Salvage Agreement and Contract Salvage: Risk Dynamics in Salvage Law

Risk Dynamics in Salvage Law

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1 Introduction

Shipping and seafaring are interdependent but as a combined phenomenon has, since time immemorial, been considered a dangerous and risky occupation. If shipping is a risky venture as it doubtless is, then salvage, famously described as an “endeavour so heroic that it is unrivalled in fiction”,[[1]](#footnote-1) is fraught with even greater risk. This chapter concerns the law and practice of salvage as perceived from the vantage point of risks encountered by the salvor on the one side and those from the opposite side, that of the shipowner who needs the salvor’s services. In more specific terms, the chapter examines the legal status of the standard form salvage agreement exemplified by the Lloyds Open Form of Salvage Agreement, popularly referred to as the lof and whether and how that is different from what in some circles is called “contract salvage”. Incidental to this examination is consideration of the difference between contract and agreement and what that difference implies in the context of salvage services; in other words, what exactly is the legal nature of such services as perceived in maritime law? The focal point of this inquiry is the key question of what is salvage agreement in juxtaposition to contract salvage.

At the outset, before venturing further, let me say that against my better judgement I have chosen to write this piece in the first person which is uncharacteristic of all except one of my previous published writings. Having said that, I have taken the liberty of approaching the subject in the present instance in the same way as I would, a conference keynote speech, and I have felt free to avoid excessive formality in delivering my message. My profuse apologies for adopting that informal stance hoping that the audience and readership will appreciate my frank subjectivity.

2 Customary Salvage

First, let me clarify what I mean by customary salvage. Basically, it is the custom and practice of salvage that has grown up over many centuries from Roman times. In the classic case of *Falcke* v. *Scottish Imperial Co*.,[[2]](#footnote-2) Bowen L.J. stated in reference to salvage, that it existed “from the time of the Roman law downwards”.[[3]](#footnote-3) Thomas J. Schoenbaum mentions that the general maritime law of salvage was a part of customary international law and also that it prevailed in Byzantine times and in the medieval Mediterranean seaport codes.[[4]](#footnote-4) Sir Christopher Robinson, Judge of the English Admiralty Court expressed the view in the case of *The Calypso,*[[5]](#footnote-5) that the entitlement to salvage was originally derived from the Roman law doctrine of *negotiorum gestio* found in the Justinian Digests.[[6]](#footnote-6) Be that as it may, those of English law persuasion would submit that it is a child of equity, which may imply, incorrectly in my view, that salvage did not exist apart from the historical advent of the Chancery, the law of equity being itself the offspring of that institution. In this context, the comment in Kennedy’s book that the Roman law itself had a professedly equitable nature, is elucidatory. I presume his reference to equity is in its general sense of fairness.[[7]](#footnote-7) The learned judge Sir Christopher Robinson in *The Calypso* also referred to the general principle of natural equity for protecting life and property which in Roman law, generated a cause of action. That this proposition of his was not accepted as stated by him but was simply a distant analogy, is borne out by some judicial decisions and text writers.[[8]](#footnote-8) But equity, whether in the general sense of fairness, or in terms of its institutional connotation, has been embedded in the law of salvage, and its role in the development of that law in England is indisputably of significant proportions. In *Five Steel Barges*, Sir James Hannen famously referred to salvage “being of a peculiarly equitable character”,[[9]](#footnote-9) and Lord Denning ostensibly reiterated the same view in *The Teh Hu.*[[10]](#footnote-10)In *The Beaverford* v. *The Kafiristan*.[[11]](#footnote-11) Lord Wright held that “...the maritime law of salvage is based upon principles of equity”.

Interestingly, in American maritime law jargon, as imprecise as it may be, the term “pure salvage” is used which is equally inexact.[[12]](#footnote-12) The appellation so framed begs the question as to what variety of salvage is impure (no pun or play on words intended). British Authors O’May and Hill use the same terminology, that is, “pure salvage”, seemingly to mean “salvage service rendered independent of contract”,[[13]](#footnote-13) and in the United Kingdom Marine Insurance Act 1906,[[14]](#footnote-14) the corresponding expression used is “salvage under maritime law”. Incidentally, Francis D. Rose uses the term “common law salvage” which adds to the convolution; he apparently uses it as a term of convenience to mean judge-made law as it prevails in the common law system.[[15]](#footnote-15)

All said, it is indisputable that the indispensable ingredients of customary salvage as they have come down to us through the ages, are represented by the triumvirate of danger, voluntariness and success. Brice sums it up well stating that – “A right to salvage arises when a person, acting as a volunteer (that is, without any pre-existing contractual or other legal duty) so to act preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger”.[[16]](#footnote-16) It is a classic exposition of the triumvirate of salvage law, although the author does not use those specific words. This epitomizes the customary law of salvage as in my personal jargon, together with the requirement that the property in question must be a subject of salvage, *i.e*., maritime property. In his Court of Appeal decision in *Gas Float Whitton No. 2*, Lord Esher M.R. held that the only subjects of salvage were “ship, her apparel and cargo, including flotsam, jetsam and lagan, and the wreck of these and freight”; added to these by statute was life salvage.[[17]](#footnote-17) Another fundamental attribute of customary salvage law apart from the aforementioned ingredients, is the Roman law principle of restitution for unjust enrichment which is the rationale for the payment of remuneration to the salvor by the owner of the salved property, at least on a *quantum meruit* basis. Of the triumvirate of ingredients mentioned above, in the present discussion we are only concerned with the requirement of voluntariness.

