

**LIKELY DEVELOPMENTS IN THE LAW OF
SALVAGE AND WRECK**

BY

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INTRODUCTION

The likely developments of the Law of Salvage and Wreck are influenced by the changing perspectives of Salvage and Wreck. The traditional perspectives have been increasingly under challenge over the last 20 years. This was initially apparent in Salvage in the 1980's. In the 1990's it is also apparent in relation to Wreck.

Partly, the challenge is technological and reflects the technological changes which have, within one generation, transformed the ships and ports around the world. Partly, it is to do with new attitudes, such as the desire to protect the environment from real and perceived threats.

This produces considerable tension as twin key themes in Maritime Law are:

- (a) the desire for certainty; and
- (b) the search for uniformity.

This was reflected over the last three millennia by the Ancient Greek Laws of Rhodes, The Digest of Justinian, the Laws of Oleron, the Hanseatic Ordinances, the Marine Ordinance of Louis XIV (France 1681) and the Black Book of Admiralty in England.

Patrick Griggs quotes with approval Professors Lilar and van den Bosch.¹

"The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their goods to the capricious and indomitable sea. Since time immemorial, the postulate which has inspired all the approaches to the problem has implied the establishment of a uniform law."

¹ Patrick Griggs [1997] LCMLQ 369 quoting Albert Lilar and Carlo van den Bosch *Le Comité Maritime International 1897-1972*, 1,

TRADITIONAL APPROACH TO SALVAGE

The traditional approach in Salvage is summed up by those well-known words "no cure - no pay". The very essence of "no cure/no pay" is if there is no beneficial result, there will be no salvage reward. This followed the long-established tradition in salvage awards. It was the tradition of the decided English cases back to the times of Dr Lushington and *"The Industry"*².

Article 2 of the 1910 Brussels Salvage Convention repeated that tradition when it said:

"Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result ..."

This is not surprising as the 1910 Salvage Convention substantially reproduced the existing principles of English Law.

This approach carried through into the 1989 International Convention on Salvage agreed at London, as Article 13 is not significantly changed in substance from Article 8 of the 1910 Convention.

ARTICLE 14 OF THE 1989 INTERNATIONAL CONVENTION

However, the 1989 Convention did incorporate new concepts - in particular, Article 14 which allows for special compensation in circumstances that had not previously existed. This provision arose out of the catastrophic oil tanker accidents like the *"Torrey Canyon"* in 1967 and the *"Amoco Cadiz"* in 1978. Not only had technology allowed for the creation of giant oil tankers, but it had also propelled an immediate and graphic depiction of an oil spill into the living rooms of the average citizen through the television set. Powerful images of despoiled beaches and dying sea-birds coated in black sludge horrified the public. This encouraged a widespread public desire to protect the environment from damage and brought home the problems that arise when a large oil spill occurs.

The sheer size of these disasters has a continuing impact. When the *"Torrey Canyon"*

² (1835) 3 Hagg. Adm 203; 166 ER 381

stranded, around 100,000 tons of crude oil were spilled. With the "*Amoco Cadiz*", over 200,000 tonnes of crude oil were spilled. In the case of the "*Exxon Valdez*" in 1989, 11 million US gallons of heavy oil were spilt into an environmentally-sensitive and sheltered stretch of water.

Nor were the calamities restricted to oil spills - the "*Ariadne*" had a cargo of dangerous chemicals and the "*Mount Louis*" a cargo of uranium hexafluoride in containers.

By the early 1980's, it was widely believed that there was a need for special incentives to make sure that salvors tried to prevent damage to the environment and that such incentives had to be significant. The case of the valiant, but unlucky, salvor and the "*Atlantic Empress*" crystallised the need for a safety net and the Lloyd's Open Form 1980 (LOF 80) recognised this.

The process of drafting the 1989 Convention was lengthy and evolved from a draft finalised at the CMI meeting in Montreal in 1981. The "Montreal compromise" evolved into the "London compromise" and the special incentives became the special compensation contained in Article 14.³ The 1989 Convention came into force on 14 July 1996.

