WHETHER THE DUTY TO PROTECT THE MARINE ENVIRONMENT TAKES PRECEDENCE OVER THE GENERAL DUTY TO PROTECT THE IMPERILED OBJECT OF SALVAGE: ARTICLE 8 OF THE 1989 SALVAGE CONVENTION

Mišo Mudrić[1]

Dezinsekcija d.o.o. v Anomyo Maritime CO.S.A (The Serine)
P-4900/09-7, High Commercial Court of Republic of Croatia, 19 March 2011

Facts

The vessel *Serine*, owned by Anomyo Maritime (defendant, salvee), registered in Sierra Leone, ran aground on the island of Unije in the Adriatic Sea off Croatia, on the 22 January 2008. The captain of the vessel issued a distress call received by the Croatian National Centre for Search and Rescue (NCSR). The NSCR immediately informed the (local) Port Authority of Rijeka and the County Operational Centre for the Prevention of Imminent Marine Pollution (OCPIMP) about the grounding. The OCPIMP, due to the fact that the owner was not immediately reachable and that the weather forecast was issuing warnings of a possible heavy storm, instructed the claimant (Dezinsekcija d.o.o., a private firm under an obligation, in accordance with a contract with the government, to aid the OCPIMP in the protection of the marine environment and keep a number of ETVs on stand-by) to surround the vessel with floating protection nets and place an additional net along the coastline in order to protect the island from a possible spill of bunker oil.

According to the information supplied by the captain of the vessel, out of approximately 160 tons of bunker oil present in the bunkers at the time of the grounding, 80 tons were located in reservoirs situated at the bottom of the vessel, half of which was lying on the sea bed. The claimant (salvor) immediately dispatched an eco-boat to the scene, in order to be able to act immediately in case the initial survey of the vessel showed signs of leaking bunker oil. Additionally, three days later, the claimant was requested by the OCPIMP to place another set of protective nets around the vessel. On the 26 January, during the second survey, it was established that the vessel was continuing to take in seawater in the engine room. On the 29 January, the claimant was requested by the OCPIMP to make two eco-boats available at the scene of the accident. The defendant did not object to the intervention of the coastal state and additionally employed the services of another salvor on 30 March to release and tow the vessel to the repair dock in the port of Šibenik, Croatia, where it arrived on 1 April.

In the event there was no leak of bunker oil during the salvage operation, but the intake of seawater caused the engine's total loss, with substantial damage to the cargo on board (out of the 2,524 bags of sodium carbonate light, 954 bags were ruined, amounting to €310.895,71 in damages based on the calculation of the consignee in the adjoined case *Henkle Algerie SPA v Anomyo Maritime CO.S.A*).[2]

The claimant pursued his right to a salvage award, and the defendant appealed on grounds that:

(i) the claimant had no grounds on which to pursue the claim, and

(ii) the claimant had failed to prevent the damage to the cargo and the engine due to gross negligence on his part, this damage amounting to a higher figure than a salvage award had the salvage operation been performed with due care.

Decision

The court proceedings consisted of two separate trials, both conducted before a first and second instance court. The first two proceedings concerned the issue of an interim measure to arrest the vessel, while the second two proceedings concerned the issue of a right to a salvage award and a counterclaim for damages caused by salvor's misconduct.

[1] Department for Maritime and Transport Law, Faculty of Law, University of Zagreb, Croatia. mmudric@pravo.hr.
[2] P-2826/08-3, High Commercial Court, Zagreb, 21 April 2008).

Interim measure to arrest the vessel

The Republic of Croatia has ratified the 1989 Salvage Convention (1989 Convention)[3] and incorporated the 1989 Convention into the Croatian Maritime Code (MC).[4] Article 774 MC restates the contents of Article 13 of the 1989 Convention ('Criteria for fixing the reward'), and Article 775 MC restates the contents of Article 14 ('Special Compensation'). The claimant stated in the Commercial Court in Rijeka[5] that he had performed a salvage operation, basing his claim on Articles 774 and 775 of the MC. He further claimed that due to his preventative activities, the threat of marine pollution (spill of bunker oil) had been avoided, and that as a result he had earned the right to claim special compensation up to 100 per cent of the costs involved, making the overall figure of the salvage award to €154.995,16. In order to secure the payment, the claimant requested the court to issue an interim measure to arrest the *Serine* until the payment has been made (or a proper guarantee issued) by the salvee.

Based on Article 776 MC (Article 15 of the 1989 Convention 'Apportionment between salvors'), in connection with Articles 774 and 775 MC, the court held that the claimant had a right to claim a salvage award or special compensation, since he, the salvor, as specified in the Regional Maritime Administrative Centre's official chronology of events, had performed in accordance with the instructions received from the OCPIMP. The court then issued an interim measure to arrest the vessel in the port of Šibenik (based on Article 951 MC, and Article 296 of the Forced Execution Act).[6]

Defendant's appeal

The defendant appealed,[7] stating that the claimant had no legitimate grounds on which to expect a salvage award (or special compensation) and contending that as it was the OCPIMP who had initiated the salvage operation, it was only that body which could claim the award. Furthermore, any salvage award was invalid due to the claimant's failure to take due care in the performance of the salvage operation, and the damage suffered by the defendant due to salvor's negligence.