The essence of voluntariness is that the service is offered without the stress of any official duty whether imposed by statute or otherwise; and more importantly in the context of the present discussion, without the compulsion of a contractual obligation to provide the services. In *The Neptune,*[[18]](#footnote-18)Lord Stowelldescribed a volunteer as a person who proffers useful service without “*any pre-existing covenant* (emphasis added) that connected him with the duty of employing himself for the preservation of that ship”. The words in italics are particularly pertinent to the subject under discussion. A pre-existing covenant must surely refer to a promise made by a potential salvor or provider of salvage services. It may be arising out of an official duty such as those typically associated with national coast guards or “search and rescue” agencies;[[19]](#footnote-19) In *The Gorliz*,[[20]](#footnote-20) it was held that navy personnel would not be entitled to salvage if the service “is no harder and involved no more risk than the work in which they would normally be engaged”. A well-known author refers to “voluntary (private) salvage” implying that only a private salvor provides services voluntarily; thus, services provided by a non-private or government salvor is not voluntary.[[21]](#footnote-21) However, in respect of public authorities carrying out statutory duties, there may be occasions when they may go well beyond their call of duty to carry out a saving act; in such instances, salvage under customary law may well be payable.

Where by virtue of a pre-existing contractual obligation, salvage is rendered, it would not qualify as a voluntary act under customary salvage law. A good example of this is a seafarer’s employment contract. If a seafarer participates in an activity involving saving his ship or any property belonging to the ship such as cargo or stores, he/she would not ordinarily be entitled to salvage remuneration. As a member of the crew, he/she is under a duty to preserve the ship, its cargo and the lives of people on board. However, if he/she carries out the same activity after a ship is abandoned upon it falling into danger or peril, and the abandonment is *bona fide*, salvage may be claimed by the seafarer as a volunteer provided the salvage effort is successful. The reasoning is that a seafarer’s employment is deemed to be terminated if the ship has been abandoned or captured. Thus, if he carries out a salvage act after such termination, he/she would be entitled to be remunerated.[[22]](#footnote-22)

Another element that negates voluntariness is where the salvage act is carried out in the interest of self-preservation alone, such as in the case of passengers of a ship in distress where they are primarily concerned with saving themselves. In such case, no salvage is payable. But there will be entitlement to salvage if self-preservation is incidental to saving of property. In *The Lomonosoff*,[[23]](#footnote-23) during the first world war, a number of British and Belgian officers boarded a ship flying the flag of Northern Russia to escape capture by the Bolsheviks. In the ensuing court action, Hill J. held that these officers were true volunteers because in the course of saving themselves, they also managed to save the shipowner’s property from the enemy.

Flowing from the discussion on voluntariness as a necessary ingredient of the customary law of salvage, it is expedient to look at what other alternatives are available for the provision of salvage services. Indeed, this is the very core of the present chapter .

3 Agreement and Contract: Legal Nature or Its Absence

The notion of pre-existing duty in the context of voluntariness is often misunderstood because most salvage today is carried out under the terms of an arrangement between the shipowner and the would-be salvor which is binding on the parties. Usually, the arrangement is under a standard form; the universally best known one is the Lloyd’s Standard Form of Salvage Agreement, also referred to as the Lloyd’s Open Form or its abbreviation, the lof. Before delving into the exact legal nature of the lof, I will first dwell on the issue of what is a contract as distinguished from an agreement, or *vice versa*, and what if any, is the distinction.

My first remark in this regard is that not every agreement is a contract in legal terms whereas one element, among others, of every contract is an agreement between the parties concerned. The distinction between the two is not always clear and not easy to discern. The basic legal requirements of a contract, at least under the common law, is that there is an offer made by one party which the other accepts, and there is mutual flow of consideration between them.[[24]](#footnote-24) Apart from these three ingredients, it is necessary that there is *consensus ad idem* or meeting of the minds; that is, both parties must be thinking alike when they enter into the contractual arrangement.[[25]](#footnote-25) If one party thinks he/she is selling apples and the other thinks he/she is buying oranges, there is no contract. Related to this, there must be certainty in the arrangement without which there cannot be a contract. In *The Gladys*,[[26]](#footnote-26) the buyers of a ship were negotiating on standard terms “to be mutually agreed”, whereas the sellers who had dealt with the buyers before, claimed there was already a binding contract. The Court held that both parties anticipated that the contract in its final form was yet to be agreed by the parties. Therefore, there was no contract between them. The decision hinged on the lack of certainty.

