

Frank Stuart Dethridge Memorial Address 2008
Protection of the Environment;
a new Focus in the Convention on Salvage 1989

The Hon. Justice D M Ryan*

Introduction

Frank Dethridge and his firm, Mallesons, had during the 1960's and early 1970's acted in industrial matters for all of the employers respondent to various awards of the Conciliation and Arbitration Commission. The main award was the Maritime Industry Seagoing Award, the respondents to which included BHP, Australian National Line, Colonial Sugar Refiners and Western Australian State Ships. Other, smaller traditional shipowners derived their representency through membership of a registered organisation of employers, the Commonwealth Steamship Owners' Association (CSOA). To say the least, industrial relations were not easy because there was a multitude of different unions representing such disparate groups of seafarers as deck officers, engineers, marine cooks, butchers and bakers, professional radio employees, marine stewards and pantrymen and seagoing shipwrights.

In about 1975 policy differences emerged between BHP, CSR, ANL and Western Australian State Ships on the one hand, which were concerned to keep their vessels operating at almost any cost, and CSOA on the other, whose members were oppressed by competition from foreign-flagged ships with much cheaper crewing. The differences became so acute that Frank Dethridge and Mallesons felt that they could no longer represent the whole body of employers in the industry. They, therefore, continued to instruct Brian Hill QC on behalf of the 'Big Four', and I, then a youngish industrial barrister, was retained for CSOA, instructed by Denis Worrall of Middletons, himself a long-standing member of the this Association.

You can readily imagine that the strategic differences and divided representation of the formerly united employer interests were not without their tensions. However, throughout it all, Frank Dethridge was unfailingly courteous and considerate, and, as far as his duty to his clients allowed, was genuinely helpful to Denis and me during our novitiate in the murky waters of maritime industrial relations.

My address today will doubtless seem narrow and unoriginal when compared with the variously elegant and learned contributions of so many of my predecessors. Nevertheless, I am pleased and privileged to offer it in acknowledgement of my personal debt to the distinguished maritime lawyer whom it commemorates and who is rightly lauded for his efforts in founding this Association.

Some of you may fear from this longer than usual exordium that I am about to embark on an historical account of half-forgotten industrial battles between shipowners and the former maritime unions which I have mentioned. At this distance in time, those conflicts seem about as remote as the wars between the Medes and the Persians. You may, therefore, be relieved to learn that I have drawn closer to what I gather is the theme of this year's Conference in choosing as my topic the concern with protection of the environment which is reflected in the 1989 Convention on Salvage.

Historical Background

Historically the law of salvage has its origins in the law of wreck which vested in the Crown, wrecked vessels and goods found in them, if unclaimed. By the *Statute of Westminster I of 1275*, neither the ship nor anything in her could be adjudged wreck where a living being escaped therefrom, 'but where the owner established his title, the goods were not to be called wreck and were to be handed to their owner on payment of salvage to those who had saved and kept them.'¹

* Justice of the Federal Court of Australia. This essay was presented as the F. S. Dethridge Memorial Address at the Maritime Law Association of Australia and New Zealand Conference in Perth Western Australia 12-14 November 2008.
1 Kennedy & Rose, *Law of Salvage*, (6th ed, 2002), 58 [105].

An *Imperial Act of 1713*² empowered sheriffs, justices of the peace, customs officers and other public officers, on application, to order the rendering of assistance to a vessel in distress and to pay reasonable salvage within thirty days of the rendering of the assistance. A further Act of 1753³ provided that a salvage reward should be paid for the services rendered voluntarily, i.e. without the order of a public officer. In 1809 another Act,⁴ provided, amongst other things, a right of appeal from the justices to the High Court of Admiralty and introduced an entitlement to salvage reward for being instrumental in saving the life of a person or persons on board a ship or vessel.

The *Admiralty Court Act 1840* confirmed the previously recognised jurisdiction of the Admiralty Court that expressly recited that its salvage jurisdiction was confined to ‘all claims and demands whatsoever in the nature of salvage for services rendered to ... any ship or sea-going vessel.’ Successive *Merchant Shipping Acts* of 1854 and 1894 respectively vested in the Admiralty Court first instance jurisdiction over salvage claims above £200 and transferred to County Courts the limited jurisdiction previously exercised concurrently with the Admiralty Court by justices. Eventually, exclusive jurisdiction in the United Kingdom in Admiralty matters, including salvage claims, came to be vested in an Admiralty Court of the Queen’s Bench Division of the High Court. However, after reciting in greater detail this jurisdictional history, Kennedy & Rose, *Law of Salvage* suggest:⁵

Of far greater practical importance, however, has been the triumph of arbitration over adjudication in salvage matters, principally under the auspices of Lloyd’s Form, and subject to the Arbitration Acts 1950, 1975, 1979 and 1996. The essentially confidential nature of the arbitration process has in one respect inhibited the development of the law of salvage, by restricting open consideration of its response to changes in shipping practices.

