

PART D

COMMENTS ON THE DRAFT CONVENTION ON SALVAGE AS APPROVED AT
MONTREAL

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1. The Draft Convention on Salvage in its present form includes the result of several compromises between competing views. It bears on its face the marks of these compromises as well as most of the familiar attributes of a document that has been drafted in committee. Thus, while it provides the answers to many questions and also a basis for further action, it should not in its present form be treated as providing a fully codified basis for ascertaining the rights and liabilities of parties affected by salvage operations.
2. A major underlying difficulty is that the Draft Convention attempts, not always successfully, to provide a uniform set of rules for three very disparate cases:
 - (a) Salvage operations involving oil tankers where there is a risk of a major spillage of oil and consequent wide-spread damage;
 - (b) traditional salvage operations in which the major concern is the rescue of a vessel and its cargo and
 - (c) salvage of property not falling into either of the two first mentioned cases.

The definition of "salvage operations" is an extremely broad one. It means:

"Any act or activity undertaken to assist a vessel or any property in danger in whatever waters the act or activity takes place."

The definition of "vessel" is limited to something "capable of navigation", but the definition of "property" is not so limited. Indeed, the Draft Convention contains no exhaustive definition of "property" at all. It is not clear whether it is intended to be limited to property which is or has been on board a vessel in danger (being fittings of that vessel, cargo or freight relating to such cargo) or whether it is intended to cover fixed structures and, indeed, anything else incapable of navigation. If it is intended to go beyond property which is or was on board a vessel in danger, then severe difficulties arise with the later articles of the Draft Convention. Many of these articles seem to assume that there is a vessel in danger in fixing the rights and liabilities of the various parties. If this is not the case, or if the property was not cargo or otherwise aboard the vessel in danger, then many of the relevant rights and liabilities are left undefined.

3. It is also to be noticed that the definition of "salvage operations" refers to "any act or activity undertaken to assist a vessel or any property in danger." This is to go

well beyond the traditional view of salvage as "the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward." Two points should be noted. First, the concept of assistance appears to be much wider than the concept of recovery of property or of attempting to recover property. Secondly, the definition would appear to embrace cases in which various persons render different types of assistance. Thus the category of persons engaged in "salvage operations" is, potentially at least, a much larger one than if the concept was confined within its traditional boundaries. This may lead to special problems in apportioning liability and entitlement to control of the salvage operation or to reward. It is not clear that the provisions of chapter 3 adequately take into account the potentially expanded category of salvors arising from the new definition of "salvage operations".

4. Another new concept which has potentially far reaching consequences is that of "damage to the environment". This is defined as:

"Substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, explosion, contamination, fire or similar major incidents."

The obvious example is that of an oil spill. It will be noted that the definition does not refer to damage to property. Indeed, it was not intended at Montreal that it should cover individual items of property. However, the introduction of the concept of "resources" may well lead to serious difficulties of definition. In common parlance this has at least two distinct meanings. It can refer to things that are capable of being taken away, such as timber, minerals and so forth; it can also refer to places of and facilities for recreation, such as beaches and playgrounds. Since marine life is dealt with explicitly in the definition, the resources most at risk would appear to be of the latter kind. However, a variety of fixtures capable of being damaged by oil or other pollution may form part of the latter category of resources. It would seem desirable to have more certainty as to precisely what resources are sought to be protected by the Convention.

5. Another and, perhaps, unavoidable difficulty lies in deciding at what point physical damage becomes "substantial" or at what time an incident becomes "major". The difficulty here is the extremely wide variation in the extent of damage that can be caused by marine accidents. Even the most minor consequence of a serious oil spill may be very large compared with the potential damage caused by an overwhelming disaster to a smaller vessel.

