described as any property not permanently and intentionally attached to the shoreline and includes freight at risk.

The definition of property capable of being salved has been broadened to include anything in any waters that is capable of salvage unless 'permanently attached to the shoreline'.[48] This is a highly desirable enlargement.[49]

However, the 1989 Convention excludes inland navigation vessels, property permanently attached to the seabed for the purposes of hydrocarbon production, storage and transportation[50], warships and other vessels of state being used exclusively for governmental non commercial service.[51]

Concerning MODU's[52], it is now settled in shipping law that drill rigs are vessels despite the decision in Dome Petroleum Ltd v N Bunker Hunt[53]. According to the 1989 Convention drill rigs are not 'subjects of salvage' when they are working (or so it seems).[54] This provision clearly raises the inference that MODU are to be treated like other navigable property, in terms of salvage, when they are in harbour, in transit. An interesting question arises at this stage: what could possibly be the point of an exclusion of

46 Article 1.
47 Including a vessel which is stranded, left by her crew or sunk.
48 For example jetty, pier; see A Bishop 'A new IMO regime for salvage' (1988) 7 ISU Bulletin 1.
49 D Kerr 'The 1989 Salvage Convention: expediency or equity?' (1989) 20 JMLC 508.
50 Article 24.
51 Article 25. This articles excludes specific vessels but it does not exempt 'property' which clearly is covered by the provisions of article 1.
52 Mobile offshore drilling units.
53 1978 1 FC 11 (TD).
54 See article 3 1989 Salvage Convention.

'working' rigs for salvage purposes. It seems, that since under article 6 the Convention can be overridden by a contract, the only practical effect of article 3 will be to make it necessary for salvors to stop, reassess the position, and negotiate either LOF or a special contract with the rig owners. This agreement should clearly specify that rigs are considered as vessels for the purpose of salvage.

Article 3 of the 1989 Salvage Convention, reveals a complete failure to understand the practicalities of salvage in situations where it is the result of representations from the oil industry. When they are working, rigs are most heavily exposed to danger. If a distress situation arises in which beneficial services can be provided by salvage contractors, no doubt both they and the rig owners will be anxious to get the effort underway. This provision serves only to delay the commencement of services while the parties negotiate a suitable contract.[55] Salvors should be aware of this situation in order to avoid any delay in salvage operations.

As long as the peril exists, and casualties continue to occur because of the human error factor and the inherent risks associated with adventure at sea, salvage should be awarded in all instances where its availability works to preserve the environment or induce the use of such resources to prevent any type of loss. This ancient and humane concept should no longer be hindered or unduly circumscribed by artificial barriers of restricted properties subject to salvage unrelated to the goals of marine salvage.[56] The subject matter of salvage as described must be rescued from marine peril.

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55 D Kerr op cit 508.
56 A Pelaez op cit 519.

2. Marine peril

The vessel, by virtue of the venture in which she is involved, is exposed to risks arising from marine perils or distress associated with the venture at sea. Whether or not it is one that can normally be expected to be encountered during the venture, an operative peril or distress will generate a salvage claim only where a danger exists.[57] The danger to the salved maritime property is an essential element for salvage.

The danger referred to here is defined as 'marine peril'[58] placing the maritime property at risk of loss damage, destruction or deterioration. It is the very foundation of a claim to salvage award.[59] The degree of danger is the most important element to be considered in awarding salvage.[60] In principle, the danger must exist and the maritime property must be exposed to it[61] for salvage to take place. If the vessel or other maritime property is not in danger, the service rendered to it cannot qualify as salvage service. The person performing such service is not entitled to a salvage award, but only to remuneration for work and labour normally done.[62]

In the context of shipping law and as far as salvage is concerned, the danger of loss or damage (referred to here) must be a real and sensible one.[63] It need not necessarily be great, absolute or imminent.[64] At least there must exist a situation of probable danger or a state of difficulty coupled with a reasonable apprehension of real future danger to the maritime property.[65] The danger must

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57 Kennedy op cit 129.
58 TJ Schoenbaum op cit 503.
59 See The Wilhelmine (1842) 1 NOC 378.
60 Article 8 of 1910 Convention; also The Perfective (1949) 82 LI L Rep 873-5.
61 See The Geertje K (1971) 1 Ll Rep 285-7.
62 See Mossel Bay Boating Co v Brinck (1901) 18 SC 271-2.
63 See The Mount Cynthos (1937) 58 Ll L Rep 18, 25.
64 See Mossel Bay Boating Co v Brinck, supra.
65 See The Mangoro (1913) WLD 60-7.

neither be fanciful or vaguely possible. A real possibility must exist[66], or have passed, by the time the service is rendered.[67] Also the subject matter (of salvage) must have encountered some misfortune which might possibly expose it to loss or damage if the service were not rendered.[68] Indirect danger, such as the salvage of one ship from colliding with another will not be a salvage to the second vessel if the collision could have been avoided[69] or prevented.

In order to warrant a salvage service, there must be reasonable, present apprehension of danger. Thus to escape the danger, no reasonable, prudent and skilful person in charge of the venture would refuse a salvors help if it were offered to him upon condition of his paying a salvage reward.[70] For the purpose of salvage, it is a question of fact whether a ship or other maritime property is in danger or distress. The onus of proof is on those who claim to be salvors.[71] If bona fide and reasonable, the master's opinion as to the existence of danger will be strong evidence that the danger was a real one.[72] Frequently the existence of danger is not disputed. Very often contention centres around the degree of danger which will affect the quantum of a salvage award.[73] As far as the degree of danger is concerned, it is not necessary that the subject matter be in danger of total loss or damage. A salvage service may be performed though the danger is easily remedied.[74] The degree of danger will affect the salvor's claim where he is habitually engaged in the performance of services in order to avoid danger to shipping.[75] Also the existence of

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66 See The Mount Cynthos supra.
67 See The Betavier (1853).
68 See The Charlotte (1848) 3 WM Rob 68, 71; also The Mount Cynthos supra.
69 See The Port Caledonia and The Anna (1903) 184.
70 See The Mount Cynthos supra.
71 JP Van Niekerk op cit 4.
72 See The Wordsworth (1898) 88 Fed Rep 313.
73 See The Aglaia (1888) 13 PD 160-1.
74 See The Lord Dufferin (1849) 7 NOC Supp 33-4.
75 Kennedy op cit 131.

alternative and cheaper ways of saving the property may substantially affect the degree of danger and so may reduce the amount of the salvage award.[76]

There is no requirement that the danger which threatens maritime property must emanate from the normal perils of sailing on the sea. Danger from war risk[77] as well as danger to proprietary rights are sufficient[78] for claims. Danger to the salvor alone when performing salvage operations will not found a claim for salvage.[79] However, the risk run and the difficulties incurred by the salvor will be taken into account by the admiralty court in assessing the amount of the salvage reward. We now turn to voluntariness.

3. Voluntariness

The first thing that needs to be said, as concerns voluntariness, is that it is a universal maritime tradition, expressed as a duty for seafarers to give assistance against marine perils to vessels in danger at sea. This moral obligation has its origins in the maritime tradition, born from solidarity, which exists amongst seafarers against the dangers of navigation to which they are all exposed.[80]

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76 See The Queen Elizabeth (1943) 8 Ll Rep 803, 820.

77 Such as the Gulf War recently.

78 See The Tafelberg (1942) 71 Ll Rep 189.

79 Kennedy op cit 134.

80 De Smet Droit Maritime et Droit Fluvial Belges Fernand Larcier (TII) Bruxelles 1971 No 505 607-10. Selon l'auteur, le premier document connu conférant à l'assistance un caractére obligatoire est la constitution cum nobis de 1556 du pape Pie V qui ordonne aux marins, pêcheurs et habitants des etats Pontificaux de venir en aide aux navires en peril de se pendre sous peine d'avoir à payer la contrevaleur des biens qui eussent pu être sauvés.

Ce devoir trouve d'ailleurs son orgine dans une tradition maritime née de la soildarité qui existe entre les gens de mer en présence de danger de la navigation auxquelles ils sont tous exposés. Il est consacré par la convention de 1910. [...] Tradition provenant de facteur determinant pour les gens de mer, en raison et en fait:

But the existence of this duty as tradition does not prevent the services rendered from being voluntary.[81] Salvage must be voluntary. Voluntariness is an important characteristic of salvage operations.

The issue of the voluntary nature of the salvage act calls for a determination as to whether the salvor had a legal duty to assist[82] the vessel in danger. Since a salvage act must be voluntary, an individual would be a salvor who renders salvage services under the following circumstances cannot claim a salvage reward: (i) statutory obligation to preserve the vessel, property and life at risk at sea; (ii) pre-existing contractual duties; (iii) the interest of self-preservation; (iv) to fulfil an official duty.

- la soumission permanente des marins aux risques de mer qui fait que arrive aujourd'hui à d'aucuns d'entre eux peut leur arriver demain, et superstitieusement peut être que ce serait defier le destin que de negliger l'aléa bénéfique d'une réciprocité;
- un sentiment parfois de solidarité professionnelle;
- l'appât d'une remuneration (...).

According to the writer, the first document giving a compulsory character to salvage is the constitution cum nobis, 1566 of Pope Pius V. This commanded seafarers, fishermen and inhabitants of the Papal states to come to the assistance of vessels in danger of being lost, under pain of having to pay an amount equivalent to the value of the property that should have been saved.

The origins of this duty are to be found in maritime tradition born out of solidarity between seafarers faced with navigational dangers to which all were exposed. It finds expression in the 1910 Convention.

[...] Tradition coming from important factors for seafarers, in fact:

- Seafarers are permanently exposed to the risk of the sea which makes them think that what happens to one of them today may happen to another tomorrow; they may be superstitious by thinking that to neglect the benefit of reciprocity would be to defy fate; sometimes a feeling of professional solidarity; - lure of remuneration. See De Smet op cit (TII) 626.

81 See Kennedy op cit 183.

82 T Schoenbaum op cit 503.

The service rendered in these conditions are prima facie not salvage. In doctrine, this is well settled in the traditional approach to salvage.

The above mentioned duty may arise from the relationship of: (i) the salvor to the salved vessel such as its own crew member, master or passengers; (ii) the salving vessel to the salved vessel such as tug and tow; or (iii) from the fact that the salvor was by virtue of his employment under a public official eg pilots, members of the army, person employed on harbour tugs, foremen..., or (iv) from the discharge of duty owned to a third party as in the case of a Lloyd's agent or underwriter's agent.[83] In principle, all the individuals are excluded from recovering a reward as salvor for their services, except in special circumstances. Let us consider some cases.

A crew member, no matter how heroic his act may have been or how instrumental in saving the ship, he is not entitled to salvage reward[84] unless before the acts were performed there had been a final abandonment of the vessel by the master sine spe recuperandi and sine animo revertendi.[85] The underlying idea is that by the abandonment the contractual relationship which bound the crew to the ship is dissolved. Discharge by the master is considered as having the same effect as abandonment.[86]

In the Santa Maria[87] an award was made to the officers and crew members of the vessel. The ship was abandoned after being on fire and out of control following a collision. Later she was reboarded. The crew worked with other salvors

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83 G Gilmore & C Black op cit 541; also Kennedy op cit 182.
84 De Smet op cit 625.
85 G Gilmore & C Black op cit 533.
86 See Dr Lushington in The Florence (1852) 16 Jur 572.
87 See The Santa Maria 247 F Supp 248 1967 AMC (WD Wash 1966).

to put out fire ensuring the safety of the vessel and its cargo.

Similarly, the passengers are also excluded as non-volunteers. They are held to give assistance when the vessel is in danger. Thus, short of abandonment, their efforts are not normally compensated.[88] Usually in saving the vessel and cargo, they are in fact and purpose working in the interest of self preservation i.e. their own safety. However, the duty of assistance of passengers is not absolute as in the case of the crew members[89] of the vessel.