The predominant use of standard forms of salvage agreement, prompted by the growth of professional salvors which has been permitted by the availability of reliable power-driven vessels, is a reflection of technological and practical changes which have had several implications for salvage jurisdiction over the twentieth century, particularly with regard to new subjects of salvage. Not all of these implications have as yet been clearly dealt with by the courts or the legislature. Thus, the availability of reliable power-driven vessels has also prompted development of the time charterparty, the remuneration for which, known as hire, is a subject of value, the preservation of which would appear to justify a salvage reward, although this has not, as yet, been clearly recognised. This is in part, at least, because certain subjects of salvage, such as time-charter hire, bunkers and containers, have an identity with other, firmly established, subjects of salvage, namely the ship and the cargo, which has inhibited separate consideration.

Admiralty jurisdiction in Australia was first vested by letters patent under the seal of the High Court in Admiralty in Robert Ross as Judge in Vice Admiralty. The Court of Vice Admiralty remained an Imperial Court and operated independently of the Courts of New South Wales. Vice Admiralty Courts had, by 1863, been established in all the Australian colonies and their jurisdiction over various maritime claims, including salvage, was confirmed by the Imperial *Vice Admiralty Courts Act 1863*. The same Act provided for a right of appeal from Courts of Vice Admiralty to the Judicial Committee of the Privy Council. Later, in 1890, the Vice Admiralty Courts were replaced by Courts constituted as Colonial Courts of Admiralty with the same jurisdiction as the Admiralty Jurisdiction of the High Court in England as it existed at the time when the Imperial *Colonial Courts of Admiralty Act 1890* was passed. That Imperial Act constituted the Colonial Courts of Admiralty which came to comprise, in Australia, the Supreme Court of each of the States and Territories, the High Court and, possibly, the Federal Court.⁶ Those Courts remained the repository of Admiralty jurisdiction in Australia until the coming into force of the *Admiralty Act 1988* (Cth) which vested jurisdiction concurrently in the Federal Court and the Supreme Courts of the States and Territories. That Act confers on the various Courts in which jurisdiction is vested the power to adjudicate over salvage claims.

Notwithstanding that jurisdiction over salvage claims had long been vested in justices and specialised courts of Admiralty, the common law courts from time to time pronounced on the rights and liabilities of shipowners and those claiming to have preserved ships or their cargo from loss. Gradually, the common law courts came to recognise in a person saving property from damage or destruction a right to reasonable recompense supported by a possessory lien over the property which had been saved. However, actions akin to salvage claims were rarely brought in the common law courts because they lacked the facility, enjoyed by courts of Admiralty, of entertaining actions *in rem*. Moreover, the distinction became academic after 1875 since when, by the

2 12 Anne c. 18.

3 26 Geo. III, c. 18.

4 49 Geo. III, c. 122.

5 (6th ed, 2002) 66 [125]-[126].

6 ALRC Report No 33 *Civil Admiralty Jurisdiction* 19.

Judicature Act, ‘any claims in the nature of salvage’ have been justiciable in the Admiralty jurisdiction of the Supreme Court.

International Conventions have, since early in the last century, contained provisions dealing with salvage of seagoing vessels. The *Brussels Salvage Convention 1910*⁷ attempted an international unification of the law, substantially along lines which had been developed by English statutes and judicial pronouncements. However, that Convention was never formally incorporated into English domestic law. By contrast, the *London Convention on Limitation of Liabilities for Maritime Claims 1976*⁸ was enacted in the *Merchant Shipping Act 1979*(UK) and its effect has been preserved by s185 and Schedule 7 of the *Merchant Shipping Act 1995* (UK). Likewise, the *International Convention on Salvage 1989*⁹ (*1989 Convention*) was eventually enacted in the United Kingdom by the *Merchant Shipping (Salvage and Pollution) Act 1994* (UK) but did not affect rights and liabilities arising out of operations started before 1 January 1996. The *1989 Convention* was, as to certain Articles, imported into Australian municipal law by s315 of the *Navigation Act 1912* (Cth).

