THE "NAGASAKI SPIRIT"

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SEMCO SALVAGE & MARINE PTE LTD v. LANCER NAVIGATION CO LTD

LANCER NAVIGATION CO LTD v. SEMCO SALVAGE MARINE PTE LTD

(THE "NAGASAKI SPIRIT").

Good morning to all.

First of all, I would like to thank the Argentine Maritime Law Association and the Uruguayan Maritime Law Association for allowing me to be here in front of all of you. I confess that when I was invited to participate, I had just become a mother for the first time and I said that I would only accept the proposal if they allowed me to give exactly the same talk I had given at the Uruguayan Conference last year because I did not have time to prepare it. They said yes, and I accepted.

But then, when I started to prepare the presentation, I understood that repeating exactly the same talk, with the same power point, was going to be very boring, especially for my Uruguayan colleagues who had already listened to it. It was much more enriching to look for another point of view from which to analyze the Convention. And I decided to look for a practical case.

I could not bring you a judgment of our courts, because the Convention came into force last year and since then we have not had any claim of such seriousness in our country. So I chose to look for a foreign judgment. My main interest was to get a judgment that included an analysis of Art. 14, since it was the great novelty brought by this Convention.

And so, I found the famous and well-known case of the "Nagasaki Spirit". I suppose most of you are familiar with it, since besides being a very serious incident, its repercussions in the maritime sector were very great. Anyway, as a way of refreshing everyone's memory, I will summarize the facts.

FACTS

On September 19, 1992 at 23.20 hrs the tanker Nagasaki Spirit collided with the container ship Ocean Blessing in the northern part of the 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, 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 the Convention had already been drafted, so LOF 90 incorporated the text of Articles 13 and 14[1].

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, remaining there 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 lasted eighty-four days.

The LOF provided that the salvage claim should be settled in arbitration. Therefore, an Arbitral Tribunal was appointed to resolve the matter.

The main issue at stake in this arbitration (among other secondary issues) is the following:

Does the special compensation include a profit or does the Convention seek that the shipowner only recovers the expenses it incurred in the salvage operation?

I will now go on to detail the findings of each of the tribunals, in order to analyze their conclusions. The answer lies in the analysis of articles 13 and 14 of the Convention[2].

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[1] The Convention came into force in England in 1995 and was incorporated into the Merchant Shipping (Salvage and Pollution) Act 1994. It was thus included in English domestic legislation.

[2] ARTICLE 13: Criteria for determining the reward
The reward shall be determined with a view to encouraging salvage operations, having regard to the following criteria in no particular order:
(a) the value of the ship and other property salvaged;
(b) the skill and efforts made by the salvors to prevent or minimize damage to the environment;
c) the measure of success achieved by the salvor;
d) the nature and degree of the hazard;
e) the salvor's skill and efforts to save the ship, other property or human life;
f) the time spent, expenses incurred and losses suffered by the rescuers;
(g) the risk of liability and other risks incurred by the rescuers or their team;
h) the promptness with which the services were rendered;
(i) the availability and use of vessels or other equipment for salvage operations;
(j) the degree of preparedness and effectiveness of the salvor's equipment and the value thereof.
(3) The reward, excluding interest and legal costs payable under the award, shall not exceed the value of the vessel and other property salvaged.

Article 14: Special compensation
(1) Where the salvor has carried out salvage operations in respect of a ship which directly or by the nature of its cargo constituted a threat of damage to the environment and has failed to obtain, 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 defined in this Article.
(2) Where, in the circumstances referred to in paragraph (1), the salvor has succeeded by his salvage operations in avoiding or minimizing damage to the environment, the special compensation payable by the owner to the salvor under paragraph (1) may be increased to a maximum of 30% of the expenses incurred by the salvor. However, the court, if it considers it equitable and just and bearing in mind the relevant criteria set out in paragraph (1) of article 13, may further increase such special compensation, provided that in no case shall the total increase exceed 100% of the expenses incurred by the salvor.

The Arbitral Tribunal of First Instance, in the hands of Mr. R. F. Stone, decided:

To award a special compensation of $ 7,658,117. It also considered it fair to increase the special compensation by 65%, which brings the special compensation to $ 12,635,893.