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88 l'effort des passagers au secours du navire peut valablement être recompensé. Selon De Smet, l'allocation d'une remuneration aux passagers se justifie car si leur aide est efficace, elle a pour resultat de diminuer la créance du navire assistant, c'est à dire, inversément reduire la dette du bâtiment assisté à l'égard du navire assistant, en sorte que la rémunération accordée aux passagers n'alourdit pas la charge financière de l'assistance.

[The passengers' effort to rescue the vessel can be validly rewarded. According to De Smet, the allocation of a remuneration to passengers is justified. If their assistance is effective it will diminish the amount of money payable to the salvor. In other words, it will reduce the debt of the assisted vessel to the salving vessel in such a way that any remuneration paid to passengers will not increase the costs of salvage. See De Smet op cit (t II) 626.

89 Because the passengers are not under any legal obligation to work for the safety of the vessel in danger at sea. This is not the case for the seamen.]

l'obligation pour les marins de deployer les efforts dont ils sont capables pour que le navire parvienne sain et sauf à destination est un devoir découlant du contrat d'engagement maritime. Elle trouve sa retribution dans les gages convenus pour les services que le navire est en droit d'attendre d'eux. Subsidiarement, l'accomplissement de cette obligation est presque toujours lié à la propre securité des marins. Voir De Smet op cit (t 11) 625.

[The obligation of the seamen to make every possible effort to ensure the safe arrival of the vessel at its destination is a duty which comes from the maritime employment contract. It finds its recompense in pledges agreed for the services that the vessel is expecting from them In addition, the performance of

Without abandonment, exceptionally ingenious services, commonly referred to as 'meritorious' have occasionally been rewarded. Such was the case in Towle v the Great Eastern.[90] The vessel was disabled following a gale. The passengers devised and worked to rig an emergency gear with whose aid the ship and its cargo were brought safely to port.

Under the requisite of voluntariness, a salvage claim is not defeated by the fact that the salvage operations.[91] The motiviation of the would be salvor is irrelevant. A professional salvor who acts for economic gain is a volunteer, as well as an incidental salvor, usually known as 'a good Samaritan salvor'.[92] But the crews and officers of a professional salvage vessel, as distinguished from the owners, would be barred from making individual salvage claims on the ground that their actions, being within the scope of their employment, could not be considered truly 'voluntary'.[93] They are non volunteers.

The desire to encourage the proper performance of existing duties[94] and to avoid refusals to render services except where the claimant is likely to receive a salvage award are basically the reasons for excluding individuals who are not volunteers[95] as noted above. Also it should be mentioned that the mere existence of a pre-existing obligation does not per se preclude a salvage reward.[96] All the factual circumstances will be examined carefully. A person performing a pre-existing obligation will only be entitled

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these duties is nearly always related to their own safety.]

90 See 24 Fed Cas 75, case no 14, 110 (SDNY 1864).

91 G Gilmore & C Black op cit 544.

92 See BV Bureau Wijsmuller v United States (1983) 702 F 2nd 333 [2nd 1983].

93 See A Norris op cit paras 58, 81.

94 Which failure might in fact cause or contribute to the danger necessitating salvage.

95 Kennedy op cit 182.

96 Ibid 183.

to salvage for extraordinary efforts.[97] It is the same for the tug and the tow. The simple fact, for instance, that a tug has rescued her tow from a danger for which the tug is not responsible does not lead automatically to an award[98] for salvage.

Note that it is immaterial that salvage is ordered by a third party having control over the salvor's movements.[99] The test of voluntariness only applies between the salvor and the salved interests. The fact that a person performing a service is ordered to do so to a third party will not bar his claim against the salved property for salvage reward.[100] The respondent in a salvage action has the burden of proving that the salvage act was not voluntary.[101]

It should be mentioned that salvage reward is excluded for salving life in danger at sea. But success is still necessary.

4. Success

One of the most striking features of the traditional concept of marine salvage is 'success'. No success - no salvage. It is a key concept. In other words, without success there is no salvage at all.

The concept of success is not an easy one to grasp Since the pre-requisite of salvage award is that some of the maritime property must be salved and that the award is paid out of the salved fund, it clearly stands to reason that an unsuccessful salvor, no matter how heroic his efforts may have been, is not entitled to salvage award. Salvage operations must therefore be successful. This is well

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97 See Master, Officers of St JW Sauer v Owners of SS Sellasia (1926) 447.
98 G Gilmore & C Black op cit 545.
99 See The Carrie (1917) 224.
100 See The National Defender (1970) 1 Ll Rep 40, 45.
101 See Clifford v M/V Islander 751 F 2nd 1, 5, N, 1 1985 AMC 1855 (1st Cir 1984).

established in principle under the traditional approach of marine salvage.

In Melanie v San Onofre[102] it was pointed out that the salvage operations must be useful and contribute to success in order to entitle salvage award. Services rendered, however meritorious, which do not contribute to the ultimate success, do not give title to salvage award. Of course, one might justifiably assume that salvage operations are not less useful when they have prevented the worsening of the situation.[103] Obviously it is not voluntariness nor meritorious heroic efforts which are rewarded but successful results.[104] Traditionally 'success' implies a 'useful or successful result'.

In the case of special contract where the master of the vessel at risk of marine peril bind the owner to pay for certain assistance independently of the ultimate success, the remuneration paid will not be a salvage award.[105] In the circumstances where the vessel is rescued from distress and left in a position of great danger, there is no success and consequently no salvage award. It makes no difference that the plaintiffs were entitled to cease rendering services, whether due to inability to continue them successfully or having to save themselves from danger.[106]

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102 1925 AC 262-3.

103 Il est vrai qu 'on peut admettre qu'un résultat utile a été obtenu lorque l'intervention a eu pour effet d'empêcher l'aggravation de la situation. (It can be admitted that a useful result has been achieved when salvage operations have prevented the deterioration of the the situation.) See M de Juglart et J Villeneau Répertoire Méthodique et pratique de l'assistance en mer Paris, 1962, 334.

104 Ce n'est donc pas, ecrivent de Juglart et J Villeneau, la bonne volonté, ni l'effort qui est remuneré, mais le succés. See M de Juglart et J Villeneau op cit 324.

105 Kennedy op cit 278; also M de Juglart et J Villeneau, 324.

106 See The Cheerful (1885) 11 PD 3.

As long as the service in question could have contributed to success, it is not necessary that it should alone, or ultimately have caused the successful salvage. Usually this happens where there are many salvors who render salvage services to a ship in danger[107] at sea.

Where one salvor brings a vessel in danger to a position of greater but not complete safety and a second salvor then takes over and brings the vessel into safety, the first salvor will be entitled to a reward even though his service alone did not save the vessel[108] as will the second salvor, though not instrumental in the first rescuing of the ship.[109]

As previously mentioned, if there is no success, then the salvor receives nothing however costly and meritorious are the services rendered. The principle of 'no cure - no pay' applies. Whether there is success or not, the salvor receives no payment from the third parties, whose property not being recognized as subject of salvage, he has protected or preserved, however great a benefit he has conferred on them.

As part of the merits of the services, a salvage reward often reflects the fact that a salvor has prevented or minimized environmental damage or the possibility of claims arising for damage to third parties' property. Such award is still limited by the size of the salved fund.[110]

Although the degree of success is immaterial in relation to a salvage entitlement, it is nonetheless, a very material criterion in relation to the assessment of the salvage award. There exists a close affinity between the value of

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107 J van Niekerk op cit 7.
108 See Georgetta Lawrence v Calcutta (1878) 8 Buch 102 107 108.
109 See The Master of the SS Politician v Master of the Cromartyshire (1902) 19 AC 147-150.
110 G Brice op cit 40.

the benefited property and the quantum of the award[111] to be paid. Note that in performing salvage operations, salvors may forfeit their rights by misconduct or fault. This a maritime application of equity or the principle of the clean hands rule.[112]

Ultimately then it would be fruitless indeed to list the numerous acts which have been held to constitute salvage under the formal requisite of successful result. It is a matter of facts and circumstances. However, salvage services can be undertaken under standard agreement, known as 'Lloyd's Open Form'.

1.2 SALVAGE UNDER STANDARD AGREEMENTS: LOF CONTRACT

'Lloyd's Form has been signed'. This is a statement which is quite common to find in most of maritime casualty reports.[113] Lloyd's Standard Form of Salvage Agreement 'no cure - no pay' is, as indicated before, the earliest example of a standard form of contract used by the salvage industry.[114]

Whilst there exists several standard forms of salvage agreement[115], the majority of salvage operations conducted at sea by professional and incidental salvors are carried out under the terms of LOF[116] of salvage agreement.

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111 See The Ewell Grove (1835) 5 Hagg 209 221.
112 G Gilmore & C Black op cit 536.
113 J Griggs 'An examination of Lloyd's Standard Form of Salvage Agreement' (1974) 2 LMCQ 138.
114 M Lacey 'New standard agreements for salvage services under development' 1992 ISU Bulletin 12.
115 See supra.
116 See ISU Bulletin 1989 8 12. It should be mentioned that since the annual survey of International Salvage Union (ISU) member's salvage started in 1978, more than 2,200 salvage operations have been carried under 'no cure - no pay' contract conditions. Almost 76% of these operations were conducted under LOF. There was significant increase in the value of property salved (4.5 in 1991) and rise in number of cases (increasing from 152 in 1990 to 184 in 1994). However, for the first time the number of operations carried out by

According to Lacey[117], it is estimated that, on average, about 80% of world-wide 'no cure - no pay' salvage services are carried out under LOF agreement. All this goes to show the importance of the LOF in marine salvage.

Generally salvors and salvees enter the salvage agreement either in extremis ie under stress of circumstances or after the immediate distress has passed.[118] Salvage under LOF contract[119] will focus on the following topics: (i) historical review; (ii) the 'open' Form; (iii) the salvor's gamble and the hallmark of LOF: 'no cure - no pay.'

1. Historical review

In earlier times, according to Kennedy[120], salvage operations were much less certain and controlled than they have become today. They frequently took the form of uncoordinated personal services. Such circumstances were not favourable to the prior arrangement to salve, particularly since the would-be salvors could not share complete confidence in their ability to undertake salvage successfully.

However, the emergence of steam powered vessels in the nineteenth century furnished potential salvors with more reliable and controllable means of salvage propulsion and therefore, more effective means of salvage. Incidental to this development was the use of a standard form of salvage agreement[121] hereby referred to as LOF.

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alternative contracts exceeds those performed under LOF, See Lloyd's List Monday March 22 1993 9.

117 M Lacey op cit 12.

118 In the later case, often salvage operations consists of raising or refloating a sunken or a stranded vessel, or salvaging its cargo.

119 Noteworthy that reference to LOF contract hereinafter is basically LOF 1980 and 1990.

120 Kennedy op cit 303.

121 Kennedy op cit 303.

Historically, Lloyd's Standard Form of Salvage Agreement had its origin in 1890 when a salvor operating in the Dardanelles agreed to render services on the basis that his remuneration would be fixed by decision of the committee of Lloyd's or that of an arbitrator appointed by them[122] for dispute settlement. The Form was drawn up by Henry Hozier of Lloyd's to prevent salvors holding shipowners to ransom. It binds both parties to follow a set procedure once there has been a successful salvage.[123] At that time, Lloyd's was involved in the appraisal and approval of the Standard Form of Salvage Agreement to be utilized by the individual salvor.[124]

In 1892, the first LOF for general use was published. Following subsequent amendments, it was decided in 1908 that this should be the sole form of salvage agreement under the auspices of Lloyd's. Consequently, the previous practice of confirming separate agreements with individual salvors was thereupon discontinued[125] in use.