By contrast to a contract, which is invariably a legal arrangement, that is, a legally enforceable arrangement between the parties in question, an agreement is a relatively loose arrangement simply because, strictly speaking, all the necessary characteristics of a contract are not present. As such, an agreement, as distinguished from a contract, may not always be enforceable by law unless certain steps are taken such as including in the agreement a mechanism for dealing with any incomplete requirement and for resolving disputes that may arise. In that sense, an agreement is akin to “a promise for a promise”. In other words, where two parties exchange promises, the failure of one to keep his/her promise may not be legally enforceable, although non-legal enforcement devices may be available in the form of some persuasive action taken by the wronged party against the party in default. Economic or administrative sanctions are examples of such action which may well be a possibility. As explained by Treitel, “the law of contract is concerned with circumstances in which agreements are legally binding”. In other words, agreement is the core element of a contract characterized by the elements of offer and acceptance, whereas its enforceability is represented by the element of consideration.[[27]](#footnote-27) At any rate, an agreement can be morally binding and a breach could lead to undesirable consequences for the party in breach. Be that as it may, a contract in legal terms and an agreement not legally enforceable are intimately connected on several fronts, as we shall see, in the context of salvage services that do not unequivocally fall under the tenets of customary salvage law. These observations provide the launching pad for our consideration of the universally well-known Lloyd’s Open Form; what this standard form actually is, and why we should be concerned.

4 Lloyd’s Standard Form

In the late 1800s and early 1900s, various standard forms were devised purporting to depict agreements for the provision of salvage services. These were generally of the “open” type, where the award was to be determined by arbitration. Revisions and alterations of these forms developed by different salvage organizations eventually culminated into the first Lloyd’s Standard Form of Salvage Agreement published by the Committee of Lloyd’s. These were characteristically “open forms” meaning that the remuneration payable for the salvage services was left open to be decided and awarded by arbitration. Kennedy notes that in the earlier forms there was a blank space where an agreed figure could be inserted followed by the words “unless this sum shall be afterwards objected to as hereinafter mentioned in which case the remuneration for the services shall be fixed by arbitration in London”. Filling the blanks with a specified amount and the stipulated words fell into disuse and eventually London arbitration for determining the award became the norm.[[28]](#footnote-28) Thus, in *The Renpor,*[[29]](#footnote-29)Brett M.R. held in reference to a salvage agreement that “…it fixes the amount of salvage to be paid both for services to life and property, but leaves untouched all the other conditions necessary to support a salvage award”.

It is not the intention here to enter into any analytical probe or examination of the Lloyd’s Open Form (lof) itself, the current version of which is lof 2020; rather, the object is to determine whether it is in the nature of a contract or is simply an agreement in the sense portrayed in the earlier text. That said, some preliminary observations need to be made in respect of it, including some relatively recent radical changes taking account of tanker disasters and the marine environmental dimension of salvage. Since its 2000 version, the lof has incorporated the Salvage Convention of 1989 in spirit if not in letter.[[30]](#footnote-30) As such, it subsumes the regime of special compensation which is a partial departure from the age-old principle of “no-cure-no pay” reflecting another essential ingredient of customary salvage, namely, that of success. Notably, in the Salvage Convention, 1989, the requirement of success is impliedly manifested in the notion of “useful result”.[[31]](#footnote-31) Without further ado, it is now expedient to examine whether the lof and other similar standard forms are contracts in the true legal sense.

5 Salvage Agreement and Contract Salvage

It is pertinent to note at the outset of this discussion that in *Admiralty Commissioners* v. *Valverda* *(owners),*[[32]](#footnote-32) Lord Roche in the House of Lords referred to an observation made by the respondent’s counsel that in the era of that case, numerous salvage operations were carried out by agreement. His Lordship thought that the observation made by counsel in which the lof was mentioned, was quite accurate. His statement to that effect is the point of departure for our comparative examination of the correlation between salvage agreement and contract salvage. Suffice it to say preliminarily, that one is an agreement whereas the other is a full-fledged contract with all its legal attributes.

In terms of customary salvage law, it is unequivocally the case that a right to payment of salvage is independent of contract. This verity has been imported into the common law of England through the case law. In *Five Steel Barges*, Hannen P. held in respect of payment for salvage rendered

It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him *notwithstanding that he has not entered into any contract* on the subject.[[33]](#footnote-33)

The words in italics emphasizing that point, are instructive. So are the words “pre-existing contractual … duty” in the statement of Geoffrey Brice cited earlier.[[34]](#footnote-34) Where a contract is entered into before danger arises, it is pre-existing and therefore any services provided pursuant to it would not qualify as customary salvage. In the case of a salvage agreement, the rights, duties and liabilities of the parties involved are subject to the agreement which largely incorporates the rules of customary salvage law and bears its hallmarks; but those rights, duties and obligations only arise when the agreement is reached in the face of danger. There is therefore nothing pre-existing.