On the other hand, it fixed the salvage at $ 9,500,000, so that the final award would be a total of $ 3,135,893.

The Court, in the sentence, emphasizes the need to encourage salvage. It explains that a professional salvor who did the best he could, but failed to prevent damage to the environment, is not going to be motivated to try again or stay in business if he only charges his expenses. He concludes that he should charge an amount that will contribute to a future investment.

He believes that it would be helpful to know the market prices, although an equivalent amount is not an exact mathematical calculation anyway.

The second to analyze the case was Mr. J.F. Willmer for the Court of Appeals.

The salvage award is set at $10,750,000, while the special compensation is set at $5,216,404.20. Consider a fair increase of 65%, which would bring the amount to a total of $ 8,607,066.90.

Taking into account these figures, it would not be appropriate to charge special compensation.

Regarding the way in which the concept of "expenses" is defined in the Convention, the magistrate establishes that even though it is broad, it is still a definition of "expenses", which does not include profit. The possibility of charging a special compensation is a "safety net", an additional incentive. But it only applies when it is greater than any reward for a save.

Both arbitrators consider that the period for calculating the special compensation is the entire salvage period.

Both parties appealed the award on the basis of the Arbitration Act 1979.

The main issues to be discussed in the corresponding appeals were the following:

What is meant by "equitable amount" (art. 14.3)? In respect of which period the salvor could claim special compensation?

SUPREME COURT - QUEEN'S COURT CHAMBER

The judgment of the Supreme Court delivered by Mr. Justice CLARKE, explains that although the ordinary meaning of the expression "equitable amount" imports the idea of remuneration (which usually includes a profit), if the words are constructed in the context of the Convention, it distinguishes between remuneration and reward on the one hand and compensation and expenses on the other. It then considers that to be remunerated or rewarded is to receive profit, and to be compensated is to receive a restitution of expenses.

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(3) For the purposes of paragraphs (1) and (2), the salvor's expenses shall mean the personal expenses reasonably incurred by the salvor in the salvage operation and an equitable amount for 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). defined in this article.

He expresses that, if the idea had been that the special compensation should include an element of "gain", it should have been clearly established in art. 14.1. He understands that when the provisions of art. 14.1 are complied with, only expenses are recovered. If the provisions of art. 14.2 are complied with, expenses and profit are recovered.

The express reference to (h), (i) and (j) in Art. 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 goes beyond what are simply expenses. If this had been the idea, it would have been expressly stated.

He does not share the conclusions of the second instance arbitrator, who compares the amount for special compensation with the salvage reward and thus elevates the latter. He says that these two should not be compared and the calculation of both should be kept separate.

In his opinion an "equitable amount" of expenses including profit is not compatible with the expression "expenses which have been actually and reasonably" employed for a salvage operation, as the Convention says. If it speaks of expenses that have been "reasonably" employed, it is clear that it is speaking only of expenses and does not refer to adding a profit.

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

On this ruling, there were appeals by all:

SEMCO SALVAGE appealed CLARKE's decision as to how it interpreted the definition of "equitable amount", considering that it should include profit.

On the other hand, the shipowners appealed JUSTICE CLARK's decision that the entire salvage operation should be taken into account in calculating the amount of special compensation, as they 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 theory that the Convention was made for the purpose of guaranteeing the salvor for uneconomic salvage was rejected; the most that should be charged would be reasonable expenses.

<u>COURT OF APPEAL</u>

Finally, we have the conclusions reached by Lord Justice STAUGHTON in the Court of Appeal:

What is the meaning of "equitable amount" (or "fair rate")?

The judge makes an analysis of the drafting history of the Convention.

He refers to a meeting of the International Maritime Committee in Montreal in 1981 where a draft of the Convention was approved. This draft was submitted to IMO at a diplomatic conference in April 1989 accompanied by a report by the Danish lawyer, Bent Nielsen.

STAUGHTON explains that in the end there are no clear indications as to how the concept of "equitable amount" was interpreted and whether it includes profit or not, but there are indications that Art. 14.3 refers to "expenses" and that 14.2 refers to "remuneration or reward". In other words, Art. 14.2 does include a "profit".