6. The broad definition of "salvage operations" has the consequence that many public authorities concerned with the regulation of marine activities or with providing assistance to shipping may become salvors within the terms of the Draft Convention even if their activities do not fall within the conventional concept of salvage operations. It is therefore highly desirable that the rights and liabilities of all such authorities should be clearly defined. Such public authorities will generally be under a statutory duty to perform their acts and activities whether or not these come within the expanded definition of "salvage operations". However, it is too much to hope that in all such cases municipal law will deal with the extent to which such public authorities may avail themselves of the rights and remedies provided for in the Convention. Accordingly, it would appear undesirable to leave this aspect entirely to municipal law as does article 1-3-3.
7. A further problem introduced by the broad definition of "salvage operations" concerns the opting out provision (article 1-4). This article gives parties to a salvage contract the option to opt out of the Convention. Provided one accepts the principle of opting out, this provides a satisfactory mechanism in conventional salvage cases where there is expressly or by implication a salvage contract of the usual form. However, the position of a person who renders assistance within the extended concept of "salvage operations" but without the existence of a contract (for instance, public bodies and other persons rendering assistance not specifically directed to actual saving of property) is not provided for. It therefore appears that persons more peripherally concerned with salvage operations may find that the Convention applies to them regardless of the wishes of the parties whereas the persons more directly concerned are able to opt out.
8. Article 1-5, which deals with invalid contracts or contractual terms, represents another uneasy compromise. It provides:

"A contract or any terms thereof may be annulled or modified if:

- (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable, or,
- (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered."

Most traditional salvage contracts are entered into under the influence of danger; accordingly, the major test imposed by (a) is that the contract should be "inequitable". Unfortunately, this is a concept which has widely different

meanings in different jurisdictions. (Compare, for instance, the diverse approaches of Japanese and Australian law to cases in which a contract has been entered into a good faith but there has been a subsequent change of external circumstances.) On a Japanese view, the subject matter of paragraph (b) may well be fully covered by paragraph (a). This would not, however, be the case in some other jurisdictions. In the case of paragraph (b) the test is made by comparing the amount of payment under a contract with the "services actually rendered". This test is somewhat difficult to reconcile with the test posed by article 3-2 which takes into account a variety of circumstances and is not limited to the services actually rendered. More generally, article 1-5 appears to suffer from two major difficulties. First, it is expressed in vague terms capable of a wide diversity of meanings. Secondly, the annulling or modification of a contract is a very drastic step, yet no machinery is provided explaining how and by whom this may be done. If the only way in which it can be done is by commencing arbitration proceedings, the parties will not know whether the contract is valid until well after the relevant events take place. By then it is too late for them to take any invalidity of the contract into account in the conduct of the salvage operations.

9. Article 2-1 deals with the duty of the owner and master of a vessel in danger. It illustrates some of the gaps left in the Draft Convention as a result of the expanded concept of salvage operations. While the definition of "salvage operations" applies not only to a vessel in danger but also to "any property in danger", the duties imposed on the owner by the first two paragraphs of article 2-1 are limited to an owner of a vessel in danger. This provides no real problem if the concept of "any property" is limited to property originally on board a vessel in danger. However, if it has a wider connotation, the duties of the relevant owner are not specified. Secondly, it will be noted that paragraphs 1 and 2 of article 2-1 appear to be drafted on the assumption that even if more than one salvor is involved in the salvage operations, all salvors will be, directing their efforts to substantially the same task. This is not necessarily so under the extended definition of "salvage operations" and this fact gives rise to drafting difficulties. In particular, the duty of the owner and master of a vessel in danger to require or accept the services of another salvor arise "whenever it reasonably appears that the salvor already effecting salvage operations cannot complete them alone within a reasonable time or his capabilities are inadequate". This should be expanded to deal with the case in which an original salvor is perfectly capable of carrying through to completion the limited range of "salvage operations" on which he has embarked but where there are salvage operations of a different sort on which he will not embark.

10. Similarly, under article 2-2-1, the salvor is required to use his best endeavours to save the vessel and property. This requirement is perfectly intelligible when applied to the traditional concept of salvage operations. With the new broader definition in which a salvor may be rendering a more limited type of assistance it may be inappropriate.
11. Article 2-2-1 also provides that the salvor in carrying out the salvage operations, shall also use his best endeavours to prevent or minimize damage to the environment. It should be made clear whether the salvor's obligation in this respect is limited to damage to the environment arising as a result of that salvor's salvage operations. Another possibility is that the salvor has an obligation when once embarked on salvage operations to prevent or minimize damage which would occur in the future but for his intervention. (For instance, the vessel may be leaking oil and the salvor may be obliged to use his best endeavours to stop the leak.) A final possibility is that this article obliges the salvor to undertake mopping up operations. This would, of course, be potentially very onerous. A further point is that the extent of the salvor's obligations may depend on whether he has undertaken limited or general salvage operations. Finally, the article leaves unclear which of the two duties (that of salvaging the vessel and property and that of preventing or minimizing damage to the environment) is to be treated as paramount.
12. Article 2-2-2 imposes as duty on the salvor in certain circumstances to accept the intervention of other salvors. Unfortunately these circumstances are limited to the case set out in article 2-1-2 and are thus subject to the difficulties outlined above in cases where various salvors may be required to carry out various disparate tasks.
13. Article 2-4 requires contracting States to take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general. The concept of damage to the environment in general appears to be broader than the concept of "damage to the environment" as defined in article 1-1-4. If this is intended, further guidance should be provided as to its meaning. The heart may well sink at the idea of co-operation with "other interested parties", but this is a matter of policy rather than drafting.
14. Chapter 3 of the Draft Convention deals with the rights of salvors. Article 3-2-1 sets out the various considerations to be taken into account in fixing the amount of the reward. Some of these are new and may require further clarification. Paragraph (b) lists as one of the considerations "the skill and efforts of the salvors in preventing or minimizing