On the basis of the above, therefore, in unison with the author Christopher Hill, my view is that it is erroneous to use the term “salvage contract”. I also fully agree with the author that referring to that term would imply that we are exclusively in the realm of contract which we are not; rather we are in the law of salvage. This statement reinforces the contention that salvage is *sui generis*. The author goes on to say that it is perhaps less misleading to use the term “salvage agreement” presumably for reasons that will become apparent as the present discussion unfolds.[[35]](#footnote-35) Mention has already been made of the nature of an agreement as distinguished from that of a contract in terms of the legally binding force of the latter. In another case, *The Hestia*,[[36]](#footnote-36)it was stated that “salvage claims do not rest on contract … the right to salvage is in no way dependent on contract and may exist and frequently does exist in the absence of any expressed contract or of any circumstances to raise an implied contract”. In the UK Marine Insurance Act, the phrase “independently of contract” is used in section 65. A consideration of what that means in the context of that legislation is beyond the scope of the present chapter, but nevertheless, is food for thought in attempting to determine analytically the legal status of the lof as to whether it is a contract or an agreement.

It is well recorded in the historical annals of shipping that in days bygone, salvage assistance was proffered to ships in distress by the crew of passing ships who were well versed in seamanship but were not salvors by trade. In the 19th century, as engines replaced sails as the predominant means of ship propulsion and power-driven vessels increasingly became the norm, professional salvors entered the world shipping scene. Today, contrary to what was then, the provision of salvage services in the face of danger or peril, without the benefit of an agreement, is virtually non-existent.

Having said that, basically, transactional arrangements in salvage law fall into two groups. One is what should correctly and exclusively be referred to as a salvage agreement, which in my view as I have demonstrated above, is not a contract in the strict sense of that word. Incidentally, a case in point regarding the effect of customary salvage law in the face of a salvage agreement is *The Raisby.*[[37]](#footnote-37) The master of the *Raisby*,a disabled ship, entered into a written agreement with the master of the *Gironde.* Pursuant to the agreement, the *Gironde* was to tow the *Raisby* to the nearest port for repairs which was St.Nazaire in France. The remuneration payable was to be assessed by arbitrators appointed by the owners of both vessels. A French court having awarded salvage in respect of ship and freight, an action was brought in England by the owners of the *Gironde* against those of the *Raisby* claiming salvage for saving cargo. The English Court held that the agreement in question constituted salvage proper, that is, salvage under customary law. The shipowner was not liable for payment of salvage for the saving of cargo; the cargo owners were directly responsible for that. In so ruling, the presiding judge Sir James Hannen held in effect that the agreement did not change the legal position of the master under customary salvage law.[[38]](#footnote-38)

The prominent author Professor D. Rhidian Thomas states – “A salvage agreement is a maritime agreement which, in harmony with the general tenets of maritime law, specifies the amount of the salvage award or the method by which the salvage award is to be assessed”. He goes on to say that an agreement that does not reflect these principles is not a salvage agreement. The lof is widely accepted as a salvage agreement and partial success “without negligence or want of skill and care” is rewardable under it.[[39]](#footnote-39)

Hence, the lof is doubtless an agreement, albeit one that is enforceable. It is enforceable because it expressly defines the relationship between two parties involved in a commercial activity germane to shipping with international dimensions. I also find support for my contention that the lof is an agreement as opposed to a contract, based on the fact that the lof from its inception, has never been referred to in the instrument as a contract, but on the contrary, always as an agreement. Flowing from that observation, is an interesting query as to whether the lof is simply an agreement to agree.[[40]](#footnote-40) In the Treitel text on contract law, the author cites the decision of the House of Lords in *Walford* v. *Miles*[[41]](#footnote-41)in which Lord Ackner held that “…an agreement to agree is unenforceable simply because it lacks the necessary certainty”. According to this judicial statement, if the lof were to be characterized simply as an agreement to agree, it would lack enforceability. However, the statement was made by His Lordship in relation to the application of the requirement to use “best endeavours” in the performance of a contract.[[42]](#footnote-42) Incidentally and notably, the lof in Article 1(a) provides that the salvor “shall use his best endeavours” to salve the property in question. All in all, therefore, the lof is enforceable despite its status as an agreement.