The essence of Article 14 is that if the salvor by its salvage operations has prevented or minimised damage to the environment where a vessel or its cargo threatened such damage, then, at least, the salvor would be entitled to special compensation up to a 100% equivalent of the salvor's expenses.

It is important to emphasise that it is a reimbursement of expenses not a profit payment, as Lord Mustill made clear in "*The Nagasaki Spirit*"⁴, it is not "a kind of free-standing environmental salvage". Defining the expenses has been controversial as has been well illustrated by "*The Nagasaki Spirit*" judgment and the ongoing debate.

³ The history of this development is explained in the article by Geoffrey Brice Q.C. "*The new Salvage Convention: green seas and grey areas*" [1990] LMCLQ 32 at p40 onwards. Also in his textbook *Maritime Law of Salvage* (1993) p259.

⁴ [1997] 2 W.L.R. 299 at p301 and [1997] 1 Lloyd's Rep 323 at p327

FOLLOW UP FROM THE 1989 CONVENTION

The 1989 Convention has its critics but the concepts in it have been carried forward into the Lloyd's Open Form - both the 1990 version (LOF 90) and the 1995 version (LOF 95).

There has been a continuing degree of unhappiness centred on the Article 14 issue.⁵ This has led to an ongoing, vigorous debate.⁶ As a result of the experience gained in claims under Article 14, it was generally agreed that the mechanism for assessing Special Compensation within the meaning of Article 14 of the Salvage Convention, was not as satisfactory as it could be.

To resolve this, a special **SCOPIC** clause has been developed in joint discussion between the International Group of P & I Clubs, the International Salvage Union, the London Marine Insurance Underwriters and the International Chamber of Shipping. It is designed for use in casualties involving members of the International Salvage Union and ships entered with a member of the International Group and takes the form of an optional Addendum that can be used in conjunction with the LOF. It is supported by a Code of Practice between the International Salvage Union and the International Group of P&I Clubs, and a Code of Practice between the International Group of P&I Clubs and members of the Lloyd's Underwriters' Association and the International Underwriters Association of London.

This clause came into operation on 1 August 1999, and will operate for a trial period of two years and be kept under annual review.

The clause can be incorporated into an LOF contract by simply adding the additional words:-

"It is agreed that the SCOPIC Clause is incorporated into this contract."

The Clause itself is a very detailed and lengthy one with 15 sub-clauses together with 3 appendices. Copies of the SCOPIC Clause, together with the Appendices, Codes of Practice and the Salvage Guarantee Form can be obtained from Lloyd's Salvage Arbitration

⁵ S. Girvin in "*Special Compensation under the Salvage Convention 1989: A Fair Rate?*" [1997] LMCLQ 321 at 328.

⁶ Articles in *Fairplay* 15 January 1998 at pages 18 and 27 record the views expressed at the IBC Salvage and Wreck Removal 2000 Conference.

Branch or be downloaded from the Lloyd's website (<http://www.lloyds.com>) under Agency and Salvage - SCOPIC⁷.

Although the SCOPIC Clause only came into operation on 1 August 1999, it was tested on five casualties prior to 1 August, where the parties agreed to the SCOPIC Clause being incorporated into LOF 95. Apparently, the parties concerned have agreed that the Clause was successful in achieving its objectives and no problems were encountered.

An important aspect of the SCOPIC Clause is that it is not triggered by "a threat of damage to the environment". Instead, the Contractor has the right to invoke it by written notice. SCOPIC remuneration is defined as the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out-of-pocket expenses; and bonuses due.

Invoking the SCOPIC Clause does not affect the assessment of salvage services in accordance with Article 13 of the Salvage Convention.

It is important to remember that the SCOPIC Clause is not an amendment to the Salvage Convention itself. However, as Lloyd's is the World's leading insurance market and Lloyd's Open Forms are used worldwide, this will have a major effect on Salvage Law and Practice. If the SCOPIC Clause, with whatever variations or updates are necessary, turns out to be as successful as hoped, then it is likely to be used as a de-facto amendment to the Salvage Convention in practice.

