

Salvage or Emergency Response?

Introduction

- 2.1 There is considerable confusion, not least in the industry, over the use of the terms emergency response and salvage. Some evidence given to the Committee regarded these as two entirely separate issues, while in other cases they were regarded as a continuum of service that could not easily be split into the two aspects.
- 2.2 Salvage is one service offered under the general heading of emergency response to distressed vessels – that is, emergency response to render assistance to vessels in danger, or potentially in danger. The committee sought to clarify this matter because it found that two different questions were being posed - does Australia need salvage capability, and does it need emergency maritime response capability. Whether we need one response to these questions or two separate approaches depends on whether the two concepts are different or just different views of the one problem.
- 2.3 One of the complicating factors is that danger, as used in this context, includes financial danger, for example the financial loss incurred due to being delayed, late delivery of cargo or failure to deliver cargo.
- 2.4 Another problem is that every emergency situation is different; each one presenting some features that make it unique. This means that in most cases it is impossible to categorically distinguish between emergency response and salvage.

Emergency Response

2.5 The obligation of ships to go to the assistance of vessels in distress is enshrined both in tradition and in international treaties such as the International Convention for the Safety of Life at Sea (SOLAS), 1974. The principle is set out in paragraph 1 of Article 10 of the International Convention on Salvage 1989:

Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.¹

2.6 The above article does not have the force of law in Australia, but it shows clearly that internationally, maritime authorities recognise that salvage and emergency response are very closely linked.

2.7 Some industry participants do, however, consider that there is a clear distinction between the two aspects. For example, Mr John McGoogan of Inchcape Shipping Services said :

The foreign shipowner sees clearly a division between each of the items that we are talking about. Salvage is an issue which comes into play when a salvage contract is awarded to a salvor. That supplier can be offshore or onshore. ...Emergency response is very different.²

2.8 Bunbury Port Authority said it considered that it is:

...important to differentiate between salvage capability to protect life, property and the environment, where there is an immediate danger, to where a vessel requires assistance due to loss of motive power, steering malfunction etc. where there is no immediate danger.³

2.9 Other industry participants disagreed. At the roundtable discussions in Melbourne, Mr Bendy of United Salvage (Adsteam) commented:

...We really do see that the emergency response category can take a lot of different aspects. One of them is salvage, one of them might be emergency towing, but it is all part of a continuum and there is really no clear delineation except for an ocean towing exercise ...As I said, we really do not see that there is a clear line of distinction between each one of those and a lot does depend on the

1 International Convention on Salvage, 1989, p.11.

2 Mr John McGoogan, transcript of evidence, Melbourne, 28 April 2004, p. 3.

3 Bunbury Port Authority, submission 1, p.2.

circumstances at the time. Another part of it is also wreck removal, which can be a completely different exercise.

I do not believe you can sit here and say they are separate or they are all combined. You have to look at each separate incident to determine exactly what is involved.⁴

2.10 In the same discussion, Captain Dale Cole added:

...from a professional salvor's point of view I think those professional salvors sitting around this room would not see a difference between emergency response and salvage; they are one and the same thing for me. How you differentiate between an emergency response and a salvage is probably to go down to the contractual arrangements between the contractor and the ship that is in difficulty.⁵

Salvage

2.11 Salvage is the act of rendering services to a vessel in danger. Those services must be rendered voluntarily (that is, the salvor is hoping for a financial return for his services) and must "not have been rendered pursuant to a contractual or official duty."⁶ This means that there must be no pre-existing contractual arrangement between the salvor and the ship-owner.

2.12 The International Convention on Salvage 1989 defines salvage operations as meaning:

...any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.⁷

2.13 Salvage may occur in emergency conditions where a ship is in immediate danger at sea, which may include danger to lives or the environment.

2.14 Salvage is paid for by the owners of salvaged vessels under one of a number of widely recognised contracts; the most commonly used contract is Lloyd's Open Form (LOF).⁸

4 Mr Paul Bendy, transcript Melbourne, 28 April 2004, pp. 2-3.

5 Captain Dale Cole, transcript 28 April 2004, Melbourne, p.3.

6 White, M W. *Salvage; Towage; Wreck and Pilotage* in White, M W (Ed) (2000) *Australian Maritime Law*, Federation Press, p. 241.