Another question is whether the lof as an agreement is within or outside the full scope of the customary law of salvage.[[43]](#footnote-43) If the lof is a contract pure and simple, that is, beyond an agreement, then it cannot fall within the full scope of customary salvage, as otherwise it would be a contradiction in terms unless the instrument is fully reflective of customary law. In my view, the lof is not so; it simply bears its hallmarks. Even as an agreement, however, it can be postulated that the lof represents a partial non-statutory codification of the customary salvage law. On the other hand, it is arguable that the customary law requirement of voluntariness is in conflict with any kind of agreement, whether or not it is in the form of a contract proper. Can it be said that services provided pursuant to any such arrangement can never be voluntary service and therefore would not qualify as salvage under customary law? In this regard it has been pointed out that even a professional salvor may qualify as a volunteer in the same manner as a so-called “good samaritan” salvor.[[44]](#footnote-44) Indeed, in the opinion of Christopher Hill, “[T]he requirement that the service must be given voluntarily does not preclude the salvor … from making the service the subject of an agreement”.[[45]](#footnote-45)

Regarding the propositions made by the two authors cited above, the question arises as to whether a service initially offered voluntarily but then reduced to an agreement can be rationalized as maintaining the quality of voluntariness. It is suggested by Hill that the assumed obligation to use best endeavours to carry out the salvage operation and take the stricken vessel and its cargo to a place of refuge or safety which can be a named port or “other place to be hereafter agreed”, does not impinge upon the voluntariness of the salvor’s service but an omission to discharge it will involve a breach of the agreement and consequential liability. It would appear, however, that if the owner of property salved attempts to show that the service provided was involuntary and thereby avoid paying a claim for salvage, he/she would have to show compellingly that there was a duty on the part of the person providing the services to do so “wholly and completely” and that it was otherwise owed to the owner of the property pursuant to a contractual obligation such as that of a ship’s pilot who has acted beyond his contractual obligations. Such a situation is well within the realm of possibility and the explanation given by Hill is fine.[[46]](#footnote-46) But as pointed out by Schoenbaum, a contractual or other obligation tantamount to a legal duty to assist will preclude voluntariness.[[47]](#footnote-47) Furthermore, on the question of whether the lof is in line with customary salvage law, it is adequately clear that the concept of “no cure-no pay” in the lof is squarely consistent with the notion of success, and no doubt, the rigid requirement of ultimate preservation of the *res* falls within the compass of success.[[48]](#footnote-48)

In the foregoing discussion, one type of contractual arrangement has been described as the salvage agreement. Another type is, for want of a better description, confusingly referred to as “contract salvage”. The confusion arises, at least partly, from authors and drafters of legal instruments referring to “salvage contract” when the proper term is “salvage agreement” as aptly demonstrated above. For instance, in the Salvage Convention of 1989, Article 6 is captioned “Salvage contracts”, erroneously in my opinion, but is perhaps defensible on the basis that the term is inclusive of all kinds of arrangements for the provision of salvage services; in other words, encapsulating both salvage agreements and contract salvage. The first paragraph of that Article makes the Convention applicable as if it is a residuary regime, only where there is no contract in place, express or implied, thus giving primacy to contract over the Convention. In attempting to codify the customary law of salvage the Convention mentions “danger” in several places and “useful result” in Article 12 as a substitute for success, but the notion of voluntariness is absent.

The salvage agreement is an arrangement where the remuneration may be agreed to be determined later, but all other requirements of customary salvage are either provided for in the agreement or is applicable otherwise anyway. Contract salvage, on the other hand, is like any other contract where the right to remuneration and the amount is based on the terms of the contract. Professor Thomas opines that an agreement that does not qualify as a salvage agreement, in that the amount of the salvage award or how it should be assessed are not specified, is conveniently styled contract salvage. Writing in 1978, he points out that the exact difference between the two was yet to be judicially determined.[[49]](#footnote-49) Simply stated, the basic distinction is that contract salvage does not have the characteristics of customary salvage. In contract salvage, the contract itself is the only basis for the rights, duties and liabilities of the parties involved. Schoenbaum states that it is the principle of “no cure-no pay” that distinguishes pure salvage from contract salvage. In the latter, the remuneration is fixed by contract without regard to success which implies that as a matter of freedom of contract, payment may be owed to the salvor regardless of whether he/she succeeds in the salvage operation. Also, as the author points out, in customary salvage, success is a necessary ingredient and a prerequisite because unless property of value is salved, there would be no pot of money from which payment can be made by way of remuneration.[[50]](#footnote-50) Unlike the lof, contract salvage, in the common law context, does not fall under the rubric of admiralty jurisdiction and is, therefore, not subject to the action *in rem* which is exclusive to that jurisdiction. Salvage agreements, on the other hand, are amenable to the equitable jurisdiction of admiralty permitting the court to set aside the agreement and impose its own award unlike the case of common law jurisdiction.[[51]](#footnote-51) One other important distinction between salvage agreement and contract salvage is that the former, including the lof gives rise to a maritime lien.[[52]](#footnote-52)

Further to the above, another point of comparison between salvage agreement and contract salvage was observed by Professor Thomas,[[53]](#footnote-53) by reference to the case of *Admiralty Commissioners* v. *Valverda* (owners).[[54]](#footnote-54) In that case, the House of Lords was seemingly of the view that in an agreement which made provision for compensation in respect of expenses incurred, even in the absence of any success, the characteristic of a salvage agreement remained intact.; in other words, the arrangement was a salvage agreement. My observation in this regard is that such an arrangement is not what I have ventured to describe as contract salvage. Professor Thomas comments that the decision attracted some criticism and appears to have been based on legal precedent of doubtful credibility. Even so, he points out that it was relied on by the court in a Canadian case, *North Star Marine Salvage Ltd*. v. *Muren et al*.[[55]](#footnote-55) There, the court went even further and held that an agreement in which provision was made for remuneration was a salvage agreement regardless of whether the operation was successful.