Basically the concept which undermines LOF is that if the shipowner and the salvage contractor cannot reach an amicable settlement, they have to abide by a process of arbitration provided by (but independent from) - Lloyd's, which administers LOF through its Salvage Arbitration Branch. The reason why LOF attracts salvage contractors is that it guarantees payment against a maritime lien.[126]

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122 J Griggs op cit 138.
123 See Lloyd's List Monday March 21 1994 6.
124 Kennedy op cit 303.
125 R Thomas op cit 276.
126 It is assumed that a maritime lien is given to salvors in all jurisdictions and it may not be enforced when satisfactory security has been provided. Normally under LOF, salvage guarantees must be lodged either with Lloyd's or with the salvor before the lien can be lifted and the vessel allowed to proceed. The modern practice in shipping business is that the shipowner will normally arrange for the vessel to proceed on her voyage against an undertaking that the cargo will not be released at destination until the cargo guarantees

Through the years the Form has been revised from time to time. Revisions have sometimes been radical as will be discussed. It has been necessary from time to time to harmonise LOF with developments in case law, practice and other changes[127] needed.

Having described the historical background of LOF, it is appropriate at this stage to examine some aspects of this Form.

2. The 'Open' Form

When providing salvage services[128] to ships and their cargoes, the salvage contractor often uses LOF. More specifically, Lloyd's 'Open'[129] Form is used where the casualty is such that the ship remains either afloat or aground.

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have been provided. See CMI Newsletter, December 1981 6; Also Lloyd's List Monday March 21 1994 6.

127 Kennedy op cit 303, LOF was revised in 1980, 1926, 1950 (incorporation of appeal provision), 1967, 1972 and recently in 1980 and 1990.

128 Which may involve towage, fire fighting, patching and pumping, lightening, refloating, cargo transfer. These salvage services are known within the shipping industry as 'dry salvage'. Salvage to ships and /or their cargoes in cases where the vessel has sunk, namely wreck removal, are known as 'wet salvage'. In situations where a vessel has sunk or become a wreck, there will usually be little or no commercial value left in the property. Nonetheless, it may still be necessary to remove the vessel, as it may pose a hazard to navigation or it may be blocking a berth, river, channel or sea passage. It may also be necessary to remove the vessel because it (and/or its cargo) constitutes a threat to the environment. There are also occasions when it is necessary to recover a sunken vessel following loss of life or to carry out an investigation into the cause of loss. It is in these situations that an alternative form of contract is required. See M Lacey 'New standard agreement win acceptance' 1993 12 ISU Bulletin 12.

129 Lloyd's Form is called 'open' because it leaves the amount of any salvage reward to be decided later by arbitration. See Gaskell 'LOF 1990' (1991) LMCLQ 104.

The adoption and the use of standardized documents by the ocean towage and marine salvage industry is always very encouraging in international trade. It makes business, particularly commercial contracts, easier and practical. It is considered that this is in the best interest of both the salvage industry and the customers. Additionally, there is a remarkable need for acceptance. In order to gain acceptance within the market, any standard agreement must be seen to serve the purpose intended. In short, it must be properly balanced between the parties and it must accurately reflect the nature of the work to be undertaken.[130] It is needless to say that Lloyd's Form has won such acceptance in the international salvage market.

It should be mentioned that LOF is by definition a contractual instrument governing salvage operations at sea. Although widely used, it is by no means the only way of conducting salvage services. The Form can be described as a specialized commercial contract (document), a quick means of reaching a fair agreement between the salvage contractor and the ship owner for salvage services. Very often it is an in extremis agreement. Sometimes it is entered into between parties after the immediate danger has passed for a specific task[131] to be done.

Once signed, LOF creates a legal relationship between the salvor described in the instrument as 'contractor' and the owner of the distressed vessel. LOF is directly concerned with saving of maritime property. It makes no provisions for the saving of life in the absence of recovery of property.[132] Under LOF contract there is no reward for saving life in danger at sea.

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130 M Lacey op cit 12.
131 See supra.
132 R Thomas 'Lloyd's Standard Form of Salvage Agreement - A descriptive and analytical scrutiny' (1978) 2 LMCQ 277. This was the same for many as for the protection of the environment.

Whether entered under stress of circumstance or after the immediate danger has passed, LOF is enforceable. The only problem is that the in extremis agreement will be enforced according to its terms only if it appears to have been negotiated fairly. If the salvor refused assistance unless the master of the distressed ship consented to an extortionate bargain, not only will the agreement be set aside, but the reward will be reduced or forfeited entirely according to the degree of the salvor's misconduct. The unfairness of the agreement is usually found in the salvor's greedy over-reaching, but it can occur the other way round as well. In requesting assistance, a canny master may conceal aspects of the danger or of the time, labour and expense which the salvor will have to put out. Where the salvors have been so entrapped, they will not be bound by the parsimonious agreement.[133] It should be stressed that contract on LOF terms is not contract uberrimae fidei, voidable on the ground of non-disclosure. [...] For instance, where a master of a vessel failed to reveal serious damage to her which made a successful salvage of her either impossible or at least extremely unlikely, and a salvage contractor was, as a result of non-disclosure led or encouraged to sign LOF and thereby to take upon himself the obligation to use his best endeavours to salve on a no cure-no pay basis, the court might strike down the LOF agreement, exercising its equitable jurisdiction to declare the LOF invalid and refuse to give effect to it at the suit of the shipowners.[134]

LOF is executed by the owner, master or agent of the distressed vessel on behalf of the shipowner, cargo and freight. In practice this is effected by agents acting on behalf of the principals. They must therefore act within the scope of their authority. The mere fact that a person enters into an agreement 'on behalf of another' does not

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133 G Gilmore & C Black op cit 579.
134 J Brandon 'The unique mariner' No1 (1978) 1 Ll Rep 455.

ipso facto bind the latter in the absence of the requisite authority.[135]

Agreeing to LOF has some important effects. First of all, it changes the character of the salvage service. The service is converted into a legal obligation owed by both parties viz the salvor and salvee. It is not a discretionary service.[136]

The second effect of signing LOF is that the common law contractual doctrine which asserts that 'past consideration is no consideration is not applicable to salvage'. A salvage agreement may validly apply to past as well as to future services.[137] The Form can be entered into after the salvage operations are under way. In this respect clause 1(d) of LOF provides:

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135 See Black v Smallwood (1966) 117 CLR 52 39 ALJR 405.

136 R Thomas op cit 278. As regards the salvor's duties, it should be remarked that LOF 90 uses both expression 'due care' (art 8.1(a)(b)) and 'best endeavours' (art 1(a)(i)). According to Gaskell, the requirement of 'due care' is essentially an objective one based on reasonableness, taking account of the general standards in marine salvage. The emphasis on 'best endeavours' might seem to indicate a more subjective test, looking at the actual capabilities of the salvor. It could be that a particular professional salvor could in fact do more than an incidental salvor [Gaskell op cit 113].

The higher standards of care required in the recent LOF is more appropriate to professional salvors. They often use the Form, in contrast to the incidental salvor to whom the 1989 Convention might apply (Gaskell op cit 114]. In the Tojo Maru, the House of Lords made an extremely perspicacious remark about the standard of care undertaken by professional salvors during salvage operations. The House of Lords observed that undertakings by the contractor to exert himself properly, carry with them an obligation to perform the task which he has assumed with due skill and without negligence. If the contractor is a professional salvor, he must perform his duties with the skill of an expert. Any failure on the part of the contractor in this respect will render him liable in damages and may deprive him of any award [The Tojo Maru (1971) 1 Ll Rep 341 HL] for salvage.

137 Admiralty Commissioners v Valverda (owners) 1938 AC 173; R Thomas op cit 278; J Griggs op cit 138.

> 'In the event of the services referred to in this agreement on any part of such services having been already rendered at the date of this agreement by the contractor to the said vessel and/or her cargo, freight, bunkers stores any other property thereon the provisions of this agreement shall apply to such services'.

It stands to reason therefore that the common law contractual doctrine that 'past consideration is no consideration' has no application to salvage agreement under LOF.[138] The existence of the above-mentioned clause expressly implies that it is probably better to consider the agreement, not as representing an exception to the past consideration rule, but as an example of a retrospective contract, binding upon the parties from the very commencement of the salvage operations[139] at sea.

Thirdly, agreeing to LOF places the salvor's right to salvage beyond any doubt.[140] Obviously, signing LOF would make it very difficult for the shipowner to assert afterwards that the service rendered was for towage and not salvage.[141]

Fourth, the signing of the Form is in practice conclusive evidence of the existence of 'danger' as against the shipowner. It implies the existence of danger.

Furthermore, it seems that an individual who is not a volunteer may have difficulties in claiming salvage under the agreement.[142]

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138 J Griggs op cit 138.
139 Trollope & Colls Ltd v Atomic Power Constructions Ltd (1962) 3 ALL ER 1035.
140 N Gaskell, C Debattista, R Swatton, Chorley and Giles' Shipping Law 8 edn 1987, 459.
141 Ibid.
142 G Brice op cit 248-9; also The Bostonian v the Gregerso (1971) Ll L Rep 220.

Fifth, as a matter of principle, the existence of the Form appears to exclude the doctrine that 'a salvor cannot benefit from his own wrong'. Under this doctrine a salvor who has been responsible for the predicament of the imperilled vessel is precluded from claiming an award for any subsequent beneficial service.[143]

As concerns the applicable law to LOF contract, it is to be noted that an executed salvage agreement under the terms of Lloyd's Form avoids the complex issue which relates to the governing, rather than the proper law applicable because the form is expressly subject to the English law[144] regardless of the place where it is signed or executed.

Finally, it should be observed that signing of the Lloyd's Form has some advantage for the shipowner and the salvor. It is beneficial in many negotiations, especially contractual, if both sides start with known assumptions. This is particular so when negotiations must proceed under stress of an emergency and when the negotiating parties met for the first time. In trying to negotiate a safe passage through the often strange waters of the salvage adventure, all must at times appreciate the familiar landmarks of the agreement. LOF offers this chance. An express aim of the Council of Lloyd's is to make sure that LOF is always a form that can be agreed to with little or no negotiation.[145] Thus, the

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143 R Thomas op cit 284. This doctrine was subject to critical scrutiny in the Kafiristan. Although the facts of this case are not exactly in point to the judicial comment and reasoning, they are nonetheless applicable and support the contention here argued. Therefore, where LOF is executed, a salvor, notwithstanding his delinquency, can succeed in his claim for salvage award by reference to the agreement itself. See Thomas op cit 284; also The Beaverford v The Kafirstan (1938) AC 136.

144 Clause 11, LOF 80 and 1(g) LOF 90.

145 See remarks of G Darling at the Conference on Lloyd's New Form of Salvage Agreement 12 November 1980; for details see Cohen op cit 269.

underlying principle of LOF appear to agree to avoid haggling when a vessel is in distress.[146]

On the other hand, the salvor minimizes risks when he signs LOF. He avoids the problems of 'pure salvage'.[147] Under LOF he gets a detailed set of promises from the shipowner concerning the conduct and payment for salvage services.[148] However, his risks persists[149], yet his successful or useful result offers him more than a mere quantum meruit. Before we turn to the next point, it is relevant to mention that the Lloyd's Form of Salvage Agreement is administered from London by the Salvage Arbitration Branch of Lloyd's Agency Department.[150]

3. The salvor's traditional gamble and the hallmark of LOF: 'no cure - no pay'

As said before, a salvor could not claim an award for merely having come to the rescue of a distressed vessel. What should be established is that the would-be salvor's efforts have led to actual saving of the property, rather a salved fund out of which he could claim a salvage reward. If a salvor could demonstrate that his efforts contained all the 'ingredients' and met all the requirements of salvage services he became entitled to a salvage award based on implied contract. Generally speaking this gave rise to the principle of 'no cure- no pay' of LOF.[151]

The salvage services rendered under the LOF contract are fundamentally based on 'no cure- no pay'. According to clause 1 of LOF, the services shall be rendered and accepted

146 See Lloyd's List Monday 21 March 1994 6.
147 As opposed to 'Commercial salvage', for details see Cohen op cit 266.
148 See LOF 80 or 90 provisions as to security, interest, payment award and special compensation.
149 Such as the harsh application for the 'no cure - no pay' principle which can leave the salvor unrewarded - despite some success; see infra.
150 See Lloyd's List op cit 6.
151 'LOF' here refer to its general or common aspect except where specified.

as salvage services upon the principle of 'no cure - no pay'. This article is coupled to two important features of LOF.

