MARITIME SALVAGE CONVENTION (LONDON 1989) RATIFICATION BY URUGUAY AND ANALYSIS OF ITS PROVISIONS

Dra. Florencia Sciarra Marguery

MARITIME AND PORT LAW MAGAZINE Number 3 - Year 2019
La Ley Uruguay

JOURNAL OF MARITIME AND PORT LAW

Number 3 - Year 2019

Uruguay Law

MARITIME SAVAGE CONVENTION (London 1989)

Its recent ratification by Uruguay and an analysis of its provisions.

Dr. Florencia Sciarra Marguery[1]

SUMMARY. 1) Background 2) Analysis of its articles 3) The Special Compensation i) Generalities ii) Meaning of "expenses": analysis of the opinion of the English Courts in the case of the "Nagasaki Spirit" iii) Experience in the maritime environment after the "Nagasaki Spirit". 4) Personal conclusions

1) Background

Nowadays salvage in the Uruguayan regime is mainly regulated by the following regulations:

Articles 1472 to 1481 of the Commercial Code, the International Convention for the Unification of Certain Rules Relating to Maritime Assistance and Salvage (Brussels 1910), ratified by law No. 5152 of August 18, 1914 and since June 2018, by the Maritime Salvage Convention (London 1989) which was ratified by law No. 19,622.

The London Convention establishes several changes to the current regime, which are worth mentioning. But the biggest and most important change is established in Article 14, which we will analyze at the end of this paper.

[1] PhD in Law and Social Sciences (graduated in 2010 from Universidad de la República).
Postgraduate studies in Applied Procedural Law (2012-2013 Universidad de Montevideo).
Postgraduate in Maritime Law (held in London in 2015-2016 by the Lloyds Maritime Academy in conjunction with the London Metropolitan University).
Partner and currently member of the Board of Directors of the Uruguayan Association of Maritime Law, being the current treasurer.
Partner of SCIARRA & ASOC.

In its origins, the Convention was born as a result of certain accidents that occurred prior to its entry into force and which caused great environmental damage.

One of them is the well-known accident of the "Amoco Cadiz", a Liberian-flagged oil tanker that ran aground off the coast of Brittany (France) on March 16, 1978. In order to free it, they tried to tow it and in one of these attempts the ship broke up, spilling T 227,000 of crude oil, polluting an area of 360 km.

The economic losses in terms of the value of the ship and its cargo were enormous, but more impressive was the environmental disaster it caused. Any attempt to salvage the ship did not work, and an oil slick covered about 360 km of sea surface and beaches. It is one of the largest ecological disasters on record.

It is said that a tugboat arrived on the scene rather quickly, but that there were nevertheless long delays in the contract negotiation which caused the ship to run aground. This was denied by the salvors, who always stated that, despite the lack of a contract, they had done everything in their power to prevent the vessel from running aground.

This event was one of those that prompted a rethinking of the well-known "no cure no pay" principle.

As a reminder, the "no cure no pay" principle is defined in the Commercial Code, the Brussels Convention and the London Convention. Article 12 numeral one of the London Convention states:

"Salvage operations which have produced a useful result shall give right to reward".

The second paragraph states: *"Except as otherwise provided, no payment is due under this Convention if the salvage operation had no useful result".*

What is the benefit for those salvage companies that have not been able to save the ship and its cargo, but have nevertheless contributed to the prevention of an environmental disaster?

It was necessary to have some kind of incentive for those cases where the chances of saving the ship were nil or very difficult, but there was a need for someone to intervene anyway in order to avoid even greater environmental damage.

The issue of environmental damage was of great concern, and the Conventions that existed up to that time did not promote it, since, if a shipowner or salvage company put all its equipment and efforts into avoiding or reducing an environmental disaster, it did not matter how much damage its help would have prevented. If the operation was unsuccessful, the salvage company had no claim.

As a result, the International Maritime Organization (IMO) asked the Comité Maritime International (CMI) to review the legislation on salvage and to draft a new Convention. The CMI moved quickly and at a Conference in Montreal in 1981 agreed on a draft of the new Convention. This draft was passed to the Legal

Committee, who ended up presenting the final version that was approved in 1989. The Convention entered into force on July 14, 1996; to date it has been ratified by 70 states.