7 International Convention on Salvage, 1989 p.7.

Lloyd's Open Form

- 2.15 Formulated in the 1890s, LOF has become the standard contract worldwide for a salvage agreement. Also known as the Lloyd's Standard Form of Salvage Agreement 'no cure-no pay', it has undergone several revisions since its inception. The basic principle 'no cure-no pay', means that the salvor is entitled to a reward only if the salvage operations are successful.
- 2.16 The much simplified 2-page LOF 2000 is the latest version.⁹ Several features contained in the International Convention on Salvage, London, 1989, have been incorporated into recent versions of LOF. In particular, LOF 2000 has seen the introduction of the optional Special Compensation Protection & Indemnity (P&I) Clause (known as the SCOPIC clause). This was the result of a pact between the International Group of P&I Clubs, the International Salvage Union and the London Property Underwriters, with the knowledge of the International Chamber of Shipping.
- 2.17 SCOPIC puts to rest issues that might otherwise be raised by a shipowner or cargo interest opposing a claim for salvage reward. It represents an agreement that the service is one of salvage and not one of towage. It also conclusively proves the existence of 'danger'. These are two issues that often arise in salvage disputes.
- 2.18 LOF 2000 allows a salvor to terminate operations 'when there is no longer any reasonable prospect of a useful result, leading to a salvage reward.' On the other hand, the shipowner is also under an obligation to 'cooperate fully' with the salvor.
- 2.19 In the case of disputes, LOF directs resolution by way of arbitration, to be conducted in England.
- 2.20 Arbitration is usually heard by a Queen's Counsel experienced in maritime law, with an appeal to a similarly qualified arbitrator. The Lloyd's Procedural Rules (1994) and the Lloyd's Standard Salvage and Arbitration Rules govern the arbitration proceedings.
- 2.21 The SCOPIC clause provides for another forum for special compensation claims, when the value of the property salvaged is insufficient to cover the expenses incurred. Although salvors have a claim, or lien, over property salvaged, they often have a problem enforcing this in practice. Under

8 There are various alternative forms of salvage contract, such as the Japanese Form, Beijing Form, Moscow Form, Turkish Form, the Baltic & International Maritime Council (BIMCO) Towhire or BIMCO Towcon, or through the courts under common law.

9 A copy of this agreement can be found in White, M W. *Salvage; Towage; Wreck and Pilotage* in White, M W (Ed) (2000) *Australian Maritime Law*, Federation Press, Appendix V, p. 243.

Clause 4 of LOF, they can ask for a security to be provided to Lloyd's. The salvor also agrees not to arrest or obtain the property if security is provided. An arbitrator may include in the award, expenses reasonably incurred in obtaining security. Interest is payable as provided for in Clause 11 of LOF.

- 2.22 A salvor cannot force a shipowner to secure claims that would be payable by cargo owners. On the other hand, shipowners are required to use their best endeavours to ensure that cargo owners provide security before releasing the cargo, failing which they will be in breach of contract. This security is normally issued in favour of the Council of Lloyd's or to the salvor, often on the basis of the standardised Lloyds Salvage Guarantees, such as the ISU 1 or ISU 5.¹⁰
- 2.23 An exception to the 'no cure –no pay' principle was introduced in LOF 1980, in an attempt to encourage salvage of vessels that possess the potential to harm the environment. For example, where the vessel is a tanker, wholly or partly laden with oil, and the salvage is not successful, the salvor is awarded reasonable expenses and an increment not exceeding 15% of those expenses. This arrangement creates a safety net against fruitlessly incurred costs.¹¹
- 2.24 Such a claim can only be brought against the tanker owner and then only if the failure of the services has not been caused by the contractor's negligence. This exception is also found in the Salvage Convention 1989, rewarding the salvor for his skill and efforts in preventing or minimising 'damage to the environment,' along with an increment of up to 30%, which may, under special circumstances be increased to 100%.¹² An arbitrator may include in the award expenses reasonably incurred in obtaining security. Interest is payable as provided for in Clause 11 of LOF.

10 International Salvage Union 1 Salvage Guarantee Form and International Salvage Union 5 Salvage Guarantee Form. See http://www.marine-salvage.com/isu_docs.htm. The difference between the two forms is that ISU 5 incorporates a SCOPIC Clause.

11 For more detail on special compensation provisions see White, M W. *Salvage; Towage; Wreck and Pilotage* in White, M W (Ed) (2000) *Australian Maritime Law*, Federation Press, p. 272-274. Also see <<http://www.etshipping.com/march2002/legal.html>>

12 International Convention on Salvage, 1989 Article 14, Clause 2, p.7.

Committee Comments

- 2.25 The Committee noted that the wide variety of circumstances and conditions surrounding cases of distress at sea, make it very difficult to logically separate emergency response and salvage.
- 2.26 In this report, the Committee will treat the two terms as interchangeable. For the purpose of the Committee's inquiry it makes little difference whether a vessel responds as an emergency response or for salvage purposes. The main questions facing the Committee are:
- Does Australia need a continuous salvage capability, including the capacity to respond to emergency situations?
 - If yes:
 - ⇒ Is the present capacity enough?
 - ⇒ Where should salvage-capable tugs be placed?