Firstly it described the service offered and accepted as a 'salvage service'. Upon this, LOF is conclusive and it ceases to be open to either party to assert otherwise.[152] The agreement being so definitive, represents an example of one of the few occasions when the law allows 'the form' to triumph over 'the substance'.[153]

Secondly, this clause emphasizes and reproduces the most signal feature of the salvage law viz 'no cure - no pay'. This expression, which is also found as a bold sub-title to LOF, clearly asserts the legal foundation upon which the Form is constructed.[154]

This brings us to the question of the real meaning of the principle 'no cure - no pay'. According to Kennedy, the import of the maxim is the notion that successful recovery or protection of the endangered property or some part of it is a condition for entitlement to a salvage award.[155] Similarly, if the value of the salved property whether part vessel or part cargo, is not great, it may well be that the remuneration will not sometimes cover the salvor's expenses.[156] On the other hand, the maxim used in the LOF of Salvage Agreement, appears to be the contractual version

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152 See The Beaverford v The Kafiristan (1938) AC 136. It should be mentioned here that the contractor is not given any exclusive right to salve the distressed vessel. Accordingly, the other party to the agreement is required to engage additional or alternative assistance and would-be justified in doing so if it is proved that the contractor, for any reason, is unlikely to complete the service successfully [See The Cambrian Dee 15 (1848) 154 Adm Dig 3ed (1887)]. In these circumstances, salvage can be claimed even when the service is provided by a sister ship.

153 R Thomas op cit 280.

154 Ibid.

155 Kennedy op cit 129.

156 Kennedy op cit 130.

of the traditional philosophy of marine salvage since it requires a 'successful result' for salvage award.[157] If these interpretations are true, it stands to reason that under a 'no cure - no pay' agreement, the salvage contractor can abandon the salvage operations if the chances of successful results are nil. He runs the risk that he may not recover normal recompense for his services or he may only recover part of it. Under these circumstances, the salvor is not obliged to carry on with salvage operations except in specific conditions such as leaving the salvageable property in greater danger than it was before.[158]

It should be mentioned that contracting under Lloyd's Form, the contractors have a clear preference for a system in which the rewards are based on the 'no cure no pay' principle rather than daily rate systems as in normal cases of salvage.[159]

The 'no cure - no pay', an intensely practical principle, achieved three goals basically in marine salvage. Firstly, it is designed to dissuade unsavoury or incompetent salvors Secondly, it set an upper limit for Admiralty Courts and arbitrations on the size of the award, since salvor could not claim an award greater than the value of the property he had salved.[160] In practice, however, awards were much lower. They tended to reflect a percentage of the salved

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157 In the same way, the 1989 Salvage Convention implied the 'no cure - no pay' principle when it requires a 'useful result' for an award (see article 12), except where special compensation clauses apply.

158 Or when he wants to obtain some special compensation for involvement in environmentally sensitive salvage operations; see LOF 80 and 90.

159 See CMI Report, CMI Newsletter 1984 18.

160 Although no salvage award has ever reached 100% of the value of the property salved, some judicial support exists for such an award. In the Petition of the United States (vessel Invincible) 229 F supp 241, 245 (D or 1963), the court stated obiter dictum that under unusual circumstances, the total value of the vessel might be awarded to the salvors'.

property[161], usually below 20%. The third advantage of the system is that it guaranteed the salvor's awards could be enforced either against the shipowner[162] or against the salved property.[163] No successful salvor needed to worry about an unenforceable award. For these reasons, a central feature of marine salvage under LOF for a long time has been the principle of 'no cure - no pay'.[164] It should be noted that regardless of the political system in which it originates, most salvage throughout the world under contract are based on the 'no cure - no pay' principle.[165] This indicates how important this principle is in marine salvage, reflecting the traditional concept in contractual form.

The 'no cure - no pay' principle, which has served the shipping industry well in the past, has come under increasing scrutiny in recent years, especially as a result of the increase in tanker casualties. The problems associated with no cure-no pay are complex, such as diminution of the salvage award, the chance of an award being little, the possibility of no incentive for a salvor of a stricken tanker whose cargo has escaped or is about to escape and to cause pollution.[166] Also the requirement of saving property which had an arrived salved value could have particularly harsh results when a salvor undertook to act in a situation where pollution was present.[167]

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161 Known as the 'arrived salved value'.
162 By means of an in personam action.
163 Through an in rem action.
164 Abecassis & Jarashow op cit 142-3.
165 A Miller 'Lloyd's Open form 1980 - a commentary' (1981) 12 JMLC 243-4.
166 A Bessemer-Clark 'The role of the LOF 1980' (1980) 3 LMCLQ 297.
167 As Bessemer-Clark remarked, there are factors which have effect on the value of the salved property award. Take for instance the tanker phenomena under the traditional concept of marine salvage. First, enormous damage to the vessel cause great potential for spills. This in turn increases the treat of oil pollution but reduces the potential salvable cargo and hence the potential remuneration. Secondly, the oil spill often renders salvage operations more difficult both physically and politically. Physically because of the

The single, but striking example, of the Atlantic Empress[168] disaster is an illustration of the serious inadequacies of the 'no cure - no pay' principle to regulate modern salvage issues. It shows the real size of the salvor's 'no cure - no pay' risk. The Atlantic Express, a 288 000 dwt tanker, collided with another VLCC, the Aegean Captain in 1979 about 32km north of Trinidad and Tobago. The collision was caused by negligence. Professional salvors were quickly on the scene. Both vessels accepted and signed LOF 72 for salvage services.

Salvage contractors began to tow the seriously damaged Atlantic Empress away from the beaches of Trinidad and Tobago, while under way they battled a serious fire aboard the US$45m tanker. At the same time, one of the neighbouring Caribbean states wouldn't allow the stricken vessel into their territorial waters, where the fire could have been fought more easily. Instead, the vessel headed out into the Atlantic with flames leaping 30 metres from the deck and leaking oil.

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dirt and the smell. Politically because an oil spill which threatens a coastline tends to attract the attention of the local government whose coast it threatened. Usually, if not inevitably, that government feels obliged to intervene to prevent or minimize pollution as well as to give directives to the salvors. This can interfere with the successful salvage of the vessel and lead to international leper phenomena. Thirdly, in an extreme case the salvor can be deprived of his potential award altogether through no fault of his own by a government decision. This happened in the Christos Bitas where on the orders of the British government the tanker was towed out to sea sunk. Salvors faced similar issue in the Andros Patria (1979) and the Kurdistan. The tendency of all of these factors combined is to render the salvage of stricken laden tanker less attractive under the old LOF. It highlights the necessity of which was born LOF 80 and 90 to provide greater incentives for salvors in modern salvage. For details, see Bessemer-Clark op cit 297-8; P Coulthard op cit 150.

168 See 'An inhibiting factor to voluntary action', (ext 1979) Seatrade 135; also see M Cohen op cit 266-7 and E E Gold op cit 490.

The tow and damage control efforts continued for two weeks. The fire was almost controlled when an explosion caused the contractor's situation to become untenable. Shortly after the explosion, the Atlantic Empress sank in the Caribbean. The Captain Aegean, badly damaged, was towed to Curacao. But she was declared a constructive total loss.[169] Surely, many things need to be pointed out from this accident as far as the 'no cure - no pay' principle under the old Lloyd's Form is concerned.

First, the accident illustrates the enormous cost of such a disaster[170] and the fortunate side of fate because of the salvor's services.[171] A real pollution disaster would have happened if both cargoes had been lost closer to land and salvors did not intervene. They prevented and minimized pollution.

Secondly, the salvage of the smaller vessel which was declared a constructive total loss. This meant the salvors have little salved namely hull value from which to be compensated. If the vessel had not also been loaded with a valuable cargo, the salvage contractors might very easily have lost out, because of the harsh application of 'no cure - no pay', receiving only minute compensation from the vessel's scrap value.[172] This would have been the salved

169 Gold op cit 490.

170 The underwriters incurred huge losses because of the total loss of one vessel, its cargo and the constructive total loss of the second vessel. This was about US$100m; see 'Legal and Commercial Notes ' (1979) LMCQ 558.

171 Both vessels were loaded with some 470 000 tons of crude oil. This is more than twice as much as the oil spill from the Amoco Cadiz and more than four times as much as from the Torrey Canyon. While the larger vessel's oil was spilled in the ocean, much of the smaller vessel's cargo was saved; see E Gold op cit 490.

172 It should be mentioned that new construction costs are nowadays often lower than extensive damage repairs in the shipping market. Accordingly, even large, modern, sophisticted vessels now tend to get written off like

fund upon which the salvage reward is based. The constructive total loss system, which of course has been a marine insurance practice for a long time, was never intended to be so widely and frequently used. This has led to the reluctance of the salvage contractors to accept a LOF on a badly damaged vessel in ballast or loaded with cargoes of little value.[173]

Thirdly, the loss of the Atlantic Empress was literally 'no cure - no pay' for salvage contractors.[174] The gamble had failed. No 'cure' led to 'no pay'. Because the salvors were working under a 'no cure - no pay' contract, they received no remuneration for two weeks of extensive efforts and expenses.[175] However, there had been considerable anti-pollution success. The salvors' efforts had prevented a major oil spill along the southern Caribbean coast. Probably the potential claims for oil pollution and clean-up for instance, against the 70 000 tons of crude oil cargo of the Atlantic Empress could have exceeded the Amoco Cadiz

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automobiles after an accident. Engine room flooding or fire damage for instance, can quickly turn a vessel into a constructive total loss, although the shell and the main structure may have suffered little damage. In the light of consideration of the 'no cure - no pay' principle, this means that a salvage contractor under LOF, in particular the old form, is often dependent on the value of any cargo salved to provide his award; see A Wilbraham 'The Salvor's Perspective' in WF Searle ed International Sumposium on Marine Salvage NY 1979 Washington MS 1980 50.

173 Under these circumstances salvors don't like the idea of 'no cure - no pay'. Rather they would like guaranteed fees and perhaps a special award too if another disaster such as Amoco Cadiz is to be prevented. See M Cohen op cit 265.

174 Salvors lost their 'prize' and much equipment after a harsh salvage operation involving tugs, a large salvage crew, fire fighting experts and fire equipment. It was reported that one salvage contractor had five tugs on the scene for the whole two weeks, at a cost of US$1,500 per tug per day; see S Horn and P Neal 'The Atlantic Empress - Sinking, Large Spill Without Enviornment Disaster' in Proceedings 1981 Oil Spill Conference, API 1981 429. Also see E Gold op cit 491-2.

175 Abecassis & Jarashow op cit 144.

claims. Obviously pollution underwriters were saved from paying out a lot of money in indemnity. A large oil disaster was averted. This was really a 'cure', yet there was no 'pay'[176] because of the rigorous hallowed traditional 'no cure - no pay' principle.