2) Analysis of its articles

Both the Commercial Code and the Brussels Convention distinguish between "assistance" and "salvage", defining the activity of assistance as an activity of a preventive nature for the purpose of avoiding a loss, when there is a situation of peril; while the expression "salvage" is used when the intention is to mitigate or mitigate the consequences of a loss.

The London Convention does not distinguish, but unifies both in a single concept of "salvage", defining in Article 1 (a) "Salvage operation" as "any act or activity undertaken to aid or assist a ship to safeguard any other property in distress in navigable or any other waters".

Articles 3, 4 and 5 provide exceptions to the application of this Convention.

Article 3 establishes that this Convention shall not apply to cases where the salvage of:

1) Fixed or floating platforms.

2) Mobile drilling units

These exceptions apply when such platforms or units are engaged in exploration, exploitation or production of mineral resources on the seabed.

These exclusions were especially requested by the oil industry who feared that a casual salvor without great knowledge of how to operate this type of platforms could cause even more damage than that produced by the incident itself.

Article 4 establishes that this Convention shall not apply to warships or other state-owned vessels, unless a state party decides to apply the Convention to such vessels.

Article 5 states that this Convention shall not affect any provision of national laws or any international convention governing salvage operations carried out by or under the supervision of public authorities.

Now, what happens when a ship needs assistance? What are the contractual conditions that regulate the relationship between the assisted ship and the assistance provider?

One of the things that can present a problem is that generally, when a vessel needs assistance it is in an emergency situation. Therefore, every minute is key and the ship's master cannot take all the time he would otherwise take to negotiate the salvage contract.

It is necessary to reach an agreement quickly; delays in these cases may mean the absolute failure of the salvage operation.

Our Code of Commerce regulates this in article 1479, establishing a very restrictive criterion by stating that any contract agreed with the Master at sea or in the middle of a casualty is null and void. It only admits the execution of contracts once the risk is over, but in any case it states that they will not be binding with respect to owners or insurers who have not consented to them.

Already the Brussels Convention of 1910 gave a more practical solution by establishing that in case the contract had been agreed under unfair conditions (fraud or reticence, excessive remuneration, or lack of proportion with the service rendered), it could then be annulled or modified by a Judge at the request of one of the parties, if the same had been concluded under the influence of danger. In other words, unlike the Commercial Code, it allowed contracting, but left open the possibility of annulment.

The 1989 London Convention in its Article 6 enables the master to enter into contracts for salvage operations on behalf of the shipowner. It also provides that both the master and the shipowner are empowered to enter into contracts on behalf of the owners of the property above the ship.

This is a great solution. If we have a ship where there is cargo from many different owners (as it is the case for example in large container ships), it would be extremely cumbersome or even impossible for the master and/or shipowner to request authorization from each of the cargo owners in order to close a salvage contract. This is totally incompatible with the speed required for a vessel in need of assistance in a distress situation. It is vital that the Master has the freedom to be able to enter into a salvage contract quickly, which is ultimately in the interests of all those who have an interest in the ship.

Of course, the Master does not have absolute powers and there are remedies for cases of abuse. Article 7 of the Convention regulates these remedies by establishing the possibility of annulling and modifying this contract when it has been agreed under the influence of undue pressure, in case it has been in a situation of distress and its conditions are not equitable, or the agreed payment is excessively high or low in relation to the services rendered.

Unlike the Brussels Convention and the Commercial Code, the London Convention does not expressly mention the possibility of annulling a salvage contract by judicial process. However, we understand that this would be possible since it is the only way to annul a contract in our law. So there is no doubt that if you want to apply some of the remedies set forth in Article 7 you will have to go before a Judge to request it. This, at the end of the day, is what gives greater guarantees to all parties.

Article 8 refers to the obligations of the salvor, which are to act with due diligence in salvage operations, to have due diligence to avoid or minimize damage to the environment, to seek the assistance of other salvors and to accept the intervention of other salvors.

