

LAYING THE MARK TO PORT AND STARBOARD: SALVAGE UNDER DURESS AND ECONOMIC DURESS AT CONTRACT LAW

Olivia Lennox-King*

The law of salvage rewards volunteers who render valuable services to recognised subjects of salvage in danger. The nature of this legal right is neither consent-based, nor contractual in nature, and appears as antithetical to the contract law, being based on public policy and equitable considerations. Nevertheless, in modern times contracts control salvage operations with such frequency that contractual salvage has become the norm, usually under a standard form contract known colloquially as the Lloyd's Open Form.

Despite this development, there has been little discussion on the interrelationship between salvage and contract law. This has led to theoretical uncertainty in areas where the two jurisdictions apply different rules to the same concepts, particularly in the area of duress. While the approach of contract law is procedural, salvage law combines a procedural approach with an enquiry into the substantive fairness of the contractual terms. After consideration of alternative models, where each regime overrides the other, this paper argues that a scenario where the two regimes co-exist is preferable. Based on the common rationale of controlling illegitimate behaviour, it is argued that the procedural approach of contract law should be incorporated into salvage law, and the latter's substantive requirements correspondingly relaxed.

1. Introduction

This paper examines modern salvage law, from its early development to the modern concept of salvage as successful service to salvageable property in peril. In more recent times salvage, existing as it does within the particular jurisdiction of Admiralty law, has run up against the rules of contract law. The juxtaposition of the law of sea and the rules invoked in private commercial dealings (a category to which the majority of shipping contracts belong) has some repercussions for the law relating to salvage. The aim of this paper is to examine the justifications for the special rules of salvage, so that the current situation can be critiqued. While the case for special rules applying to salvage is sustainable, some adjustments to the present position are considered desirable.

It seems, for law, the sea changes everything. From the earliest developments of legal systems, a fundamental difference has been recognised between the law that applies on land, and the law that governs actions on the water. To maritime activities, agreements and commerce, a different set of rules is applied, born of the belief that business of the sea is fundamentally different to any other endeavour. From this recognition, the modern jurisdiction of maritime, or Admiralty, law has developed and flourished.¹ Modern law continues to work within this historical paradigm, developed over centuries into a separate body of law that, if not a 'maritime law of the world'², finds similar expression throughout maritime nations. An entire body of jurisprudence exists, outlining the differences between both the maritime and municipal contexts, and the unique nature of the legal rules applicable to the former.

The law of salvage is but one area that illustrates the uniqueness of maritime law. Indeed, as will be seen, the rules and principles of salvage are remarkable in that in many areas they differ significantly from those found within the

* I wish to thank Paul Myburgh, Associate Professor of Law and Associate International Dean at the University of Auckland, for his invaluable help and support throughout the researching and writing of this paper.

¹ At the outset, it is important to clarify the terminology used in this paper. In jurisdictions belonging to the Anglo-Common law tradition, the nomenclatures 'Admiralty' and 'maritime' are often used interchangeably to refer to the law governing claims relating to the sea. Strictly speaking, maritime or shipping law comprises 'the law that regulates navigation and commerce by sea', and is the more expansive term, while the term 'Admiralty' refers to the issue of the jurisdictions of the courts, and the traditional rules exercised by the Admiralty courts of England. See Paul David, 'Maritime Law: Admiralty' in Law Book Company, *Laws of New Zealand* (at 5 January 2007) [1-1] (LexisNexis NZ Online, Commentary).

² See *The Tojo Maru* [1972] AC 242, 290-291 (Lord Diplock), where His Lordship refuted the existence of any such body of law.

common law.³ However, to a student of modern maritime law, the unique nature of the salvage claim is not necessarily clear, particularly where other legal rules appear applicable. More specifically, modern salvage rules increasingly co-exist with contractual obligations between the parties to a salvage operation. Contract law has its own set of rules and principles. In many cases, it seems that the two regimes have laid the same course, only to approach the mark on opposing tacks. Which tack, then, is the law to take? Various options present themselves. On the one hand, it is possible that the rules of contract law override the rules of salvage, which might be considered default rules in the absence of express agreement between the parties. Then again, the special rules of maritime law are jealously guarded, and have been consistently applied, so that their supercession by contract law rules cannot be assumed. Moreover, the special treatment afforded to salvage agreements has been further enshrined in the 1989 *Salvage Convention*,⁴ so that, where the 1989 *Salvage Convention* applies, law has come down on the side of public policy and the supremacy of salvage law

Nevertheless, common law principles are increasingly making their presence felt, and the current state of the law should not be the end of the enquiry. There remain enduring questions as to the present and future approach to salvage, and the applicability of contract law, particularly in the modern context where the majority of salvage cases involve commercial salvage operations. The aim of this paper is to examine the justifications for the special rules of salvage to see whether the current position is sustainable, in light of the case law developments, industry practices and the traditional rationales behind the doctrines. Although maritime case law is sometimes problematic in establishing hard and fast rules and setting precedents, it is still highly instructive on the way maritime judges conceive of salvage, and the interaction between salvage and contract law. Close examination of important cases will illustrate the problems and possibilities that arise when exporting contract law into the salvage domain. As to the specific questions of this paper, the concept of duress as it appears in salvage law and contract law will be compared and contrasted. The procedural approach of contract law, focusing on the quality of the consent to the contract and the process that occurred up to the conclusion of the contract is very different from the position of salvage law, which is concerned with a dual enquiry into first, the position of the parties, and secondly, the terms of the contract itself and what they reveal about the bargaining process. Once the separate regimes have been discussed, and their differences considered, it will be possible to examine three separate scenarios for the law: where contract is supreme; where the rules of salvage are upheld; and finally, the possibilities for the two schemes working together.

Essentially, the thesis of this paper is that the special rules of salvage that exist in the maritime jurisdiction are a justifiable feature of our legal system. When one considers the weight of the policy considerations behind the rules, and the specific context of salvage, existing as it does in times of emergency and necessity, the tendency to encourage salvors via reward and lenient rules is both understandable and desirable, a result of the careful balancing act undertaken by the maritime judiciary, and more recently by international regulation. However, this paper also asserts the view that the rules of salvage law should not be too jealously guarded, nor should the value of contract law's influence be ignored. Many developments of the law of the land are equally applicable to maritime law, and, when applied by thorough reasoning and care, may be a welcome addition to the legal principles governing maritime cases. Moreover, the rationale behind the concept of salvage is not as far removed as might be assumed: salvage law shares many of the characteristics of other areas of the law, dealt with under the law of restitution. It will be argued that if restitution values form at least part of the basis of salvage, arguments that assert a connection between maritime and common law – such as the one in this paper, that contract law should have a place in the law of salvage – are more convincing.

The concept of duress in salvage law is an excellent example of this argument, existing as it does by virtue of the appearance of contracts and contract law within the maritime realm. Because of this, and for other reasons of legal principle and development, the rules of duress that appear in contract law should, as this paper will argue, be applicable in the maritime context, albeit with some modifications for the nature of salvage compared to an

³ In New Zealand, maritime law has been integrated into the common law legal system insofar as there exists no separate court for the administration of the Admiralty jurisdiction, and the High Court of New Zealand exercises the jurisdiction concurrently with the general jurisdictions of equity and common law. The separate Admiralty jurisdiction that was developed in England has been imported into the New Zealand context via various statutes, from the *Colonial Courts of Admiralty Act 1890* (Imp), to the current *Admiralty Act 1973*. In addition, the provisions of the *Maritime Transport Act 1994* enact various international maritime conventions as part of domestic law. For more detail see David, above n 1, para 1-2. The term 'common law' used here and elsewhere in this paper therefore refers to the rules of law not concerned with maritime law.

⁴ *International Convention on Salvage*, opened for signature 28 April 1989 (entered into force 14 July 1996) (1989 *Salvage Convention*).

ordinary commercial contract. Other contractual considerations have rightly been applied in the maritime context, such as contractual misrepresentation, in order to deal with questions that come before the court that are undeniably of a contractual nature. However, care should be taken with such importation. Although helpful in deciding maritime cases, principles of contract law should be applied so that they work with the current established salvage system, and do not undermine it. How precisely this should occur, and the various readings of the international regulations and case law, will be considered below.

2. Salvage, a Uniquely Maritime Concept

2.1. The Historical Development of the Concept of Salvage

Maritime law as a whole, and salvage in particular, has a long and colourful history. Texts dealing with maritime law almost always emphasise the ancient and long-standing origins of the jurisdiction.⁵ The beginning of the common law Admiralty tradition⁶ can be found in evidence of civil law texts of Rhodian and Roman law, and later, in Italian merchant law and King Richard I's maritime exposition, *The Rolls of Oleron*.⁷ Via such 'ancient and various sources, developed and built upon by decisions of the [Admiralty] Court'⁸, the modern English Admiralty jurisdiction has been developed, from which the maritime laws of other common law nations were born. However, the sources on which modern salvage law is built are consistent in three important respects: they consistently recognise the merit in remunerating volunteers who act to preserve ships and their contents, that such remuneration should be in the form of a reward, and that the salvor in question should be entitled to enforce his claim by way of a possessory lien or *in rem* claim.⁹

Perhaps because of its ancient roots, the salvage law of today has undergone much change from its historical ancestor. The traditional concept of salvage involved the rescue of property from wrecked ships, and included 'flotsam, jetsam and lagan'.¹⁰ Today's concept of salvage has developed from its original form, of rewarding those who rescued property that had been lost at sea (the conventional idea of salvage being, for example, those who recovered valuables from the wreck of a foundered ship). Modern salvage also encompasses the rewarding of those whose efforts succeed in preventing the loss of property at sea, aiding a ship in distress and recovering property from a vessel that would otherwise be lost.¹¹ The categories of property that can be salvaged have also been widened.¹² From here, maritime law has created, via the doctrine of salvage, two relationships: between the rescuer and the rescued (that is to say, the owner of the thing rescued), and between the thing saved and the salvor, in the form of a security relationship based on the salvor's maritime lien. As is clear from this development, two concepts of salvage now exist: one of recovery of already lost or abandoned property, and one of aiding others in the retention of property in danger of being lost. The wisdom behind assimilating the two concepts into the single heading 'salvage' may justifiably seem puzzling to the onlooker. The first category conjures up colourful images of piracy and looting,¹³ far removed from commercial steamship operations arising between experienced commercial parties, where the object is to rescue a stranded ship and her cargo in return for substantial financial reward. Some

⁵ See for example William Tetley, *International Maritime and Admiralty Law* (2002) Chapter 1; John Reeder (ed), *Brice on Maritime Law of Salvage* (4th ed 2003) Chapter 2; and Francis D Rose (ed.), *Kennedy and Rose, the law of salvage* (6th ed 2002) Chapter 1.

⁶ As mentioned above at n 1 and n 3, the terminology in this area is somewhat problematic. The reference to 'common law Admiralty' is to the rules of maritime law that exist in common law countries and have been developed from the English Admiralty inheritance, in many common law countries via the *Colonial Courts of Admiralty Act 1890* (UK). However, the Admiralty law developed in England is of civil law heritage. After the Protestant Reformation of the 16th century, Admiralty law was practiced by a body of practitioners descended from the medieval canon lawyers, who were influenced by the earlier arrival of the Romans in England. These practitioners congregated in the Doctors Commons, where Admiralty law developed and resided until the dissolution of the Commons in 1857. See Kennedy, above n 5, 51-54.

⁷ For further detail, see Donald A. Kerr, 'The Past and Future of 'No Cure, No Pay'' (1992) 23 *JMCLQ* 3, 411, 412-413.

⁸ *Admiralty Commissioners v Valvadera (Owners)* [1938] AC 173, 200 (Lord Roche).

⁹ Kerr, above n 7, 412. Salvage is one of a limited range of circumstances recognised by judicial doctrine that give rise to a maritime lien, a 'privileged charge or claim upon property that arises by operation of law'. The resultant maritime lien allows the salvor to bring an *in rem* claim directly against the ship or property concerned; Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (2002) 22.

¹⁰ Kennedy, above n 5, 59-60.

¹¹ Rhys Clift and Robert Gay, 'The Shifting Nature of Salvage Law: A View From a Distance' (2005) 79 *Tulane Law Review* 1355, 1357-1358; see also Brandon J's judgment in *The Unique Mariner (No.1)* [1974] 1 Lloyd's Rep 555 (discussed below).

¹² See Article 1(c) of the 1989 *Salvage Convention*, above n 4, where property is defined as 'any property not permanently or intentionally attached to the shoreline, and includes freight at risk', cf the decision in *The Gas Float Whitton (No 2)* [1897] AC 337.

¹³ For a modern example of the juxtaposition of the different concepts of salvage, the recent case of the grounding of the *MSC Napoli* is interesting see BBC, '700 Napoli Cargo Items Salvaged', *BBC News*, 8 February 2007 <http://news.bbc.co.uk/2/hi/uk_news/england/devon/6344559.stm> 8 February 2007.

writers and judges have recognised this distinction and suggested that the two ideas be considered as two, or even three separate doctrines: the distinction drawn in more recent judgments between non-contractual and contractual salvage suggests a further categorisation.¹⁴ Historically, however, English law has drawn no theoretical distinction between the categories, so that the heading ‘salvage’ embraces all three concepts. Nevertheless, for present purposes, the reference to salvage is primarily concerned with the last two categories of ‘modern’ salvage: contractual and non-contractual salvage operations to assist an ailing vessel and her cargo.

2.2. The Nature of Maritime Law

It is convenient at this stage to say something of the nature of maritime law, as it informs much of the following discussion as to salvage law and the interrelationship of the laws of sea and land. By its very nature, the maritime industry and trade is international. In terms of the law governing it then, maritime law is perhaps unique among the different ‘types’ of law in that uniformity throughout the maritime world is highly desirable. That laws, rights and liabilities are the same throughout the voyages of a commercial vessel is indisputably a driving impetus in the development of the law. In the context of salvage, this push for uniformity has resulted in two international efforts to standardise the law, the 1910 *Salvage Convention*¹⁵ (modelled on British Admiralty law, as the leading maritime nation of the time),¹⁶ and its more recent successor, the 1989 *Salvage Convention*. Whilst the latter of these will be discussed throughout this paper, it is important to note that the 1989 *Salvage Convention* does not necessarily supplant the operation of the Admiralty jurisdiction as regards salvage.¹⁷ The rules of the 1989 *Salvage Convention* work in conjunction with current maritime law, and indeed, in many areas (such as inequitable agreements) have been sourced directly from the common law Admiralty tradition, merely restating the current position in those countries. Nor does the 1989 *Salvage Convention* override freedom of contract; with two important exceptions, parties are free to contract out of the provisions of the 1989 *Salvage Convention* via Article 6(2). Thus, the following references as to the non-codified law of salvage and the references to case law remain for present purposes applicable to the questions confronted in this paper.

2.3. The Concept of Salvage Today

The early conception of salvage was succinctly summed up by Lord Diplock in the *Tojo Maru*:¹⁸

It is true that, except in the case of derelicts, the rendering of salvage services was consensual. It involved the acceptance by the owner of a vessel which was in peril of an offer by the salvor to try and save it for a reward upon a *quantum meruit* in the event of success. To 20th century English lawyers this has the essential characteristics of a contract. But to lawyers in the 18th and the first part of the 19th centuries the similarities between salvage services and contracts for work and labour were less apparent. There was no room for any consensual element in the case of derelicts; and even when there was a consensual element the implied promises lacked mutuality in that the salvor assumed no obligation to continue to provide his services. He could withdraw at any time, yet claim a reward if his services had contributed to the successful saving of the ship.

From this statement, and as will become clear from the following discussion, it may be seen that the basis of salvage is not consent, or mutuality, or voluntariness, in the sense that we experience in other areas of the law, notably contract law. Indeed, the very basis of a request for salvage is compulsion of circumstances, where a salvee is forced to rely on the aid of another to remedy the situation in which they find themselves. In such circumstances, a salvee would hardly be considered a volunteer in the conventional sense (though a salvor must be).¹⁹ Nor is consent necessarily an appropriate consideration; there may even be circumstances where a salvee is an unwilling participant in the salvage operation.²⁰ Nevertheless, maritime law will view the situation as one where the rescued

¹⁴ See for example, Nicholas Gaskell, ‘The Lloyd’s Open Form and contractual remedies’ (1986) *Lloyd’s Maritime and Commercial Law Quarterly* 306, 307 and S Stoljar, *The Law of Quasi Contract* (1964) 171-176.

¹⁵ *Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea*, opened for signature 23 September 1910 (entered into force 1 March 1913) (1910 *Salvage Convention*).

¹⁶ Kennedy, above n 5, 67.

¹⁷ See the *Comite Maritime International Report to the International Maritime Organisation*, Antwerp, 6 April 1984, 12.

¹⁸ *The Tojo Maru*, above n 2.

¹⁹ Brice, above n 5, 59.

²⁰ See for example, *The August Legembre* [1902] p 123 and the following discussion at above n 137.

party should be compelled by law to reward the rescuer.²¹ Put this way, the distinction between contract law and salvage is apparent. In situations where no contract or agreement exists, the law will nevertheless impose liability, based, as will be discussed, on overriding policy considerations.

While precise definitions of salvage differ, and there is a judicial reluctance to limit the concept of salvage lest its equitable nature also be limited,²² a useful working definition has been given by Francis Rose:²³

[Salvage may be described as] a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.

This definition highlights two important features of salvage. First, where a party is contractually bound to provide assistance prior to the circumstances necessitating a salvage arising, their actions are not voluntary, and thus their services will not be considered salvage.²⁴ Secondly, to meet the various policy requirements of salvage, the operation must have a useful outcome, either to the owner of the salvaged goods, or in modern times, to the environment.²⁵ This definition may be further supplemented by the broader definition of a 'salvage operation' given by the 1989 *Salvage Convention*:

Article One

For the purposes of this Convention –

- (a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any waters whatsoever.