Therefore, the calculation of expenses as defined in Art. 14.3 does not include profit. Only expenses are calculated, since the element of gain would be given only in case the option of art. 14.2 is given.

Anyway, he says in his sentence that it is not entirely clear and that it gives him the impression that the drafters left in 14.3 an open door to be interpreted and therefore resolved by the Judges at the time of ruling. Because it was a much debated issue, taking into account that the negotiation was between the rescuers and P&I Clubs. It is likely that there are elements to interpret it one way or the other.

Regarding Art 14.3, it considers that "personal expenses" refers to money actually spent. And as for "equitable amount corresponding to equipment and personnel", it does not refer to money actually spent because the word "and" clearly distinguishes it as something else.

When it then speaks of "equitable amount", the question is whether it is an equitable amount of expenses or an equitable amount of compensation. The word "compensation" would seem to indicate a refund of money. But at the moment when art. 14.2 speaks of an increase of 30% and up to 100%, this indicates that there is a "reward".

It concludes then, that it is to an equitable amount of expenses, in which it is necessary to take into account, at the moment of calculating them, the costs for the equipment that the rescuer has had for a certain time, the cost of personnel, among others. 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 calculation are paragraphs (h), (i) and (j) of Article 13.1, namely: the promptness with which the services have been rendered, the availability and use of vessels or other equipment for salvage operations, and the degree of preparation and effectiveness of the salvor's equipment, as well as the value of the same.

The calculation should then include the ability of the salvor to provide an immediate response and the effectiveness of the response. It is important to make the calculation taking into account how the rescuer was prepared to respond.

For the purposes of the calculation of Art. 14.3, subparagraphs (a) to (g) of Art. 13.1 are not to be taken into account. And this means that it is not a salvage reward.

An "equitable amount" means an amount of expenses, comprising indirect costs and fixed costs, as well as taking into account the additional costs of having resources available for immediate action. Remuneration or profit is covered by Art. 14.2. But as for a more in-depth case-by-case analysis, what "equitable amount" implies is a matter for the courts to decide. The result is not exact mathematics.

It concludes that the calculation, as it stands, does not lead to the recovery of any special compensation. Therefore, on this point, SEMCO SALVAGE's appeal does not proceed.

"The period point:

This point was not necessary to resolve, as it was brought to appeal by the shipowners and they already won on the salvage reward. But anyway, the Judge says that it is important to analyze and resolve it, for the good of the industry. That is why he clarifies that it is not going to be a binding precedent for other Courts.

The discussion centers on whether the costs referred to in Article 14.3 are those corresponding to the period during which the salvage lasted or only the costs that were generated while the threat of damage to the environment lasted. In the case at hand, the threat of environmental damage began after the salvage work began and also culminated some time before the end of the salvage work.

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 who expressed 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 the view of JUSTICE CLARKE.

Art. 14.1 begins: "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...". The threat of damage to the environment is a necessary condition. The possibility of collecting special compensation may induce the salvor to embark on an operation where he at least has the possibility of recovering expenses. This possibility does not exist if there is no threat of environmental damage. Therefore, it considers that the computation starts when the threat of environmental damage begins.

This in terms of the beginning of the computation of expenses.

What about the cessation?

Beyond the fact that he finds arguments for and against, he refers to what is established in the text of art. 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 entire salvage operation, from the beginning to the end.

He therefore concludes that the expenses of the entire salvage operation, from the beginning to the end, should be calculated.

Lord Justice EVANS does not agree with his colleague. He makes an assessment regarding the salvor's expenses. He begins by saying that the salvor who has contracted the services of or purchased from another company equipment and hired personnel, the price at which he purchased it is likely to include a commercial profit from the supplier.

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

With regard to the "fair rate" he discusses the meaning of the English word "fair" (literal translation: just). He concludes that what is to be looked at is the commercial value of those services, a value that is "fair" to 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 paragraphs 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 that sense, he does not share the arbitrator's conclusion that the "fair rate" of Art. 14.3 includes an incentive for remuneration, but on the other hand he also does not believe that it

does not include any element of profit. He explains that the "equitable amount" or "fair rate" is calculated on the basis of the salvor's costs and these costs are calculated taking into account the commercial value of the service rendered, unlike the salvage compensation in Art. 13.