As for the shipowner and the master of the ship, as well as the owner of other property in distress, they shall have the obligation to cooperate with the salvor, to

act with due diligence to avoid or minimize damage to the environment and to accept the delivery of such property when requested by the salvor.

Article 9 refers to the right of coastal states to protect their coasts or interests against pollution or threat of pollution.

Article 12 is the starting point for the regulation of the right to reward, and it begins by defining the well-known principle of "NO CURE NO PAY".

It establishes that:

1. Salvage operations that have produced a useful result shall entitle to reward.

Unless otherwise provided, no obligation to pay under this Convention arises if salvage operations have not produced a useful result.

Article 13 establishes the criteria for determining the reward. They are very similar to those we have taken into account to date for the purposes of calculation: value of the ship and property, measure of success achieved, degree of danger, efforts expended, time spent, expenses incurred, losses suffered, risks incurred, promptness with which the services were rendered, availability of ships and equipment for the operation, the value of the equipment used by the salvor, and the efforts made to minimize damage to the environment.

The reward will be paid for all interests attached to the vessel and salvaged property. In other words, the reward would be paid not only by the shipowner, but also by the charterer, the owners of the goods transported and salvaged, etc. I emphasize this because, as we will see later, the special compensation of Article 14 will be paid only by the shipowner.

Article 13 gives the possibility to the state parties to stipulate in their national laws that the payment shall be made by one of the parties only, reserving the right of that party to recover against the other interests for their respective shares. And it ends by saying "Nothing in this article shall prejudice the right to raise defenses". What does the latter mean?

The English version reads *"Nothing in this article shall prevent any right of defense".*

When we have to apply this in our country, it generates a doubt because in its literal translation "any right of defense" is "the right to apply any type of defense". But in the Spanish version it says "derecho a oponer excepciones" and the exceptions in our legislation are not any type of defense, but precisely limited defenses that are specially provided for in Article 133 of the General Code of Procedure.

The English version would leave open the possibility of raising any defense, and the Spanish version, if we interpret it according to the meaning of the word "exceptions" given by our legislation, would be the limited defenses established in Article 133 of the CGP. How is this resolved? It will be in the hands of the judges, who will have to resolve it case by case interpreting the Convention.

On the one hand, when the law is clear, there is no right to interpret it differently. The version that would apply to us is the Spanish version and it speaks of opposing exceptions. Therefore, the restrictive position should be applied and it should be accepted that in this case the defenses enabled by Article 12 are those established by Article 133 of the CGP.

But is it possible to interpret a Convention in one way or another depending on the language?

In my opinion, no. I understand that the wording of the Convention was not discussed in Spanish, much less taking into account our law. Therefore, if we go to the background of the Convention, it should be interpreted according to the language in which the Convention was drafted. But we cannot ignore the fact that the possibility of filing defenses is a limited defense in our law and therefore if we are going to apply the Convention here, we cannot talk in our country about filing defenses and take it to mean filing any kind of defense.

I confess that I do not have a position on this issue and I look forward to the interpretation of the judges on this matter.

3) Special Compensation

i) General

It has been said that article 14 is an exception to the well-known principle of "no cure no pay", since in order to be entitled to special compensation, it is not essential that there has been a successful outcome of the operation, but rather that one is entitled to receive compensation for the mere fact of having participated in a salvage operation where there was a threat of damage to the environment.

In order to understand if this is necessarily so, and if this article is really an exception to this principle, I will analyze it in depth.

Article 14 states the following:

Article 14: Special compensation

(1) Where the salvor has carried out salvage operations in relation to a ship which directly or by the nature of its cargo constituted a threat of damage to the environment and has not succeeded in obtaining, pursuant to the provisions of Article 13, a reward at least equivalent to the special compensation calculable in accordance with this Article, he shall be entitled to receive from the owner of that ship special compensation which is equivalent to his expenses as herein defined.

(2) 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 per cent 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 per cent of the expenses incurred by the salvor.

(3) Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

(4) The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

(5) If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole of part of any special compensation due under this article.

(6) Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

First of all, this article, in my opinion, is not very well written and this is what ends up making it more complex than it is. But in reality it is very simple.

It is not possible to understand numeral 1 without understanding numeral 2 and 3.