damage to the environment". It should be made clear whether this envisages damage to the environment arising as a direct result of the salvage operations or whether it contemplates that the salvage operations should consist of or include the further operations referred to in paragraph 11 of these comments. Paragraph (i) lists as one of the considerations "the state of readiness and efficiency of the salvor's equipment and the value thereof." Consistently with the idea of encouraging salvage operations, it would appear that the greater the value of the equipment used the greater the reward that should be available. This provision thus looks at the salvage operation from the salvor's point of view and rewards him taking into account the value of the equipment that he uses. It would seem to do this whether or not the equipment is strictly necessary for the immediate salvage purpose. While this would seem to be eminently fair, it is difficult to reconcile this idea with the terms of article 1-5 which allows a contract of salvage to be annulled or modified where the payment under the contract is in an excessive degree too large for the services actually rendered. This latter position clearly looks to what is done and the value of it to the owner. This is quite different from looking at what equipment is used from the salvor's point of view.

15. Article 3-3 deals with the additional reward available to the salvor who has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment. If by his salvage operations he prevents or minimizes damage to the environment, his reward may be increased. However, there is a limitation that in no event shall it be more than doubled. This limitation presumably arises from a perceived need to limit the liability of the owner. However, it is to be noted that the damage that may be caused to the environment could be wholly unrelated to the ordinary reward that the salvor would be able to obtain. Accordingly, there may be something to be said as a matter of policy for obliging the owner to bear a larger loss than this limitation would allow.

16. Article 3-3-3 again raises the question of what is to happen where the salvor has available on his vessel equipment which is much more expensive and specialised than is actually needed to effect the particular salvage operation. While he is conducting his salvage operation, this equipment may be unavailable for other purposes. Accordingly, from the salvor's point of view it is reasonable that he should be compensated for this. However, article 3-3-3 limits the salvor's expenses in this respect to a fair rate for equipment actually and reasonably used in the salvage operation. This article was settled as a result of compromise, but the question arises whether the compromise takes adequate account of the need to encourage salvors to embark on salvage operations.

17. Article 3-3-5 provides:

"If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any payment due under this Article".

It is to be noted that this article does not refer to damage caused by the salvor in the course of his salvage operations, but rather to damage which he has failed to prevent or minimize. The use of the word "negligently" suggests that he had some duty of care so to prevent or minimize it. However, the nature and extent of this duty of care is unclear. It is desirable that the Convention should deal with this matter.

18. Article 3-5-2 provides:

"A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the remuneration awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment."

The idea appears to be that a total sum is fixed in respect to salvaging the vessel or other property and in preventing or minimizing damage to the environment and then this is apportioned not only between those concerned with salvaging the vessel or other property or preventing or minimizing damage to the environment, but also amongst any salvors of human life. It is difficult to see why other salvors, other than the salvors of human life, should be forced to forgo some of the remuneration to which they would ordinarily be entitled in these circumstances. If the view is that a salvor of human life is entitled to his reward, this should be at the expense of someone other than the other salvors.

19. Article 3-7 provides for a penalty in the event of a salvor's mis-conduct. Once again this introduces the concept of "neglect". For reasons set out above, it is desirable that this should be explained more fully.

20. Chapter IV deals with claims and actions. It introduces a concept of "satisfactory security". It would seem desirable that the machinery for determining whether a particular proffered security is satisfactory or not should be set out more fully. If it is not clear until after arbitration whether or not certain proffered security was "satisfactory", this information will be available too late for the parties to adjust their activities accordingly.