Under this definition, the performance of other activities, such as engaged services, may also constitute salvage.²⁶ Indeed, this has been the view in more recent cases, such as *The Unique Mariner (No. 2)*, where Brandon J drew no distinction between authorities referring to engaged services and those dealing with salvage operations when dealing with the rights of superseded salvors.²⁷ And, while they may coexist with contractual obligations, it has been consistently reiterated that salvage rights may exist separately and independently from a contractual arrangement.²⁸ In fact, it is arguable that the need for the existence of the concept of salvage stems directly from the lack of agreement or contract between the parties; where there is no private agreement (and until 1875 and the advent of the steam tug and professional salvors, there rarely was) that provides for obligations and resultant liability, the law invests individual rights in salvors, based on its own established principles and norms to govern such situations.²⁹ Where contract and salvage overlap then, is the core of this paper. It is to this feature of the law that we will return, as the possibility of simultaneous existence of the two sets of rules has proved somewhat problematic for modern salvage contracts. But in order to compare the two legal orders, it is necessary to first understand the foundations of salvage.

2.4. The Prevailing Rationales of Salvage Law

Central to the concept of salvage is the idea, based both on public and private policy, that salvors (that is, those who perform an act of salvage within the above definition) are entitled to a salvage award for their services, which is calculated to reimburse salvors for the expenses incurred during the salvage operation, remunerate them for their

²¹ 1989 *Salvage Convention*, above n 4, Article 12.

²² See for example *The Governor Raffles* (1815) Adm. 2 Dod 14, 17 (Lord Stowell).

²³ Kennedy, above n 5, 8.

²⁴ This is dependent on the nature and scope of the salvage agreement at hand; if a service is conveyed in a way, or by a party, not strictly covered by the agreement, a salvage award might still be possible. Moreover, a salvor can be bound to perform a particular salvage without the agreement losing its character as a salvage agreement, provided that the contract is entered into after the salvage is necessary; see Martin Davis and Anthony Dickey, *Shipping Law* (3rd ed 2004) 628.

²⁵ Kerr, above n 7, 419-423.

²⁶ 'Engaged services' refers to services performed by another party at the request of the master of a casualty ship, for example, the provision of certain equipment (such as an anchor and chain). At traditional Admiralty law a reward was still due even where the service had no useful result; see Brice, above n 5, 117-119.

²⁷ *The Unique Mariner (No. 2)* [1979] 1 Lloyd's Rep. 37, 49.

²⁸ Christopher Hill, *Maritime Law*, (6th ed 2003) 335; see also *The Five Steel Barges* (1890) 15 PD 142, and *The Unique Mariner (No. 2)* above n 27, 49.

²⁹ *The Hestia* [1895] P 193.

efforts, and which, significantly, includes an element of reward.³⁰ Once the salvage operation has been performed successfully,³¹ obligations accrue as between the salvor and the salvaged. It is here one finds what some have seen as the central feature of the maritime jurisdiction and its uniqueness. At common law, a party is entitled to neither compensation nor reward for lending a helping hand. The dichotomy has been famously described thus:³²

If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any persons whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice.

At first glance, the very concept of salvage appears repugnant to the long-standing common law doctrine that a person cannot be required to pay for a benefit, which he has neither contracted for nor requested.³³ As Bowen LJ famously observed, under the common law 'liabilities are not to be forced on people behind their backs, any more than you can confer a benefit upon a man against his will.'³⁴ His Lordship went on to observe, as have so many other judges of common law and Admiralty, that the concept of maritime salvage represents an exception to this principle.

Thus, the concept of salvage has a long pedigree, so that 'from time immemorial, the merit of rewarding maritime salvors appears to have been recognised as self-evident.'³⁵ But such history does not explain the reason for the theory, nor does it explain why there is a difference between the law of the land and the law of the sea. Admiralty judges and academics alike have paid scant attention to the theoretical bases of salvage. Admiralty decisions are characterised by their ad hoc nature, and are based on practical considerations rather than on slavish regard to precedents. While this characteristic is often laudable in practice, a consistent reading of the case law is problematic. Dr Lushington, Judge of the High Court of Admiralty from 1838 to 1867, and his successor until 1883, Sir Robert Phillimore, were at least in part responsible for the resurgence of the Admiralty Court and the continuing practice of Admiralty law after the assaults of the common law on the jurisdiction.³⁶ Since it was during this period that the use of contracts in salvage operations began, it might be thought that such individuals, trained as they were in the Civil Law tradition,³⁷ would expound theoretical bases for the rules of maritime law. However, Dr. Lushington's judgments are more notable for their practicality and dynamism than any adherence to an express theory or principle, or, it has been said, to any concept of consistency.³⁸ The jurisprudence as to the difference between land law and maritime law is therefore somewhat underdeveloped. Discussions of the distinction between these two bodies of law invariably centre on the English historical roots of Admiralty and the special equitable nature of the jurisdiction. From their earliest developments, the English Admiralty courts were courts of equity, acting according to 'good conscience' – that is, acting to do what was right and fair between the parties in the circumstances, without being bound by the sometimes inflexible (and therefore unjust) rules of the common law and the doctrine of *stare decisis*.³⁹ With the amalgamation of the English Courts of Admiralty and common law

³⁰ Francis D Rose, 'Restitution for the Rescuer' (1989) 9 *Oxford Journal of Legal Studies* 2, 167-204, 171.

³¹ Although one of the traditional criteria is success, that there has been an erosion of the requirement for success in the traditional sense in salvage operations; see Kerr, above n 7, 411-427.

³² *Mason v The Blaireau* 6 U.S. (2 Cranch) 177, 186 (1804) 188 (Marshall CJ)

³³ Kerr, above n 7, 418.

³⁴ *Falcke v Scottish Imperial Assurance* (1887) 34 Ch D 234, 248.

³⁵ Kennedy, above n 5, 2.

³⁶ For greater detail, see F L Wiswall Jnr., *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970) esp. Chapters 2 and 3.

³⁷ *Ibid.*, 68.

³⁸ *Ibid.*, 68-69; see also Gaskell, above n 14, 311. See also Kennedy's discussion of Dr. Lushington's judgment in *The Henry* (1851) 15 Jur 353, where his Honour held that a salvee's misrepresentation as to the value of the cargo of the salvaged ship was immaterial to the price of the salvage agreement, a view that is wholly inconsistent with established case law; Kennedy, above n 5, 426-428.

³⁹ The doctrine of *stare decisis* means that courts follow precedents as to the same legal issues, set in earlier cases, in courts at the same level or higher; *The Liffey* (1887) 6 Asp M.C. 255; *The Teh Hu* (1969) 2 Lloyds Rep. 365, 369 (Lord Denning).

into a single system,⁴⁰ Admiralty retained its ‘particularly equitable’ nature, remaining apart from the general common law, with its own considerations and principles.⁴¹

2.4.1. Public Policy Considerations: Salvage as a *Sui Generis* Concept

Just as maritime law is distinguished by its equitable nature, so too are the justifications for salvage derived from maritime’s equitable basis. The prevailing rationale is twofold. The first is that, that as a matter of public policy, salvage should be encouraged via reward for services rendered. Secondly, principles of natural justice hold that a salvor should be rewarded where a benefit is conferred on another by reason of their efforts, and its corollary, that non-payment would result in unjust enrichment of the salvaged party.⁴² As to the former reason, maritime law is littered with judicial reference to the public policy that dictates that salvage be rewarded, often expressed in somewhat loquacious and venerable language, heavy in rhetoric. In a famous and frequently quoted passage, Storey J said:⁴³

Salvage, it is true, is not a question of compensation *pro opera et labore*. It raises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium by way of honorary reward, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property as well as life. Treated as a mere question of compensation for labour and services, measured by any common standard on land or at sea, the salvage of one moiety is far too high. But treated, as it should be, as a mixed question of public policy and private right, equally important to all commercial nations, and equally encouraged by all, a moiety is no more than may justly be rewarded.

Other expositions have emphasised the inherently dangerous and uncertain nature of the maritime mercantile enterprise, wherein the risks of sea travel are high and unpredictable, and the potential for loss great.⁴⁴ The validity of this view, at least from a historical perspective, cannot be doubted: from the earliest developments of the Admiralty jurisdiction, the law has been alive to the perilous nature of the sea. In the context of maritime endeavours, public policy holds that the law should encourage the voluntary undertaking of risk by others to avoid, escape or prevent the peril in question. Moreover, because of the nature of salvage – that is, the requirement for success,⁴⁵ and the fact that the possible award is capped by the value of the salvaged property⁴⁶ – judges have traditionally been at pains to ensure that salvors are adequately rewarded. Judicial consideration has encompassed not only the salvor’s undertaking of primary risk to life and limb, but the contingent risk, present at the outset of the salvage operation, that despite their best efforts the salvage will be unsuccessful, or that the value of the salvaged goods will be small, and so the potential reward low, irrespective of the effort expended. Generously rewarding salvors encourages the undertaking of such risks and, in the modern context, the encouragement given must extend to the expensive task of maintaining and servicing a fleet of salvage vessels, kept at the ready to attend to maritime casualties. For the same reasons, courts have generally treated the nature in which the salvage is conducted with benevolence, taking a ‘lenient approach to mistakes’⁴⁷ in order to encourage salvors to act without fear of undue

⁴⁰ A comprehensive survey of the English and New Zealand history is outside the scope of present discussion. It is enough to say that, following the changes of the 1873 and 1875 Judicature Acts and the subsequent changes in the latter half of the twentieth century, maritime law is now administered as a separate jurisdiction within the same court systems in both England and New Zealand. For a more detailed account, see David, above n 1, (3) 15-25.

⁴¹ Note that in *The Juliana* (1822) 2 Dods 504, 520, Lord Stowell distinguished the more general equitable nature of Admiralty from the increasingly rigid equitable jurisdiction of the Courts of Chancery. However, as Kennedy has noted, with the amalgamation of the separate courts into a single High Court, maritime’s equitable nature has increasingly resembled that of the equity developed by Chancery; Kennedy, above n 5, 12.

⁴² *Five Steel Barges* above n 42, 146.

⁴³ *The Henry Ewbank* (1883) 11 Fed. Cas. (Case No. 6376) 1166, 1170; cited in *The Albion* (1861) Lush. 282, 284, and *The Fusilier* (1865) Br. Of Lush. 341.

⁴⁴ Nicholas Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990’ (1991) 16 *Tulane Law Journal* 1, 14.

⁴⁵ Brice, above n 5, p. 2; 105-108.

⁴⁶ Since salvage is one of the recognised categories that attract a maritime lien, this is a necessary consequence of a claim in rem against the ship, as the possible quantum of award is limited by the value of the ship. The parties may, however, agree to a higher sum (or an assessment formula which results in a higher sum), and in the absence of inequity, this will be enforced; see for example *The Inna*, 148. In practice, however, a salvee is unlikely to agree to a higher sum, and indeed, such an excessive amount is likely to attract either the Admiralty Court’s discretionary power to set aside inequitable agreements, or the sanction of Article 7 of the 1989 Salvage Convention, above n 4.

⁴⁷ *The St. Blane* [1974] 1 Lloyd’s Rep 555, 408 (Brandon J).

judicial scrutiny of their actions during operations.⁴⁸ The public policy talked of is a generalised one, intended to promote salvage, so that while a court exercising the Admiralty jurisdiction may have regard to the justice between the parties, individual awards may fall somewhat harshly on owners in particular cases, where public policy considerations result in high awards.⁴⁹ This sentiment has particular relevance to professional salvors, where the cases show a particular tendency to grant generous rewards, and so encourage the continuance of their salvage operations.⁵⁰

Fundamental to the concept of salvage is the value in protecting maritime property; a value of significance today, where the cargo under threat may be extremely valuable, perishable or unstable. Moreover, the rules of salvage law indicate an acknowledgement of the value of preserving a ship, often extremely valuable in itself, and the loss of which may also result in downstream loss, in the form of lost time and potential earnings for the owners of both the ship and its cargo. As commercial vessels are usually carrying cargo on consignment, there are usually a number of property interests at stake when a vessel runs into difficulties at sea. While a salvage award may seem exorbitant or extreme to a non-maritime lawyer, the award may nevertheless represent a small portion of the potential loss had the salvage not been undertaken successfully. It is this contingency that maritime adjudicators recognise when making awards, and which more recent codifications of maritime law have sought to recognise.⁵¹ More recently, the value in salvor's taking action to prevent environmental damage caused by a maritime incident has been recognised.⁵² In making salvage awards, the Admiralty jurisdiction is guided wholly by its equitable discretion as to the value of the services, a fair level of compensation to the salvor crew, and a reward element, rather than by any hard and fast criteria or formula, so that the quantum of reward may vary even between tribunals in a single jurisdiction.⁵³ The more recent criteria set out in Article 13 of the 1989 *Salvage Convention* provides more specific guidance, but nevertheless leaves the final assessment of the value of the services to the national court or tribunal deciding the matter.

There are other sound public policy reasons behind the salvage idea besides the ideas of risk and rescue. The maintenance of a professional salvor industry has meant that rescue operations can be undertaken and paid for without the establishment of state infrastructure, and taxpayer contribution.⁵⁴ Salvage is a user pays system, wherein the particular shipowner (or ultimately, underwriter) bears the expense for the benefit they have received in the rescuing of the ship.⁵⁵ While this is changing in some parts of the world, and governmental involvement is steadily encroaching on the realm of the volunteer salvor,⁵⁶ it is still currently true to say of many countries (including New Zealand) that the volunteer salvor fulfils an invaluable role in the maritime community. It has already been noted that the establishment and maintenance of an effective salvage fleet is an expensive undertaking, made viable (and, arguably, increasingly less so, as salvage incidents become less commonplace)⁵⁷ by the prospect of generous salvage awards for successful actions. The cost of replacing this private industry by a governmental regime similar to the services found on land would not only be momentous but, it is submitted,

⁴⁸ This does not mean that a salvor will not be held liable for his negligence or failure to perform his salvage duties adequately; in addition to the general duty not to act negligently (*The Cape Packet* (1848) 3 W Rob 122, 125 (Dr. Lushington)), under the 1989 *Salvage Convention* (art 8.1(a)) salvors are under a duty to carry out salvage operations with due care. There may also be duties of care imposed by contractual agreement (for example, Lloyds Open Forms 1995 and 2000 specify that salvors are to use their 'best endeavours'). See further Kennedy, above n 5, 501.

⁴⁹ *The Glengyle* [1898] AC 519; see also *The Industry* (1835) 3 Hag Adm 203, 204 (Sir John Nicholl).

⁵⁰ *The Makedonia* [1958] 1 QB 365, 374. However, judicial attitude is not always so favourable towards salvors. In the shattering decision of *Semco Salvage & Marine Pte. Ltd v Lancer Navigation Co. Ltd (The Nagasaki Spirit)* [1997] AC 455, the House of Lords interpreted the reference to a 'fair rate' for the salvors in Article 13 of the 1989 *Salvage Convention* as meaning a fair rate of reimbursement for expenditure, and not a fair rate of remuneration. The resultant dissatisfaction in the salvage community has led to the development of SCOPIC, which stands for 'special compensation protection and indemnity clause' and is a contractual term that may be incorporated into the LOF 2000 by agreement between the parties. For more information on SCOPIC and its provisions, see Brice, above n 5, 614-620.

⁵¹ Gaskell, above n 44, 14. But see above n 50.

⁵² 1989 *Salvage Convention*, above n 4, Article 13, 14.

⁵³ *The Cuba* (1860) Lush 15, 16. As an aside, this is doubtlessly one of the reasons that salvage agreements tend to specify a governing law, and why the Lloyds Open Form and its reference to London arbitration has achieved such success.

⁵⁴ See *The Goring* [1987] QB 687, 701, where Gibson LJ commented 'there are at sea no neighbours, normally no public services such as fire brigades, and few passers-by to provide assistance either from moral obligation alone or from public duty'.

⁵⁵ *Admiralty Commissioners v The Valvadera*, above at n 8, 189.

⁵⁶ Kerr, above n 7, esp. 423-427.

⁵⁷ *Ibid.*

unnecessary: assuming the present system is functioning effectively, there is little merit in replacing it.⁵⁸ There is therefore significant public interest in maintaining and adequately rewarding private salvage operations, and, consequently, private salvage agreements between parties that may function without state intervention. This is arguably also a reason for ensuring a successful legal regime to cover salvage: the utilization of the private, user-pays system of arbitration under the Lloyds Open Form and the avoidance of frequent, lengthy and expensive litigation (paid for at least in part by the taxpayer funding of the court system), are significant public policy factors for the law to consider.

2.4.2. A Second Possibility: Salvage as a Manifestation of Restitution Values

Another possible analysis of salvage is on the grounds of restitution and unjust enrichment. This theory holds that where a benefit is conferred on another, the person by whom the action that occasioned the benefit was performed should be rewarded for their service. Although earlier accounts of the law of restitution suggested that it was based on an implied contract between the parties, this model has now been soundly rejected, and restitution and unjust enrichment have been developed as legal principles in their own right.⁵⁹ Likewise, maritime law has recognised that the law of salvage is not contractual in nature,⁶⁰ but instead of a general equitable character. In *The Cargo Ex Port Victor*, after rejecting the view that a salvage claim is based on an implied contractual relationship between the owner of the endangered goods and the salvor, Sir Francis Jeune P stated ‘the true view is, I think, that the law of Admiralty imposes on the owner of the property saved an obligation to pay the person who saves it simply because in view of that system of law it is just he should.’⁶¹ This comment, while rejecting the quasi-contract argument, belongs to the above view of salvage that rests solely on maritime law’s general equitable character.