Paragraph 1 establishes that in order to be entitled to special compensation there must have been a threat of damage to the environment. It also establishes that the salvor must not have obtained a reward at least equivalent to the value of the special compensation. It says that the special compensation must be paid by the shipowner. And finally, that the value of that special compensation is the equivalent of the expenses.

So, by way of summary, if there was a threat of damage to the environment, the salvor is entitled to claim the amount equivalent to his expenses.

What does the article refer to when it speaks of "threat" of damage to the environment?

The Convention does not regulate it, it does not establish that it implies a threat. Therefore, this will be left to jurisprudential criteria if it is discussed before a Judge, and/or it will be in the hands of the doctrine to define when we are in front of a real threat of damage to the environment.

The second clause, on the other hand, establishes that when the rescuer has managed to avoid or minimize the damage to the environment, he will have the right to increase the amount of these expenses up to a maximum of 30%, and in case the court considers it equitable and fair, it may be increased up to 100%.

For the purpose of following the thread, if there was a threat of environmental damage and the operation was unsuccessful, you are entitled to claim the

equivalent of the costs. If the environmental damage was avoided or minimized, the judge can establish that these costs are increased by 30% and up to 100%.

The key then is to see what these expenses are, since they are the basis for the calculation.

ii) Meaning of "expenses": analysis of the opinion of the English Courts in the case of the "Nagasaki Spirit".

What does Article 14 refer to when defining "expenses"?

Expenses are defined in the third paragraph.

It states "For the purposes of paragraphs 1 and 2, expenses of the salvor shall mean the personal expenses reasonably incurred by the salvor in the salvage operation and an equitable amount for equipment and personnel actually andreasonably employed in the salvage operation, having regard to the criteria set out in article 13, paragraph 1(h), (i) and (j). defined in this article".

The article defines two types of expenses:

1) Personal expenses

2) Equitable amount corresponding to the equipment and personnel actually and reasonably employed in the salvage operation, taking into consideration the criteria established in article 13, paragraph 1 h), i) and j).

What are personal expenses?

First, there is an important discrepancy between the English version and the Spanish version.

The Spanish version says "gastos personales". The official English version says "out of pocket expenses".

"Out of pocket expenses" in Spanish means the expenses actually incurred by the shipowner, which is not the same as "gastos personales".

If we try to go to the literal meaning of the term, it would not make any sense to say that the shipowner can claim his "personal expenses", since when we use this term we immediately think of expenses incurred by a natural person and/or for his person. Therefore, in my opinion, it should be interpreted as "out of pocket expenses", i.e. those expenses actually incurred. This is the majority opinion of foreign doctrine and jurisprudence.

The most complex part and where I intend to focus is on the second meaning of expenses. The one that establishes that the expenses are that "equitable amount corresponding to the equipment and personnel actually and reasonably employed in the salvage operation, taking into consideration the criteria set forth in Article 13, paragraph 1(h), (i) and (j)".

For the purpose of analyzing this concept, I turned to the famous case known as "The Nagasaki Spirit" (SEMCO SALVAGE & MARINE PTE LTD v. LANCER NAVIGATION CO LTD LANCER NAVIGATION CO LTD v. SEMCO SALVAGE MARINE PTE LTD).

This case was one of the pioneers in terms of interpretation of the Convention, the conclusions reached by the courts made a lot of noise in the maritime environment, generating great controversy and discussion as to whether the Convention interpreted in this way really innovated, whether it benefited or harmed, and especially, whether it really motivated salvage companies to participate in a casualty only for the purpose of preventing or minimizing damage to the environment.

The main points discussed by the English courts were twofold:

1) Whether the third clause of Article 14, allowed within the definition of "expenses", to include an amount corresponding to profit.

2) Whether the expenses to be calculated corresponded to the entire salvage operation, or only to those expenses that were generated when there was a threat of damage to the environment.

The facts were as follows:

On September 19, 1992 at 23.20 hrs the tanker Nagasaki Spirit collided with the container ship Ocean Blessing in the northern Malacca Strait.