Lord Mustill in *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd*¹⁰ (the *Nagasaki Spirit*) paid particular attention to the history of development in the law of salvage before coming to construe Art 14 of the *1989 Convention*. At the outset of his speech, his Lordship, who was rightly described in the same case by Lord Mackay of Clashfern LC as ‘such an eminent authority’¹¹ on the law of salvage, made these perceptive observations of the considerations which had led to the making of the *1989 Convention*:

My Lords, the law of maritime salvage is old, and for much of its long history it was simple. The reward for successful salvage was always large; for failure it was nil. At first, the typical salvor was one who happened on a ship in distress, and used personal efforts and property to effect a rescue. As time progressed, improvements in speed, propulsive power and communications bred a new community of professional salvors who found it worth while to keep tugs and equipment continually in readiness, and for much of the time idle, waiting for an opportunity to provide assistance and earn a large reward. This arrangement served the maritime community and its insurers well, and the salvors made a satisfactory living. It was however an expensive business and in recent years the capital and running costs have been difficult for the traditional salvage concerns to sustain. A number of these were absorbed into larger enterprises, less committed perhaps to the former spirit, and unwilling to stake heavy outlays on the triple chance of finding a vessel in need of assistance, of accomplishing a salvage liable to be more arduous and prolonged than in the days of smaller merchant ships, and of finding that there was sufficient value left in the salvaged property at the end of the service to justify a substantial award. At about the same time a new factor entered the equation. Crude oil and its products have been moved around the world by sea in large quantities for many years, and the risk that cargo or fuel escaping from a distressed vessel would damage the flora and fauna of the sea and shore, and would impregnate the shoreline itself, was always present; but so long as the amount carried by a single vessel was comparatively small, such incidents as did happen were not large enough to attract widespread attention. This changed with the prodigious increase in the capacity of crude oil carriers which began some three decades ago, carrying with it the possibility of a disaster whose consequences might extend far beyond the loss of the imperilled goods and cargo. Such a disaster duly happened, at a time when public opinion was already becoming sensitive to assaults on the integrity of the natural environment. Cargo escaping from the wreck of the *Torrey Canyon* off the Scillies caused widespread contamination of sea, foreshore and wild life. The resulting concern and indignation were sharpened when the *Amoco Cadiz* laden with 220,000 tons of crude oil stranded on the coast of France, causing pollution on an even larger scale, in circumstances which rightly or wrongly were believed to have involved a possibly fatal delay during negotiations with the intended salvors.

To this problem the traditional law of salvage provided no answer, for the only success which mattered was success in preserving the ship, cargo and associated interests; and this was logical, since the owners of those interests, who had to bear any salvage award that was made, had no financial stake in the protection of anything else. This meant that a salvor who might perform a valuable service to the community in the course of an attempted salvage, by for example moving the vessel to a place where the escape of oil would be less harmful, would recover nothing or only very little, if in the end the ship was lost or greatly damaged. Something more was required to induce professional salvors, upon whom the community must rely for protection, to keep in existence and on call the fleets necessary for the protection of natural resources in peril. Some new form of remuneration must be devised. It is with an important aspect of the scheme worked out during long and hard-fought negotiations between the shipowning and cargo interests and their insurers on the one hand and representatives of salvors on the other, with participation by governmental and other agencies, that the present appeal is concerned.

7 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 23 September 1910, Brussels

8 Opened for signature 19 November 1976, IMO, entered into force 1 December 1976.

9 Opened for signature 28 April 1989, IMO, entered into force 14 July 1996.

10 [1997] AC 455.

11 *Ibid* at 458.

I have attempted by that necessarily brief historical excursus to explain why, until recently, the law of salvage has been pre-occupied with the provision of an appropriate reward or compensation to a salvor for the effort and risk undertaken in preserving the salvaged vessel or cargo. The assessment of that reward or compensation was focused on matters intrinsic to the salvaged property, principally its value and the peril of loss or damage to which the vessel or cargo had been exposed and the risk to life and limb of the ship's crew which the salvor had averted. That provides the background against which courts have lately been called on to resolve two issues arising from the impact on salvage operations of environmental considerations. The first of those issues is whether any, and if so, what weight is to be given in assessing the reward for a salvor to the avoidance or reduction of a danger to marine flora, fauna or other resources or the environment as a whole. The second issue arises when a salvage operation carried out in the face of a substantial danger to the environment has been unsuccessful or has resulted in the salvor recovering less by way of an award referable to the value of the property salvaged than was expended in undertaking the operation.

Preventing or minimising environmental damage as a factor enhancing the salvage reward fixed in accordance with Art 13

Article 13 of the *1989 Convention* preserves the traditional salvage principle of 'no cure – no pay' or the need for a 'useful result' as the phrase is used in the text of the Convention.¹² That requires the saving of life or property of value and, by force of Art 13(3) the maximum award (excluding interest and costs) can never exceed the value of the salvaged property.