Nevertheless, more recent scholarship has explicitly explored the link between salvage and restitution, and has aligned the salvage jurisdiction with other examples of restitution. Francis Rose, one of the central proponents of the restitutionary view of salvage law, has argued that restitution values form the core of the concept of salvage. This view of salvage is supported by other leading writers on the subject, who have also addressed salvage as part of the modern law of restitution for unjust enrichment.⁶² Although he acknowledges that policy considerations are important to the law of salvage, Rose denies that they are the basis of a salvage claim. It is instead the provision of a benefit to the defendant that dictates that a salvage payment must be made. This is evidenced by the fact that a salvage award is tied to the value of the benefit occurred, so that all those who benefit from the salvage must contribute to the award, and ‘if the resulting benefit is so small that the salvor’s reward as normally assessed would leave little or no actual benefit to the salvee, the sum payable will be reduced accordingly.’⁶³ Furthermore, the retention of that benefit by the salvee without payment would constitute an unjust enrichment at the expense of the conferring salvor, so that the maritime law will require the salvaged party to return the value of the benefit.⁶⁴ This view of salvage expressly aligns it with the Civil Law doctrine of *negotiorum gestio*, whereby a person who manages the affairs of another in a time of emergency is entitled at law to reimbursement for expenditure incurred.⁶⁵ Recovery depends on the voluntariness of the person in question (in that they have no pre-existing legal duty to act), and the requirement that they act because of the emergency, in a reasonable manner, and in the interests of the owner, and not himself.⁶⁶

Although the doctrine of *negotiorum gestio* is not applicable in the common law context, it has nevertheless been considered as part of the law of restitution, and highly relevant to considerations of a parallel doctrine in the

⁵⁸ Ibid. See also Kerr’s suggestion that the formulation of salvage would necessarily change with governmental intervention, especially as to the ‘pay’ element and the question of whether the same policy considerations exist in rewarding a governmental agency, rather than a voluntary private salvor; *ibid.*, 425-427.

⁵⁹ Lord Goff and Gareth Jones, *The Law of Restitution* (6th ed 2002) 5-12.

⁶⁰ Cf. submissions put forward in *The Telemachus* [1957] P47, 48.

⁶¹ *The Cargo ex Port Victor* [1901] P 243, 249.

⁶² See, eg, Goff and Jones, above n 59, where Chapter 18 is devoted entirely to the discussion of salvage.

⁶³ *Ibid.*, 171.

⁶⁴ Kennedy, above n 5, 19. Restitutionary principles have been applied in salvage cases; in *The Winson* [1982] AC 939, the plaintiff salvors recovered property and stored it, awaiting the owner’s instructions. They subsequently claimed the expenses they had incurred in storing the goods. The House of Lords, reversing the Court of Appeal, held that the salvors were entitled to restitution for the expenses they had incurred.

⁶⁵ Rose, above n 30, 170.

⁶⁶ *Ibid.*, 193. A reasonable manner has been expressed as a duty to take such care as a businessman might be reasonably expected to take in similar circumstance.

common law. In his convincing analysis, Rose also challenges the orthodox assumption, as articulated by Bowen LJ,⁶⁷ that the common law is hostile to allowing liability in cases of unsolicited benefit. The most obviously example is that of the necessitous intervenor, one who acts to prevent harm to another, or the interests of another, in times of necessity.⁶⁸ According to Rose:⁶⁹

The law of salvage is the leading paradigm of English law's admission of recovery for necessitous intervention and affords a developed scheme for implementing it, so that, although it is impossible to transpose directly into the common law, it merits constant reference in considering the structure of a general system of restitution at common law.

As has been discussed, one of the fundamental tenets of salvage is the need for necessity, articulated in the case law as the requirement for danger.⁷⁰ In this sense, salvage shares its parentage with the limited common law right to reimbursement in respect of services rendered in an emergency without request.⁷¹ Certainly, salvage is the far better developed (and more frequently invoked) of the two. If this is the basis of salvage, danger and necessity, the question arises as to why the rules not apply equally on land where the same requirements are fulfilled. It is from this basis that Rose approaches the question of restitution, arguing that the law of the land should recognise a similar right to that of salvage in circumstances of emergency (albeit that the award should be confined to reasonable expenses, and, exceptionally, remuneration for professional services).⁷²

Rose's analysis of the law of salvage as a branch of restitution for unjust enrichment is compelling, and has the advantage of opening a new branch of law and authority for consideration in salvage cases. As his work shows, aligning salvage with the Civil Law (and land-based) concept of *negotiorum gestio* strengthens the case for the development of a similar concept for services in cases of emergency on land. Ultimately, however, there are two objections to Rose's view. First, although he argues strenuously that there are case law examples that do not categorically deny the existence of a concept of necessitous intervention, neither are there solid case law examples that concretely support his theory.⁷³ Restitutionary analyses are notably absent from salvage case law authority.⁷⁴ The central example to his discussion is *The Goring*,⁷⁵ a case concerned with a purported salvage of a drifting vessel on the River Thames. The House of Lords upheld the decision of the Court of Appeal below, and, in a judgment tied closely to the statutory interpretation of the territorial scope of the *Administration of Justice Act 1956* (UK), confirmed that there was no right to salvage in the internal waters of the River Thames.⁷⁶ In the course of delivering the speech of the Judicial Committee, Lord Brandon asserted that the scope of the salvage cause of should be determined by reference to the relevant statutory provisions, and that any extensions should be by legislative action, rather than judicial actions.⁷⁷ This sentiment is problematic to the case's authority for the development down this line.

Secondly, and more specifically to salvage, the contention that restitution is the core basis of salvage does not withstand an examination of the rules of salvage themselves. It is true that the fact that a salvee must pay the salvor for the benefit received appears to be a result of considerations of unjust enrichment and the exercise of the remedy of restitution. However, as the earlier discussion indicates, encouragement of salvors is a central feature of salvage, and lies behind maritime law's willingness to award not only compensation for expenses, but remuneration and reward. Salvage awards clearly do not conform to the restitutionary method of assessing the defendant's liability by reference to his gain at the plaintiff's expense.⁷⁸ The attitude taken to the actions of salvors⁷⁹ further illustrates the public policy aspects of salvage awards. So too does the express acknowledgement in Admiralty decisions that

⁶⁷ See above n 34 and accompanying text.

⁶⁸ Rose, above n 30, 169.

⁶⁹ *Ibid*, 171.

⁷⁰ Kennedy, above n 5, 332.

⁷¹ Goff and Jones, above n 59, 470.

⁷² Rose, above n 30, 178.

⁷³ *Ibid*, 171-172, where Rose asserts the fact that payment has been refused to a necessitous intervenor demonstrates a failure to meet the preconditions for relief, rather than an inherent resistance to restitutionary claims of this nature.

⁷⁴ See for example, *The Tojo Maru*, above n 2, 268 where Lord Reid (a judge with a background in Scots law, where the doctrine of *negotiorum gestio* still exists) denied the existence of a land-based law of salvage and made no mention of a restitutionary analysis of salvage.

⁷⁵ *The Goring* above n 54 (Court of Appeal); [1988] 1 AC 831,855.

⁷⁶ *The Goring* [1988] 1 AC 831, 855 (Lord Brandon).

⁷⁷ *Ibid*, 857.

⁷⁸ Peter Birks, *An Introduction to the Law of Restitution* (1985) 305.

⁷⁹ Discussed above n 47 and accompanying text.

motives of self-interest and financial gain do not in any way negate a salvor's claim to reward.⁸⁰ In my view, it is not possible to relegate public policy to a secondary permeation of salvage law. Considerations of the public good are such a central part of salvage law that they ultimately overshadow the 'private right' aspects of the salvage formulation,⁸¹ and, for Rose's thesis, make the use of salvage as a template for a similar right on land highly problematic. Restitution should be considered as a relevant consideration for salvage, but it is not sustainable to say that the entire body of rules surrounding salvage are attributable to the law of restitution. We will return to the influence of restitution on the issue of duress in salvage, where restitution principles are again relevant to, but not determinative of, the questions facing salvage law.

3. The Tides of Change: Modern Salvage Law and its Links to Salvage of Old

Modern salvage bears little resemblance to the salvage of the past. In the first place, humankind's control over what occurs on the seas is ever increasing. The seas are increasingly regulated and monitored by on-shore parties and authorities. Vast advancements in technology have revolutionised on-board communication and navigational methods, so that communication with land-based operators, technicians, and shipowners has become increasingly instantaneous, accessible and reliable, as has access to weather and landfall information. The maritime mercantile industry now includes vessels of immense proportions, carrying all manner of cargo, as well as commercial fleets of sizes hitherto unseen. With these developments have come changes in infrastructure. Professional salvors are now a common occurrence across the globe, well organised with vast resources at hand, often with standing arrangements with shipping companies to provide salvage services to their fleet. The formulation of salvage has come to be modified to respond to the changing requirements of the industry, particularly with reference to the requirement for success, and increasing concerns environmental issues surrounding the transport of biohazardous crude oils and substances.⁸²

Most significantly, and coinciding with the advent of the commercial salvage industry around the turn of the 20th century, salvage operations have come to be performed almost exclusively under salvage contracts.⁸³ The most common of these, the Lloyds Open Form - in its many incarnations, the most recent in 2000, popularly known as the LOF 2000 - is widely available and almost universally used by salvors, being frequently carried on board commercial vessels.⁸⁴ The purpose of the Lloyds Open Form is simple; although in its modern form it is much more than a 'glorified arbitration clause',⁸⁵ the essential purpose behind its use is to defer the question of quantum of reward to arbitration in London, conducted ex post facto under the auspices of Lloyds of London. This therefore settles two key issues for the parties, of jurisdiction and forum, by the specification of an established forum with experienced maritime arbitrators, and a jurisdiction that is considered sophisticated and in its approach to salvage claims is attractive to shipowners and salvors alike. The use of Lloyd's Open Form also combats another problem: with the improvements in technology and communications, fatal delays arose while the master of the vessel communicated with his on-shore employers for instructions. By delaying the key issues of a salvage contract, the agreement can be concluded and valuable time saved.⁸⁶ Lloyd's Open Form was designed to become industry practice, and the widespread use of such a standard form would, it was hoped, ensure the acceptance of salvage in adverse conditions, so that both parties could be sure of the benefits and obligations involved.⁸⁷ This intention has been largely realised; from a worldwide perspective, an overwhelming percentage of salvages are carried out under the Lloyd's system, most without incident or recourse to the courts.

As a consequence of the success of the Form, important changes have come about in the law of salvage, most of them positive: as a whole the maritime community and judiciary alike have welcomed the uniformity, certainty and standardisation brought about by its use. However, as is often the case, the establishment of such a successful

⁸⁰ *Fisher v The Oceanic Grandeur* [1972] Lloyd's Rep. 396, 408. Cf the requirement of the doctrine of *negotiorum gestio* that the actions of the *gestor* be in the interests of the owner, and not himself; Rose, above n 30, 170.

⁸¹ *The Henry Ewbank*, above n 43.

⁸² See above discussion at above n 50.

⁸³ Non-contractual salvage claims do still occur; in its 1984 report the CMI estimated that 80% of salvages are performed under a salvage contract, and Lloyds Open Form is by far the most frequently used; above n 17. In *Sembawang Salvage Pte Ltd v Shell Todd Oil Services Ltd* [1993] 2 NZLR 97 the claim by the plaintiffs was for non-contractual salvage.

⁸⁴ *Council of Lloyds Standard Form of Salvage Agreement: 'No Cure, No Pay'*, 1 September 2000 (LOF 2000). General reference to the various versions of the Form shall be referred to by 'Lloyds Open Form'. See also Gaskell, above n 44, 14.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 15.

⁸⁷ Edgar Gold, 'Maritime Salvage: Towards a New Regime' (1989) 20 *Journal of Maritime Law and Commerce* 4, 487, 488.

system has ambiguous consequences for the development of the law. As a primary point, Lloyd's Open Form refers to arbitration not only the question of reward quantum, but also any other dispute under it.⁸⁸ Although the courts' Admiralty jurisdiction over these contracts remains, courts internationally give effect to arbitration clauses, so that very few proceedings appear before the courts.⁸⁹ Since arbitration proceedings in England (where Lloyd's arbitrations are held) are confidential,⁹⁰ reports of cases rarely become public, and the few cases that come before the courts most often arise as special cases, where the arbitrators refer the case to the courts to settle questions of law.⁹¹ Members of the maritime community are known to be reluctant to resort to litigation, owing to the amount of money, risk and time involved in litigating disputes.⁹² The occurrence of cases stating the position of the law has therefore been reduced even further, and the development of legal rules and principles stagnated by this development of a private dispute resolution system.⁹³

The second, more significant reason, strikes at the core of the salvage jurisdiction. Because Lloyd's Open Form is by nature a contract between the parties, there is a question of conflict of legal rules. As has been discussed, traditional salvage is not contractual. One might assume then, that there is a conflict in the rules applied to a situation by salvage, on the one hand, and contract law, on the other. It may be thought, for example, that where a contract stipulated for a very large reward amount, contract law may hold that the autonomy of the parties is to be respected and (absent evidence of imperfect consent) upheld, whereas under the maritime jurisdiction the same sum may be set aside as being inequitable. Similarly, as will be seen, in a situation where one party claims that their consent to a salvage agreement was vitiated by duress or undue influence, established principles of contract rules will not automatically apply. This being the case, some clarification on the interaction of salvage law and contract law seems necessary. However, the authorities are far from clear. Some case law authority asserts that salvage principles continue to exist even where a contract is entered into, without further analysis or clarification. A second, more recent chain of cases posits that contractual principles should apply, even take precedence, over the laws of salvage. These cases, sired by *The Tojo Maru*, have proved extremely problematic to the law of salvage, and remain to be considered more fully.

4. The Nature of the Present Enquiry

It is important to delineate the scope of the enquiry at hand. At the outset of this paper, I stated my intention to consider salvage in the context of situations of duress and undue influence. These are issues concerning the formation of a contractual relationship, and in this sense are threshold issues for a court to decide; it matters little what the terms of an agreement are, and which rules apply to them, if there is no true agreement to begin with. For this reason, the enquiry into the interrelationship between salvage and contract law is so significant. A contract will be upheld where its terms reflect the intention of the parties; if the consent of one party is imperfect, a contract is liable to be unenforced by the courts, as it does not truly reflect the parties' wishes. At common law, this kind of question of validity is largely a procedural enquiry, with little reference to the substantive terms of the contract,⁹⁴ but, as will be seen, the situation is very different under the law of salvage. Moreover, because the concept of salvage encompasses both non-contractual and contractual situations, the enquiry is somewhat divided. For instance, in a case of 'pure' salvage, where no express contract exists, the enquiry as to validity is redundant, and the matter would be dealt with under traditional salvage principles, without the question of the applicability of contract law. It is where a so-called salvage contract⁹⁵ exists that the issues arise; indeed, they arise precisely because of the presence of a contract between the parties. Nevertheless, courts exercising the Admiralty jurisdiction have still applied the traditional rules of salvage. In order to determine the validity of an agreement between parties

⁸⁸ LOF 2000, above n 84, Clause I.

⁸⁹ See for example the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958 (entered into force 7 July 1959), to which most of the developed world are signatories, which requires courts in signatory states to stay proceedings to allow arbitral proceedings to be conducted.

⁹⁰ *Arbitration Act 1996* (UK), s. 7.

⁹¹ This was the case in both *The Unique Mariner* (No. 2) above n 27, and *The Tojo Maru*, above n 2. In both cases the matter was referred back to arbitration for final consideration and award.

⁹² Gold, above n 87, 488.

⁹³ Many writers have criticised the lack of publication of Lloyd's arbitral awards on this basis; see Hill, above n 28, 337, and Justice Richard Cooper, 'Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations' (1997) 71 *Australian Law Journal* 686, 690.

⁹⁴ This is not to say the terms of the contract are irrelevant from the enquiry; far from it, but a common law court will not require evidence of substantive unfairness to hold that duress or undue influence exists; see Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions (Part II)' (2000) 16 *Journal of Comparative Law* 191.

⁹⁵ Hill has denied that such agreements should be referred to as contracts, as to do so is to 'suggest we are in the 'world of contract', and not the law of salvage', Hill, above n 28, 335.

to salvage, the applicable legal principles must be known. A brief discussion of the relevant differences is outlined below.

5. Duress and Contract Law

5.1. Contract Law and the Procedural Approach

The exercise of deciding the validity of a putative contract is often a complex one. While courts strive to give effect to the agreement between the parties, it must first be ascertained that the contract in question does in fact reflect that agreement, and that the consent of one or more of the parties is not vitiated by, for example, a misrepresentation by the other party, a mistaken belief (held by any combination of the parties), or imperfect consent of a party as a result of duress or undue influence. A further issue for the law is whether a contract affected by such imperfections is to be held void, as if it had never existed, whether the contract is voidable at the suit of one of the parties to the putative contract, or, owing to a statutory scheme, the court may exercise discretion as to the status of the contract.⁹⁶ Above all, however, the contractual law enquiry is procedural: the validity of a contract does not stand or fall on the terms of the contract, but rather on the quality of the consent, and the authenticity of the agreement between the parties.⁹⁷ The terms of the contract may not be wholly irrelevant to the issue of validity: disadvantageous terms are often relevant, especially when one party is claiming a special disability,⁹⁸ to show that the contract has been affected by reason for that disability or weakness. Nevertheless, the mere fact that a term appears unfair to one party does not of itself render a contract invalid.

In a salvage situation, the salvee is almost always in a position of disadvantage and vulnerability when concluding the salvage contract, owing to the circumstances in which they are placed. This does not mean, however, that all the doctrines relating to vitiation of consent⁹⁹ are automatically applicable. The law does not offer a general principle of relief against inequality of bargaining power. In the cold light of commercial reality, the parties to any given contract are rarely of perfectly equal bargaining power.¹⁰⁰ For a finding of unconscionable dealing, for instance, a disadvantage must be present in one of the contracting parties that goes beyond mere inequality, to the existence of factors which significantly impair the innocent party's ability to 'exercise rational, and independent judgment.'¹⁰¹ Because of this, the doctrine tends to arise in individual, one-off transactions, rather than commercial contracts between business parties.¹⁰² Likewise, as its name suggests, the equitable concept of undue influence is concerned with the wrongful exercise by one party of influence over another, a relationship-based concept that relies on either on the demonstration of influence (often categorised as 'actual' undue influence), or on the circumstances of the contract indicating an influence has been exerted ('presumed' undue influence).¹⁰³

5.2. Duress and the Development of the Concept of 'Economic Duress' at Contract Law

Although undue influence and unconscionable dealings are by no means intrinsically inapplicable to the salvage context, in practice there will be few cases where the issue arises to be dealt with. Parties to a salvage agreement, while not always strangers, are not usually in the kind of relationship anticipated by equity's undue influence jurisdiction, and salvage parties are not usually subject to the kind of disabilities covered by undue influence. The most likely abuse of the bargaining process that is likely to occur in a salvage situation would be pressure amounting to duress, either directly (to property or person) or to economic interests. That the enquiry into contractual validity at common law is largely a procedural one is illustrated by contract law's approach to the issue of duress. What kinds of pressure constitute duress, and the approach the law should take, is far from settled.