12,000 tons of crude oil caught fire at sea. Both vessels caught fire. The entire crew of the Ocean Blessing lost their lives and only two people from the Nagasaki Spirit survived.

On September 20 at 9 a.m. the salvage company SEMCO SALVAGE agreed to salvage the Nagasaki Spirit by LOF 90. At that time the Convention had not yet entered into force, but nevertheless the Convention was already in existence and LOF 90 incorporated Articles 13 and 14 of the Convention.

On September 26 at 12:00 hrs SEMCO SALVAGE succeeded in extinguishing the fire on the Nagasaki Spirit and at 17:00 hrs she was towed out of the area. On October 3 the Nagasaki Spirit was anchored in Belawan, Indonesia until October 24. On 22 October the remaining cargo was transshipped to the Pacific Diamond and the Nagasaki Spirit returned to her owners. Putting out the fire took them the first seven days, but salvage in total took 84 days.

The LOF stipulated that the salvage claim had to be settled in arbitration.

The first instance arbitrator analyzed the concept of "expenses" and concluded that what was sought by Article 14 was a need to encourage the intervention of salvage companies. He stated that a professional salvor who did the best he could but failed to prevent damage to the environment was not going to be motivated to try again or stay in business if he only had the possibility of recovering his expenses. He should collect an amount that would contribute to a future investment.

The arbitrator further concluded that with regard to the second clause of Article 14, the amount for expenses should be increased by 65%.

Mr. J.F. Willmer was the second instance arbitrator, who gave another approach to the concept, stating that this definition of expenses, although broader than the concept of "personal expenses", is still a definition of "expenses" itself, and therefore should not include a profit.

It uses the expression "safety net", which to understand this concept, literally translated, would be a "safety net". The idea is that, if you do not have the possibility of collecting a salvage reward, you can at least recover your expenses.

Regarding the period to calculate those expenses, the salvage operation in total lasted 84 days, but the threat of damage to the environment was only the first few days and then it was controlled. What then arose here was the dilemma of whether the salvage company could claim the expenses corresponding to the 84 days that the salvage operation lasted, or whether only the period in which there was a threat of damage to the environment (which was clearly less) should be calculated.

Both arbitrators concluded that the period for calculating these expenses was the entire salvage operation.

The case went on appeal to the High Court (Queens Bench Division).

In this case the matter was considered by Mr. Justice Clarke, who considered that although the ordinary meaning of "fair rate" (in its translation "equivalent amount") imports the idea of remuneration (and that this usually includes a profit) if the words are constructed in the context of the Convention, the Convention distinguishes between remuneration and reward on the one hand and compensation and expenses on the other. He then considers that to be remunerated or rewarded is to receive profit, and to be compensated is to receive a restitution of expenses.

He explains that, if the idea had been that special compensation should include an element of "gain", it would have been very easy to make this clear in Article 14.1.

If Article 14.1 is complied with, only expenses are recovered. If article 14.2 is complied with, expenses and profit are recovered.

The express reference to (h), (i) and (j) in Article 14.3 was for the purpose of ensuring that a fair proportion of the cost of maintenance of vessels ready for use is taken into account. The idea was not to turn the meaning of "expenses" into something that exceeds what are simply expenses. If this had been the idea, it would have been expressly stated.

As regards the period for calculating the special compensation, he is of the opinion that the expenses corresponding to the entire salvage operation are calculated. Nowhere in the wording of Article 14 does it appear that these expenses must be limited to a certain part of the salvage.

There were appeals from all.

The salvage company, SEMCO SALVAGE, appealed CLARKE's decision as to how it interpreted the definition of "equivalent amount", considering that it should include an amount corresponding to profit.

And the shipowners appealed JUSTICE CLARK's decision in that it considered that the entire salvage operation should be taken into account in calculating the amount of special compensation. The owners considered that the period to be taken into account was only that in which there had been a threat of damage to the environment.

The matter went to the Court of Appeals.

There Lord Justice STAUGHTON makes an analysis of the meaning of "fair rate", ("equivalent amount").