In my view, there are other significant distinctions; contract salvage largely pre-empts the compulsion of all the three ingredients of danger, voluntariness and success. In terms of danger, which is a necessary ingredient of customary salvage, in contract salvage, there may not even be any apprehension of danger let alone its actual presence; in other words, the danger may have come and gone. The ship, in such instance, may be lying sunk or stranded and in need of being lifted or refloated. The owner may enter into a contract with the salvor for lifting or refloating the ship for which he receives a negotiated sum as consideration for the services. The payment may be due under the contract regardless of success, full or partial. Danger may be caused by collision, grounding, fire or some other human-made cause; or it may be the consequence of a natural cause such as the fierce actions of wind and waves like a storm or tsunami. In any event, salvage operations can be carried out under the terms of a contract subject to the doctrine of freedom of contract allowing any lawful provisions to prevail regardless of the presence or absence of danger at the time the services are rendered.

To provide salvage services in respect of the kinds of situations described above, there are several varieties of standard forms generically known as Fixed Price Contracts or Contracts on Negotiated terms. They may provide for lump sum payment or may be based on daily or hourly rates and are typically referred to as Time and Materials Contracts. The Donjon-Smit contract is one that deals with salvage, firefighting and lightering services “after the fact”, and provides for a funding agreement between Donjon-Smit, a joint venture of two internationally recognized salvage companies and the owner of the vessel to be salved. The contract operates under the Oil Pollution Act, 1990 (opa 90) of the United States.[[56]](#footnote-56) and may incorporate other standard forms such as towhire 2008 and wreckhire 2010 produced by the Baltic and International Maritime Council (bimco) as well as the lof, the current version of which, as previously mentioned, is the lof 2020. One Fixed Price or Lump Sum contract is the salvcon 2005 produced by the International Salvage Union (isu). Others are wreckstage 2010, wreckfixed 2010 and responcon 2017 all of which are produced by bimco. The last-named standard form pertains to salvage services provided in cases of oil spills consequential to wrecks causing damage to the marine environment. Generally, salvage operations under Time and Materials contracts are controlled and supervised by the shipowner itself or its insurer.[[57]](#footnote-57) Notably, all of the above-mentioned standard forms fall under the rubric of what I refer to as contract salvage.

As alluded to above, a contract entered into before danger arose or after the danger has passed would not qualify under the customary rules of salvage law, and services provided under such a contract would therefore, in my view, be considered as contract salvage. With regard to voluntariness, in contract salvage it is trite that the services are not voluntary. They are provided under the terms of a contract freely entered into by the parties and such a contract may or may not be pre-existing. Regarding success, as already discussed, there is no compulsion in contract salvage that the salvor’s efforts must succeed, but there is nothing to stop the parties from including success as a term of the contract.

Notably, in respect of salvage agreements, Kennedy has this to say:

An agreement may provide for remuneration on alternative bases without losing its character as a salvage agreement. It may provide for salvage remuneration in the event of the services proving successful or beneficial, and for payment of expenses, loss or damage incurred if the services are not successful or beneficial. Such an agreement does not prevent the agreement as a whole from being regarded as a salvage agreement.[[58]](#footnote-58)

There may be a potential anomaly in the above statement in light of the Salvage Convention of 1989 providing expressly in Article 12(2) that no salvage is payable in the absence of “useful result”. Given that the United Kingdom having given effect to it by statute, in English law, if an agreement provides for payment of remuneration regardless of success, in my view, it is not a salvage agreement but rather falls squarely within the concept of contract salvage. It must be noted, however, that Kennedy refers to payment of “expenses, loss or damage incurred” even if the services are not successful or beneficial, but does not mention payment of remuneration in the absence of success or benefit. At any rate, outside the purview of the Salvage Convention, 1989, an agreement such as the lof is in line with customary salvage law because the salvor offers its services in the face of danger or apprehension of danger and not under the compulsion of a pre-existing covenant to provide the services.

An interesting case in the field of contract salvage highlighting its distinctive character is the Chinese case *The Archangelos Gabriel*.[[59]](#footnote-59) In this case, the owners of the Greek ship *Archangelos Gabriel* contracted with Nanhai Rescue Bureau of the Ministry of Transport of the People’s Republic of China to refloat their grounded vessel on the basis of what is known in China as an “employment contract for salvage”. The device is akin to contract salvage and in essence is a contract in the ordinary sense, not bearing any of the characteristics of *sui generis* customary salvage. None of the customary law ingredients were present in this particular case.