⁹⁶ In New Zealand, the position is complicated by the *Contractual Mistakes Act 1977* (NZ), and the broad discretion conveyed upon the court via s. 7 in providing a remedy for a mistake of the kind covered by the Act. The conclusion that the parties' agreement is not genuine will therefore not always lead to a valid/void dichotomy.

⁹⁷ For greater discussion see Bigwood, above n 94, and Rick Bigwood, *Exploitative Contracts* (2003).

⁹⁸ Such as in claims of unconscionable bargains; see Mindy Chen-Wishart, *Unconscionable Bargains* (1989) Chapter 5.

⁹⁹ That is, the doctrines of undue influence, unconscionability and economic duress.

¹⁰⁰ *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686, 708 (Lord Scarman); see also Dillon J's comments in *Alec Lobb (Garages) Ltd & Ors v Total Oil GB Ltd* [1985] 1 All ER 303, 313.

¹⁰¹ *Moffat v Moffat* [1984] 1 NZLR 600, 608; see also *Commercial Bank of Australia v Amadio* (1983) 46 ALR 404, 413 (Mason J).

¹⁰² Chen-Wishart, above n 98, 35.

¹⁰³ John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991) 170-171.

Nevertheless, it is possible to present some general principles that have largely been accepted. Threats as to bodily harm and violence have historically been treated as constituting duress so as to invalidate apparent consent to a contract.¹⁰⁴ A more recent trend has been to recognise that an application of indirect pressure, usually related to the economic interests of the victim, may be regarded as illegitimate by the law so that the contract can be avoided at the (timely) suit of the party being victimised.

Following the dicta of the Privy Council in *Pao On v Lau Yiu Long*, where the Board accepted that a claim of economic duress may be recognised by the common law,¹⁰⁵ their Lordships again had occasion to consider the matter in *The Universe Sentinel*.¹⁰⁶ In that case, the complainant shipowners alleged that the contract in question was obtained under duress, namely, the ‘blacking’ of the ship by union workers, the practical effect of which was that no tug was available to assist in wharf operations, and the ship was unable to leave port until the contract was signed. The House of Lords identified two elements of the duress enquiry: (i) the existence of pressure amounting to compulsion of the will of the victim; and (ii) illegitimacy of the pressure exerted.¹⁰⁷ Although the comments in *Pao On v Lau Yiu Long* suggested that the required pressure must be so great in nature that the will of the victim is completely overborne, this interpretation is inconsistent with earlier case law regarding duress, which recognised that duress does not literally deprive the person affected of all choice, but leaves him or her with a choice between evils.¹⁰⁸ Lord Scarman himself in *The Universe Sentinel* went on to clarify his earlier comments, acknowledging that vitiation of consent is usually not ‘the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him.’¹⁰⁹ According to his Lordship, it is this thread of principle that runs through from the earlier cases involving threats of physical violence, to threats against property and finally, to threats to economic interests in business and trade.

In relation to the second requirement posed in that case, as to the nature of the pressure exerted, not all pressure will be considered illegitimate. As has been stated, the mere existence of an inequality in bargaining power is not sufficient. Concerning this aspect, Lord Scarman had the following to say:¹¹⁰

In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.

The pressure factor is a circumstantial one, to be addressed on the facts of each case. Although unlawful action will invariably be considered illegitimate,¹¹¹ it is also possible that lawful actions may constitute duress where there is an absence of practical choice, or where the circumstances mean that the law will look upon the actions of the person applying the pressure with disfavour.¹¹² A good illustration that has been discussed is situations of blackmail, where the threat – perhaps to reveal information to a particular source – may be lawful, and it is the demand at issue.¹¹³ Although this requirement has had less attention in the main authorities for duress, it also appears that the pressure applied must be at least a ‘significant cause’ of entry into the contract,¹¹⁴ so that, but for the pressure or threat the victim would not have entered into the contract, either at all or on those particular terms.¹¹⁵

¹⁰⁴ See, eg, *Skeate v Beale* (1840) 11 Ad & El 983.

¹⁰⁵ *Pao On v Lau Yiu Long* [1980] AC 614, 626.

¹⁰⁶ *Universal Tankships of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 (‘The Universe Sentinel’).

¹⁰⁷ *Barton v Armstrong* [1976] AC 104, 121.

¹⁰⁸ *Lynch v Director of Public Prosecutions of Northern Ireland* [1975] AC 653, 690-691 (Lord Simon). Note that although the case dealt with a defence of duress in a criminal case, Lord Simon and Lord Wilberforce drew specific analogy with the law of contract. Chitty also states that there is little difference between criminal and civil law on this point; HG Beale (ed.) *Chitty on Contracts* (Volume 1) (29th ed, 2004) 510.

¹⁰⁹ *The Universe Sentinel*, above n 106, 399.

¹¹⁰ *Ibid*, 399-400.

¹¹¹ Goff and Jones, above n 59, 318.

¹¹² *Ibid*, 399. See also *A-G for England and Wales v R* CA 298/00, 29 November 2001, para 62 (Tipping J).

¹¹³ *The Universe Sentinel*, above n 106, 401. The confirmation in *The Evia Luck* [1992] 2 AC 152 that legal, non-tortious action (in that case, industrial action that was lawful in the country in which it occurred) may nevertheless constitute illegitimate pressure in an economic duress enquiry has attracted some consternation; see for example Richard O’Dair, ‘Restitution on the Grounds of Duress – Handle With Care: *The Evia Luck*’ (1992) *Lloyd’s Maritime and Commercial Law Quarterly* 145.

¹¹⁴ *The Evia Luck*, above n 113, 165.

¹¹⁵ *Huyton S.A. v Peter Cremer GmbH & Co* [1999] Lloyd’s Rep. 620, 636, where Mance J accepted the comments in *The Evia Luck*, but subsequently appears to have specified a more stringent test than merely ‘a significant cause’.

The above formulation highlights the fact that a finding of duress does not depend on the substance of the contract. What matters at law is the position of the parties in terms of one another and the choices available to them. Since contract law lies ‘within the realm of self-assumed obligation’, where private parties choose with whom and on what basis they will undertake obligations and liabilities,¹¹⁶ it makes sense that the cornerstone of contract law should be consent, rather than fairness or justice. Particularly in the area of commerce and trade, the law should be mindful of the realities of business. Indeed, the duress cases indicate that the law is mindful of the fact that individuals act every day under pressure of one sort or another, in their personal lives and in business, which is regarded as perfectly legitimate and does not attract the sanction of the law.¹¹⁷ The result of such pressure does not necessarily lead to fair agreements, or bargains that are equally beneficial to all parties involved. Nevertheless, contract law holds that ‘a man cannot be treated unfairly with his own consent’.¹¹⁸ What is of concern to the common law, then, is where one party to a contract loses his ability to consent, due to the circumstances in which he finds himself, circumstances that have improperly been brought about, facilitated, or capitalised upon by the other party.

5.3. Restitution and Duress

One of the rationales put forward for salvage law, discussed earlier in this paper, is the law’s recognition of the unjust enrichment of the salvaged party, in receiving a benefit that they have not paid for. In circumstances of duress, the restitutionary analysis becomes relevant. As a general principle of unjust enrichment, where a service is performed without the request or acceptance (with the knowledge that payment is due) of the party on whom they are conferred, no benefit is conferred at law and thus no unjust enrichment has occurred.¹¹⁹ Since there is no requirement for consent or engagement in salvage, it is unclear how far this general principle extends.¹²⁰ The principle would seem to apply in situations of traditional, non-contractual, salvage, where salvage services are reasonably prohibited or refused, as the salvor would know that the services were unwanted and not considered beneficial by the salvee. Article 19 of the 1989 *Salvage Convention* further confirms this position, stating that ‘services rendered notwithstanding the express and reasonable prohibition of the owner or the master shall not give rise to payment under the provisions of this *Convention*’.¹²¹ One can imagine circumstances in which the hull insurer or underwriter may declare a damaged vessel a constructive loss and there is no threat to loss of life or (other) property, where the services of any willing salvors will be reasonably rejected. In terms of the type of economic duress conceived of at common law, the position is more straightforward as a clear application of the general principle. If a party’s consent to a contract is shown to be lacking, then the benefit conferred under the contract is likewise not freely accepted and restitution may occur once the victim avoids the contract.¹²² Here again, the difference between contract and salvage leads to uncertainty. The position may be more certain at common law, but in a salvage context it is unclear how far a judge would extend the principle of voluntariness and require restitution on the part of the salvee where a salvage service has actually been performed.

6. Salvage: Duress and Inequitable Agreements

6.1. The Position at Admiralty Law

6.1.1. The Modern Conception of ‘Salvage under Duress’

It may be said that duress, undue influence and unconscionability can all be broadly considered as examples of inequality of bargaining power.¹²³ On the other hand, the conditions in which salvage cases arise sets it apart from

¹¹⁶ Bigwood, above n 94, 16.

¹¹⁷ *Barton v Armstrong*, above n 107, 121.

¹¹⁸ Bigwood, above n 94, 12, citing J R Lucas, *On Justice* (1980), 10.

¹¹⁹ Goff and Jones, above n 59, 20.

¹²⁰ Kennedy, above n 5, 28.

¹²¹ 1989 *Salvage Convention*, above n 4, Article 19.

¹²² *The Evia Luck*, above n 113, 164-165 (Lord Goff).

¹²³ This is a broad assertion, meant to characterise the nature of the enquiry and does not take into account the finer details of the doctrines; indeed, attempts to assimilate the three concepts under the single heading have proved to be unsuccessful. Undue influence, for example, cannot be explained or rationalised on the basis of inequality alone; see J Burrows, J Finn and S Todd, *Law of Contract in New Zealand* (2nd ed 2004) 368; see also *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339 (Lord Denning); *National Westminster Bank Plc v Morgan* [1985] AC 686, 708 (Lord Scarman).

other circumstances in which a contract may be concluded, and in which these doctrines operate. By its very nature salvage involves a real risk of danger to one of the parties involved, whether as to property or life, so that the salvee (or at least, the agent of the salvee who enters into the salvage contract, usually the master of the vessel in peril, who is present at the scene of the incident) is not on equal terms with the salvor at the conclusion of the salvage agreement.¹²⁴ This is an important point, as it has invariably been observed in the case law and appears to have contributed to the formulation of what is an 'inequitable' salvage agreement under maritime law. Consequently, it is not enough that a contract is intrinsically, or procedurally, defective, but there must be substantive inequality in the terms of the contract, usually as to the sum to be paid.¹²⁵ In perhaps the most famous case of duress in a salvage situation, In *The Rialto*, Butt J said:¹²⁶

I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If however...it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement.

Because the power of the Admiralty Court is an equitable one, there is a danger in asserting a precise formulation of what will constitute an inequitable agreement at maritime law. This was the view of the court in *Akerblom v Price, Potter, Walker & Co*, where the opportunity to lay down such a prescription was declined. Because of the 'endless variety of circumstances which constitute maritime casualties', courts should instead adhere to the fundamental rule of doing what is fair and just between the parties. If an agreement is manifestly unfair and unjust in the circumstances of a particular case, the courts should refuse to apply it.¹²⁷

Despite the general nature of the Admiralty Court's discretion, it has been suggested that it is possible to identify three categories in which Admiralty would act to set aside the agreement.¹²⁸ The first reflects Admiralty's civil law background, and the principles of unjust enrichment that developed therein.¹²⁹ Where the benefit (or in a contract situation, the consideration) obtained for a service is inconsistent with what the court considered to be fair and just dealing, the court will require that the unconscientiously obtained benefit be returned to the innocent party.¹³⁰ In the second category, the court would set aside an agreement obtained by actual or equitable fraud.¹³¹ The third category arises where the agreement to the contract was obtained under compulsion. Sir Robert Phillimore, in the *Cargo ex Woosung*, commented:¹³²

Now, in one sense the services of every salvor are unwillingly and under duress accepted; the lesser evil of losing a portion of the profit and property being submitted to, rather than the greater evil of losing all, so that in a sense all salvage services are accepted under compulsion. But there is no compulsion of duress of a criminal character, unless, indeed, all reasonable limits are transgressed by the salvors, as there has been a use of false representation or the excitement of ungrounded fears in order to procure the acceptance of their services.

The difficulty with such categorisation is that the nature of the court's equitable jurisdiction does not lend itself to neat classification. As the comments in *The Rialto* indicate, compulsion or duress alone is not actionable; the consideration for the agreement must also be extortionate for the agreement to be set aside. However, when enquiring whether an agreement has been entered into under compulsion, the standard is considerably less stringent than that required for a finding of economic duress at common law.¹³³ The enquiry is an objective one, and the relevant question is whether the agreement was manifestly unfair or unjust having regard to the respective positions of the parties at the time the agreement was entered into.¹³⁴

¹²⁴ The courts have had little difficulty in considering that certain circumstances give rise to practical compulsion; in *The Medina* the court held that the master of the eponymous steamer was practically compelled to agree to the salvors demands on account of his responsibility for the lives of the 550 passengers aboard; *The Medina* (1876-77) LR 2 P D 5. See also Cooper, above n 93, 1-2.

¹²⁵ *The Rialto* [1891] 175; *Akerblom v Price, Potter, Walker & Co* (1880-81) LR 7 QBD 129; *The Medina*, above n 124.

¹²⁶ *The Rialto* above n 125, 177.

¹²⁷ *Akerblom v Price, Potter, Walker & Co*, above n 125, 132.

¹²⁸ Cooper, above n 93, 688.

¹²⁹ Wiswall, above n 36, 58.

¹³⁰ Cooper, above n 93, 688.

¹³¹ *Ibid.*

¹³² *The Cargo ex Woosung* (1876) 1 PD 260, 265.

¹³³ *Akerblom v Price, Potter, Walker & Co*, above n 125, 132.

¹³⁴ Cooper, above n 93, 689; see also *The Altair* [1897] P 105, 108.

This objective consideration of compulsion does not mean that a finding of duress is more likely at Admiralty law than at common law: the secondary requirement of substantive unfairness puts further obstacles in place before an Admiralty court would be persuaded to set aside an agreement. Aside from this second requirement, however, the concepts in the two jurisdictions share the same rationale: that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate. In fact, it has been suggested that the salvage cases are helpful to delineate the distinction the economic duress cases make between what is legitimate business pressure, and what is illegitimate and attracts the sanction of the law.¹³⁵ *The Rialto* and other subsequent case law are examples of how behaviour less than criminal actions, fraud or deceit can constitute duress so as to vitiate consent, where the demand may be lawful, but the nature of the demand in the circumstances, and considering the positions of the parties, is sufficient to render the victim devoid of any practical choice other than that offered by the party in question. In salvage law, this rationale is modified by public policy considerations, and the desire to encourage salvors to ensuring that they are not deprived of the fruits of their agreements, merely because they are dealing with a party in a vulnerable position. Something more is required. Likewise, a salvor is not subject to the disapprobation of the courts because they demand reward for their services and refuse to act other than on their specified terms of engagement.¹³⁶

6.1.2. Traditional Salvage Law – Prohibition and Officiousness

The cases discussed above deal with situations where the complainant alleges a defect in the agreement between the parties. The claims in these cases deserve further scrutiny, as they do not conform to the traditional rules of salvage; it may be said that if salvage is not based on consent, but on necessity, the concept of ‘salvage under duress’ requires further explanation. In *The August Legembre*,¹³⁷ the court had occasion to consider an incident where a French steamer ran into trouble off the entrance to the Bristol Channel and required assistance. Having engaged the services of two tugs, the *Helen Peele* and the *Victor*, the captain of the ship refused the services of a third tug, the *Dragon*. However, the captain of the *Victor* refused to carry out the service without the aid of a third vessel, and the *Dragon* joined the operation, notwithstanding its dismissal. Salvage was subsequently awarded to all three vessels. A valuable service had been conferred, and in such circumstances that, in the judgment of the Court, a prudent salvee would have consented to the salvage. The refusal of the captain was relevant to the making of the award, which was to be ‘of a moderate character’.¹³⁸ This case, as an application of the principle in *The Vandyck*¹³⁹ has been followed in subsequent case law and approved of as sound in principle and pragmatic in its approach.¹⁴⁰ Similar provision has also been made in the 1989 *Salvage Convention*, via Article 19.¹⁴¹ The inference is there that where the prohibition is not reasonable or express, and a salvor successfully carries out the service, a salvage reward is possible.

In cases of salvage without express agreement, the only circumstance where a concept akin to duress can conceivably arise is where salvage services were forced on a salvee that expressly and reasonably prohibited them. Even then, the issue is not one of compulsion, but of misconduct by the would-be salvor, whose actions will be assessed by the court as to whether the circumstances was genuinely one of salvage, and deserving of reward. Purporting to ‘salvage’ a vessel that is clearly in no need of assistance will attract no award whatever.¹⁴² Where no express agreement exists, there can be no undue influence or illegitimate pressure in the sense referred to in cases such as *The Rialto*. Similarly, only when a party enters into an agreement can issues of inequity arise as to the amount they have agreed upon, because where there is no agreement the court will make an award based on considerations of justice and fairness. The very existence of such cases, and the rules contained therein, owe their genesis to the superimposition of contract law concepts and the principle of voluntariness onto the salvage landscape. With this knowledge in mind, further scrutiny as to why different rules exist is deserved.

¹³⁵ Cooper, above n 93, 694-695.

¹³⁶ *Fisher v The Oceanic Grandeur*, above n 80, 408.

¹³⁷ *The August Legembre*, above n 20.

¹³⁸ *Ibid*, 128-129.

¹³⁹ *The Vandyck* (1882) 5 Asp MLC 17, where the Court of Appeal held that where salvage services are rendered to property in danger, without request or engagement by the recipient of those services, the recipient is nevertheless liable to pay a salvage reward where the vessel is in such circumstances that a prudent man would accept them.

¹⁴⁰ See for example *The Kangaroo* [1918] P 227, *The Pretoria* (1920) 5 Lloyd’s Rep 172, 176; see also Kennedy, above n 5, 31-32.