*United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC (The La Pampa)*¹³ provides an instructive illustration of an individual evaluation of each of the criteria listed in Art 13(1)(a) to (e) of the *1989 Convention* which, as Tamberlin J noted, are not in any specific order indicating a degree of priority to be given to one or the other. They largely reflect considerations to which Anglo-American case law has traditionally given effect. A salient exception is Art 13(1)(b) which allows a court or tribunal to take into account 'the skill and efforts of the salvors in preventing or minimising damage to the environment.' In the *La Pampa*, Tamberlin J, at first instance, had to make an award for the salvage of the vessel, a Cape size bulk carrier with a gross tonnage of 91,651 tonnes and an estimated value at the time of US\$20 million. She ran aground in the Auckland Channel of Gladstone Harbour in Queensland on 27 March 2002. She was then fully laden with a cargo of coal as well as carrying bunkers containing over 300,000 metric tonnes of fuel oil, diesel oil and lubricating oil. The vessel was quickly re-floated by three tugs provided by the salvor and was manoeuvred to a safe anchorage within the Gladstone Harbour.

His Honour regarded Art 13(1) of the *1989 Convention* as being of central importance. As well, the case was seen as raising a critical question of liability salvage which his Honour identified¹⁴ as 'should the Court treat as a relevant consideration whether any potential liability of the vessel or its owners may have been avoided by the actions of the salvors.'

In setting out to resolve that question of interpretation of the *1989 Convention*, his Honour identified from the *travaux préparatoires* and other material the following relevant extrinsic circumstances:

... after the "Torrey Canyon" environmental disaster in 1967 and that of the "Amoco Cadiz" in 1978, there were extensive debates and proposals enlivened in the maritime community representing competing interests as to whether the 1910 Brussels Convention on Salvage should be replaced or modified to provide greater incentives to salvors and to protect the environment. In the "Torrey Canyon" operations, great expense was incurred by the salvors to avoid contamination but because the efforts to save the vessel were unsuccessful, under the 1910 Brussels Convention they were unable to obtain a reward for their skills and efforts. This was perceived by salvors to be plainly inequitable. These discussions led to negotiations which culminated in the 1989 Convention.¹⁵

The conclusion was then reached that proposals to include liability salvage were not reflected in the terms of the *1989 Convention* which Tamberlin J considered 'clearly represents a delicate balance struck between competing interests.'¹⁶

¹² Art 12(1) and (2).

¹³ [2006] 163 FCR 151.

¹⁴ *Ibid* at 162 [42].

¹⁵ *Ibid* at 162,[46].

¹⁶ *Ibid* at 163 [49].

After reviewing the treatment of the subject in several standard texts and the decision of Lynch J, a District Judge of the US Ninth Circuit, in *Westar Marine Services v Heerema Marine Contractors S.A.*,¹⁷ his Honour considered the preferable approach to the question of liability salvage to be that suggested in these passages from *Brice on Maritime Law of Salvage*:¹⁸

... even if the prospect of damage to the property of third parties is *not expressly* included in the Convention, *national laws may*, it seems, *be permitted to include without there being breach of an international obligation ... the removal by the salvor of the threat* of claims against the owner of the salvaged property can properly be regarded *albeit very generally* as one of the elements showing the merit of the salvor's services and to that extent an enhancing feature.

... it is inappropriate in a salvage action to investigate in detail who would have been liable in damages to third parties and for how much.

Detailed evidence and findings directed to answering these questions are beyond the scope of a salvage action. *Save in the most straightforward case* where the existence of liability on the owner of salvaged property is self evident, all the Tribunal can say is that but for the success of the salvage services claims against the owner by third party owners of damaged property would have been made and would have had to have been investigated and defended. (emphasis added by Tamberlin J).

Those extracts have not been amended or supplemented in the 4th Edition of *Brice*¹⁹ which was published in 2003 after the untimely death of the learned author in 1999.

Taking what he had earlier indicated to be the preferable approach, Tamberlin J concluded:²⁰

... The Court should consider that the factor of potential exposure to third party liability operates generally to inform the fixation of the global figure, which results from the evaluation of the criteria listed in Article 13 that may be relevant in the particular case. It would not be appropriate to investigate, admit and consider detailed evidence as to the nature and extent of such liability.

Having considered the authorities, the Travaux, the Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors. And, in appropriate circumstances, this may inform the fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor. In some circumstances, it may not be of any significant weight.