What is quite certain is that the reason for the inequitable result was the equating of the traditional requirement of success with the fundamental principle of salving property having an arrived salved value, commonly known as 'the salved fund'. With the loss of the Atlantic Empress due to the explosion during salvage operations, no property with value was salved. Yet the salvage contractor conferred some benefit to the owners of the sunken vessel. Their efforts prevented damage to the local coast therefore protected the shipowners from liability for ensuring oil pollution claims.[177] To that extent, it would hardly be an exaggeration to admit that there had been both benefit and success. Not traditional 'success' as mentioned earlier, but a new aspect of success, 'useful result', which appears to be beyond the old concept. The salvors' voluntary effort had also benefitted the public interests ashore.[178]

As concerns partial success of the salvage services rendered, LOF 1972 provided that if the operation was 'only partially successful', without any negligence or lack of ordinary skill and care on the part of the salvor, he was entitled to receive a 'reasonable remuneration'.[179] Although the Form did not detail how the arbitrators were to arrive at such a 'reasonable remuneration', it was implied that the traditional ordinary principles of salvage law were to apply. Thus if the salvor undertook to salve both vessel

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176 E Gold op cit 491-2.
177 The shipowners could have faced the same situation as the owners of the 24 000 ton bulk carrier, Apollo Sea which sank off Robben Island. The latter would have to pay for the cleaning up of the pollution disaster.
178 Abecassis & Jarashow op cit 144.
179 See clause 15 LOF 1972.

and cargo, but was only able to salve the cargo, his remuneration would be assessed on the merit of his services as a whole. His award would come out of the salved value of the cargo, however, since it was the only value against which an award could be made and nothing else. No provision was made for the salvage contractor to receive any compensation for other beneficial effort such as the protection of the environment.[180]

If the 'no cure - no pay' contract under LOF is such a gamble, as mentioned earlier, the obvious issue is therefore why salvage contractors ever accept LOF terms. It may be concluded that if the salvors could do better they would. But many cases are emergencies and in others the situation is just without hope. In either circumstances and commercial realities, no shipowner is going to hire a salvor on a cost plus or hourly rate. When the shipowner perceives the situation to be in extremis or hopeless, he will probably think of any out-of-pocket expenses for salvage as a waste. The only salvage contract he will be willing to make with a salvor is therefore one that costs him nothing except his agreement.[181] On the other hand, this can be the salvor's risk of receiving nothing from the agreement.

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180 P Coulthard op cit 50; Abecassis & Jarashow op cit 144-5.

181 Take the case of the Atlantic Empress for instance. The salvage agreement was not at all beneficial for the salvor. The traditional gamble 'no cure - no pay' under LOF 72 was made and lost. It should be remembered that the Atlantic Empress was the largest vessel ever lost and its 276 976 tons of crude oil was the largest cargo volume ever lost from one vessel. Despite this and probably because the salvor made such a great effort to tow the stricken tanker away from Trinidad and Tobago, there was no apparent oil spill impact on any Cairbbean island resulting from casualty. A Caribbean Exxon Valdez has been narrowly missed, yet under LOF 72, salvors received nothing for pollution preventon. See Horn & Neal op cit 429.

According to Cohen[182], the rationale for accepting the LOF contract under 'no cure - no pay', in abstract, is that underlying the use of any contingency free arrangement, satisfactory allocation of risk costs and benefit are fairly apportioned. The shipowner obtained salvage services. These are services that he cannot provide himself. Nevertheless, he obtains the services at no cost unless there is a successful result and therefore a (salved) fund out of which payment can be made. Thus no matter what the outcome of salvage operation, the shipowner is no worse than if he had made no salvage contract at all. This is not the same for the cargo owner. He has an interest that the cargo should be salved.

In the final analysis, the salvage agreement, LOF under 'no cure no pay', fundamentally based on the traditional concept of marine salvage[183] has revealed itself inadequate and out of date. It was perceived that this well-accepted principle could no longer adequately serve the best interests of either the shipping industry or the world community[184] especially the environment.

Since the salvage remuneration is paid out of the salved fund, the existence of factors which militate against the value of the property award render salvage operations under 'no cure - no pay' less attractive and without incentive. They casually appear to be of insufficient value to provide an award appropriate to the salvage services required.[185] For salvors, there was a decreasing inducement to undertake work as major risks based on 'no cure - no pay' contract.[186] This reluctance by salvors was quickly seen to affect not only the shipping industry but also the coastal states

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182 M Cohen op cit 267. Convenience may play some role in the popularity of LOF.
183 This should be understood as LOF 72.
184 Gold op cit 492.
185 Lacey op cit 13.
186 G Darling 'Willing salvors - a paramount need'(1990) Seatrade 160.

environmental interests. It should be remembered that when the 'no cure - no pay' principle first evolved, the complex problem relating to tanker salvage could not have been contemplated. The traditional salvage rules did not offer sufficient incentives to salvors. Nowadays, the pattern of marine salvage services has changed to include prevention and protection of the environment. LOF 80 and 90 were born of these necessities. This is also the reason why a new approach to the whole salvage system, both conventional and contractual was needed.[187] The new instruments not only modify the old concept of marine salvage but introduced a new salvage regime. This will be the main topic of the second chapter.

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187 See 1989 Salvage Convention; LOF 80 and 90.

CHAPTER II

THE MODERN SALVAGE SYSTEM

In retrospect, on a contractual basis it should be recalled that LOF with its sacrosanct principle 'no cure-no pay' was hardly to blame for all the problems and difficulties faced by modern marine salvage.[188] Besides, the Form itself was not intended to be a panacea or a smooth sailing opportunity for salvor. It was simply designed as a quick means to provide a fair compromise for a necessary service to be rendered, especially in emergency situations.

Prior to the alterations in oil tankers and the growth of popular environmental consciousness in the early sixties and seventies, LOF had worked well for all kinds of salvage services, including those rendered to oil tankers.[189] LOF became almost obsolete only when tankers and their cargoes grew larger and more valuable[190] making the risk of pollution higher than the potential of salvage. On the other hand, the traditional law of salvage could not offer adequate solutions to modern problems faced by the shipping community, especially in the salvage field. Out of this necessity LOF 80 was born.

The revision of the rules on traditional salvage was deemed necessary. The rules were in need of modernization. A revision was also necessary for the purpose of regulating in a more complete manner the private law aspects of the problems raised by maritime casualties[191], in particular oil transportation. The 1989 Salvage Convention was born in this context followed by LOF 90.

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188 As previously indicated, the Form is a specialized commercial contract. Although widely utilized, it is by no means the only way of conducting marine salvage. There are several alternative means, contractual or not, see supra.

189 See supra. Also see Admiralty Commissioners v Valverda (owners) 1938 AC 173.

190 M Cohen op cit 273.

191 See CMI Newsletter Dec 1981 3.

Since the Brussels Convention and the early LOF were formulated, the technical and economic development in international shipping has been very significant.[192] This happened in such way that the above-mentioned instruments were soon out-dated.

Many changes have been taking place in shipping operations and practice. Nowadays vessels are often much larger and more sophisticated, carrying for instance, cargoes of crude oil and quantities of dangerous cargoes such as chemicals and nuclear waste, all of which was not foreseen in 1910. In the event of a casualty, these cargoes may pose a real threat to the environment. Salvage operations have become technically more sophisticated. The effect of such developments highlighted by many maritime casualties called for changes in salvage law to be discussed and formulated.[193]

Another aspect of this transformation is that while the dangers which ships and cargoes represent vis à vis third party interests have substantially increased, in particular relating to the environment, the dangers to the ships and cargoes themselves have been reduced. Further, the value of ships and cargoes have increased enormously.[194] To the professional salvor this means fewer, but more valuable opportunities.[195] Consider the case of Exxon Valdez and the tanker phenomenon today.

Similarly, salvage techniques have improved substantially. But they have become far more capital intensive.[196] This has had a certain adverse effect on the ready availability of adequate salvage equipment along the sea routes of the

192 See CMI Newsletter Dec 1984 5.
193 See CMI Newsletter Dec 1981 3.
194 But often the cargo has higher value than the vessel.
195 See CMI Newsletter Sept 1984 5.
196 Marine Operation and modern shipping involve large investments and considerable financial risks. This increases the salvor's responsibility; see Lloyd's List Monday March 22 1993 12.

world. On the other hand, it had become clear that the traditional salvage law, contractual or conventional, did not offer sufficient incentives to salvage contractors. This is especially the case, as will be discussed, where the prospect of successful salvage is very little or nil, while major salvage operations might be urgently needed to protect the environment. Under these conditions, the revision of the whole traditional system of marine salvage - based on the 1910 Convention as well as LOF was inevitable. These revisions were also needed in the light of the age of these rules and substantial developments in shipping since they were formulated.[197] The core of these general revisions form the modern salvage regime. The new philosophy of marine salvage - through LOF 80 and 90 will be analyzed and evaluated.[198] This Chapter will be divided into two main sections as follows:

2.1 PRESSURES AND REACTIONS:RADICAL CHANGES FORCED UPON SALVAGE
2.2 SUBSTANTIAL INNOVATIONS

2.1 PRESSURES AND REACTIONS: RADICAL CHANGES FORCED UPON SALVAGE

From 1960 to 1990, marine salvage has gone through considerable upheaval. This was a transitional period for salvage which reached its highest point with many events leading to its metamorphosis. From 1980 to 1990, salvage has experienced great transformations.

The pressures on the traditional international law of marine salvage have been accumulating for many years. In general, these constraining forces have been of a diverse nature such as substantial developments of a political[199], economical,

197 See CMI Newsletter Sept 1984 5.
198 This will include some aspects of the 1989 Salvage Convention.
199 Pollution of the coastal waters, for instance, was perceived as 'political dynamite' capable of constraining coastal states to take unilateral action

technological and environmental nature. Mention should be made as well of unforeseen pressures which threatened the whole salvage system.

The traditional law of salvage had become quite inadequate to meet the demands of marine salvage for present and future needs.[200] The fundamental reason for believing this assumption to be true is that subsequent issues seemed to confirm it.

Several maritime incidents such as the Torrey Canyon, the Pacific Glory, the Arrow, Amoco Cadiz and others in the sixties and seventies, were all markedly detrimental to the salvage business. They have shown the inadequacy of the traditional salvage system, have combined to catch the attention of the International Maritime Organization and Lloyd's[201] and have contributed to the world wide phenomenon of environmental awareness. The salvage industry has fallen upon hard times.[202] This has lent weight to salvors claiming that the whole salvage system worked against their best interests.[203] As mentioned earlier, marine salvage law has, in recent years, also been undergoing a very considerable upheaval, to the extent that the shipping community has just concluded an almost total revision of the time hallowed salvage principle.[204] International salvage was clearly in a profound transition from an old concept to a new order.

The speed with which commercial, international and shipping interests reacted shows the necessity for transformation and

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in salvage matters or to intervene in salvage operations. This in turn has resulted in maritime leprosy problems.

200 See First Sessions 'Challenges to the salvage industry' Third International Symposium on Marine Salvage, Proceedings, Washington: MTS 1985 9.

201 D Kerr op cit 506.

202 Ibid.

203 M Cohen op cit 271.

204 E Gold op cit 488.

the sense of urgency which has come to surround the issue. Although the existence of the increased problems faced by the salvage industry was generally recognized, the means of rectifying them were subject to a great deal of dispute[205] at various levels.

The starting point in this process was the IMCO decision. In the light of the new developments in marine transportation, IMCO's legal committee decided to review the private and public law of salvage. The task of reviewing the private law of salvage was given to the CMI which formed a subcommittee comprising representatives of the world admiralty and maritime community to study the whole salvage industry, as well as proposals to modify LOF. The main issue at this stage was that increased vessel size, new oil pollution dimension and growing coastal state interest in protecting and preserving its marine environment had combined to make the tanker salvor's position rather unworkable. As a possible solution to these problems, it was suggested that a fresh infusion of capital was necessary.[206] A new source of funds for salvors could be created by a new salvage convention that would force parties to contribute to the salvage award pool.[207] More specifically, the proposition was that a revision, rather than a replacement of the Salvage Convention of 1910 should incorporate the principle of 'liability salvage'.[208] This solution was not only unacceptable but also unworkable[209]

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205 Ibid 50.