While negotiations continue on the SCOPIC Clause, a new LOF has been in abeyance, but this is now progressing. The Lloyd's Form Working Party with representatives of the maritime community, will be meeting in London in November 1999 to discuss the latest proposals and, if agreement is reached on the content and format, it is hoped that the new LOF form will be published in the Year 2000.

⁷ Thanks to the wonders of the Internet and the efficiency of GAB Robins Marine (Auckland) and Lloyd's Salvage Arbitration Branch (London), all the clauses were available in Auckland only a matter of hours after being released in London.

WRECK

Like Salvage, there has been a long tradition in relation to Wreck. It has always been seen as a potential source of income. Sometimes this was seen as a matter of royal prerogative⁸ and sometimes as a matter of local private initiative, for example the notorious wreckers who lured vessels onto the rocks in order to profit from the wreckage.

The established English tradition was that there would be a local Receiver of Wreck who was responsible for the wreck to make sure that it was dealt with and disposed of in an orderly manner. In New Zealand, the local official in some provincial areas who included Receiver of Wreck amongst his or her titles was often surprised to hear that he or she had the responsibility for a maritime disaster. The office of the Receiver of Wreck has just been abolished in New Zealand with the overall power going to the Director of Maritime Safety. Responsibility for wreck removal falls on the vessel owner. If the wreck is a hazard to navigation within the region of a regional council that council may also have responsibilities to discharge.⁹ The wording of the statutes concerned is complex and a suitable challenge to the legal mind.

A comparatively new concept that is increasingly important is that a wreck may be part of the cultural heritage of the country in whose waters it is lying. This is clearly so if it is a Portuguese galleon lying off the coast of Portugal, or if it is found in the sand dunes of a West Coast beach in New Zealand. However, that concept is more debatable if the vessel is found in a strait which it was passing through on the way back to Lisbon, and the connection is purely geographical rather than historical.

In any event, this concept has now expanded to the point where the preservation of a wreck as an underwater archaeological site is widely seen as being for the common good of humanity.

The causes of this change of perspective are, once again, partly technological. Scientific developments allow for wrecks to be tracked down, identified and explored. Sensational

⁸ Prerogative Statute 17 of King Edward II.

⁹ Maritime Transport Amendment Act 1999 and Local Government Amendment Act (No.2) 1999.

discoveries of this kind have included the "*Titanic*", the "*Diana*" wreck in the Straits of Malacca, and some of the treasure recovered off the Florida coast. However, it is not only the professional who can now discover and explore important wrecks. With the expanded use of diving equipment amongst enthusiastic amateurs, there is a widespread public participation in such exploration.

Just as land-based archaeology has progressed from the early battering ram techniques of Belzoni in the early 19th century in Egypt, through the painstaking investigations of Tutankhamun's tomb in the 1920's, to today's highly scientific investigations in Luxor, so have the underwater archaeological procedures become increasingly careful and professional. Although scavenging and fossicking will occur, more-and-more divers, amateur as well as professional, appreciate the importance of applying the scientific techniques of underwater archaeology. Side scan sonar can survey large areas of the seabed using sound waves to identify wrecks. Magnetometers can produce maps of the seabed pinpointing the location of metal objects like cannons, even when covered by thick mud. A useful summary of the last 50 years in nautical archaeology is given in the article, "History beneath the Sea" by Professor George F. Bass in the November/December 1998 issue of *Archaeology*, page 49 onwards.

Unlike land-based archaeology, where there are usually overlapping layers of habitation, a wreck is a single moment in time - a stopped clock. This is why a pre-disturbance survey of a wreck followed by scientific investigation is so important.

The availability of modern submersibles has meant that even wrecks like the "*Titanic*" lying in 4,000 metres (13,000 feet) of water can be explored and objects recovered. Since 1912, the loss of the "*Titanic*" has been a constant source for newspaper articles, books and films, even a metaphor for overweening pride. The recent monumental box office success even built the underwater exploration into the storyline of the film.

Finding the "*Titanic*" has become a major catalyst for debate. Should the mass graves of so many be left in peace, what type of artefacts should be recovered, should the artefacts that are recovered be displayed?