In the result, his Honour gave little weight to protection of the environment as a general enhancing factor in fixing the award. That was because he regarded Art 13(1)(b) as premised on a finding of a real risk of substantial physical damage which has been averted by the skill and efforts of the salvor. He went on to observe:²¹

... In the present case, the possible risks that may have arisen had the tugs not provided assistance include the release of oil, damage to or blockage of the channel, damage to adjoining structures or resources or livestock, or even, in the worst-case scenario, the break-up of the vessel. The possible pollutants or sources of contamination include the oil and dirty ballast water that may have escaped from the damaged ship and, in the event of the break-up of the vessel, pieces of wreckage that would be scattered in the area surrounding the vessel.

In his Honour's view, there had been no more than a remote possibility of a release of oil from the *La Pampa*'s bunkers or the escape of any other contaminants or pollutants. Accordingly, in quantifying the reward, he gave 'some but not great weight' to the danger of substantial damage to marine life or resources or the environment generally. Later in his reasons,²² Tamberlin J concluded that the factor enumerated in Art 13(1)(d) of the 1989 *Convention* is concerned only with danger to the 'vessel and other property'. That paragraph requires account to be taken simply of 'the nature and degree of the danger.' In his Honour's view it did not extend to the nature and degree of the danger of adverse effects on the environment. He reached that conclusion by reasoning that

17 (1985) 621 F.Supp. 1135.

18 (3rd ed 1999) at [6-21] to [6-24].

19 (4th ed, 2003) at [6-21] to [6-24].

20 [2006] 163 FCR 151, at 165 [56]-[57].

21 *Ibid* at 169 [74].

22 *Ibid* at 170 [84]-[86].

express references to ‘damage to the environment’ in other parts of the Convention excluded Art 13(1)(d) from being predicated in part on that concept.

The *La Pampa* went on appeal to a Full Court of the Federal Court. Most of the Full Court’s discussion centred on the trial Judge’s analysis of the facts. However, the Full Court did make these observations about the risk of damage to the environment and liability salvage:²³

The Risk of Damage to the Environment

The risk of damage to the environment was premised upon the salvors’ success on the issue of global failure. Moreover, his Honour found that the positions in which the fuel and oil had been stored were distant from those areas where there could have been any prospect of failure. Underscoring any environmental sensitivity of the Curtis Coast Area does not assist in the identification of some further error. This ground also fails.

Potential Liability to Third Parties

The claims that the salvors refer to, as those which ought to have been taken into account in this regard, are those which arise by reference to the vessel:

- (a) blocking the port;
- (b) polluting the environment; and
- (c) losing, or being delayed in delivery of, its cargo.

His Honour, however, assigned little weight to this factor. His Honour expressly acknowledged the potential risk of the first two occurrences. It followed from his findings of fact that the risk that such liabilities might arise was remote. There is nothing to suggest his Honour was unaware of the third, when he observed that the salvage operation had occurred in a relatively short time-frame. The salvors have not established that any error attended these findings.

Professor Martin Davies has recently made this comment on the judgments in the *La Pampa*:²⁴

Perhaps the most interesting part of the decision at first instance, at least from a legal point of view, was Tamberlin J’s extensive consideration of whether “liability salvage” could be taken into account when assessing salvage reward under the Salvage Convention 1989. Tamberlin J said that the factor of exposure to third-party liability could be taken into account generally to inform the global figure assessed under art 13, without considering detailed evidence about the nature and extent of the liability averted by the salvors. The Full Court found no error in Tamberlin J’s application of that factor. In doing so, they implicitly endorsed its relevance.

A similar approach to that adopted in the *La Pampa* was taken by Clement DJ in delivering the opinion of the US District Court for the Eastern District of Louisiana in *Trico Marine Operators, Inc v Dow Chemical Company and Security Pacific Leasing Inc.*²⁵ At the time of that decision, the 1989 Convention was not in force as part of US municipal law but had been signed by the President and ratified by the Senate. However, it was noted that the 1990 revision of the Lloyd’s Open Form of Salvage Contract (LOF) ‘incorporates Articles 13 and 14 of the 1989 Convention giving them contractual effect. LOF 1990, Clause 2. Neither revision recognises liability salvage.’²⁶

The Court considered that the plaintiffs were likely to recover a traditional salvage award on the application of the six criteria which had been propounded by the US Supreme Court in the *Blackwall*.²⁷ Those criteria were:

- (a) the degree of danger from which the salvaged property was saved –
- (b) the salvaged property’s value –
- (c) the risk incurred by the salvors –
- (d) the salvors’ promptitude, skill and energy –

23 (2007) 163 FCR 183, at [45]-[47].

24 *International Maritime and Commercial Law Yearbook* (2008) 12.

25 1993 AMC 1042, December 28, 1992.

26 *Ibid* at 1044.

27 77 US (10 Wall) 1 (1869).

- (e) the value of the salvors' property put at risk.