¹⁴¹ See above n 121 and accompanying text.

¹⁴² See *The Homewood* (1928) 31 Lloyd’s Rep 336, where the ‘salvors’ were denied the claimed salvage of a vessel that was anchored and unmanned.

6.2. The 1989 *Salvage Convention* and the Concept of 'Undue Influence'

The 1989 *Salvage Convention* owes much to the traditional Admiralty law, even as it represents an effort to modernise and regularise international rules of salvage. Starting from the beginning of the twentieth century, salvage has become increasingly complicated, with novel issues coming before the courts and new pressures on the industry. One pressure has been environmental concerns, and the rise of 'maritime leprosy', where damaged ships containing dangerous or polluting cargo have been denied entry into national ports, and have become major problems for the maritime industry. Although it was once a maritime tradition for foreign ports to offer a crippled ship a 'port of refuge' in their territorial waters, this has changed with the advent of ships carrying volatile, dangerous and potentially polluting cargoes. A series of unfortunate events, including the infamous *Torrey Canyon* disaster of 1967,¹⁴³ the *Amoco Cadiz* catastrophe of 1978, and the *Atlantic Empress/Aegean Captain* collision of 1979, illustrated that traditional maritime law was no longer equipped to deal with the problems of the industry.¹⁴⁴ The refusal of states to allow such maritime lepers into their territorial waters for fear of damage not only led to great loss and destruction, but also resulted in the loss of the ship, as salvors were forced to scuttle the vessels out to sea to avoid environmental damage. Thus, the fund against which the salvor could claim for their services disappeared, and with it the inclination of salvors to go to the aid of vessels in these situations. A second pressure arose after the decision of the House of Lords in *The Tojo Maru*, where the court held that salvors were not, as was previously believed, immune from claims of negligence in the course of an operation, nor did they enjoy limitation of liability.¹⁴⁵ This caused great consternation among salvors, and a further push for industry reform. These pressures, combined with drive for modernity and standardisation, led to development of new rules to deal with salvor reward and remuneration.

The significance of the 1989 *Salvage Convention* is twofold. As a matter of international law, the 1989 *Salvage Convention* becomes effective as a part of municipal legal systems by ratification and subsequent domestic legislative action.¹⁴⁶ Thenceforth, even in cases where there is no express salvage contract, or a standard form other than the Lloyd's Open Form is used, where the law of a country that is a signatory state to the 1989 *Salvage Convention* governs the case, Article 7 will apply. Furthermore, the incorporation into the 1990, 1995 and 2000 versions of Lloyd's Open Form of various aspects of the 1989 *Salvage Convention* ensures enormous practical impact in the salvage world.¹⁴⁷ The consequences of this inclusion will be discussed elsewhere in this paper. As to setting aside or modifying contracts, the 1989 *Salvage Convention* follows the formula applied in *The Rialto* and subsequently followed throughout the case law, and states the following:¹⁴⁸

Article 7

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.

The 'undue influence' mentioned refers to all manner of unfair pressure or influence, such as fraud and duress, and not only the discrete category of cases dealt with under that heading in equity.¹⁴⁹ The expression here broadens the scope of the 1910 *Salvage Convention*, which referred only to 'fraud and concealment'.¹⁵⁰

¹⁴³ See the *Torrey Canyon Report*, 1967 AMC 569, cited in Gold, above n 87, 488.

¹⁴⁴ *Ibid*, 488-493.

¹⁴⁵ *The Tojo Maru*, above n 2; see also D R Thomas, 'Salvorial Negligence and Its Consequences' (1977) *Lloyd's Maritime and Commercial Law Quarterly* 167.

¹⁴⁶ In New Zealand, the 1989 *Salvage Convention* is part of domestic law by virtue of the *Maritime Transport Act 1994* (NZ), Part XVII. Its operation was finally brought into effect by the requisite Order in Council on 16 October 2003. Part XVII incorporates the English text of the 1989 *Salvage Convention* (which is authoritative; Article 34, above n 4) into NZ domestic via Schedule 6 of the Act. For further information, see David, above n 1.

¹⁴⁷ Gaskell, above n 44, 4. Note that the Lloyd's Open Form 1990 only incorporated certain Articles of the Convention, while the 1995 version incorporates the Convention as a whole; Richard Shaw, 'The 1989 Salvage Convention and English Law' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 202, 202-203.

¹⁴⁸ 1989 *Salvage Convention*, above n 4, Article 7.

¹⁴⁹ Kennedy, above n 5, 442

¹⁵⁰ *Ibid*.

As to the alternative influence of danger, the wording of the section was slightly altered from Article 7 of the 1910 *Salvage Convention*, which referred to the agreement having been entered into 'at the moment and under the influence of danger'.¹⁵¹ Brice has argued that, since danger is a precondition to a successful salvage claim, to give the passage proper effect, the reference to 'the influence of danger' should be read as requiring the mind or negotiating power of the complainant to be overborne, or at least significantly affected by the danger faced at the time the contract was entered into.¹⁵² However, unlike the common law, there is no requirement under Article 7 that the compulsion need be illegitimate; it suffices that an external danger is present and influential on the unfortunate party.¹⁵³ This is a much broader formulation of the duress concept, and takes the law of salvage under Article 7 further from common law economic duress. Nor is it a requirement of Article 7(a) that the other party to the salvage take advantage, or indeed, even be aware of the danger.¹⁵⁴ As to the requirement for compulsion, however, the first part of the formulation of Article 7, both as to undue influence and danger, appears to be consistent with the common law duress formulation, in that it deals with procedural defects in the salvage agreements.

It is the second part of Article 7(a), and Article 7(b), that introduce the requirement for substantive injustice. The wording of Article 7(a) makes it clear that procedural inequity alone will not suffice. The effect of the second half of Article 7(a) is that, no matter how much a party has been influenced or affected by the presence of danger, any appeal to modify or annul the agreement will not lie unless the terms of the agreement are also shown to be substantively unfair. Article 7(b) furthers the substantive approach, so that where a sum is grossly disproportionate to the services provided there is no requirement for procedural irregularity, and the price may be varied, or the whole contract set aside, at the discretion of the court. Whereas there is some debate as to whether the terms under Article 7(a) must be inherently inequitable (to be judged at the time the contract is entered into) or unfair in the circumstances,¹⁵⁵ Article 7(b) clearly refers to situations where the price agreed to is in fact disproportionate. Since a court can increase, as well as reduce, an award, this section not only protects salvees, but is also consistent with the 1989 *Salvage Convention's* overall theme to encourage salvors.¹⁵⁶ The threshold that the sum must be 'excessive' further reflects maritime law's reluctance to interfere too lightly with salvage agreements, and adds a further hurdle for a petitioner to overcome before having an agreement modified or overturned.

As to what exactly should be considered inequitable, or grossly disproportionate, the 1989 *Salvage Convention* is silent. It has been observed that it is highly unlikely that a court would consider inequitable a salvage agreement concluded under a standard form agreement such as Lloyd's Open Form.¹⁵⁷ In the first place, since Lloyd's Open Form leaves the calculation of reward to an arbitrator, acting with the benefit of hindsight and with the authority to determine what is just as between the parties, an award determined this way is unlikely to be modified by the court. It might even be said that the very idea behind the Lloyd's system is to leave the question of quantum to a time when the parties are not so affected by their circumstances as to be manifestly unequal, and the interests of both parties are represented. Secondly, the Lloyd's Open Form represents a standard form in the industry, widely known and used and therefore it is improbable that its terms would be considered inequitable. Having been developed by a committee of maritime experts, including underwriting representatives, shipowners, members of the salvage industry, and Admiralty law practitioners, the nature of Lloyd's Open Form is likely to be relevant, in that it represents a kind of industry bargain, well considered and researched. Likewise, because of the incorporation of the provisions of the 1989 *Salvage Convention*, the same considerations apply. Where figures, such as those involving environmental damage and recovery, have been painstakingly negotiated by state and industry interests, 'it would take a very brave judge to 'modify' the figures in Article 14(2)' for example.¹⁵⁸

Nonetheless, some have suggested that there are ways that Article 7 could apply to cases where Lloyd's Open Form has been used. Since the operation of Article 7 is not limited to the influence of danger, or fear of peril, but includes

¹⁵¹ 1910 *Salvage Convention*, above n 15, Art 7.

¹⁵² Brice, above n 5, 373.

¹⁵³ Kennedy, above n 5, 442.

¹⁵⁴ *Ibid.*

¹⁵⁵ Kennedy argues that the proper reading is that the terms should be judged at the outset of the contract, as inequity is a different enquiry from the unfair operation of contractual terms; *ibid.*, 444.

¹⁵⁶ Some writers see this provision as more favourable to salvors, who, being 'eternal optimists' are more likely to underestimate a job than to demand an excessive price, a somewhat different viewpoint to the operation of Article 7; see Donald A Kerr, 'The 1989 Salvage Convention: Expediency or Equity?' (1989) 20 *Journal of Maritime Law and Commerce* 4, 505, 511.

¹⁵⁷ Kennedy, above n 5, 443.

¹⁵⁸ Gaskell, above n 44, 14.

the broad heading of 'undue influence', it is arguable that the power could be invoked where a ship's master was motivated by the financial position of the shipowner, and agreed to a manifestly unfair agreement where there was no practicable alternative but to accept salvage on Lloyd's Open Form.¹⁵⁹ This might be the case where the ship's distress was not in the nature of salvage (for example, towage), and consequently the award provided for under the contract would be greater than that which would be awarded by a court.¹⁶⁰ In this way, entry into the contract itself (and the operation of its terms) might be inequitable under Article 7(a), and the award excessively large for the services actually rendered. Less likely, but also arguable, would be where the operation of the terms are unfair to one party in the circumstances. For instance, Nicholas Gaskell has suggested that it might be argued that the reference to arbitration in London is inequitable to a foreign party, on whom the expense of arbitrating the matter in a foreign jurisdiction may fall heavily.¹⁶¹ Given that 'inequality' could include the unfair operation of terms, and the danger of labelling any contract, however widespread, as unimpeachable, the possible validity of these arguments should not be dismissed out of hand.

In sum, the 1989 *Salvage Convention* reflects the past approach of traditional Admiralty law to the question of inequitable agreements, with some important changes. First, Article 7 spells out definitively what constitutes an inequitable agreement. Undue influence combined with substantive inequality, or substantive inequality alone, is sufficient to attract a remedy, at the discretion of the court, but undue influence alone is not enough. The inclusion of external circumstances in the formulation of influence has had the effect of relaxing the undue influence requirements at salvage law, below what they would be at common law or perhaps at Admiralty. It can also be said that Article 7 has the effect of introducing some rigidity into the law, by specifying the elements that are required for a finding that a term is inequitable. Combined with these requirements however is the broad power not only to annul, or set aside, an agreement (the usual remedy exercised at the discretion of the Admiralty Court), but also the power to modify the terms of the agreement, possibly extending as far as terms other than the offending one in question. This is a much broader power with no equivalent at common law, although the power of the Admiralty Court to set aside an agreement and make a different salvage award at its discretion has the same practical effect.¹⁶²

7. The Orthodoxy and Preservation of the Status Quo: Salvage and Contract as Comfortable Bedfellows

The response of salvage law when contract intrudes on its traditional sphere arguably raises more questions than it answers. Perhaps unsurprisingly, given the virtual monopoly of arbitration over salvage cases under Lloyd's Open Form, cases that assert that salvage and contract co-exist happily are relatively dated. The earliest relevant case law makes it plain that the law of salvage was not to be subsumed by the encroachment of other areas of the law. In response to an argument that the existence of an agreement between the parties acted to exclude the operation of salvage law, by changing the nature of the obligations as between them, Dr. Lushington stated:¹⁶³

An agreement, if entered into, might be a bar to the parties recovering a salvage reward, because they would have estopped themselves from proceeding in the suit; but to suppose that an agreement can convert what is originally a salvage service into one of a different nature, is to suppose that which is utterly inconsistent with every principle of law.

Again, in *Admiralty Commissioners v Valverda (Owners)*, it was said:¹⁶⁴

It is true enough that the right to salvage arises independently of and is not based on upon contract; but it is untrue to say that where there is a contract as to salvage it ceases to be salvage. Counsel for the respondents was probably not far from the mark in saying that in these days of Lloyd's salvage agreements, the larger number of salvages are regulated by agreement. Nevertheless, they do not cease to be salvages, and they are dealt with and paid for in accordance with the maritime law of salvage.

¹⁵⁹ Clift and Gay, above n 11, 1369.

¹⁶⁰ Since by Clause D of the LOF 2000, above n 84, the contractor's services 'shall be rendered and accepted as salvage services', to agree to the use of Lloyd's Open Form has the effect of invoking salvage law and the 1989 *Salvage Convention*.

¹⁶¹ Gaskell, above n 44, 14. Gaskell also raises arguments against this contention, on the basis that the Lloyd's Open Form is internationally recognised, arbitration is commonplace in the shipping industry, and the convenience of the salvor should be a major influence on the court (in accordance with the policy of encouraging salvors).

¹⁶² *Ibid.*

¹⁶³ *The William Lushington* (1850) 7 Notes on Cases 361, 362-363.

¹⁶⁴ *Admiralty Commissioner v Valverda*, above n 8, 202 (Lord Roche).

It is convenient at this point to consider what is meant by a 'salvage agreement'. It may be thought that 'pure' salvage, according to its judicial conception, exists in the absence of agreement, and that salvage under contract is a different beast. This view is suggested by some of the case law. Nevertheless, from the time when express agreements began to be used, the agreements between the parties have been consistently referred to as 'salvage agreements' and held as subject to the rules of salvage. The most often used description of these is given by Kennedy, and characterises a salvage agreement as one which 'fixes the amount to be paid for salvage, but leaves untouched all other conditions necessary to support a salvage award, one of which is the preservation of at least part of the res: that is, ship, cargo or freight'.¹⁶⁵ In theory then, an agreement that affects the conditions of salvage, such as the requirement for success, might be classified as something other than salvage. However, in practice, judges have been anxious to preserve the reach of maritime and salvage law. For example, the fact that an agreement contains clauses that do not strictly conform to the rules of salvage will not exclude the maritime jurisdiction. The most obvious example is where a contract provides for some form of payment to the party contracting to provide services, whether or not successful. This was the case in *Admiralty Commissioner v Valverda (Owners)*, where it was contended that a provision for compensation for out of pocket expenses in the event of failure by the party providing the service prevented an agreement from being a salvage agreement. The House of Lords rejected this contention, and held that, where an agreement contains a part referring to salvage, this part is severable, and takes effect as a salvage agreement on the conclusion of a successful salvage operation.¹⁶⁶ On the basis of this decision, it seems that only an express exclusion of a salvage reward will be effective to oust the jurisdiction of maritime law over a contract in the nature of salvage.¹⁶⁷

These cases positively reject the assertion that, because a party has entered into a contract, the relationship between the parties becomes wholly contractual and the rules of salvage law cease to apply. Other cases that have not explicitly dealt with the interaction of salvage and contract nevertheless belong to this line of authority, where the rules of salvage are applied with little or no reference to the existence of the contract, or the resultant potential for contractual rules to apply. Where parties have used Lloyd's Open Form, or entered into contract for a specific liquidated sum, Admiralty law and its rules have continued to apply to, for example, claims of undue influence, inequitable bargains and vitiation of consent.¹⁶⁸ Moreover, the salvage requirement for voluntariness has been read widely, so that the existence of contractual obligations does not transform a salvor from a volunteer to a contractor, provided that the contract was concluded after the need for services arose.¹⁶⁹ As will be seen, these authorities do not appear to be reconcilable with the decisions in *The Tojo Maru* and its progeny. To say that contract rules are to be applied where an express agreement exists ignores the fact that, if salvage law continues to apply, it is unclear where its rules are to find expression. Similarly, stating that salvage laws should apply, without further exposition or clarification, merely obscures the fundamental issue. Contract law belongs to the realm of the common law. In my view, to 'cross-fertilise' maritime law with common law principles to this extent, more discussion on the interrelationship is needed than merely asserting the presence of contract law and applying its principles.

8. Choosing a Bearing: Where to From Here?

Having canvassed the landscape of the earlier salvage cases, the question of whether contract law principles should have a place in the maritime world remains to be addressed. If one takes the position that common law contract rules can and do exist in contracts governing events on the sea, the cases raise a range of possibilities for how the relationship between the two regimes should work. Which set of rules takes precedence? Can the two regimes co-exist neatly? Or should salvage law remain governed solely by one, or the other, but not both? The conundrum is not easily answered. There are strong arguments for each view, and each regime has its own developed principles and justifications. Nevertheless, the exercise is worthwhile, and, it is submitted, well overdue. The maritime industry is hugely important and lucrative, and salvage is an extremely important concept within that system. Indeed, the existence of the carefully planned and administrated efforts of Lloyd's Open Form and the *Salvage Conventions* bear testament to the importance of salvage. The principles governing the law should be equally clear

¹⁶⁵ Kennedy, above n 5, 346.

¹⁶⁶ *Admiralty Commissioner v Valverda*, above n 8, 197 (Lord Maughan), 202-203 (Lord Roche).

¹⁶⁷ *The William Lushington*, above n 163, 363.

¹⁶⁸ See later in the paper; see also *The Rialto et al*, above at n 125.

¹⁶⁹ Hill, above n 28, 335.

and articulated. To attempt to answer the questions posed, three separate models will be considered. It is not suggested that the case law is consistent, nor is it possible to reconcile the authorities with one another. The ad hoc nature of Admiralty decisions, combined with the reluctance of mariners to litigate, has meant that Admiralty case law is not the mine of information and principles that common law or equity case law is. What this paper attempts is to examine the authorities, and, with reference to the policy reasons and context already discussed, suggest a way forward.