The idea of protecting wrecks began initially within territorial waters but has expanded during the last 25 years. In 1976, Australia passed legislation protecting wrecks on its continental shelf. Spain and Ireland have done likewise and there is an implied recognition of the power to do so in the European Convention on Protection of the Archaeological Heritage (Revised) 1992.¹⁰

Although the 1982 United Nations Convention on the Law of the Sea UNCLOS had general provisions over the protection of underwater remains, they were not specific enough.¹¹

This has led to pressure for an international convention.

THE CONCEPT OF AN UNDERWATER CULTURAL HERITAGE CONVENTION

From 1989 onwards, the International Committee on Cultural Heritage Law of the International Law Association, worked on the preparation of a draft convention on underwater cultural heritage. The International Law Association was founded in 1873 and has played a major role over the years in encouraging international conventions, including preparatory work on the Hague Rules¹² in 1924 in relation to the carriage of goods.

The ILA Committee, with Professor O'Keefe as Chairman and Professor Nafziger as Rapporteur, presented draft convention outlines to ILA conferences in 1990 and 1992 for discussion. After each conference, the drafts were revised.

In 1994, the International Law Association Conference in Buenos Aires debated the updated draft. After final amendments, this draft was adopted by the International Law Association on 20 August 1994 and submitted to UNESCO for consideration.

The ILA Committee had worked closely with experts invited by the International Council on Monuments and Sites (ICOMOS). In October 1996 the **ICOMOS International Charter**

¹⁰ Dr Patrick O'Keefe ILA Newsletter ADI - Actualites No.9 January 1998

¹¹ e.g. Article 303, 1982 UNCLOS

¹² International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, August 25, 1924.

on the **Protection and Management of Underwater Cultural Heritage** was ratified at Sofia. This charter supplements the 1990 ICOMOS charter for the Protection and Management of Archaeological Heritage.

WORK ON A DRAFT UNESCO CONVENTION

UNESCO was already interested in the idea of a convention. In 1993, the UNESCO Executive Board requested the Director General of UNESCO to undertake a study into the feasibility of a new international instrument for the protection of underwater cultural heritage.

After the ILA Draft Convention was referred on to UNESCO, the continuing work on a feasibility study was approved by the Executive Board of UNESCO and circulated to the member states for their comments.¹³

A meeting of experts in archaeological, salvage and jurisdictional fields took place in May 1996. A wide range of countries were involved in making comments on the draft, including the United States of America, which is currently not a member of UNESCO. The text of the April 1998 Draft Convention was proposed by UNESCO and the United Nations Division of Ocean Affairs and Law of the Sea (DOALOS), with the advice of the International Maritime Organisation (IMO).

The 1996 ICOMOS Charter was included in the draft UNESCO Convention¹⁴ and it provides rules and standards intended to govern underwater project design, funding, investigation, material conservation, site management and maintenance, health and safety, reporting, curation and dissemination of information.

Geoffrey Brice QC commented:

"The key to success, it is submitted, in achieving the objects of the draft Convention is to focus on the beneficial aspects of salvage and co-operation with responsible salvors, thus reaching a balanced solution satisfactory to all

¹³ UNESCO documents 28c/39 and 28c/39 Add.

¹⁴ Articles 1(3) and 24 of the April 1998 Draft Convention.

interests, governmental and private"¹⁵

Since there has been a Draft Convention to debate, the discussions and negotiations have been intense. Apart from the two formal meetings of Government Experts, which took place in Paris in late June 1998 and in April 1999, there have been a number of other meetings, often between States that have comparable interests so that common negotiating positions can be agreed upon. It is important to remember that there are wider interests involved, and not just commercial interests, but also naval and military strategic interests.

At the April 1999 meeting in Paris, there were some 75 States represented, along with 10 groups of observers - including the United States of America. There seems to be almost universal agreement on the need for a Convention.

It is widely recognized that the eventual text must be compatible with UNCLOS. However, perceptions of UNCLOS vary between different States and it is critical to remember that technology has now made shipwrecks accessible to an extent not contemplated in the late 1970s.