He begins by reviewing the drafting history of the Convention, recalling the meeting of the International Maritime Committee in Montreal in 1981 where the draft was approved. This draft was submitted to the IMO at a diplomatic conference in April 1989 accompanied by a report by the Danish lawyer, Bent Nielsen. STAUGHTON says that in this background there is no clear indication of how the concept of "fair rate" was interpreted, and whether it includes profit or not, but there are some indications that Article 14.3 refers to "expenses" and that Article 14.2, when increasing these expenses, refers to "remuneration or reward". In other words, Article 14.2 includes "profit".

In other words, the calculation of expenses as defined in Article 14.3 does not include profit. Only expenses are calculated. The element of gain would be given in case the option of article 14.2 is given.

Anyway he says in the sentence that it is not clear and that it gives him the impression that they left 14.3 to be solved by the Judges. Because it was a much debated issue considering that the negotiation was between the salvage companies and P&I Clubs. So there are likely to be elements to interpret it one way or the other.

Regarding Article 14.3 it says that "personal expenses" refers to money actually spent. Now, as far as "fair amount corresponding to equipment and personnel" is concerned, it says that it does not refer to money actually spent because the word "and" clearly distinguishes it as something else.

When he then speaks of "fair rate" ("equitable amount"), the query is whether it is an equitable amount of expenses or an equitable amount of remuneration. He says that as far as the word "compensation" is concerned, it seems to indicate a refund of money. But as soon as Article 14.2 speaks of an increase of 30 % and up to 100 %, this already refers to a "reward".

In his opinion, it refers to an equitable amount of expenses. And this is taking into account the calculations of the cost of equipment that the rescuer has had for a

certain period of time, the cost of personnel, etc. All these calculations are not simple and in many occasions will require the participation of an accountant.

One of the things that must be taken into account for the purposes of the calculation are paragraphs (h), (i) and (j) of Article 13.1, that is: the promptness with which the services were rendered, the availability and use of vessels or other equipment for salvage operations, and the degree of preparation and efficiency of the salvor's equipment, as well as the value of the same.

The calculation should then include the salvor's immediate response capability and effectiveness. In other words, it is important to make the calculation taking into account how the rescuer was prepared to respond.

It is important then to be clear that for the purposes of the calculation of Article 14.3, paragraphs (a) to (g) of Article 13.1 should not be taken into account. This is what suggests that the special compensation is not a new and distinct salvage award.

It concludes that an "equitable amount" means an amount of expenses, comprising not only direct costs but also indirect costs, and takes into account the additional costs of having resources available for immediate action. Remuneration or profit is covered by Article 14.2. But above that, the meaning of "fair rate" is something to be resolved by the courts in the case. The result is not exact mathematics.

He concludes by saying that the calculation as it is made does not lead to the collection of any special compensation. Therefore, on this point, SEMCO SALVAGE's appeal does not proceed.

<u>"The period point":</u>

This point was not necessary to resolve, as it was brought to appeal by the shipowners and they had already won on the previous point. But anyway the Judge says that it is important to talk about this and resolve it, for the good of the industry. For this reason he clarifies that what is resolved in this case will not be a binding precedent. However, he considers it important to resolve it.

The question is whether the costs referred to in article 14.3 include all those corresponding to the period during which the salvage lasted or only the costs that were generated while the threat to the environment lasted. In this case the threat to the environment began after the salvage work began and also ended some time before the salvage work was completed.

He explains that all of the previous judges concluded that costs should be accounted for during the entire period of the salvage work, the only one to express the contrary was JUSTICE CLARKE who said that costs do not begin to be accounted for until the threat of environmental damage begins. STAUGHTON shares JUSTICE CLARKE's view in this regard.

He quotes Article 14.1 which says "Where the salvor has carried out salvage operations in relation to a ship which directly or by the nature of its cargo constituted a threat of damage to the environment...", and says that according to this article the threat of damage to the environment is a necessary condition. This is because the possibility of collecting special compensation under Article 14 may induce the salvor to engage in an operation where he at least recovers the expenses. And that this possibility does not exist if there is no threat of environmental damage.

Beyond the fact that he finds arguments for and against, he refers to what is established in the text of article 14.3 when it says "to the equipment and personnel that have been effectively and reasonably employed in the salvage operation". When he speaks of the salvage operation, it is understood that he meant the salvage operation from the beginning to the end.