206 The nationalization of the industry was excluded as a solution.

207 See the preliminary report by professor E Selvig, Chairman of the CMI Subcommittee.

208 According to this theory, basically supported by the salvage industry, in addition to saving valuable maritime property for the benefit of the shipowner and the cargo owner, the salvor also provided a most valuable service to the shipowner and his liability underwriter in preventing, or minimizing the escape of oil, pollution and third party claims which might have resulted therefrom; see Miller op cit 245.

209 This theory makes sense but it is difficult in practice. the main problem is the evaluation of a

in the context of the realities of the commercial salvage market.

The second stage was the OCIMF salvage committee's study on the matters. It made several radical proposals for modification of the existing salvage regime. One of the suggestions was to put an end to the 'no cure - no pay' principle. Further, the best endeavours clause of LOF should be applied not only to the salvage operations but also to pollution prevention efforts.[210] Accordingly, salvors of an oil tanker should be repaid for all out of pocket expenses related to efforts to salvage the vessel and cargo, as well as for avoiding oil pollution. Beyond this the salvor would be given a bonus of a certain amount which would not be greater than a given percentage of the value of the salvaged property if the salvage operation undertaken were successful. An upper limit was placed on potential salvors' remuneration. This suggestion was later moderated by the proposal that repayment for out of pocket expenses ought to be only for oil pollution prevention expenses. These suggestions were not accepted in general. Nevertheless, some of the basic OCIMF proposals were incorporated in LOF 80.[211]

The third stage was managed by the Lloyd's committee in early 1979 which appointed a working group to review the 1972 edition of LOF. The aim was to draft an updated version that would take into account improvements both that experience had demonstrated were necessary, and that reflected the technical, economic and legal consideration which had to be dealt with in the normal salvage agreement.[212] The group was expanded to include

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speculative risk - which is difficult, because of the common law prejudice against speculative damages; see M Cohen op cit 272.

210 Ibid.

211 G Becker 'Preventing and minimizing pollution damage: industry initiatives' in Ali-Aba Course of Study, Oil-Spills and the Law 1980, Ali Aba 1980 201.

212 A Miller op cit 246.

representatives of the international chamber of shipping, the OCIMF and the international group of protection and indemnity association. This committee formulated the Darling proposals. One of the suggestions from these proposals was that the salvors would be obliged to use their best efforts to prevent the escape of oil from a tanker, although they would have no clean-up obligation, nor be liable for escaped oil. Moreover, shipowners had to create a new pollution fund out of which salvors could be remunerated for successful pollution prevention efforts.[213]

The shipowners and the P & I Club felt that it was inappropriate for them to bear the entire burden of this new remuneration. They understood the economic and political benefits that came from expeditious tanker salvage, but they were disinclined to establish an oil pollution fund for this purpose. The did not accept the idea of liability salvage, and as a result, the fund concept was abandoned.[214] Meanwhile the revision of LOF 72 continued and the revised version was published in May 1980.

It is essential to mention that the major modifications introduced by LOF 80 were designed to encourage salvors to undertake salvage operations involving oil tankers. Obviously the threat of oil pollution was one of the main concerns in drafting LOF 80. The most innovative provision introduced the concept of a 'safety net'.[215] Despite the fact that the new Form retained the 'no cure - no pay' principle, it nevertheless appeared to break with the ancient rule of salvage that a salvor is only compensated from property saved.[216]

LOF 80 was followed by the 1989 Salvage Convention which replaced the out-dated Salvage Convention of 1910. The

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213 The fund was going to be equal to the vessel's limitation fund under CLC.
214 M Cohen op cit 272-3.
215 N Gaskell op cit 105.
216 E Gold op cit 499.

motivation for this new Convention was that if focused on the desirability of uniform international rules relating to marine salvage and the increasing concern for the protection of the environment. It provided greater incentives to for salvors to rescue vessels which present a great pollution threat, after having sustained damage to such an extent that they are economically unattractive to a 'no cure - no pay' contractor. Since the environment is community property, the new Convention has taken the step that salvors must be offered 'adequate incentives' in order to induce them to attempt salvage in unpromising or marginal situations, even where little or no salved value is present.[217] Previously, no incentive of this nature existed.[218] It is relevant to note that the 1989 Convention was greatly inspired by LOF 80 from which it borrowed extensively.[219]

After consultation with shipping, insurance and salvage industries, Lloyd's of London produced LOF 90. This incorporated the essential element of the 1989 Salvage Convention - giving it contractual effect. In the light of experience obtained from 1980 to 1990, it also made many improvements to the previous version.[220] Despite some setbacks and loopholes, LOF 90 recognized the[221] that there should be a thriving salvage industry, existing in a balanced legal regime[222] which took into account the interests of all parties concerned.

2.2 SUBSTANTIAL INNOVATIONS

Having examined pressures and reactions which have brought about a new salvage regime, this paper now turns to analyze some substantial innovations brought by the new system. this will be done mainly in two sections as follows:

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217 D Kerr op cit 507; also see ISU Bulletin (9) 13.
218 G Brice op cit 40.
219 N Gaskell op cit 104-5.
220 A Bishop op cit 1.
221 N Gaskell op cit 104-115.
222 Be they hull, cargo or environmental interests, coastal states, seafarers or passengers.

(A) Does LOF 80 and 90 give sufficient inducement to salvors?

(B) What is the balance of satisfaction? (re: pollution/salvage).

A. Does LOF 80 & 90 give sufficient inducement to salvors?

In modern salvage operations, salvors have three obligations in a given job. These are - salving expensive sophisticated vessels, recovering valuable and often hazardous cargoes, and preventing and minimizing damage to the environment.[223] This accentuates the salvor's duty to provide a high level of care and skill in performing of salvage services.[224] In most maritime casualties, vessels in peril often present an enormous pollution threat. These vessels invariably sustain damage which makes them not only economically unattractive to a 'no cure - no pay' salvage contractor but can also make them become maritime lepers unwelcome in ports. The international community has acknowledged the fact that huge liabilities and environmental harm could be avoided if salvors could be encouraged to attempt salvage operations in unpromising or marginal situations where they might otherwise hesitate.[225] Salvors should be encouraged to perform that kind of service by offering them adequate incentives.[226] It remains to be seen whether the new salvage regime provides sufficient encouragement to salvors. An important development was contained in LOF 80 and 90, and in the 1989 Convention, providing for a 'safety net' and 'special compensation' to resolve this issue.

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223 See Lloyd's List Monday March 22 1993 12.
224 See clause 1 LOF 80 and 90. Also article 8 the 1989 Salvage Convention.
225 N Gaskell op cit 116; also D Kerr op cit 506.
226 G Brice op cit 397.

1. The safety net clause

The history of shipping business provides numerous instances of maritime casualties. The Captain Aegean and others are examples where the salvor's efforts in salvage operations were successful in preventing or minimizing damage to the environment, but the salved property (rather the salved fund) was either non existent or too insignificant to allow an arbitrator to make an encouraging award to the salvage contractor, or to give remuneration which would cover his out-of-pocket expenses.[227] In other cases such as the Escherosheim[228] and the Amoco Cadiz[229], salvage contractors were sued for damage to ships, or for causing pollution in trying to salve vessels.

In response to these issues and the increasing problems faced by the existing salvage regime, several solutions have been proposed, such as liability salvage and the pollution fund, to encourage salvors to undertake perilous operations to protect the environment, and to reward them for doing so.[230] LOF 80 introduced the 'safety net' clause (clause 1(a)). This clause broke completely new ground.[231] A safety net, in the form of an indemnity for expenses, is provided for salvors who fail to earn any salvage award; perhaps because the vessel has sunk after being towed away from the coastline[232] or because of other circumstances. It was felt that only a safety net provision would encourage salvors to undertake the especially difficult salvage operations where the possibility of success was small but the risk of environmental damage was enormous. The safety net clause is a radical departure from traditional and general salvage principles . It has introduced an exception to the hallowed contractual principle of 'no cure - no pay'.[233]

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227 G Brice op cit 42.
228 1976 1 WLR 430.
229 1984 2 LR 304.
230 P Coulthard op cit 499 also Brice op cit 41.
231 G Brice op cit 42.
232 For instance The Atlantic Empress/Agean Captain collision 1979.
233 N Gaskell op cit 105; also Gold op cit 499.

The analysis of clause 1(a) of LOF 80 reveals some important features underlying the safety net provisions. Firstly, it is applicable to three situations: (i) where the services are not successful; (ii) where the services are only partially successful; (iii) where the salvor has been prevented from completing the services. While the first and the third conditions reflect the issue of coastal state intervention in salvage operations as already indicated, the provision on partial success takes into account the issue of valuation.[234]

Secondly, any rights of recovery for the salvor exist only in regard to casualties involving oil. The safety net is limited to incidents where the property being salved is a tanker laden or partly laden with cargo oil. It should be mentioned that LOF 80 does not cover oil spillage from dirty ballast. The safety net clause applies to cases where the oil cargo threatens damage to the environment and it is under no circumstances subject to any territorial limitation. This latter aspect is unique to LOF 80 and marks its advantage over other LOFs, in particular LOF 90.

Thirdly, what the salvage contractor catches in the 'safety net' is his reasonably incurred expenses. This includes out of pocket expenses and a fair rate for all tugs, craft, personnel and other equipment used by the salvor during salvage operations. In addition, the salvage contractor receives an increment of up to 15% thereof as a profit margin, but only if, and to the extent that, the total amount does not exceed any available award under the Form. It should be made clear that the amount of the expenses plus the 15% increment is the maximum that the salvage contractor can recover under LOF 80, regardless of the circumstances of the salvage services rendered.[235]

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234 A Wilbrahim op cit 56.
235 P Coulthard op cit 57; also Cohen op cit 274.

Fourthly, in all the cases mentioned above, it is the shipowner who is responsible for paying the costs and expenses. The reason for this LOF tanker only arrangement is that insurance exists and the safety net award is borne by the tanker owner's P & I Club, thus ensuring that payment of the sums due will be made. This is very important for the anti-pollution scheme because it is little comfort to any contractor to have a right of recovery if in practice there is no means of enforcing such right.[236]

Aside from these features, the safety net clause merits some further comments. On the issue of valuation mentioned earlier, often the salved value of property is so low that any award based thereon will not provide adequate remuneration to the contractor. Wilbrahim notes that[237] limiting the availability of the safety net to cases where it exceeds the amount 'otherwise recoverable', is only relevant in cases of partial success, since in the two other situations there is no property salved and consequently no other award is forthcoming. The exception to 'no cure - no pay' reveals itself under these conditions as a 'safety net', providing remuneration only when that which is traditionally available fails to be enough to satisfy the salvor. Nevertheless, the approach retains the 'no cure - no pay' principle as the basic policy of LOF. It is an apparent recognition of the preference suggested by the salvage industry.