8.1. Model One: The Tojo Maru and the Supremacy of Contract Law

8.1.1. The Tojo Maru

The case involved the salvage of the eponymous tanker following a collision with another vessel. The salvors were engaged under the Lloyd's Open Form terms of 'no cure – no pay'. Owing to the unauthorised actions of a diver from the salvage party, a gas explosion occurred in the tanker's hold, causing significant damage. In the course of the London arbitration, the owners of the ship and cargo counterclaimed against the salvors for negligence. The salvors in turn maintained that there was a rule of maritime law that a successful salvor cannot be liable in damages for the result of any negligence on the salvor's part. Thus, while the case dealt with issues of negligence and limitation of liability, on appeal the House of Lords had the opportunity to consider the nature of the Lloyd's Open Form contract and its relationship with the general law of salvage. Of all their Lordships' speeches, Lord Diplock's has proved the most problematic. After surveying the history of Admiralty and common law, his Lordship asserted that to conceive of Admiralty, common law and the Equity of Chancery as rival jurisdictions, completely separate from one another, and untouched by developments in the spheres of the others was to misconceive the operation of the law. In his Lordship's view, Admiralty has been cross-fertilised by both common law and Chancery, and this process has continued after the merger of the courts under the *Judicature Act 1875* (UK).¹⁷⁰

The speech continues to consider the relevant provisions of Lloyd's Open Form, which according to his Lordship is essentially 'a contract for work and labour'.¹⁷¹ After making the observations referred to earlier,¹⁷² Lord Diplock continued:¹⁷³

Today, in the latter half of the twentieth century, most salvage services, other than that of 'standing by' a vessel in distress, are performed by professional salvors under a salvage agreement under Lloyds Standard Form... The proper approach [to the question of duty of care owed by a contracted salvor] in the year 1971, as it seems to me, is to consider first what would be the salvage contractor's liability under the general English law of contract, and then to examine what, if any, differences flow, either in principle or on the authority of previous decisions, from the special characteristics of salvage service.

Because of the historical development of Admiralty and the fact that contracts were not used in salvages until relatively recently, judges and practitioners should look outside maritime law, to the common law of contracts, for guidance as to interpreting contractual obligations.¹⁷⁴ From there, special features of the context in question should be addressed. In the case before the court, the issue was whether there were any particular importations into the contract between the parties that would displace the general rule in work and labour contracts that the contractor 'warrants that he will use reasonable skill and care in the provision of the services', and a breach of that warranty will result in damages assessed in the normal contractual manner.¹⁷⁵

On a general contractual analysis of the status of a salvage contract performed on a Lloyd's Open Form basis, Lord Diplock observed that three of the peculiar features of salvage under Admiralty law had been incorporated into Lloyd's Open Form. The first was that the traditional maritime requirement for success has been imported into the Form, modifying what would otherwise be an ordinary contract for services. This alone did not mean that a salvage contract stands apart from the rest of contract law; the requirement for success is also a feature of contracts with

¹⁷⁰ *The Tojo Maru*, above n 2, 291.

¹⁷¹ *Ibid*, 292.

¹⁷² *Ibid*; see above n 18.

¹⁷³ *Ibid*, 292.

¹⁷⁴ *Ibid*.

¹⁷⁵ That is, the contractor will be liable for a sum that will put the other party in the same position that they would be in had the contract not been breached; *ibid*, 293.

real estate agents, or individuals who sell goods on commission.¹⁷⁶ Another distinctive feature of the salvage jurisdiction that his Lordship addressed was Admiralty's discretion to set aside a hard bargain, and 'substitute a sum assessed upon a quantum meruit [reasonable value as deserved] basis for a fixed sum agreed between the parties.'¹⁷⁷ This, too, has found expression in Lloyd's Open Form via the arbitration clause, which states that should a reward figure be agreed, then subsequently objected to, the final sum should be fixed by arbitration.¹⁷⁸ While the discretion of the Admiralty court has no parallel in the common law of contract, in Lord Diplock's view, many contracts today are assessed on the principle of quantum meruit. These three features, taken together, were insufficient to show that salvage agreements are fundamentally different from other types of contract, and to oust the general rule of English law that a 'person who undertakes for reward to do work and labour upon the property of another owes to the owner of the property a duty to exercise that care which the circumstances demand.'¹⁷⁹ Applying this view to the facts of the case at hand, his Lordship rejected the existence of the rule argued for by the salvors, that maritime law precludes a salvor from being found liable for negligence.

8.1.2. The Unique Mariner (No. 2)

Since the decision in this case built on Lord Diplock's sentiments in *The Tojo Maru*, it is convenient to consider the two cases together. Here, the ostensible issue for the court was the status of superseded salvors in the making of a salvage award. The salvors in question, the crew of the tug *Salvaliant*, had signed a Lloyd's Open Form contract with the ship's master, and, having been replaced in the salvage operation by another professional salvor, claimed damages for breach of contract, and/or a salvage reward for the services actually rendered to the distressed ship in the course of the resultant arbitration. The arbitrator and appeal arbitrator had found that the salvors were entitled to both a salvage reward, and to compensation for the lost opportunity in completing the salvage operation. In a special case, Brandon J reversed this finding, and held that the salvors were entitled to damages for breach of contract, but not for a reward for services actually rendered. In doing so, he followed the approach of Lord Diplock in *The Tojo Maru* and drew a distinction between salvors who were engaged without an express agreement, and those who perform the salvage operation under a contract such as Lloyd's Open Form (as was the case here).¹⁸⁰ It therefore followed from Lord Diplock's comments that, just as a salvor who is not operating under a contract has no duty to continue a salvage service, nor does a salvee have any obligation to continue to employ the salvors for the duration of a non-contractual salvage operation. Any award made to the salvors is on the basis of public policy, namely 'the encouraging of salvors to be willing and ready to render salvage services even though they may, after entering upon them, be deprived, as a result of supercession, of the opportunity to complete them successfully.'¹⁸¹ On this basis, superseded salvors were not entitled to compensation on the principle of *restitutio in integrum*. Their rights extended to a salvage reward for any services actually rendered, and some compensation for the lost opportunity in being precluded from completing the operation and attaining the full reward.¹⁸²

His Honour then went on to treat the question of contractually engaged salvors as one to be answered by the common law of contract, based on the express and implied terms of the contract, with the provisions of maritime law only being applicable in so far as the contract expressly or impliedly incorporated them.¹⁸³ By his observation, the duty contained in Lloyd's Open Form that the salvors use their best endeavours did not exist in maritime law, separate of an express contractual term. Likewise, the owners of the salvaged property had a contractual obligation to accept and pay for the services provided as salvage services.¹⁸⁴ On this basis, Brandon J considered whether the agreement between the parties modified the principle of salvage law, earlier referred to, that neither party has an obligation to continue the salvage operation. He answered this question in the affirmative. On the principles of contract law, it was necessary to the efficacy of the salvage contract, and to give it the necessary mutuality required

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, 293-294.

¹⁷⁸ Ibid, 294. Note that newer versions of Lloyd's Open Form (e.g. the 1995 and 2000 versions) no longer include this clause, and the amount of salvage is now left entirely to a subsequent arbitration; Brice, above n 5, 539-549.

¹⁷⁹ *The Tojo Maru*, above n 2, 294.

¹⁸⁰ *The Unique Mariner (No. 2)* above n 27, 49-50.

¹⁸¹ Ibid, 50.

¹⁸² Ibid.

¹⁸³ Ibid, 51. Note that Brandon J's comments were not confined to Lloyd's Open Form, but apply to express salvage contracts made generally; this is clear from his later comments regarding *The Valsesia* (1926) 26 Lloyd's Rep 22, 53.

¹⁸⁴ Presumably, here his Honour is referring to the fact that under Lloyd's Open Form, a salvee is precluded from claiming the services were not in fact salvage services, and thereby avoiding salvage rules; without a salvage agreement, the owner of salvaged goods may dispute this, although a court may nevertheless hold that the services were in the nature of salvage, and reward is due.

of a bilateral contract, that a term be implied to the effect that, 'so long as the person employed is both willing and able to perform the work and labour which he has undertaken, the employer will not act in such a way as to prevent him from doing so'.¹⁸⁵ If such an implied term existed, it followed that the supercession of the salvors was a breach of the contract, the gravity of which constituted a repudiation of the contract,¹⁸⁶ and the salvors were entitled to recover damages.¹⁸⁷

The decisions in *The Tojo Maru* and *The Unique Mariner (No. 2)* are important in several respects. Starting with the earlier of the two cases, the treatment afforded to salvage is quite different to earlier maritime case law dealing with salvage contracts. Lord Diplock's speech emphasises the connection between salvage and the common law, by comparing features such as the requirement for success with contracts of commission, and the quantum meruit calculations of the Admiralty court with general labour contracts. This approach plays down the role of policy considerations and the special context of salvage law, identifying its unique features – such as the characteristic that the salvor's remuneration cannot exceed the value of the property saved – more as a consequence of the fact that the only remedy available to a salvor at Admiralty law was an action in rem against the ship, rather than attributing it as a unique feature of salvage law, setting it apart from, and at odds with, the general common law rules of recovery.¹⁸⁸ Furthermore, his analysis of a contractual salvage on a Lloyd's Open Form basis indicates that the special features of salvage mentioned are relevant solely because of their inclusion in the Form, and that they modify what would otherwise be an ordinary contract for services.¹⁸⁹ This has the effect of orienting contractual salvage squarely towards common law contract rules, while at the same time emphasizing the difference between contractual and traditional non-contractual salvage. This distinction is further developed by Brandon J in *The Unique Mariner (No. 2)*, so that the second case indicates the practical effect, in terms of damage calculations, of applying contract principles of recovery over traditional salvage rules.

How far the ratios of the two cases extend is unclear. The contention of the salvors in *The Tojo Maru* was for the extension of the special nature of salvage to encompass a salvorial indemnity for negligence in the course of a successful salvage. Lord Diplock was therefore analysing the law from the viewpoint of restricting the rules of salvage to deny the existence of such a rule, and limiting the policy considerations that normally encourage salvors by taking a lenient approach so that gross negligence was not covered. However, the language his Lordship's judgment is broad, and his comments as to the nature of salvage generally and contractual salvage specifically were framed in general terms. His analysis as to the special features of salvage that have been incorporated into the Lloyd's Open Forum was similarly general, as is illustrated by their use in *The Unique Mariner (No.2)*, which dealt with the entirely different issues of supercession and salvage recovery. Neither case makes it clear whether the existence of an express contract imports all the rules of contract law, and, as will be seen, *The Unique Mariner (No.2)* is especially problematic when considered in light of Brandon J's comments in the first hearing of that case. As to their relevance as case law authority today, both cases were also decided before the 1989 *Salvage Convention* came into effect, and thus are silent as to the effect of its provisions

What of Lord Diplock's view? As will be seen, the assertion that common law is the predominant applicable law is not correct when examining duress and influence, and the current state of the law. If his Lordship's view is to be preferred, contractual rules as to duress, undue influence and unconscionability would apply. At a primary level, there would be no requirement for substantive fairness, and the validity of the salvage contract would depend on the quality of consent to the agreement. In my view, there are some significant advantages to applying contractual doctrines to salvage situations. First, economic duress, undue influence and, to a lesser extent, unconscionability, are all well established through case law and jurisprudence. Importing these concepts into salvage law may be beneficial to the development of the law in this area, and 'flesh out' salvage law to a greater degree. This is also the view taken by Brice¹⁹⁰ and Kennedy.¹⁹¹ Both writers assert (albeit in passing) that, while it should not be assumed that Admiralty wholeheartedly adopts all of contract law's rules as to vitiation of consent, the applications of

¹⁸⁵ *The Unique Mariner (No. 2)* above n 27, 51.

¹⁸⁶ *Ibid*, 52.

¹⁸⁷ *Ibid*, 53. This finding is consistent with the principles of damages for breach of contract; a party must choose the heads of damages under which they claim, but cannot claim both compensation and restitution, see Burrows, Finn and Todd, above n 124,746-748. This analysis reduces the agreement between the parties to the nature of a common law contract, and as the judgment makes clear, rejects the notion of a 'salvage fund', which would take account of the fact that the salvees had already paid the successful salvors for their services.

¹⁸⁸ *The Tojo Maru*, above n 2, 293.

¹⁸⁹ *Ibid*.

¹⁹⁰ Brice, above n 5, 359-360.

¹⁹¹ Kennedy, above n 5, 415

contract doctrines of duress, mistake and misrepresentation are a valuable contribution to law concerning assumed obligations. After all, maritime law is a commercial enterprise, conducted by commercial parties who increasingly resort to contracts to specify, delineate and limit the obligations that occur between them. In this sense, the application of contract law principles seems appropriate to maritime trade and dealings.

Furthermore, despite the expressed aim of maritime law to do what is fair and just between the parties in the circumstances of each case, it is submitted that the current approach of salvage law may give rise to injustice. To illustrate, take the facts of *The Medina*. A ship with some 500 passengers ran aground in the Red Sea. The only nearby vessel, the steamship *Timor*, approached, and its captain, Captain Brown, offered to take the passengers to their destination, but only for the stipulated price of 4000 l, the price of the passenger's whole journey upon the *Medina*. On the basis that the sum demanded was grossly exorbitant, and the agreement was forced upon Captain Black of the *Medina* by practical compulsion, the English Court of Appeal found the agreement to be inequitable and instead awarded salvage in the sum of 1800 l. To vary the facts, had Captain Brown demanded a more reasonable sum (say 2000 l), would the agreement have remained on foot? In an enquiry of economic duress, the threat by the *Timor* to abandon the passengers to their fate would be sufficient to deprive the captain of the stricken vessel of any viable alternative to entering the agreement on those terms. The absence of choice, and the steamer captain's conscious utilisation of this lack of alternative would, I submit, be enough to render the pressure illegitimate in the eyes of the law.¹⁹² Thus, the owners or representative party of the *Medina* would have had a case to avoid the contract under the jurisdiction of the common law. On the other hand, it would seem that, in the absence of fraud or deceit, this same use of influence and danger by the *Timor*'s captain might not be enough to invalidate a salvage agreement were maritime law principles applied. Although it would be true that Captain Brown's actions were manifestly unjust, so that the objective test of salvage would be satisfied, the requirement for gross exorbitancy in the contract price would likely mean that Admiralty law would not interfere with the agreement. Possibly, had the captain's actions so overstepped the grounds of propriety and justice, an Admiralty court may be moved to exercise its general equitable nature to provide a remedy, this is by no means a certainty, and unlikely when the more rigid rules of the 1989 *Salvage Convention* are applicable.

It cannot be overemphasised that policy considerations play a crucial role in the rules of salvage. In order to encourage salvors, courts purport to make awards on a reward basis, and take a lenient approach to a salvor's actions in carrying out the contract. In holding that pressure is an incident of a salvage situation, and that it alone is not enough to justify judicial interference, maritime law again operates leniently on a salvor. However, it may be argued that the merit of the espoused public policy is not necessarily untouchable. The modern context brings further considerations. For one thing, the presumption that the salvor and the salvee are automatically unequal when a salvage agreement is concluded requires greater examination. As modern seafaring becomes increasingly regulated, the risk involved has been dramatically reduced. As one writer has colourfully put it, 'modern vessels [are] practically idiot-proof.'¹⁹³ Incidents requiring salvage services are therefore less frequent, and there are less salvage opportunities available for professional salvors.¹⁹⁴ At the same time, there may be more than one tug or salvage vessel available when a crisis occurs. The cases involving multiple salvage claims and superseded salvors are testament to the fact that an ailing ship may often have more than one vessel willing to give assistance, and more than one option in terms of entering into a salvage contract.¹⁹⁵ It may therefore be incorrect to say that a vessel in need of salvage assistance is always at an unequal bargaining position, and that, as a matter of policy, something more is required in order to render the salvor's bargain inequitable.

It is submitted that the requirement for substantive injustice represents the result of a balancing exercise. On the one hand is the express judicial policy to encourage salvage and treat salvors with some leniency; on the other hand is the law's desire to control behaviour that compromises or undermines the bargaining process, where a salvage agreement is entered into. In the English Admiralty tradition and the 1989 *Salvage Convention*, the balance appears to have come down on the side of the former, so that the undue influence exerted by the salvor will have no effect unless it results in unfair terms, or an unreasonable contract price. Conceivably, a salvor acting under such rules –

¹⁹² This view is supported by the views of Cooper J, above n 93, 689.

¹⁹³ Gold, above n 87, 487.

¹⁹⁴ As an aside, Admiralty cases often involve colourful factual situations that offer the onlooker a glimpse of the inner workings of the maritime salvage industry. See for example *The Unique Mariner (No. 1)*, above n 11, 443-445, where Brandon J relates the code system employed by a salvage company to protect its salvage 'prize' from other enterprising salvors.

¹⁹⁵ See, eg, *ibid* where the case concerned the replacement of one salvor with another, and *The Altair*, above n 134, where the stricken vessel was rescued by four separate salvage operators at once.

whether via the application of the English Admiralty system, the 1989 *Salvage Convention*, or the Lloyd's Open Form or similar standard form contract – may act towards the salvee with relative impunity, safe in the knowledge that, provided his actions do not result in substantive inadequacies, his salvage reward will be forthcoming. Especially for a jurisdiction that seeks to do what is right and fair for each party in every circumstance, this outcome cannot be desirable. It may be that traditional Admiralty law would not allow behaviour that so overtly transgresses the boundaries of propriety, but the regime provided for by the 1989 *Salvage Convention* (and through it Lloyd's Open Form) allows no room for such discretion. In the light of these considerations, the rules of contract law appear as appealing and applicable alternatives.