He concludes that the reference to the salvage operation is to the entire operation and that therefore the expenses of the entire operation should be calculated.

It is important to mention, even though it is in the minority, the opinion of LORD JUSTICE EVANS. He begins by saying that the salvor has contracted the services of or purchased from another company equipment and hired personnel, and the price at which he purchased it surely includes a commercial gain from the supplier.

He says it has been said that any loss of profit by the salvor should be taken into account when calculating the salvage premium. He considers it unrealistic to disregard any loss of profit suffered by the contractors when considering what the expense of providing the service was. Over and above the direct costs, the salvor suffers the loss of profit as a "disbenefit", which he understands is the economic term used for a loss of profit that could be included within a generic cost.

With regard to "fair rate" meaning "fair", he concludes that what must be looked at is the commercial value of those services, a value that is "fair" or just for both parties. He says that this is clearly reflected in the inclusion in the calculation of paragraphs (h), (i) and (j) of Art. 13.1. These three factors are relevant when calculating the commercial value of the services rendered, while paragraphs (a) to (g) would be relevant when calculating the salvage premium.

In this sense, he concludes that he does not share the arbitrator's conclusion that the concept of expenses in the definition of "equivalent amount..." of article 14.3 includes an incentive in terms of remuneration, but on the other hand, he does not believe that it does not include any element of profit. He says that the "equitable amount" or "fair rate" is calculated on the basis of the costs of the rescuer and these costs are calculated taking into account the commercial value of the service rendered.

Finally, as for the opinion of Lord Justice SWINTON THOMAS, he makes an analysis of what "fair rate" means and how the term "expenses" is interpreted and

he thinks that from a broad point of view, all types of costs should be included. In any case, he concludes that the element "profit" will result from article 13 and article 14.2, and therefore would not result from 14.3.

What happens if the threat of environmental damage disappears, is the salvor no longer entitled to claim special compensation for the remaining period until the salvage ends? In your opinion, you believe that the salvor can claim special compensation from the beginning of the threat of environmental damage until the salvage is completed.

Shipowners and cargo owners are perfectly covered against an eventual disproportionate claim since the article uses the word "reasonably".

In the position of the majority of the Court, they conclude that the salvage company is not entitled to charge special compensation.

The salvage company appeals and this ends up being resolved by the House of Lords.

It is essential to analyze Lord Mustill's conclusions, which did become binding precedent for subsequent courts.

Says the magistrate that four elements were identified as components of "equivalent amount":

1) The direct costs of the salvor for carrying out the salvage task.

2) The additional costs of having the equipment and personnel available for immediate operation

3) An additional element that leads to including in these costs a percentage of profit

4) A final element that converts the special compensation to the level of a salvage reward.

Both the salvage company and the owners of the salvaged vessel were of the opinion that items 1 and 2 are included. Both agreed that option 4 did not apply. What is in dispute is item 3.

He believes (as does CLARKE) that the idea of the Convention was not to create a new salvage reward. The concept of "expenses" predominates in the first three paragraphs of Article 14.

Analyze the wording of Article 14.2 which speaks of "expenses incurred" by the salvor. By using the word "expenses", but especially by using the word "incurred" he can only be talking about expenses actually incurred and not about gain. You cannot "realize" a gain, you can "realize" a cost.

The word "compensation" is similar to "reimbursement". Furthermore, he considers that there is a clear distinction between article 14.1 and 14.2 which distinguish "compensation" and "reward".

He understands that the idea of the Convention was to have an incentive for salvage companies to be ready and able to act in order to protect the environment, but this does not imply converting the concept of "expense" into "profit".

He does not believe that salvage companies need a profit as an incentive. Under the previous regime there was a "no cure no pay" principle. With this new option, an unsuccessful salvor will be paid not only for direct costs, but also for indirect costs. Previously, if he was unsuccessful, he was not paid at all. And he will be charged, even if he was not successful in preventing or avoiding damage to the environment. This is incentive enough.