Dr Patrick O'Keefe has written a detailed analysis of the results of discussions at the Second Meeting of Government Experts, which is to be published soon by the Oxford University Press in the International Journal of Cultural Property. Dr O'Keefe's report analyzes the discussions and sums up as follows:

"Did this meeting make progress in preparing a Convention on the Protection of the Underwater Cultural Heritage? The answer is definitely, "yes". Although the results are somewhat chaotic, there is now material which the States can consider before the next meeting of experts. Negotiation and compromise will be necessary as with preparation of all international conventions."

¹⁵ Geoffrey Brice Q.C. *Salvage and The Underwater Cultural Heritage* 20 Marine Policy (1996) 337 at 342.

THE CONTROVERSIAL ISSUES

Particularly controversial areas identified by Dr O'Keefe in his analysis can be listed as follows:

(a) Coastal State Jurisdiction over Cultural Heritage on its adjacent Continental Shelf, or in its Exclusive Economic Zone

The ILA draft proposed a Cultural Heritage Zone and extending the coastal state jurisdiction to the outermost limits of the continental shelf. The reason for this proposal was that the coastal state is probably the sovereign authority best placed to control activities detrimental to cultural heritage on its adjacent continental shelf. In addition, the coastal state is certainly the one with the most immediate possibility of exerting control. As a compromise, Article 5 of the April 1998 Draft Convention specifies the right of coastal states to establish jurisdiction over underwater cultural heritage in its exclusive economic zone and on the continental shelf.

The great majority of the States support this approach. However, an influential group of States, including the United Kingdom, United States of America, Norway, Germany and France are opposed.

Ironically, although the United States of America has consistently opposed this in principle, in practice, the United States has legislation enabling the creation of marine sanctuaries on its own continental shelf. This is being used to protect the remains of the "USS Monitor" lying 16 miles off the coast of North Carolina.

The recent decision in the United States Supreme Court in "*The Brother Jonathan*"¹⁶, has shown the complexity of State and Federal Laws governing Wrecks. It has been seen as tilting the procedural balance in favour of the commercial salvors by establishing that a State cannot just simply invoke the Abandoned Shipwreck Act 1987, but will have to prove its title to the wreck.

¹⁶ 102 F. 3d 379; No. 96-1400; Lexis 2788 see also case note comment by C.J.S. Forrest in [1998] LMCLQ at p509 onwards and comments by Forrest Booth in International Business Lawyer July/August 1999 at p292 onwards.

The debate at the Second Meeting of Government Experts resulted in three options evolving, one reflecting the majority, one the minority and one a compromise. The resolution of which of the options will eventuate is now the subject of ongoing discussion and negotiation.

(b) Status of Warships

This has increased in importance as an issue over the last 12 months. Not only is it warships that are at issue, but other vessels sunk while on government non-commercial service. These were excluded from the application of the Draft Convention. The group of Latin American States who made the Declaration of Santo Domingo are pressing for including such vessels in the Convention, because otherwise, the nations of the Americas would virtually have no right to salvage any shipwrecks dating from colonial times. Needless to say this is opposed by Spain, the ex-colonial power concerned.

There is also an issue as to what is meant by "warship", or "vessel engaged on government non-commercial service", and whether there should be some time limit as to the application of these terms.

(c) The Relationship with the ICOMOS Charter

It is proposed that the Charter for the Protection and Management of Underwater Cultural Heritage prepared by ICOMOS should be annexed as an integral part of the Draft Convention, but subject to a procedure for revision that is not as cumbersome as revising the Convention itself. The general wording of the Annex is now in a form acceptable except for a provision on "commercial exploitation" and there is an ongoing debate as to whether this provision should be in the Annex or in the body of the Convention itself.

(d) Salvage/Wreck Recovery

There is always a debate as to whether "salvage" is the correct word to use when recovering artefacts from wrecks, sometimes this term is qualified as "historic salvage" or "treasure salvage" or "salvage and finds".

Article 12(2) of the Draft Convention requires States Parties to "provide for the non-application of any internal law or regulation having the effect of providing commercial incentives or any other reward for the excavation and removal of underwater cultural heritage".

The United States of America proposed that States could make a reservation allowing the continued application of the laws of salvage and finds. This brings to the fore the whole issue of the relationship between commercial wreck recovery and archaeological excavation and the implications will need to be followed up in the ongoing negotiations.