Oil limitation in the safety net clause disregards the fact that other cargoes also present great danger to the environment. The exclusion of vessels laden with chemicals, or vessels whose bunkers threaten environmental damage is a major deficiency when seen in the context of the motivation advanced for changes in the LOF. Similarly, it stands to reason that a VLCC in ballast which might be carrying up to a thousand tons of oil in an oil water mixture will not come

236 G Brice op cit 37.
237 A Wilbrahim op cit 56.

under the safety net exception. As a result, the salvage contractor will remain unprotected against the rigors of the 'no cure - no pay' principle in all of these cases.[238]

Within the concept of incurred 'expenses' described above, it should be observed that 'expenses' are not only subject to reasonable limits but also provide a fertile ground for dispute. The fact that these expenses do not take into account other factors which traditionally affect the contractor's remuneration (such as the degree of risk, the condition of the endangered salvageable property, the difficulty of the operations as well as the loss of opportunity to underwrite other salvage labour[239]) is an important deficiency in the safety net clause. Take a case in which, for example, all of the abovementioned factors are taken into account in determining the percentage of expenses to be included as an increment in safety net remuneration. While other factors might be high if the actual expenses are low, it might be argued that even a remuneration of expenses plus 15% may not be adequate remuneration for the salvage services provided.[240] Most of the deficiencies, omissions and defects were related to areas where further revision of marine salvage law and practice was needed.[241]

2. The special compensation clause

In a second important development of the Form ten years later, a new edition of LOF was introduced. Known as 'LOF 1990', this recent version of LOF not only incorporates the essential element of the 1989 Salvage Convention but in the light of experience gained since LOF 80, it makes some major changes in the contractual salvage area as well as to the previous version.[242] LOF 90 introduced the concept of 'Special Compensation' which appears to be an improved

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238 P Coulthard op cit 57.
239 Kennedy op cit 176-210.
240 Coulthard op cit 58.
241 See L Knats 'Lloyd's Open Form, Salvage Agreement Charged' (1980) Seaways 11.
242 A Bishop op cit 1.

version of the 'safety net' clause. Special compensation, borrowed from the 1989 Salvage Convention, was the result of the famous 'Montreal Compromise'. This balancing of insurance interests, denominated as 'neither equitable nor logical' but the best that could be reached to accommodate the various interests involved[243], was extended to circumstances not involving oil tankers where there were casualties that threatened the environment, generally such as for instance by chemical contamination.[244]
largely reached behind the scenes, the 'Montreal Compromise' was an agreement between those arguing for salvors and those who were likely to have to meet payments to them. Accordingly, the salvors abandoned some o their more radical proposals, such as the concept of liability salvage or a 300% safety net. In return, representatives of shipowners, cargo owners and insurers accepted certain provisions that would increase their existing liabilities. The core compensation provisions of the 'Montreal Compromise' should be considered as a package because there was to be a balance in the liability for paying for pollution prevention between vessel and cargo interests. Although nobody was happy with everything, the need to reach agreement was considered as supreme.[245]

Article 14 LOF 90, Special Compensation, reads as follows:

1. If the salvor has carried out salvage operations in respect of a vessel, which by itself or its cargo, threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

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243 E Gold op cit 499.
244 N Gaskell op cit 105.
245 N Gaskell op cit 7.

2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

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

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

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

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

It is worth stating at this point that firstly this article is concerned only with salvage operations in respect of a

vessel.[246] It is not concerned with pure antipollution measures unrelated with a salvage operation such as, for instance, cargo recovery unconnected with vessel salvage or operations to recover a container of dangerous chemicals that has been washed overboard. This is an unfortunate situation. A quick action, although not salvage service, to recover dangerous cargo lost overboard could avert major environmental damage. Notwithstanding this, the exclusion is logical if only for the reasons that article 14 payments are made by shipowners.[247]

Secondly, it should be observed that article 14 substantially enlarges the old safety net provision of LOF 80 in two major ways, namely: on the one hand, special compensation is payable in respect of damage to the environment. The concept is thus wider than damage for oil pollution.[248] On the other hand, the increment could be

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246 For example a vessel that was itself in danger had deliberately jettisoned cargo or if it had been lost overboard during an emergency.

247 In this respect, normally there should be no difficulty in obtaining payment if the shipowner's vessel is entered in a P & I Club covering the liability of paying sums owed under article 14. The salvage contractor might consider in rem proceedings against (say) the salved vessel or a sister ship if the liability is not covered and the shipowner does not have adequate assets to enforce a judgment in an in personam action. It should be mentioned that 'special compensation' is not included in the list of maritime claims in the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, Brussels, May 10 1952 (See International Convention on Maritime Law, Texts CMI (1987) 97. Also it may well not be 'salvage' carrying a maritime or 'statutory' lien. Mention should be made of the fact that payments made pursuant to article 14 are not intended to be allowed in general average. It is excluded therefore that the shipowner who has made a payment of special compensation under article 14 recover it back from cargo owners in generally average (unless there is an amendment of rule 6 of the York-Antwerp Rules, 1979); see G Brice op cit 45; N Gaskell op cit 56.

248 Damage to the environment is defined as meaning 'substantial physical danger to human health or marine life or resources in coastal or inland waters or areas

greater than 15% and could be increased by up to a maximum of 100%.

Thirdly, we must distinguish carefully between the two possible types of special compensation in article 14. First, under article 14(1), if the salvor carries out salvage operations on property which threatens damage the environment, but these have been unsuccessful in preventing or minimizing damage, the salvor will be entitled to at least his expenses, viz a fair rate for equipment and personnel used as defined in article 14(3). The result is that even if the salvor fails to protect the environment, he will be entitled to some recompense whenever there is such a threat of damage to the environment. Second, under article 14(2), if the salvor has been successful in preventing or minimizing damage to the environment, he will be entitled to his expenses, plus an increment which could be as much as 100% of those expenses. The arbitrator has the discretion to allow such an increment if he thinks it fair and just to do so.[249] There is a strong possibility that the salvor will receive a minimum payment under certain circumstances. If the property is salved but the normal remuneration under the criteria of article 13 does not amount to the minimum, special compensation will make up the difference. If no property is salved, and therefore there is no normal award, the 'special compensation' will equal the minimum payment. The special compensation is an important development and represents a transformation from the hallowed 'no cure - no pay' regime of marine salvage. This means that in many cases calculations will have to be made as to the amount due to the salvor under article 14 so the resultant figure can be compared with a normal award under article 13, hereby ensuring that the minimum is always obtained. Not

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adjacent thereto, caused by pollution, contamination, ire, explosion or similar major incidents'; see article 1(d).

249 At the first stage, the increment is up to 30%.

surprisingly, special compensation involves extra work for the representatives of all parties to a LOF contract.[250]

This brings to us a number of ancillary problems which have arisen in connection with these changes brought about by the special compensation clause. First the salvor cannot always expect security to be provided automatically although on the one hand there is an understanding that this is a liability which will be met by the P & I Clubs and on the other hand LOF 90 makes it clear that the owners shall provide security for special compensation.[251]

According to Bishop[252], clubs are not enthusiastic about providing security for such claims if they feel that they may have a defence to any claim by the owner. Usually, there is very little to arrest or attach to compel individual shipowners to furnish security. In these circumstances, the only remedy available to the salvage contractor against a ship which has been lost, or which is of insufficient value, is to apply for a mareva injuncton on the hull and machinery insurance policies. Bishop concludes however that the salvor will too often find these have

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250 A Bishop op cit 3.

251 Clause 4(b).

252 Other problems in connection with security are in cases where an ordinary salvage claim under article 13 is not sufficient with the result that there will be an extra claim for compensation under article 14, obviously it is difficult to estimate the amount in the early stages where there will be claims for special compensation. It is possible that security is only need as a measure taken beforehand. Mention should be made of another difficulty which arises with clause 4(b) of LOF 90. This provides that where the exception to the maxim 'no cure - no pay' under article 14 is applicable, the owners of the vessel shall, on the demand of the contractor, furnish security for the salvor's special compensation. The main problem here is when the contractor thinks that such claim is probably but the owner of the salved property does not. In the absence of any constraining force which can be applied, it leaves the salvor with the option of making a preliminary demand to the Arbitration for an appropriate order; see Bishop op cit 10.

already been assigned or that they are subject to an unsympathetic jurisdiction where they are not easily attached.

Second, the special compensation clause appears to be in practice more restrictive in its geographic applicability. This seems to be in contradiction with LOF 80. The new Form has led to some deviation from environmental concerns and the basic principle of 'safety net' when it places a limit on the geographical area within which the salvor can claim to have carried out his anti-pollution efforts in a salvage operation. Accordingly, special compensation applies only when the threat of damage to the environment is in coastal or inland waters or areas adjacent thereto. A standard example of this given by some salvage commentators is that of a large oil tanker which gets into trouble in mid ocean. Despite every effort to salve her and contain oil leakage, she sinks. If the salvor uses LOF 90, he is then faced with the problem of establishing that he has minimized damage to environment, whereas under LOF 80 there is no such difficulty.[253] It stands to reason that because of the geographical confinement of LOF 90, compensation is ruled out.

For the salvage contractor the loss can be quite substantial. It follows therefore that the salvor is better off under LOF 80 in certain circumstances. Seemingly there is no reason why the salvor should not use LOF 80 in preference to LOF 90 especially where it is in his best interests. Nevertheless, this is an enormous loophole in LOF 90. Although LOF 90 should face competition from the old Form. It should at least be preferable to LOF 80 because of the recent innovation it contains. Nevertheless, LOF 90 can be the better solution for salvors in salvage

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253 See Lloyd's List, Monday 21 March 1994 6.

operations involving laden tankers outside coastal or inland waters or areas adjacent thereto.[254]

The inescapable conclusion which emerges from the analysis of the 'safety net' clause and special compensation article is that these provisions are a significant step forward in building better environment protection into the traditional salvage service. On the other hand, they reflect the improvement of the salvor's chance of remuneration since for many years LOF, based on the principle of no cure - no pay, was virtually a gambling business for salvors. Progress made cannot be denied. Nevertheless, one still wonders whether these special remuneration schemes provide the necessary incentive to induce salvors to risk the difficulties associated with environmentally sensitive salvage operations or rather salvage services in general.

However, one might reasonably conclude that, although the 'safety net' is a radical departure from the 'no cure - no pay' system, it appears that this provision has been too moderate to accommodate inducement for salvors. To some extent this is understandable since the shipowner bears the cost of remuneration recoverable under the 'safety net' clause. This is also due to the difficulties posed by the concept of liability salvage as already indicated. In abandoning this cautious approach, special compensation widened the scope of the previous scheme in respect of any vessel which by itself or its cargo threatens damage to the environment and increased the salvor's increment. However, the revised wording of LOF 90 has introduced the anomaly of geographical confinement to coastal waters only. This is a deficiency in the light of the purpose for which special

254 P Coulthard op cit 58. Where salvage operations involve vessels other than tankers with special compensation being an important issue and where the applicability of the special compensation clause is not certain because of geographic confinement, it would be advisable for a salvage contractor to consult with the owner's P & I insurers before signing LOF 90. See Bishop op cit 10.

compensation was intended. It can rule out any form of compensation for salvors under certain circumstances. Many problems are likely to arise from this loophole. For instance, most maritime countries have territorial limits of 12nm but exclusive fishing rights of 200nm and 50nm pollution zones. Furthermore, despite the apparent superiority of special compensation over 'no cure - no pay', the salvor is faced with the problem of proving that he has minimized damage to the environment[255], whereas under LOF 80, there is no such difficulty. Obviously, it stands to reason that the salvor could be denied an increment under certain circumstances. It is thus not surprising that LOF 90 could sometimes be a discouragement to salvage efforts because of the unsettled issues arising out of the application of the special compensation clause.