Nor does it consider that the preamble of the Convention (the provision of having adequate incentives for rescuers to always be ready to protect the environment) refers to it including a profit. With regard to the latter, it raises three objections:

1) It considers that rescuers do not need a profit element as an incentive. Not succeeding in the operation no longer means not getting paid anything, as it was under the previous regime. Article 14 gives a sufficient "safety net" to meet the purpose of the new scheme.

2) The expenses corresponding to Article 14 should not be calculated as generously as the salvage reward of Article 13. This is clear from the moment that emphasis is placed on not including Article 13.1 (a) to (g) in the calculation.

3) The promoters of the Convention did not seek to create a new and distinct category of salvage reward intended to fund salvors.

He concludes that the Article 14 remedy is subordinate to the salvage reward in Article 13 and that each must be analyzed separately.

iii) Experience in the maritime environment after the "Nagasaki Spirit".

The findings of the English Courts in the Nagasaki Spirit case were not well received by the maritime community. The International Salvage Union (ISU) considered that they sent a negative message to the salvage industry, that the mere fact of being able to claim expenses but no profit was not enough incentive for them to act.

As for the Convention itself, the P&I Clubs feared for the number of claims that might arise from Article 14. The special compensation does not attract a maritime lien, so in many cases the P&I Clubs did not issue letters of guarantee to cover claims.

There were also many difficulties in proving the increase in Article 14.2, as evidence from many experts (marine surveyors, environmentalists, etc.) was needed, so the cost of proof was very high and time consuming.

The solution that was found was to include the SCOPIC clause in salvage contracts and thus leave out Article 14 as it was drafted in the Convention in order to regulate in a more convenient way some problems that the application of this article brought. The analysis of this clause and the salvage contracts would be the subject of a new work, so I will not expand on this.

3) Personal conclusions

I said at the beginning that I was not convinced by considering special compensation as an exception to the "no cure no pay" principle. Why do I conclude this?

Because this principle is based on the fact that a salvage reward is due when there is a successful outcome. And the salvage reward takes into account other elements for the purpose of calculating the salvage reward, including an expected gain. The special compensation is something different, it is the recovery of expenses. It is not a new salvage reward.

Article 12, which defines the "no cure no pay" principle, speaks of the "right to reward". And in Article 14, first paragraph, there is no reward if there is no profit.

The only time there is a reward is when there is success in the operation, that is, when environmental damage is avoided or reduced to a minimum. The second paragraph of article 14 does not deviate from the "no cure no pay" principle, since in this case there is a reward.

As for the appropriateness or otherwise of the Convention, in my opinion it puts us in a better position than we were under the previous regime. It is true that it has flaws and that its application is not so simple, in fact there are some complexities and the costs are high. But having the possibility of recovering expenses is undoubtedly beneficial for salvage companies, it is fairer, it promotes salvage and environmental protection, which in the end ends up being more beneficial for shipowners in particular and for countries in general. It will be necessary to correct, in practice, the way in which these expenses are settled in order to make it less cumbersome and costly, and/or the countries that are parties should analyze how they can help correct these imperfections with their internal regulations.

Beyond its shortcomings, the Convention does not contravene our current system, nor does it undermine it, it simply adds guarantees and benefits to it. It will be up to us to see how we carry out its application.

BIBLIOGRAPHY

- STEPHEN GIRVIN, “Case and comment: Special Compensation under the Salvage Convention 1989: a fair rate?”, LLOYDS MARITIME AND COMMERCIAL LAW QUARTERLY, Part 3, August 1997
- “The Nagasaki Spirit”, LLOYD’S LAW REPORTS, 1997, Vol 1
- “The Nagasaki Spirit”, LLOYD’S LAW REPORTS, 1996, Vol 1
- Module 6, Maritime Law and International Trade, Postgraduate Diploma in Maritime Law, 2013-2015, London Metropolitan University
- Informe de la Asesoría Letrada de Prefectura Nacional Naval, Expediente PNN N°11-3514 referente a la ratificación del Convenio Internacional sobre Salvamento Marítimo de 1989
- FERNANDO AGUIRRE RAMÍREZ, CECILIA FRESNEDO DE AGUIRRE, Transporte Marítimo, Volúmen II, Curso de Derecho del Transporte, FCU