(e) **Abandonment and Property Rights**

The April 1988 Draft Convention provides in Article 1(2), the circumstances under which underwater cultural heritage is deemed to have been "abandoned". This is deemed to occur if no exploration, research or recovery is pursued within 25 years of the technology being available to do so, or 50 years after the last assertion of interest by the owner, where no technology would reasonably permit exploration for research or recovery.

Exactly what amounts to an assertion of interest by a ship owner or an insurer needs clarification. Traditionally, in many parts of the World, the rights to a wreck often remain passively held for many decades, or even well over 100 years without any public assertion of ownership by the successors entitled to the wreck.

The debate over the last 12 months has added further complications. The great majority of States do not want a definition of "abandonment" in the Convention.

(f) **Photography and Tourism**

This is a new issue arising out of the "*Titanic*" litigation in the United States of America. R.M.S. Titanic Inc. (RMST), recognised as the holder of the rights to the wreck of the "*Titanic*", has been arguing that there should be no right for tourists to visit the wreck. They have even gone further into the area of intellectual property and sought a prohibition on other people photographing, filming or obtaining images of the wreck or the wreck site.

RMST was initially successful in obtaining an injunction with these prohibitions from the United States Court of the Eastern District of Virginia but one of the proposed tourists to the wreck appealed, and the United States Court of Appeals for the Fourth Circuit amended the

injunction as follows:¹⁷

"We affirm the district court's injunctions insofar as they enjoin parties and persons in privity with them from conducting salvage operations of the Titanic wreck and interfering with the salvage operations of RMST. We reverse them insofar as they purport to prohibit the visiting, viewing, searching, surveying, photographing, and obtaining images of the wreck or the wreck site, as long as these activities do not constitute any salvage effort or interfere with RMST's salvage rights.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED."

(g) **Definitions**

There is also considerable debate over the meaning of "underwater cultural heritage" and how it should be defined.

The Importance of Resolving These Issues

The technological advancements in underwater exploration and the ingenuity of maritime lawyers will keep the pressure on the various experts and States to come to as speedy a conclusion as is consistent with the proper drafting of the Convention.

THE FUTURE OF THE DRAFT UNESCO CONVENTION

It seems highly likely that there will be a Convention and much of the material that will be in the Convention is not controversial. Professor James Nafziger sums up the position in an apt maritime simile:¹⁸

"An intergovernmental ship left port in 1998 en route to UNESCO's General Conference in 2001. As a result, a multi-use regime of underwater management is evolving which seeks to accommodate commercial interests to the fundamental need for protecting the heritage. Policy and technical drafting issues abound, but a spirit of collaboration among governments, scientists and

¹⁷ *R.M.S. Titanic Inc. v Haver* 171 F. 3d 943; 1999 U.S. App. Lexis 5154; 1999 AMC 1330. See also articles by Professor James Nafziger *The Titanic Revisited* Vol 30, No. 2 April 1999 Journal of Maritime Law and Commerce p311 and *Historic Salvage Law Revisited* to appear shortly in a symposium on law of the sea issues in the next millenium.

¹⁸ From the paper *Historic Salvage Law Revisited* to appear shortly in a symposium of Law of the Sea issues in the next millenium.

salvors can speed the completion of a reliable international agreement to govern the underwater heritage. It will be high time."

THE ROLE OF EDUCATION

The drafting process of the proposed convention is a major educational exercise in itself, bringing together the views of professional archaeologists, lawyers, professional salvors, diplomats, shipping interests and insurers. However, there is a further educational dimension - the best worded convention in the world still needs public acceptance, not only by professional salvors but also by amateur and semi-professional divers, otherwise fossicking will undermine its provisions. This will need to involve a major educational drive through dive clubs and magazines around the world, as well as through the usual governmental and intergovernmental channels.¹⁹

¹⁹ This would need to expand upon what is currently provided in Articles 15 and 17 of the April 1998 Draft UNESCO Convention.

This paper has been developed and updated from the paper I presented to the International Congress of Maritime Arbitrators XIIIth Meeting, Auckland, March 1999.