Lord Justice SWINTON THOMAS, makes an analysis of what "fair amount" means and how the term "expenses" is interpreted and is of the opinion that it should be viewed from a broad point of view, including all types of costs. In any case, he concludes that the "profit" element will result from Art. 13 and Art. 14.2.

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

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

According to the majority of the Tribunal, SEMCO is not entitled to charge special compensation.

SEMCO appeals this decision.

The last Court to rule was the House of Lords, ruled by Lord Mustill.

When analyzing the concept of "equitable amount", the four scenarios that have been put forward so far were considered:

1) That such concept comprise the direct costs of the salvor for carrying out the salvage task.

2) Consider also the additional costs of having the equipment and personnel at disposal

3) A further step, which leads to the inclusion of a profit element in the concept.

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

Both parties to the lawsuit agree that the concept includes both direct costs and the additional costs of having the equipment and personnel available. Also, both agree that raising the special compensation to the level of a salvage reward is not appropriate.

Therefore, what is at issue, and what the Tribunal must decide, is point 3): whether to include a "profit" within the concept of special compensation.

Lord Mustill is of the opinion, as is Justice Clarke, that the idea of the Convention was never to create a new salvage reward.

He says that the concept of "expenses" predominates in the first three paragraphs of Art. 14, therefore in its ordinary interpretation, the concept is clear.

He begins by analyzing the wording of Art. 14.2 which says "expenses incurred" by the salvor. By using the word "expenses" but especially by using the word "incurred" he can only be talking about expenses and not profit. You cannot "effect" a gain, you can "effect" an expense.

He says that the term "compensation" is akin to "reimbursement". Furthermore, there is a clear distinction between Art. 14.1 and 14.2 since they distinguish between "compensation" and "reward". Clearly, Art. 14.1 speaks of an expense while Art. 14.2 speaks of something else.

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

He does not believe that salvage companies need a profit as an incentive. In the previous regime we had the "no cure no pay" plain and simple. With this new option, a salvor that was unsuccessful in its operation is going to collect not only direct expenses, but indirect expenses. Before, if he was unsuccessful, he was not paid at all. And he will be charged, even if there was no success in preventing or avoiding damage to the environment. He considers this to be sufficient incentive.

The preamble of the Convention refers to the importance of having adequate incentives so that rescuers are always ready to protect the environment. Lord Mustill considers that, despite this preamble, at no time is it interpreted to mean that there is a gain. With regard to this he makes three objections:

1) He considers that rescuers do not need an element of gain as an incentive. Not succeeding in the operation no longer means, as it was before, not getting paid anything. Art. 14 gives a sufficient "safety net" to fulfill the purpose of the new scheme.

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

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

Rounding out, their conclusion is that the Art. 14 remedy is subordinate to the Art. 13 reward and that each of the rewards must be analyzed separately.

CONCLUSIONS

Although the Convention is good and useful, there are things to improve and in fact the experience was not the best.

The claim for special compensation does not attract a maritime lien, and the consequence of this was that the insurance companies did not issue guarantees on this point.

As for the increase in Art. 14.2, it must be expressly proven that the damage to the environment was avoided or minimized, and this is not an easy task. Evidence from many experts (naval, environmentalists, etc.) is needed. The cost of proof is very high and the time it takes is long.

The calculation of the costs of Art. 14.3 proved to be costly, complex and cumbersome.

The solution they found in fact was to include the SCOPIC clause (Special Compensation P&I Clause) in the LOFs, replacing Art. 14. One of the tools provided by the SCOPIC clause is that once it is invoked by the salvor, the shipowner must provide a guarantee. Also, SCOPIC establishes a rate to determine the "equitable amount" of expenses, which made the calculation much easier, since it is based on a daily rate that is much simpler to calculate.

The SCOPIC clause, its application and usefulness would take us a new exposition which is not appropriate to go into at this time.

My conclusion is that the Convention innovates in many aspects, provides tools and above all encourages salvage in cases where there is danger of damage to the environment. It has difficulties in its application, which for the moment have been overcome in the drafting of contracts. This way it works, and in spite of its defects, it gives better tools than the previous system.

Thank you very much!

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