The above arguments advocate the application of contractual principles in the salvage setting. However, their application may nevertheless be problematic in the current context of salvage. Along with referring salvage disputes to London arbitration, Lloyd's Open Form also specifies the governing law of the contract. The 1995 version, which is still in use today, specifies that 'this Agreement and any Arbitration thereunder shall, except as otherwise expressly provided, be governed by the law of England, including the English law of salvage.'¹⁹⁶ Its more recent successor, LOF 2000, is less specific, stating only that 'this Agreement and any arbitration hereunder shall be governed by English law.'¹⁹⁷ Conceivably, there is no practical difference, as the law of salvage is part of English law, and in this sense the separate reference to salvage law is unnecessary. But in terms of an enquiry into the intentions of the parties in reducing their agreement onto Lloyd's Open Form, the difference might be relevant. When deciding whether to follow established principles of salvage law as to duress, or whether the case falls under Article 7, a court might have regard to the principles the parties intended to cover their agreement. Under Lloyd's Open Form 1995, the view that salvage law was intended to apply is strengthened by the express reference to the English law of salvage (supposing, of course, that the court takes the view that salvage and contract principles cannot both apply to circumstances of duress). Likewise, the fact that the parties employed a standard form that expressly incorporates specific salvage rules (the provisions of the 1989 *Salvage Convention*) indicates that both parties foresaw and intended that the rules of salvage would apply. For a court to then say that English contract law and its rules as to duress apply may introduce an element of uncertainty into an otherwise successfully stable dispute resolution system. Ultimately, the application of contract principles here would depend on whether a model of co-existence was accepted, so that the rules of economic duress could apply within the provisions of the 1989 *Salvage Convention*.¹⁹⁸

Another important possibility – though less likely, considering the prevalence of Lloyd's Open Form in cases of express salvage agreements – is that there would be an issue as to the law governing the contract, where a jurisdiction was not specified. This issue would be less problematic were salvage rules alone to apply, given the uniformity of salvage rules across the maritime world, and the use of the 1989 *Salvage Convention*. Despite uncertainty as to the governing law, the result may make no practical difference where the 1989 *Salvage Convention* applies, or the judicially formulated rules are the same. Conversely, if a court decided that the matter was to be settled under contract principles, conflict of laws issues may arise as to the different national laws of contract that could apply. Although not necessarily a bar to the application of contract law – conflict of laws principles may settle the matter conclusively in favour of one jurisdiction, and apply those contract law principles as to duress – this is a highly relevant consideration when the goals of uniformity and coherency of maritime law are considered.

8.2. Model Two: The 1989 *Salvage Convention* and the Supremacy of 'Salvage Law'

Even as the law of the sea stands apart from the law of the land, the principle of party autonomy is still applicable. Although Dr Lushington asserted that the nature of an agreement could not be changed from a salvage agreement to something else, he recognised that a party could preclude the claiming of a salvage award simply by agreeing to something else, by entering into a contract. In this sense, it cannot be said that salvage law simply overrides contract law. Salvage cases and the 1989 *Salvage Convention* alike recognise the occurrence of contracts in the salvage setting. Hence Brandon J's conclusion that contract law principles of misrepresentation and mistake applied to the contract in *The Unique Mariner (No.1)*, and his conclusion that the use of Lloyd's Open Form altered

¹⁹⁶ Lloyd's Open Form 1995, above n 147, Clause 1(f).

¹⁹⁷ Lloyd's Open Form 2000, above n 84, Clause J.

¹⁹⁸ This possibility is considered below, at C.

the nature of the relationship between the contracting parties. So too, does the existence of Article 6(1) in the 1989 *Salvage Convention* acknowledge contract law, stating that the 1989 *Salvage Convention* 'shall apply to any salvage operations save as to the extent that a contract otherwise provides, expressly or by implication'. This preserves the freedom of contract of the parties to a salvage agreement, apart for the exceptions already discussed.¹⁹⁹ The fact that contracting parties are free to modify the default position of the 1989 *Salvage Convention* as to other matters indicates that salvage law can, and often is, displaced by agreement.

In certain areas of the law, general principles are modified according to legislative agendas and concerns. In the area of consumer contracts, for example, decisions have been taken by the legislature, culminating in the passing of consumer legislation that modifies the position at common law as to the allocation of risk, and disclosure and knowledge requirements.²⁰⁰ The same may be said of salvage, particularly as to inequitable salvage agreements. The 1989 *Salvage Convention* represents an international effort to create a system that is workable and reflective of current industry concerns and practices. Because of these aims, 'the principle of freedom of contract had already been somewhat controversial in the negotiations which led up to the Montreal Draft'.²⁰¹ The concern was that if the 1989 *Salvage Convention* could be so easily circumvented, the aim of standardisation would not be realised, and the 1989 *Salvage Convention* would be meaningless. Ultimately, freedom of contract, as the basis of commercial negotiation, was considered to be too significant to override. This was not the case, however, for the concerns as to the environment and inequitable agreements. Public policy concerns as to environmental damage and the need to encourage salvors have resulted in the mandatory application of Article 7, and the 'duties to prevent or minimise damage to the environment',²⁰² as contained in Articles 8(1)(b) and 8(2)(b).

The operation of Article 6(3) means that, when the 1989 *Salvage Convention* is applicable²⁰³ and issues of undue influence (here used in the sense referred to in the 1989 *Salvage Convention*) arise in a salvage dispute, the 1989 *Salvage Convention* mandatorily applies, superseding common law and traditional Admiralty principles (in so far as they differ from the 1989 *Salvage Convention*). Not only do the rules governing the examination of inequitable agreements apply, but the discretionary remedies of annulment or modification specified in 1989 *Salvage Convention* also apply, overriding the usual common law remedies. Thus, salvage law has won out. Interestingly, its victory has occurred through international codification and legislative action, and via the operation of contract law itself. The 1989 *Salvage Convention* will directly apply as part the domestic law of member states, where there is no salvage agreement or a standard form contract other than Lloyd's Open Form is used.²⁰⁴ The second, indirect avenue of applicability for the 1989 *Salvage Convention* is that of contractual incorporation. Since Lloyd's Open Form incorporates the 1989 *Salvage Convention* as terms of the agreement between the salvage parties, the general rules of contract law are displaced by specific contractual provisions. In this analysis, Article 7 governs as a contractual term, not as an incident of salvage law. In either case, the regime contained in Article 7 overrides the general application of contract law.

The position taken by maritime law is explicable by reference to the policy considerations present in the law of salvage. These have been discussed elsewhere in this paper and need not be repeated. Suffice to say, the position taken is understandable. It has often been pointed out that substantive unfairness is a good indicator of procedural irregularity.²⁰⁵ Furthermore, it is important to remember that salvage law is in a different position to general contract law. Where defective consent to a contract is successfully raised and the contract avoided, there is usually no overarching public interest in seeing the contract enforced, or in a judicially modified arrangement being installed in place of the contract. In contrast, even where a court has found a salvage agreement to be inequitable, a salvage award has still been made to the salvors.²⁰⁶ Although the 1989 *Salvage Convention* provides for a salvage agreement to be modified or annulled, it is unlikely a salvor would be left empty-handed; a court is more likely to simply modify the contract price, or to annul the offending contractual term and decide the case in accordance with

¹⁹⁹ See above at n 17 and accompanying discussion.

²⁰⁰ In New Zealand, examples of such legislation include the New Zealand *Credit Contracts and Consumer Finance Act 2003* (NZ), the *Fair Trading Act 1986* (NZ) and the *Consumer Guarantees Act 1993* (NZ).

²⁰¹ Gold, above n 87, 498.

²⁰² 1989 *Salvage Convention*, above n 4, Article 6(3).

²⁰³ See above n 147 and accompanying text.

²⁰⁴ *Ibid.*

²⁰⁵ For instance, in the developing area of unconscionability as a legal concept capable of vitiating consent, disadvantageous terms are considered indicative of a defect in the capacity of one of the parties to consent to the contract; see Nicholas Bamforth, 'Unconscionability as a Vitiating Factor' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 538.

²⁰⁶ See for example *The Medina*, above n 125, where the court awarded 1800 l instead of the 4000 l stipulated in the agreement.

the general principles of the 1989 *Salvage Convention*.²⁰⁷ That being the case, there would be little point in a court setting aside an agreement for a particular sum which was not ‘in excessive degree too large or too small’ under contract law principles, only to exercise the Admiralty jurisdiction to impose a salvage award of only slightly different quantum on the grounds of public policy.

This is the strongest argument for the current system, relying as it does on the sui generis, public policy basis of salvage law. There is little point proposing the use of different principles where the realities of the law and industry mean that the result (namely, that a salvor guilty of economic duress under the common law principles would get nothing for their efforts) is untenable when the desirability of the survival of the salvage industry is acknowledged. In my submission, this argument is the determinative reason for my conclusion that, although contract principles are relevant, the supercession of salvage law by contract principles is not an appealing solution to the problem of the interaction between the two. That being the case, I will now move on to consider in greater detail how contract law principles may be incorporated into the law of salvage.

8.3. Model Three: Co-Existence?

The Tojo Maru did not strictly deal with issues of contract formation and duress, and Lord Diplock’s analysis does not go into greater depth as to the extent of the court’s supervisory jurisdiction. After all, the common law power to rule a contract void at the request of one of the parties can be characterised as a supervisory power of the courts, as could the power of an Admiralty court to set aside agreements as inequitable. It may be that his Lordship assumed that a court exercising the Admiralty jurisdiction still retains its historical discretion over and above the power of the arbitrators, where provision is made for arbitration proceedings. This seems to be the view taken by Brandon J in *The Unique Mariner (No.1)*, the first proceeding where his Honour considered the salvage of the eponymous tanker. If this view is taken, it is arguable that the two cases are not incompatible with the operation of the 1989 *Salvage Convention* in so far as Article 7 applies, as the 1989 *Salvage Convention* replaces traditional Admiralty law in party States. Although the two cases are nevertheless problematic to the application of the 1989 *Salvage Convention* in other ways, this is one possible reading that would allow contract law and salvage law to co-exist within the maritime legal arena, albeit with some qualifications. In my view, it is an unsound proposition to argue that the courts should ignore the fact that the parties have entered into a contract (and thus invoked the rules of contract law), and instead apply the rules of salvage exclusively. If parties choose to specify the obligations that they assume in relation to one another, a court should respect this choice and strive to give effect to the provisions of their agreement. At the same time, it is undeniable that salvage law exists, is applied by the courts, and is even specified in salvage agreements.²⁰⁸ A solution must be found whereby the two systems work together, where the relevance – and desirability – of contract law is respected, and the special features of salvage law are recognised by the application of certain rules, specific to that context.

8.3.1. A Supervisory Role for Salvage

In *The Unique Mariner (No.1)*, the owners of the salvaged tanker contested the validity of their Lloyds Open Form with the superseded salvors on the basis of mistake, misrepresentation and non-disclosure. Of these, the first two contentions were clearly based on contractual law principles, and were dealt by his Honour with on this basis, with little discussion as to the appropriateness of applying contract principles to a case of salvage within the Admiralty jurisdiction.²⁰⁹ His Honour concluded that the grounds for misrepresentation were not made out, nor was the situation one of unilateral mistake. The plaintiff owners were therefore not entitled to avoid the contract.²¹⁰ The judge also had the opportunity to deal with the nature of Lloyd’s Open Form. A central submission put forward by the owners of the salvaged vessel was that maritime law held salvage agreements as *uberrimae fidei*, contracts to be conducted in the utmost good faith, and therefore the captain of the salvor tug had a duty to disclose certain facts to the master of the *Unique Mariner*, namely that he was from Selco Salvage. This disclosure, it was argued, would have made it clear to the captain of the *Unique Mariner* that this was not the tug that the owners intended would perform the salvage.²¹¹ Having surveyed the cited authority of Dr. Lushington’s comments in *The Kingalock*,²¹²

²⁰⁷ Gaskell, above n 44, 13.

²⁰⁸ See the provisions of the Lloyd’s Open Form 1995, discussed above n 196.

²⁰⁹ See further Kennedy, above n 5, 415.

²¹⁰ *Unique Mariner (No. 1)*, above n 11, 444.

²¹¹ *Ibid*, 452.

Brandon J concluded that that case was not an authority for the proposition that salvage agreements were *uberrimae fidei*, and therefore voidable by either party on the grounds of non-disclosure.²¹³ Rather, the principles expressed by Dr. Lushington simply represented one example of maritime law's more general equitable character.²¹⁴ Two things may be taken from this. The first, more basic, conclusion is that the decision in *The Unique Mariner (No.1)* belongs to the chain of cases asserting that Lloyd's Open Form and other salvage agreements are in the nature of commercial works contracts, with no special standing and no duty for disclosure or other good faith obligations.

The second proposition is more complex. In the course of his judgment, Brandon J said:²¹⁵

The Admiralty Court has always exercised an equitable jurisdiction to declare invalid, and to refuse to enforce, an agreement of this kind if it considers the agreement, in all the circumstances of the case, to be seriously inequitable to one side or the other. In many of the cases where this jurisdiction has been exercised, the nature of the serious inequity on which the Court has founded its judgment has been that the sum agreed was of itself either much too large or much too small, having regard to the nature and circumstances of the assistance rendered: see the various cases cited in the 4th ed. of Kennedy at pp. 314-16. There may, however, be other circumstances, besides the gross inadequacy or exorbitance of the sum agreed itself, which render an agreement of the kind under discussion so inequitable to one side or the other that it should not be allowed to stand. One such circumstance is where there is oppression or virtual compulsion arising from inequality in the bargaining position of the two parties concerned; another such circumstance is the existence of collusion of one kind or another; and a third such circumstance, in my view, is where there has been non-disclosure of material facts by one side or another, as in *The Kingalock* above.

His analysis then continued to conclude that *The Kingalock* did not stand for the proposition that salvage contracts are *uberimmae fidei* in nature, but illustrated that the Admiralty Court retains a discretion to treat as invalid unfair agreements.²¹⁶

The analysis in *The Unique Mariner (No.1)* seems to suggest that salvage law and contract law co-exist in this way, with salvage law having a supervisory rule over a contractual arrangement to which contractual rules apply. Under this model, substantive issues would therefore be governed by the contract and the principles of contract law, while the validity of the contract is subject to the rules of salvage, and the discretion of the Admiralty Court to set aside inequitable agreements. However, this position is problematic in that it does not provide a cohesive picture of the law. Even if it is accepted that public policy considerations mean that salvage law, and not contract, should decide the validity of the contract, the comments of Brandon J are hardly internally consistent. Misrepresentation and mistake are also validity questions, which determine whether the parties truly consented to the contract at hand.²¹⁷ Why then, should these concepts apply and not the concept of contractual duress? Likewise, it is unclear why the equitable discretion of an Admiralty Court should not also extend to cover cases where misrepresentation or mistake would be argued. His Honour made these comments to disprove the contention that salvage contracts contain a good faith requirement, and to explain his view of what the true reading of *The Kingalock* should be. His comments might then be interpreted as stating what the historical principle of the salvage law was, and thus the modern position of salvage contracts (that is, having no special status in terms of the requirements of the parties.).²¹⁸ In light of his reference throughout the judgment to the continuing existence of a supervisory power however, this reading is unlikely.

8.3.2. Co-Existence under the 1989 Salvage Convention?

If one is to examine the position under the 1989 *Salvage Convention*, the possibility of co-existence is problematic. To begin with, the drafters of the 1989 *Salvage Convention* did not intend to override national rules governing the

²¹² *The Kingalock* (1854) 1 Spinks E & A 263, 265.

²¹³ *Unique Mariner (No. 1)*, above n 11, 454-455.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, 454.

²¹⁶ *Ibid.*

²¹⁷ See generally Burrows, Finn and Todd, above n 124, Chapters 10 and 11.

²¹⁸ *The Unique Mariner (No.1)*, above n 11, 455.

validity of contracts, or to determine the entire area of salvage law.²¹⁹ However, this intention is unclear from the text of the 1989 *Salvage Convention*, which generally states that a salvage payment should be made where a successful salvage operation occurs, unless the 1989 *Salvage Convention* otherwise provides.²²⁰ The provision in Article 6 that the 1989 *Salvage Convention* should apply unless expressly or impliedly excluded is also problematic. The 1989 *Salvage Convention*'s silence may therefore indicate its exclusive operation, or that it assumes the continued operation of other rules, or that 'it in some non-specific way embraces them within the terms of the *Convention*'.²²¹ The best view, it is submitted, is that general rules of Admiralty and common law continue to apply except where they are overridden by the terms of the 1989 *Salvage Convention*. This view is borne out by the argument that if the 1989 *Salvage Convention* were to apply as a 'closed code', this would have been explicitly indicated by its text. In fact, there are many issues not covered by the 1989 *Salvage Convention* that nevertheless exist in salvage contracts, such as issues of privity of contract²²² and sub-contractors to salvage agreements.²²³ The general rules relating to these issues must be assumed to apply, while the 1989 *Salvage Convention*'s provisions apply to specific issues such as the authority to contract.²²⁴ Also problematic is the uncertainty as to the scope of Article 7. Duress and other types of illegitimate pressure clearly fall under the heading 'undue influence'. However, it is also arguable that the term also includes such things as misrepresentation and non-disclosure, where they are combined with inequity in the terms of the contract.²²⁵

Despite the current ambiguities of the law, there is substantial support for a regime of co-existence. Leading salvage authorities all endorse the position that the influence of contract law is desirable in the maritime sphere. Maritime law must always be mindful to remain relevant and useful to the industry that it governs. As contracts have become commonplace in the salvage industry, contractual issues are more likely to appear. It makes sense that maritime law and the Admiralty jurisdiction should look to the common law for rules to deal with these issues, applying them in so far as they do not require modification for a salvage situation. There is no inherent reason, for example, why the rules of misrepresentation are inapplicable to salvage, especially where there is little governing authority dealing with misrepresentation in the case law.²²⁶ Certainly, this was Brandon J's opinion in *The Unique Mariner (No.1)*, when he concluded that ordinary principles of law relating to misrepresentation, including the statutory provisions of the *Misrepresentation Act 1967* (UK) and its attendant remedy of rescission, should be applicable to disputes regarding salvage agreements. Furthermore, since such a remedy would be present where the cause of action was made out, there was no need for the exercise of any additional discretion by the Admiralty Court to set aside the agreement for misstatement.²²⁷

At the same time, the arguments made throughout this paper indicate that principles governing inequitable agreements have merit in meeting the dictates of public policy and propriety specific to salvage law. This is illustrated by the inclusion of Article 7 of the 1989 *Salvage Convention*, a document designed to modernise and alter unworkable aspects of the law, and codify rules that were considered attractive to the range of industry and national interests involved in the drafting of the 1989 *Salvage Convention*.²²⁸ It is submitted, however, that Article 7 is far from a complete code. In particular, the broad reference to 'undue influence' is somewhat insubstantial, and lacks legal rigour. This substance is best provided by reference to contract law and the rules of duress contained therein. If courts look to these principles to discover what constitutes undue influence in the sense anticipated by the 1989 *Salvage Convention*, then the other requirements of Article 7 may be applied to ensure the features particular to salvage are respected (broadly, the encouragement of salvors and the recognition that salvage occurs in extreme and necessitous circumstances). The principles of contract would, of course, not be of a binding nature, and would likely be limited to a role of guidance. A hypothetical example would be where a party threatened to refuse to assist a vessel that, although in some difficulty, was not in need of salvage, unless that assistance was performed on the basis of a salvage contract. The distressed ship, owing to, for example, contractual commitments

²¹⁹ CMI Report 1984, above n 17, 16-17.