In a dispute between the shipowners and the Nanhai Rescue Bureau, the Bureau as plaintiffs brought an action against the shipowners in the Guangzhou Maritime Court for payment of the contracted amount and received judgment for their claim. The first instance court ruled that the operation was fully successful and under the “no cure no pay” principle entrenched in the Maritime Code of the People’s Republic of China (cmc) giving effect to the International Salvage Convention, 1989 to which China is a party, the full contract amount was payable by the shipowners to the plaintiffs without any apportionment of liability between the shipowners and cargo owners as there was no privity of contract between the plaintiffs and the cargo owners. The shipowners appealed to the Guangdong High People’s Court which decided that the appellants were liable but only for a certain percentage of the claim. The Court was of the opinion that the contract amount should be allocated separately as between shipowners and cargo owners.

On further appeal, the Supreme People’s Court reversed the decision of the Guangdong High People’s Court and held that the full amount of the contract was payable by the respondent shipowners. It held further that the “no cure-no pay” principle entrenched in the cmc was not applicable as this was not a case of ordinary salvage but was rather an employment contract of salvage which was like any other contract and fell within the purview of the Contract Law of the prc. Under that legislation, whatever amount was specified in the contract was payable by the shipowner. In terms of Chinese jurisprudence, the decision is instructive as it represents a landmark not only because salvage-related cases are relatively uncommon in China, but also because it was held not to fall under salvage law pursuant to the 1989 Salvage Convention to which China is a party, but was treated as what would otherwise be referred to, in my opinion, as contract salvage.[[60]](#footnote-60)

In terms of the distinction drawn between a “salvage agreement” and “contract salvage”, my observation is that the lof as a salvage agreement by name and specie, particularizes the specific nature of the salvage services to be provided pursuant to it. In that sense, it operates in a manner akin to a contract even if it is not one. Once the agreement is entered into, it is no longer a full-fledged voluntary service where each party may withdraw to its original status at will. Rather, for both, legal obligations arise compelling them to perform the salvage operation as defined in the lof.

6 Summary and Concluding Remarks

In summary, to put it in precise and concise terms, whereas contract salvage bears all the characteristics of a regular contract, a salvage agreement is a peculiarity of salvage law which, as mentioned previously, is *sui generis*. This characterization stems from the fact that salvage is distinctively different from contract in customary law terms. In a contract proper, if consideration is not pre-determined; the arrangement runs the risk of not being recognized by the law as a contract for want of certainty which is an essential element of a contract.

The notion of contract salvage is closely associated with grounds for rejection of a salvage reward where a pre-existing duty remains unfulfilled. The appellation “contract salvage” and the concept itself is somewhat confusing and its distinction with a salvage agreement is not readily and fully appreciated by all. In view of the inescapable verity that commercial salvage in the modern milieu is largely carried out under lof or a similar standard form agreement, how the ingredient of voluntariness operates in relation to such agreement is not all that straightforward as one might think. One must contend with the argument that salvage carried out under an lof or similar agreement, as it is today, is contract-based. My firm view is that a salvage agreement is not a contract in the strict legal sense although it possesses some of its attributes, but contract salvage surely is a contract.[[61]](#footnote-61)

A word about risk should be in order in this final part of the chapter. I have elaborated further on this matter in the below text. For salvors, the economic risks associated with ship-source pollution operations led to the adoption of the safety net and eventually, the special compensation regime in the 1989 Salvage Convention. Due to certain turn of events, none of these initiatives turned out to be satisfactory for the salvage industry.[[62]](#footnote-62) Salvors seem increasingly to prefer a contract salvage arrangement to the well-established traditional salvage agreement including the lof. Even so, in my observation, use of the scopic which is a part of the lof albeit as an optional clause has, on the whole, brought the lof closer to being a contract proper. Much of the uncertainty has diminished due to the provision of an itemized tariff. That said, scopic only operates as an alternative to the infamous Special Compensation regime in Article 14 of the Salvage Convention and its unsavoury treatment by the House of Lords in the *Nagasaki Spirit* case.[[63]](#footnote-63)

It is apparent that the lof is on the decline seemingly because the salvage industry is seeking more certainty than what the contemporary regime mainly operating under that standard form, is able to provide. This has led some to conclude that the lof is a dying concept. Restoring faith and confidence in the form has been high on the agenda at recent isu annual meetings. In that particular context and others, I have selectively drawn this and the following text from the writings of Nick Burgess and John Witte as herein cited, interspersed with my own remarks.[[64]](#footnote-64) Nick Burgess is an experienced lawyer who has practiced and continues to do so with internationally reputed law firms in maritime practice. I am prompted to point out that John Witte happens to be President of the International Salvage Union. His views may therefore be considered by some to be laced with one-sided bias. Be that as it may, the information in his published article is no doubt useful and valuable to the maritime public interested in this branch of maritime law and contemporary practice. I therefore do not hesitate to cite his views.