If one disregards the presence in Art 13(1) of the *1989 Convention* of paragraph (b), referring to skill and efforts in preventing or minimising damage to the environment, the *Blackwall* criteria are not significantly different from the traditional criteria set out in the remaining paragraphs of Art 13(1). The District Court went on to conclude:²⁸

In light of the rejection of liability salvage in the 1989 Convention and LOF 1990, the Court declines to follow the Allseas Maritime dicta suggesting that salvors should be compensated for liability avoided, and instead will apply the rule set forth in those documents. Thus, the Court will add an additional factor to the Blackwall list -- "skill and efforts of the salvors in preventing or minimizing damage to the environment."

Adding this factor (1) will require the Court to hear evidence detailing the plaintiffs' skill and efforts in protecting the environment and (2) may result in an enhanced award, as if the Court had recognized the concept of liability salvage. The difference is that the Court will not need to make an inherently speculative determination of the defendants' averted liability, but instead will consider the plaintiffs' skill and efforts in protecting the environment as a seventh subjective factor in calculating the appropriate award.

The Court need not consider whether to (1) discard the Blackwall ceiling, or (2) adopt a rule of "special compensation" such as that described in Article 14 of the 1989 Convention, because the value of the vessels and cargo in this case is more than sufficient to compensate the salvors for their efforts. However, there is considerable merit to the position that an exception to the Blackwall ceiling should be made where the value of the property saved is inadequate to compensate the salvors for their efforts in protecting the environment.

The extent of the enhancement of a salvage reward under Art 13 in any given case is in the Tribunal's discretion, but, by force of Art 13(3), the award is capped by reference to the value of the salvaged property. The liability to pay it is also, by Art 13(2), apportioned rateably between the owners of each salvaged interest according to the value of that interest.

The 'safety net' provided by Art 14

Article 14(1) of the *1989 Convention* makes recovery of 'special compensation' dependent on a failure to earn a reward under Art 13 assessed according to traditional principles, including 'no cure – no pay', with provision for enhancement by reference to environmental considerations, which is at least equivalent to the 'special compensation' assessable in accordance with Art 14. Article 14 has therefore been held to provide a safety net in the event that no maritime property is saved. That safety net is by way of guaranteeing reimbursement of the salvor's expenses with an uplift of up to 100% of those expenses. Liability for payment of the safety net amount is visited by Art 14(1) exclusively on the shipowners.

The concept of special compensation for preventing or minimising environmental damage did not, as Lord Mustill pointed out in the *Nagasaki Spirit*,²⁹ underlie a new institution of a free-standing environmental salvage. A salvor's services are still rendered to the ship and cargo and the award is borne by the shipowners and the cargo interests. The only new feature introduced by Art 13 is that the award may include an additional enhancement where the salvage operations have prevented or reduced environmental damage. As already indicated, the amount of any special compensation fixed in accordance with Art 14 is, on the other hand, due solely from the shipowners and its assessment requires only that the salvor's salvage operation should have prevented or minimised damage to the environment.

The facts of the *Nagasaki Spirit* can be stated shortly but are nonetheless graphic. The *Nagasaki Spirit* part-laden with over 40,000 tonnes of crude oil collided in the Malacca Straits with the container ship, *Ocean Blessing*. As a result, about 12,000 tonnes of the *Nagasaki Spirit's* cargo spilled into the sea and caught fire. Both ships were engulfed by flames with a total loss of life save for two members of the crew of the *Nagasaki Spirit*. Semco, the salvor, mobilised a number of tugs and, after some five days, extinguished the fire on the *Nagasaki Spirit* which was towed away from the Malaysian coast to a safe anchorage off Belawan in Indonesia. There Semco effected a ship-to-ship transfer of the crude oil remaining on the *Nagasaki Spirit* which, after about a month, was towed to Singapore and re-delivered to her owners.

²⁸ 1993 AMC 1042, at 1047.

²⁹ [1997] AC 455, at 461.

As I have already recited, the *1989 Convention* was not imported into English domestic law until 1995, long after the litigation in the *Nagasaki Spirit*. Nevertheless, the House of Lords found itself called upon to interpret Arts 8, 13 and 14 of the *1989 Convention* because it had been incorporated by reference into the LOF 1990. The principal issue for their Lordships to resolve was whether the ‘fair rate’ in Art 14(3) included, in addition to the direct costs of performing the salvage service and the indirect costs of keeping tugs and equipment on standby, a further component to bring the recoverable ‘expenses’ up to an amount capable of returning a profit to the salvor.