So far there is still room for change. On the other hand, the most satisfactory conclusions we can come to is that despite all the deficiencies, 'safety net' and 'special compensation' provisions must be considered as an improvement of the salvor's remuneration situation particularly in the light of the growing problems of the salvage industry. One would assume that without these clauses the salvor's situation, based solely on a 'no - cure no pay' salvage agreement, would nowadays be worse. The continuing salvor's battle to make the vessel's pollution capacity insurable has somewhat succeeded with the introduction of the 'safety net' and 'special compensation.' The real gains of the salvor cannot be ignored.[256] Salvors have achieved two major objectives through the safety net and 'special compensation'. Firstly, preventing and minimizing danger to the environment are now not only accepted in principle, but are also compensated as part of salvage services. The concept of salvage services has therefore been extended for the benefit of salvors, cargo owners, shipowners, underwriters and coastal states. Most

255 See article 14(2).
256 M Cohen op cit 277.

importantly the salvage industry can operate quite well under these provisions.[257] Secondly, in cases where the salvage effort is a total failure, salvors have gained a remarkable concession through the 'safety net' and 'special compensation'. This can induce them to make an attempt with the assurance of receiving at least their money back (expenses incurred) basically in situations where they would have turned their backs because of the vulnerability of substantial salved value.[258] Compared with the old system, this is an important improvement upon the traditional salvage concept and in particular the 'no cure - no pay' salvage agreement under the old OF. This represents enormous progress. The safety net and special compensation have changed the salvor's situation, from 'no cure - no pay' to 'no cure - some pay' and even to cost plus contract.[259] It is undeniable that for the modern salvor, these clauses offer more beneficial contractual arrangements than the harsh historic 'no cure - no pay' system as well as other traditional salvage concepts. In conclusion, it should be stressed that there is much to be said on both sides of the issue of the salvor's inducement. On balance, however, the argument for inducement rather than disincentive tends to prevail. We must acknowledge the sufficiency of the inducement in the fact that the possibility of unsuccessful salvage is mitigated by the possibility of recovering at least the cost of the salvage service and where applicable, an increment to expenses incurred as marginal profit. We are therefore of the opinion that to this extent, the parameters of the safety net and special compensation provisions demonstrate sufficient encouragement for salvors. Salvage contractors fears related to laden tanker salvage or of other laden vessels should be allayed. In the words of Cohen[260] theoretically, a salvor can now do no worse than break even on tanker salvage agreements.

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257 P Coulthard op cit 501.
258 D Kerr op cit 515.
259 M Cohen op cit 277.
260 M Cohen op cit 274.

B. What is the balance of satisfaction? (Re pollution/salvage)

While the law of salvage has itself remained essentially constant over the past century, the shipping industry has undergone dramatic changes. The world's fleet and its gross tonnage has increased.[261] Two thirds of this tonnage total consists of bulk cargoes, a high proportion of which are pollutants. This means that every day millions of tonnes of cargoes of all sorts, in particular those with large potential to cause pollution, are carried in greater quantities at sea.[262] Moreover, the salvor's sphere of work has expanded to large VLCC, offshore drilling rigs and production platforms, container vessels and ships carrying liquid gas or chemicals.[263] Obviously, today in dealing with modern salvage, salvors are faced with an ever increasing volume and variety of dangerous cargoes shipped by sea. The effect of the loss of such quantities of toxic cargoes on the environment is much more readily appreciated, especially after the stranding of the oil tankers Torrey Canyon (1967), Amoco Cadiz (1978) and Exxon Valdez (1989).[264]

As already indicated, the traditional law of marine salvage has been enormously affected by environmental considerations over the past decades and more than ever before. LOF 80 and 90 reflect these concerns. The recently revised Forms provide the shipping business with a viable new salvage regime which accommodates the salvor's interests, while at the same time, protecting the environment against pollution. In this respect, the 'safety net' clause of LOF 80 had for the first time created an obligation on salvors performing salvage operations to prevent oil escapes from tankers. Although it was not clearly stated in the salvage agreement,

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261 P Coulthard op cit 46.
262 N Gaskell op cit 5.
263 See Lloyd's List 22 March 1993 12.
264 N Gaskell op cit 5.

it was understood that the aim of incorporating such obligation was to permit arbitrators to allocate to salvors a higher recompense than usual to reflect the extent of pollution prevention efforts required of them.[265] Unfortunately, LOF 80 was restricted to oil pollution only and needed to be extended to cover other toxic and hazardous cargoes. This was achieved by LOF 90. The salvor's duties have been expanded beyond the previous obligations to include not only the traditional salvage service but also a further obligation in connection with pollution. The standard of care was raised to prevent and minimize damage to the environment. There is similarity of duty between LOF 80 and 90. However, the standard of care here (LOF 90) seems far more onerous. This appears from the 'special compensation' provision and the definition of damage to the environment which contains a broad interpretation of both environment and damage. In this context, damage to the environment means 'substantial physical damage to human health or to marine life resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents'. The parameters of this new duty demonstrate a more open-minded approach to the fight against pollution.

Since the adoption of 'safety net' provisions, the international legal community and the shipping business market has acknowledged that enormous liabilities and environmental harm would be avoided if salvors could be encouraged to become involved in incidents where they might otherwise hesitate.[266] The fight against pollution requires some costs sacrifices from all sectors of the shipping business. We have to consider the marine environment as a community interest in order to achieve something.

In this context, the special compensation clause of LOF 90 rewards salvor's efforts in preventing or minimizing damage

265 N Gaskell op cit 51.
266 N Gaskell op cit 116.

to the environment. There is an incentive for salvors to involve themselves in such operations as are determined necessary to prevent or minimize the escape of dangerous cargoes from ship into the sea, and thereby reduce the risk of damage to living resources in the sea and to amenities on the shore.[267] But this anti-pollution clause is limited. In the light of these considerations it would appear then that the ultimate issue raised by the balance of satisfaction has a possible twofold answer. From one point of view, the pollution situation is unbalanced because of the geographic restriction of LOF 90 the limitation of the 'safety net' clause to oil and the potential problem with the definition of damage to the environment. It is obvious that pollution in mid-ocean can be as damaging to the environment as pollution closer inshore and that the exclusion rather than the limitation is out of step with 'green' thinking and the very purpose of the new salvage regime.[268] On balance, this places the salvor in a disadvantageous position because under these restricted circumstances the loss for him can be substantial. To this extent the changes in LOF 80 as well as LOF 90 seems not to be significant and are unbalanced, not only for pollution but also for salvage.

On the other hand, it has been accepted in principle that salvors should be paid for protecting and minimizing damage to the environment. They should be given enough incentives to encourage them to respond to pollution threats, even where little or no salved value is present.[269]

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267 C Foster & J Burgoyne 'Dangerous cargoes and salvage' (1989) 8 ISU Bulletin 14.

268 A Bishop op cit 10.

269 See ISU Bulletin No 8 1989 10. To illustrate this, take the case of the Katina P (1993) a 70 000 dwt tanker which broke her back and sank off the Mozambique coast. Following reports that the tanker had suffered structural damage in a storm, a salvage response was mobilized. The ship was found to be in a dangerous condition. She was slowly towed to safety. Unfortunately, the tanker's condition continued to deteriorate to the point that her total loss was inevitable. Nevertheless, massive coastal pollution was prevented.

LOF 80 and 90 have enormously increased the salvor's duty. They have required a higher standard of care in salvage operation related to pollution. They have provided a better remuneration (amounting to at least the cost of the operations plus an increment) for salvors - when they undertake environmentally sensitive salvage which carries a potential risk of pollution. The inference is that LOF has struck a satisfactory balance between pollution and salvage. As already mentioned, the marine environment is community property and thus needs protection. The issue of pollution concerns all ocean users. Its costs and the means of defence have to be spread equitably between all sectors of the shipping business. LOF 80 and 90 have provided, to some extent, an acceptable regime to achieve this goal.[270] Since LOF of Salvage Agreement is the most widely used and internationally recognized salvage contract, the 1980 and 1990 revisions carry some considerable weight in the international effort against maritime pollution.[271]

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270 E Gold op cit 503.
271 See Lloyd's List Monday March 21 1994 6.

CHAPTER III

CONCLUSION

Having begun as a simple arbitration agreement intended to resolve disputes about salvage remuneration, LOF has unavoidably become a highly developed and complex contractual instrument at the service of the modern shipping and salvage industry.[272] Despite the fact that the sacrosanct principle of the Form, which was to avoid haggling when a vessel was in danger, did not change since its introduction, the rapid development of modern shipping has led to transformation, thus bringing LOF more in tune with current requirements of maritime realities.[273] LOF 80 and 90 were born of this latter necessity.

LOF 80 achieved the first major change when it introduced a number of novel features beneficial to the salvage contractor, especially the 'safety net' clause. This was a tanker-only arrangement limited to oil. LOF 90 was the second step. It widened the scope of noxious and hazardous substances, improved the 'safety net' clause, known now as 'special compensation', and consequently enlarged the range of the exception to the 'no cure - no pay' principle. It also incorporated the main provisions of the 1989 Convention, giving them contractual effect. This clearly puts LOF 90 ahead of international legislation[274] by placing an obligation on the salvage contractor to prevent and minimize damage to the environment, while at the same time guaranteeing him recompense for such efforts.

One of the most important successes achieved by both Forms is the exception to the long established principle of 'no cure - no pay'. For many years, this principle had worked well. But nowadays, it does not address the problem presented by maritime casualties in which there is a threat of massive oil pollution (or pollution from other noxious

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272 Supra; also N Gaskell op cit 115.
273 See Lloyd's List Monday March 21 1994 6.
274 See supra.

substances), the costs of which could far exceed the value of both vessel and its cargo.[275] Despite the fact that LOF 80 and 90 have carefully retained the hallowed 'no cure - no pay' principle, the 'safety net' clause and 'special compensation' article did considerable violence to the maxim when they appeared to break the ancient rule of traditional marine salvage that a salvor is only compensated from the salved property fund.[276] The incorporation of the exception to the 'no cure - no pay' principle was a radical departure from the very essence of LOF. This reveals a major improvement upon the old marine salvage concept. While for many years, the 'no cure - no pay' principle had left the salvors unrewarded, the exception has increased their chances of remuneration. The compensation scheme of these revised Forms is aimed at ensuring that salvage operations will be available where the possibility of successfully salvaging the vessel is slim, but where salvage is necessary to prevent and minimize pollution. Under these provisions it is thus generally accepted that there should be an appropriate incentive for a salvage contractor to undertake salvage for preserving the environment in such circumstances.[277] LOF 80 and 90 have softened the harsh principle of 'no cure - no pay' by introducing better environment protection into the old salvage service. Most important of all, faced with the growing problem of modern salvage, they appear to be something that not only the salvage industry can work under but also something that can resolve its problems.[278]

As far as LOF 80 and 90 is concerned, the traditional concept of marine salvage 'no cure - no pay' and a liberal remuneration in the event of success will only continue in the few cases which are not covered by the 'safety net' and 'special compensation'. The trend in world shipping points

275 See C Srivastava 'The IMO's work in connection with salvage' (1986) 5 ISU Bulletin 1.
276 See supra.
277 C Srivastava op cit 1.
278 P Coulthard op cit 501.

to a still greater crisis looming, especially because of the advancing age profile of world shipping, notably tankers, with all its worrying implications for the safety of the environment. These revised Forms will certainly be of greater benefit to the salvage industry which is moving steadily into the field of rapid response and pollution prevention.[279] The use of LOF 80 and 90 by the shipping and salvage industries makes an enormous contribution to international efforts to ensure the availability of expeditious and efficient salvage services which will help to save vessels and their cargoes from danger at sea, prevent pollution of the marine environment by vessel-borne substances and give the salvage contractor a better chance of remuneration.

In the light of these considerations, the writer is of opinion that in general, that LOF 80 and 90 have served the precise purposes to the extent for which they were intended.[280] The recently revised Forms have succeeded. They have achieved some effectiveness for the existing contractual salvage law. Ultimately, then, despite the fact that LOF 80 and 90 were not a panacea for all the problems of modern commercial salvage and salvors, certainly in the final analysis it is undeniably true that these Forms have succeeded in attaining most of their objectives.

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279 See Lloyd's List Monday 21 March 1994 4.

280 The purpose was to adapt to changing conditions in order to be in tune with current requirements, developing conditions and transformation in the shipping and salvage industries.

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