²²⁰ Kennedy, above n 5, 418; see also 1989 *Salvage Convention*, above n 4, Article 12.

²²¹ Kennedy, above n 5, 418.

²²² Brice, above n 5, 326.

²²³ *Ibid.*, 354-356.

²²⁴ 1989 *Salvage Convention*, above n 4, Article 6(2), which modifies general Admiralty law and gives the owner or master the power to enter into a salvage agreement, binding on both the owner of the ship and the cargo, without having to rely on common law concepts of implied authority, agency or necessity: see Brice, above n 5, 323.

²²⁵ Kennedy, above n 5, 418.

²²⁶ *Ibid.*

²²⁷ *The Unique Mariner (No.1)*, above n 11, 455.

²²⁸ CMI Report, above n 17, 14.

to receive a consignment at goods the next day, accepts the agreement as the only viable option short of failing to make its deadline. A court deciding the case could then examine whether the threat constituted undue influence under the 1989 *Salvage Convention* by asking whether the contracting ship was practically coerced by the threat not to assist, and whether that threat was illegitimate in the eyes of the law. The second element of Article 7(a) could then be considered, the undue influence having been established.

Having surveyed the relevant authorities, in my opinion it is also unrealistic to assume that courts deciding maritime cases will be willing to apply contractual principles such as duress where specific salvage rules exist. In a case of misrepresentation, a court is likely to be willing to follow *The Unique Mariner (No.1)* and apply contract law principles, since Article 7's reference to undue influence does not unequivocally include misrepresentation. But duress would clearly fall into the category of undue influence (under the 1989 *Salvage Convention*) or inequitable agreements (at traditional salvage law) and the court is likely to consider those rules are applicable. Therefore, for contract law to apply at all in duress situations, its role must be within the current salvage framework, in the manner submitted above. Moreover, I think that, although the 1989 *Salvage Convention* is not intended to operate as a closed code, it is unlikely that the courts will stray outside the grounds of Article 7 in annulling inequitable contracts. The 1989 *Salvage Convention* represents a thoroughly considered international effort to codify salvage law in a way acceptable to all relevant parties in the industry. As such, it represents a complex trade off of rights and interests which may be undermined by judicial initiatives to go outside the literal wording of Article 7.

As may be evident from the earlier discussion, there are also significant disadvantages to this approach. The certainty provided by the 1989 *Salvage Convention* is also partially offset by the potential unfairness where no remedy is available to a salvee who is induced by overbearing and coercive conduct into an agreement that is nonetheless substantively fair. It may be that an Admiralty court, considering the equitable nature of the jurisdiction, would not tolerate such a state of affairs and would invoke its equitable discretion to provide a remedy, over and above the provisions of the 1989 *Salvage Convention*. Nonetheless, in the absence of case law authority or guidance as to the proper approach, I consider that the requirement for substantive unfairness is unjustified. While unfair terms are a useful indicator of deficiency in the bargaining process, the better position would be where substantive fairness is a highly relevant consideration, and not a mandatory requirement. Courts could then make decisions bearing in mind the policy considerations and the significance of substantive features of the contract, without being strictly bound to find substantive unfairness in the contract. Although it may be argued that this change would upset the balance of considerations and make it too easy for courts to overturn salvage agreements, there are two responses to this concern.

First, the case law indicates that the courts are mindful of the importance of respecting salvage agreements and salvor's bargains, so that the introduction of a further discretion as to substantive inequality (which, in any case, existed before the introduction of the 1989 *Salvage Convention*) would not upset the balance struck. Secondly, if courts were to apply contractual principles, in cases of economic duress for example, this would have the effect of increasing the level of pressure required for a successful claim of duress above that traditionally required at salvage law. In this way, the balance of the 1989 *Salvage Convention* would be maintained, while the flexible, equitable nature of salvage law remained intact. In the end, however, a pragmatic approach is also advisable: amending an international instrument such as the 1989 *Salvage Convention* would be an extremely complicated and difficult undertaking, if not practically impossible. An alternative, and more likely, scenario would be a judicial (or other equally authoritative) statement clarifying that the traditional equitable nature of the Admiralty jurisdiction in this area has survived, so that situations such as the one envisaged here could be addressed under this residual discretion.

9. Conclusion

The rules surrounding the issue of duress in salvage law and contract law initially appear as two concepts that are diametrically opposed on their bases and rationale. While contract law applies set tests to determine whether a threat is illegitimate and causative of contractual consent, salvage law appears to have less regard for the effect of pressure in salvage situation, viewing it as an attendant feature of situations of peril and focusing instead on the effect of the threat on the substantive terms of the contract. Many of the differences between the jurisdictions on land and sea have been driven by their historical developments, in particular, the influence of civil law on the Admiralty jurisdiction, and the recognition that different considerations are relevant to the maritime world. The equitable nature of the jurisdiction means that Admiralty looks to do justice in the case at hand, rather than taking a

long-ranging view based on precedence and strict legal principles. Although modern salvage often bears little resemblance to its historical ancestor, it nevertheless shares the same rationales and justifications. Furthermore, the future of salvage has been informed by the past. The relative infrequency of salvage cases before the courts has meant that the case law authorities are often dated, and the development of the legal principles is somewhat behind the developments of the industry. Developments in the law have been brought about not by judicial pronouncements, but via the two *Salvage Conventions*, and the successive editions of the Lloyd's Open Form, developed in response to the demands of the industry.

Despite their apparent differences, salvage law and contract law are coexisting in the modern maritime world with such frequency that a clarification of the legal position is required. Closer examination of the two jurisdictions indicates that they are not as dissimilar as they first might appear, especially as regards to duress, where closer examination of the rules indicates a shared basis of preventing a party from applying illegitimate pressure to another, in order to attain that other's consent to an alleged agreement.²²⁹ Nevertheless, from this similar basis both jurisdictions have developed their own rules, different in application to the other. To apply one set of rules to the other jurisdiction, greater exposition is needed to understand how the two regimes are to work together, and, in the event, the rules of which jurisdiction are to give way. Unfortunately, no definitive answer has been forthcoming from the case law. Earlier case law has provided little guidance, acknowledging the existence of a contract only to say that salvage law still applies.

The (relatively) recent *Unique Mariner* cases and *The Tojo Maru* have arguably set the law of salvage on a new path, where contractual salvage is explicitly oriented with the doctrines and developments of contract law.²³⁰ It seems the time has come for salvage to take a different tack, towards the course laid by contract law. This is no bad thing; the writer has declared her colours by submitting that the influence of contract law is relevant and desirable. Maritime law cannot guard its uniqueness too jealously. In the area of salvage under duress, the general intention to set aside agreements that are 'manifestly unfair and unjust'²³¹ would benefit from the more developed rules and case law authority present in the common law of economic duress.

At the same time, it would be both undesirable and unrealistic to suppose that the law of contract will subsume salvage. The policy considerations are too strong, and the legal tradition too great, to consider the possibility at any great length. maritime policy considerations differ greatly from those elsewhere; the law of the land does not place so high a price on the services of volunteers as to encourage the maintenance of an industry of do-gooders, willing to rescue others and supplant the requirement for a nationalized public service. By considering the policy factors in detail, I conclude that there are powerful and valid public policy reasons for the existence of salvage and the special rules applying to it, which should not be undermined or discounted. While values of fairness and unjust enrichment are present in the concept of salvage, ultimately, one concludes that salvage is *sui generis*, an area of law developed to respond to what is a repeat (if increasingly less frequent) need of the maritime enterprise. Any proposed incursion of contract law into maritime territory should therefore be well-considered and reasoned in order to respect the special nature of salvage.

What is needed is a way in which contract law principles can be relevant in a duress enquiry at salvage law, while not overpowering the balance inherent within salvage between rights and interests. In order to support my thesis that co-existence is the best model, and, moreover, that it is possible, this paper has first addressed the other possible scenarios faced by the law: that is, the scenario in which contract rules prevail, where salvage law is applied to the exclusion of other rules, and the present state of the law. Likewise, the different states of the law where the 1989 *Salvage Convention* does and does not apply have been addressed, in an attempt to better explain the interrelationship of the various principles of law. In many ways, the suggested co-existence of salvage and contract has been presented in hypothetical form. Although *The Unique Mariner* and *The Tojo Maru* represented an enormous development for the law of salvage, they might be thought of as the first brush strokes of the present and future picture of salvage, and not the finishing touches. First, the contention in both cases that the law of contract should be the primary touchstone for express salvage agreements now requires qualification, as the 1989 *Salvage Convention* will be of primary application in signatory states and where incorporated by contract. Secondly, these

²²⁹ Cooper, above n 93, 694.

²³⁰ Gaskell, above n 14, 348.

²³¹ *The Altair*, above n 133, 108.

assertions, although far-reaching in consequence to the law of salvage, were accompanied by little explanation, and, indeed, in *The Unique Mariner (No.1)*, by seeming inconsistency.

The provisions of the 1989 *Salvage Convention* add some clarity to the issue of duress, while making it clear that the formulations in earlier Admiralty cases are still relevant to the law today. Among the consequences of Article 7 is an increased rigidity in the rules of salvage, a lamentable development that may possibly be tempered by the continued application of Admiralty's equitable discretion, or, of course, by amending the instrument itself. Owing to the broad language used, the scope of application is unclear, as is the curtailment of the possible application of contract law principles. This uncertainty has a further consequence: it leaves open the possibility that contract law principles are relevant to the 'undue influence' requirement of Article 7(a), modified for application in the salvage context by the second requirement of that section. Ultimately, the present state of the law means that particular rules of salvage law remain primarily applicable. Contract, though, will never be wholly irrelevant, nor should it be. It is to be hoped that future case law or revisions in the authoritative documents will add some clarity to the picture, and settle conclusively the question which in many ways an inheritance from the traditional tension between salvage and common law.

10. Bibliography

Journal Articles / Books

- Bamforth, Nicholas, 'Unconscionability as a Vitiating Factor' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 538.
- Beale, H.G. (ed.), *Chitty On Contracts* (Volume 1) (29th ed, 2004).
- Bigwood, Rick, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions (Part II)' (2000) 16 *Journal of Comparative Law* 191.
- Bigwood, Rick, *Exploitative Contracts* (2003).
- Birks, Peter, *Introduction to Restitution* (1985).
- Burrows, J. J Finn and S Todd, *Law of Contract in New Zealand* (2nd ed 2004).
- Cartwright, John, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991).
- Chen-Wishart, Mindy, *Unconscionable Bargains* (1989).
- Clift, Rhys and Gay, Robert, 'The Shifting Nature of Salvage Law: A View From a Distance' (2005) 79 *Tulane Law Review* 1355.
- Cooper, Richard J, 'Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations' (1997) 71 *Australian Law Journal* 686.
- Davis, Martin and Anthony Dickey, *Shipping Law* (3rd ed 2004).
- Gaskell, Nicholas, 'The Lloyd's Open Form and contractual remedies' (1986) *Lloyd's Maritime and Commercial; Law Quarterly* 306.
- Gaskell, Nicholas, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' [1991] 16 *Tulane. Law.Review.* 1.
- Goff, Lord and Gareth Jones, *The Law of Restitution* (6th ed 2002).
- Gold, Edgar, 'Maritime Salvage: Towards a New Regime' (1989) 20 *Journal of Maritime Law and Commerce* 4, 487-503.
- Hill, Christopher, *Maritime Law* (6th ed 2003).
- Kerr, Donald A, 'The Past and Future of 'No Cure, No Pay' (1992) 23 *JMCLQ* 3, 411-427.
- Donald A Kerr, 'The 1989 Salvage Convention: Expediency or Equity?' (1989) 20 *JMLC* 4, 505-520.
- Mandaraka-Sheppard, Aleka, *Modern Admiralty Law* (2002).
- O'Dair, Richard, 'Restitution on the Grounds of Duress – Handle With Care: *The Evia Luck*' (1992) *Lloyd's Maritime and Commercial Law Quarterly* 145.
- Reeder, John (ed), *Brice on Maritime Law of Salvage* (4th ed 2003).

Laying the Mark to Port and Starboard

Rose Francis D. (ed.), *Kennedy and Rose, The Law of Salvage* (6th ed 2002).

Rose, Francis D, 'Restitution for the Rescuer' (1989) 9 *Oxford Journal of Legal Studies* 2, 167-204.

Shaw, Richard, 'The 1989 Salvage Convention and English Law' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 202.

Stoljar, S, *The Law of Quasi Contract*, (1964).

Thomas, D R, 'Salvorial Negligence and Its Consequences' (1977) *Lloyd's Maritime and Commercial Law Quarterly* 167.

Wiswall F L, Jnr, *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970).

Case Law

England

Admiralty Commissioners v Valvadera (Owners) [1938] AC 173.

Akerblom v Price, Potter, Walker & Co (1880-81) LR 7 QBD 129.

The Albion (1861) Lush 282.

The Altair [1897] P 105.

Alec Lobb (Garages) Ltd & Ors v Total Oil GB Ltd [1985] 1 All ER 303.

The August Legembre [1902] P 123.

Barton v Armstrong [1976] AC 104.

The Cape Packet (1848) 3 W Rob 122.

The Cargo ex Port Victor [1901] P 243.

The Cargo ex Woosung (1876) 1 PD 260.

The Cuba (1860) Lush 15.

The Evia Luck [1992] 2 AC 152.

Fisher v The Oceanic Grandeur [1972] Lloyd's Rep 396.

Five Steel Barges (1890) 15 PD 142.

The Fusilier (1865) Br Of Lush 341.

The Glengyle [1898] AC 519 (CA).

The Goring [1987] QB 687.

The Governor Raffles (1815) Adm 2 Dod 14.

Laying the Mark to Port and Starboard

The Hestia [1895] P 193.

The Homewood (1928) 31 Lloyd's Rep 336.

Huyton S.A. v Peter Cremer GmbH & Co [1999] Lloyd's Rep 620.

The Inna [1938] P 148.

The Industry (1835) 3 Hag Adm 203.

The Juliana (1822) Adm 2 Dod 504.

The Kangaroo [1918] P 227.

The Kingalock (1854) 1 Spinks E & A 263, at 265.

The Liffey (1887) 6 Asp MC 255.

Lloyds Bank Ltd v Bundy [1975] QB 326.

Lynch v Director of Public Prosecutions of Northern Ireland [1975] AC 653.

The Makedonia [1958] 1 QB 365.

The Medina (1876-77) LR 2 PD 5.

National Westminster Bank Plc v Morgan [1985] 1 AC 686.

The Pretoria (1920) 5 Lloyd's Rep 172.

The Rialto [1891] P 175.

Semco Salvage & Marine Pte. Ltd v Lancer Navigation Co. Ltd (The Nagasaki Spirit) [1997] AC 455.

Skeate v Beale (1840) 11 Ad & El 983.

The Teh Hu (1969) 2 Lloyds Rep 365.

The Telemachus [1957] P 47.

The Tojo Maru [1972] AC 242.

The Unique Mariner (No.1) [1974] 1 Lloyd's Rep 555.

The Unique Mariner (No. 2) [1979] 1 Lloyd's Rep 37.

Universal Tankships of Monrovia v International Transport Workers Federation (The Universe Sentinel) [1983] 1 AC 366.

The Valsesia (1926) 26 Lloyd's Rep 222.

The Vandyck (1882) 5 Asp MLC 17.

Wells v Owners of the Gas Float Whitton (No 2) [1897] AC 337.

Laying the Mark to Port and Starboard

The William Lushington (1850) 7 Notes on Cases 361.

The Winson [1982] AC 939.

Hong Kong

Pao On v. Lau Yiu Long 1980] AC 614 (Privy Council).

Australia

Commercial Bank of Australia v Amadio (1983) 46 ALR 404.

New Zealand

A-G for England and Wales v R CA 298/00, 29 November 2001.

Moffat v Moffat [1984] 1 NZLR 600.

Sembawang Salvage Pte Ltd v Shell Todd Oil Services Ltd [1993] 2 NZLR 97.

U.S.A

The Henry Ewbank (1883) 11 Fed. Cas. (Case No. 6376) 1166.

Mason v The Blaireau 6 U.S. (2 Cranch) 177, 186 (1804).

Legislation

New Zealand

Admiralty Act 1973 (NZ)

Arbitration Act 1996 (NZ)

Colonial Courts of Admiralty Act 1890 (NZ.)

Consumer Guarantees Act 1993 (NZ)

Contractual Mistakes Act 1977 (NZ)

Maritime Transport Act 1994 (NZ)

New Zealand Credit Contracts and Consumer Finance Act 2003 (NZ)

New Zealand Credit Contracts and Consumer Finance Act 2003 (NZ)

Fair Trading Act 1986 (NZ)

England

Arbitration Act 1996 (UK)

Judicature Act 1873 (UK)

Judicature Act 1875 (UK)

Arbitration Act 1996 (UK)

Treaties

Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, opened for signature 23 September 1910 (entered into force 1 March 1913).

International Convention on Salvage, opened for signature at London on 28 April 1989 (entered into force 14 July 1996).

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958 (entered into force 7 July 1959).

Other Sources

BBC, '700 Napoli Cargo Items Salvaged', *BBC News*, 8 February 2007
<http://news.bbc.co.uk/2/hi/uk_news/england/devon/6344559.stm> at 8 February 2007.

Comite Maritime International Report to the International Maritime Organisation, Antwerp, 6 April 1984.

Paul David, 'Maritime Law: Admiralty' in Law Book Company, *Laws of New Zealand* (at 5 January 2007) [1-1] (LexisNexis NZ Online, Commentary).

Council of Lloyd's Standard Form of Salvage Agreement: No Cure, No Pay, 1 September 2000.

Torrey Canyon Report (1967) AMC 569.