It was held that ‘expenses’ in Art 14(3) contained no element of profit but retained the character of reimbursement suggested by the connotation which ‘compensation’ has in ordinary usage. Lord Mustill acknowledged that the provisions of the *1989 Convention* had been framed to provide a safety net for the salvor ‘even if there is no environmental benefit’.³⁰ That mitigated the harshness of the traditional, absolute, salvage rule: ‘no cure – no pay’. However, the language of the Convention did not require that mitigation to extend beyond an indemnity against a salvor’s outlays and some contribution to its standing costs so as to include the provision of an element of profit.

On the relation between special compensation for efforts directed to preventing or reducing environmental damage and a traditional salvage award, Lord Mustill concluded:³¹

Furthermore, and in my view decisively, the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of “salvage operations” which, as already seen, are defined by article 1(a) as operations to assist a vessel in distress. Thus, although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award. The only structural change in the scheme is that the incentive is now made more attractive by the possibility of obtaining new financial recognition for conferring a new type of incidental benefit. Important as it is, the remedy under article 14 is subordinate to the reward under article 13, and its functions should not be confused by giving it a character too closely akin to salvage.

It was also decided, somewhat incidentally, in the *Nagasaki Spirit* that the expenses referred to in Art 14(3) comprise those incurred during the whole of the salvage operation and not only those incurred while a threat to the environment remained.³²

The relationship between a salvage reward under Art 13 and special compensation under Art 14

Article 13 of the *1989 Convention*, as I have already pointed out, is concerned to enumerate the criteria for fixing the reward for salvage operations. That is to be done ‘with a view to encouraging salvage operations’.³³ However, subject to certain exceptions, the right to a reward is still governed by the ‘no cure – no pay’ principle. That is the effect of Art 12(1) and (2) which provide:

- 1 Salvage operations which have had a useful result give right to a reward.
- 2 Except as otherwise provided, no payment is due under this convention if the salvage operations have had no useful result.

Payment of a reward quantified according to Art 13(1) is to be borne rateably by all of the vessel and other property interests in proportion to their respective salvaged values. That is achieved by Art 13(2) which goes on to stipulate:

However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

³⁰ Ibid at 468.

³¹ Ibid at 468.

³² Ibid at 471.

³³ Art 13(1).

That apportionment of liability to pay the salvage reward is in marked contrast to the treatment of the liability to pay ‘special compensation’ which is imposed by Art 14(1) exclusively on the owner of the vessel, in these terms:

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

The ‘special compensation’ which may be awarded under Art 14 is subject to a curious two-stage cap which, in the first instance, is not more than 30% of the salvor’s expenses but may be uplifted to not more than 100% of those expenses if the tribunal ‘deems it fair and just to do so.’ That is the effect of Art 14(2) which stipulates:

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

The curiosity inherent in the structure of Art 14(2) stems from a compromise hammered out at the 1989 Diplomatic Conference which preceded the making of the *1989 Convention* and succeeded in mollifying certain South American countries. The history of the whole of the negotiations which gave birth to *the 1989 Convention* has been painstakingly recounted by Nicholas Gaskell.³⁴ The learned author noted in respect of Art 14(2):

There is now a two-tier safety net under article 14(2). When the salvor has actually prevented or minimized damage to the environment, a tribunal will award the salvor his expenses under article 14(1) and may (not must) award the salvor an additional uplift of up to thirty percent of those expenses. The thirty percent is expressed as a maximum uplift, but article 14(2) continues by saying the court may increase this uplift to one hundred percent of the expenses if it ‘deems it fair and just to do so.’ This solution apparently satisfied the South American countries, although it does not alter the substance of the original CMI proposal. It may have the desired psychological effect, however, of concentrating the mind of the tribunal on the first stage figure as a matter of normal practice, while reserving the second stage for exceptional cases. It is important to record that there is no obligation to raise the special compensation to any figure, or at all; it is entirely a matter for the tribunal. The uplift is expressed as a percentage of the expense incurred by the salvor.³⁵

There is no obligation on a court or tribunal to fix a reward under Art 13 of the *1989 Convention* up to the value of the salvaged property before considering special compensation under Art 14.³⁶ It is highly doubtful whether a claim for special compensation under Art 14 gives rise to a maritime lien.³⁷ However, a shipowner can be under an obligation to give security for special compensation under Art 14 as well as salvage reward under Art 13 in respect of which a maritime lien might be asserted. Claims under both Arts 13 and 14 are subject to the time limit contained in Art 23(1) of the *1989 Convention* requiring a claim for ‘payment under’ the Convention to be brought within two years from the day on which the salvage operations were terminated. Article 23 stipulates:

- 1 Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.
- 2 The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. This period may in the like manner be further extended.

34 Gaskell, ‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement’ (1990), 16 *Tulane Maritime Law Journal* 1

35 *Ibid* at 58.