There is both support as well as opposition associated with the lof. At the end of the day, it is all about risk; who bears it and how it can be minimized. One view is that where parties seek more certainty, the lof option offers the experience the shipping and salvage industries have derived from its use. Perhaps this is a pre-eminent reason why the lof is perceived to be the optimum way to protect not only the ship and cargo, but the crew as well, and quite importantly, the marine environment. Advantages are that the parties can enter into the agreement expeditiously without much loss of time which is of great benefit to the property owners and from the perspective of salvors, avoids loss of time which translates into increased opportunities for salvage.

On the downside, critics point to the risk of abuse and inappropriate use of the lof in some quarters and circumstances, albeit infrequently. More importantly, in salvage agreements of the “no cure-no pay” type, as between salvor and property owners, the risks are imbalanced. From the vantage point of shipowners, they often feel that the open form contract favours salvors, but the opposite view may be closer to the truth. From their perspective, salvors bear more risk. When salvage remuneration depends on success to the extent of ultimate preservation of the property, the risks are considerably high. From the salvor’s viewpoint, the outlay is high but returns are relatively low. For them, these are high risk agreements with government authorities often hot on their heels to regulate them. The current liability environment is not conducive to salvors accepting open form agreements with indefinite risks and uncertainties.[[65]](#footnote-65)

My own observation is that an arrangement based on freedom to contract such as in contract salvage can perhaps serve to balance the risks in a better way. Indeed, it appears that fixed price terms are gaining more popularity. Many such as Nick Burgess, feel that the traditional open form where awards are based on the salved value of the property, are not quite appropriate given the growing impact of the environmental dimension of salvage, and consequently, how success is being measured. It is apparent that the “no cure-no pay” system is no longer as efficacious as in previous times. Salvors are increasingly attracted to daily rate contracts with a bonus in the form of a piece of the salved value of the property as an incentive. This development is gradually becoming the norm eliminating several problematic issues connected to the traditional open form, combined with arbitral awards. In such contracts, similar to other professionals, salvors get remunerated for providing the service to an objective professional standard, not on the basis of success.[[66]](#footnote-66) Salvage income from lof based cases have dropped considerably in recent times. It is evident that “no-cure-no-pay” salvage agreements are not gaining much favour in the current milieu, not only because of the inadequacy of awards but also because the process of arbitration is tedious and lengthy.[[67]](#footnote-67)

In closing, I would say at the risk of reiteration, that many, including text writers, convention drafters and judges do not seem to distinguish between agreement and contract in the context of the subject under discussion, but I believe the distinction is significant. Those involved in the salvage business in one way or another, whether as shipowners and salvors as the main players, or risk insurers and lawyers acting as advisers and facilitators, should be interested in this distinction. Drafters or revisionists of standard forms, conventions and national legislation giving effect to international instruments, should be equally concerned and pay particular attention to the difference between salvage agreement and contract salvage. There have been calls for amending the Salvage Convention of 1989 and the lof is being periodically streamlined and updated. In China, efforts to revise the national Maritime Code are ongoing; some of its chief architects with whom I am well acquainted, are looking to obtain suitable input from people in all walks of maritime life, nationally and internationally, and also through contemporary maritime and legal texts. I hope this chapter will be a useful contribution to that body of literature and will inure to the benefit of students, academics, professionals and practitioners alike in this field which, in my view, is at once exciting and challenging.

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2. (1886), 34 Ch. D. 234. [↑](#footnote-ref-2)
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17. *Wells* v. *The Owners of the Gas Float Whitton No. 2* [1896] P. 42 (c.a.) affirmed unanimously by the House of Lords in [1897] a.c. 337. [↑](#footnote-ref-17)
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31. See Art. 12 (1) and (2). [↑](#footnote-ref-31)
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42. See Treitel (n24) 63. [↑](#footnote-ref-42)
43. It no doubt bears the hallmarks of customary law as mentioned above. [↑](#footnote-ref-43)
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49. Thomas, (n 39) 278. [↑](#footnote-ref-49)
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51. Thomas, (n 39) 278. [↑](#footnote-ref-51)
52. See the United Kingdom Merchant Shipping Act 1995, s. 224 and Senior Courts Act 1981, s.20(6); Clause 4.7 of Lloyd’s Standard Salvage and Arbitration (lssa) Clauses of lof 2011, Article 20 of the International Salvage Convention, 1989. See also Brice, note 16 paras. 8–79 and 8–80 at p. [554] and para. 8–98 at p. [560] in which reference is made to the decision of Bateson J. in *The Goulandris*, [1927] P.127; Ll. L. R. 120 at 125–126. [↑](#footnote-ref-52)
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61. I am grateful to Dr. Huiru Liu for the opportunity to consult her on the matters mentioned in this paragraph which she has discussed in her doctoral thesis and in her article in *jiml* referred to in ibid. footnote 60. [↑](#footnote-ref-61)
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