36 See Attachment 1 to the 1989 Convention headed *COMMON UNDERSTANDING CONCERNING ARTICLES 13 AND 14 OF THE INTERNATIONAL CONVENTION ON SALVAGE*, 1989 which recites:

It is the common understanding of the Conference that, in fixing a reward under article 13 and assessing special compensation under article 14 of the International Convention on Salvage, 1989 the tribunal is under no duty to fix a reward under article 13 up to the maximum salvaged value of the vessel and other property before assessing the special compensation to be paid under article 14.

37 Gaskell, *op cit* 32.

- 3 An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

A new focus on damage to the environment

Before the *1989 Convention* had come into force, there were several cases in both Australia and the United Kingdom in which an operation ultimately held to involve the rendering of salvage services effectively averted or reduced the risk of damage to the environment by the escape of toxic or potentially polluting cargoes. However, in none of those cases, as far as I have been able to discover, was the environmentally beneficial or protective aspect of the salvage taken into account as a factor enhancing the salvage reward; see eg *Fisher v The Oceanic Grandeur*,³⁸ where the salvage award was confined to the master and crew of an Australian vessel which had taken off crude oil from a stricken Liberian-registered, Chinese-crewed tanker in the Torres Strait. Stephen J, who tried the case in the original jurisdiction of the High Court, found that:³⁹

The jettison of the [*Oceanic Grandeur*'s] cargo of crude oil was not a practical possibility because of the resultant pollution. She was lying in a position where she was protected from oceanic swells by surrounding land masses and the northern extremity of the Great Barrier Reef, but there were large areas of open water adjacent to her and waves of up to six feet or so in height did occur in periods of high wind in the locality. The time of year, March, was one in which the weather was unpredictable and bad weather might occur at short notice; however it was very unlikely that cyclonic storms would occur in close proximity to the vessel's position, although the effect of distant cyclones might be felt in terms of high winds.

Despite those findings, his Honour appears to have held,⁴⁰ that the only 'independent factor tending in moderation towards an enhanced award' was the value of the salvaged vessel.

The *1989 Convention* has provided a significant new focus for both salvors and the recipients or beneficiaries of salvage services. That is on preventing or minimising 'damage to the environment' which, as defined in Art 1 means 'substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.'

Article 6(2) of the *1989 Convention* preserves the right of an owner of a vessel, or the master on behalf of the owner, to conclude contracts for salvage operations which are inconsistent with, and prevail over, the Convention. However, Art 6(3) provides that: '[n]othing in this article shall affect the application of Article 7 nor duties to prevent or minimize damage to the environment.'

Those duties are imposed primarily by Art 8(1)(a) and 8(2)(a) and (b) which respectively provide under the heading 'Duties of the Salvor and the Owner and Master'

- 1 The salvor shall owe a duty to the owner of the vessel or other property in danger:
 - (a) to carry out the salvage operations with due care;
 - (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment;
- 2 The owner and master of the vessel or the owner of the property in danger shall owe a duty to the salvor;
 - (a) to co-operate fully with him during the course of the salvage operations;
 - (b) in so doing, to exercise due care to prevent or minimize damage to the environment;

Another expression of concern for the environment is to be found in Art 9 which makes clear that the Convention does not impinge on the rights of coastal States to take steps to protect their coastlines from actual or threatened pollution. That Article provides:

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the

38 (1972) 127 CLR 312.

39 Ibid at 319.

40 Ibid at 343.

threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

The provision in Art 11 mandating that a State party to the *1989 Convention* take into account the need for co-operation between salvors, other interested parties and public authorities, specifically directs attention to the prevention of damage to the environment by providing:

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance or ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger **as well as preventing damage to the environment in general.** (emphasis added)

I have already directed attention to the inter-related provisions of Arts 13 and 14 which contain several references to ‘damage to the environment’. One such reference not so far mentioned is in Art 14(5) which provides: ‘[i]f the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.’

Conclusion

It will be seen, even from my cursory survey, that many provisions of the *1989 Convention* and the LOF and other salvage contracts which incorporate it still await authoritative exposition and interpretation. It would be salutary for courts and arbitrators undertaking that task to bear in mind the new focus which the Convention has brought to bear on the protection of the environment. In particular, effect should be given as far as possible to the new policy discernible as underlying the provisions of the Convention to which I have drawn attention. That policy is directed to encouraging salvage companies and State authorities to establish and maintain the resources needed to avert or minimise the ecological damage which a significant maritime misadventure can present. It is also concerned to provide an incentive for the speedy deployment of those resources without first conducting a detailed cost-benefit analysis by reference solely to the prospects of recovering a traditional salvage reward.