As evidence of his counterclaim, the defendant drew attention in particular to the following.

- The protection nets were not placed properly.
- The captain of the vessel *Serine* requested on several occasions during the first few days of the salvage operation to be allowed to return to the vessel (with a part of the crew) in order to assist the salvage operation with the specific aim of pumping out the seawater and preventing further ingress. Since the Port Authority denied that request repeatedly, the salvors were, in the defendant's view, responsible for the lack of care and the resulting damage to the engine and cargo.
- The salvor had failed
  (i) to board the vessel
  (ii) to stop the intake of seawater, and
  (iii) to attempt to pump out the seawater present on board (resulting in the full extent of the damage to the engine and partial damage to the cargo).
- Although the captain was finally allowed to return to the vessel on 27 January, the engine room was already flooded and part of cargo damaged.
- As the vessel had lost the engine power, further salvage tasks were made more complicated and expensive, involving the employment of a new salvor to release and tow the vessel.
- The salvor did not collect the oil in the engine room (a necessary task agreed on during the initial phase of the salvage operation and paid for by the owner in advance).

[3] IMO International Convention on Salvage 1989 http://www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html#61. See OG/IA [International Agreements segment], No 9/98, 1989 Convention.
[4] MC, Official Gazette [OG], No 181/04, 76/07, 146/08, 61/11.
[5] P-541/2008-2, 14 April 2008.
[6] OG, No 57/1996, 29/1999, 42/2000, 173/2003, 194/2003, 151/2004, 88/2005, 121/2005, 67/2008, 139/2010, 154/2011.
[7] P-4066/08-3, High Commercial Court, Zagreb, 10 July 2008.

– The vessel was pillaged by individual members of the salvage team (as confirmed in the later criminal proceedings).

Concerning the issue of a legitimate claim to an award, the court found the claimant had indeed been one of the parties performing the salvage operation, as visible from the case files, a fact not disputed by the defendant. According to the Article 771 MC (Article 12 of the 1989 Convention 'Conditions for reward'), a salvor has a right to claim a salvage award for a salvage operation that has achieved a useful result. If there are more salvors present (as was the case here), each salvor can, according to the Article 776 MC, claim a salvage award separately. An obligation to pay a salvage award, in accordance with Article 778/4 MC and in the absence of a contractual stipulation regulating differently, lies on the salvee. Articles 784 and 785 MC allow a port authority to oversee and interfere in salvage operations when such operations may influence the safety of shipping, the exploitation of natural marine resources, and the protection of marine environment. In such situations, the port authority may order the owner of a vessel or other property endangering the environment to act accordingly in an effort to annul such a threat. If a threat to the environment is imminent, the port authority may act independently from the owner of the vessel or other property endangering the environment, and all costs arising out of such actions are to be paid by the owner.

The High Commercial Court approved the decision of the Rijeka Commercial Court and rejected the appeal on the merits.

The issue of the salvage award and salvor's misconduct

In June 2009, in the Rijeka Commercial Court[8] the defendant stated that the parties had reached a private agreement in total settlement of the dispute, whereby the defendant was under an obligation to pay the claimant US$25.000,00. The court held the defendant liable to pay this sum (with interest and proceeding's costs) to the claimant. With acceptance of the settlement, the court did not pursue the issue of salvor's award and misconduct.

In May 2011, following the appeal of the defendant, the High Commercial Court affirmed the decision of the first instance court.[9]

Comment

Although, ultimately, the Croatian Court failed to decide on the merits of the claims, due to the settlement between the parties, a number of interesting issues arise out of the facts of the case.

Legitimate grounds for claim

The first issue was whether a salvage operation is a salvage service when carried out on an instruction *coming from the third party, not the salvee*, and whether such a service incorporates the necessary element of *voluntary operation*. As stated earlier, Article 785/3 MC allows the port authority to initiate a salvage operation when there is a direct threat to the marine environment, with the person responsible for the threatening substance liable for the payment of salvage costs. This does not affect the relationship between the salvor and the salvee, as the contract between the claimant and the government concerned the availability of the ETVs, and was not a contractual obligation to enter into a specific salvage operation (see *The Sarpen* [1916] P. 306). Furthermore, in accordance with Point 44 of the National Plan for Interventions in Cases of Sudden Pollution of Sea,[10] a person responsible for the pollution is responsible for the payment of costs in accordance with any special regulations relevant to the specific case of pollution. In the present case, the relevant regulation is Article 778/4 MC, according to which the owner of the salved vessel is liable for the payment of a salvage award (or special compensation) when no salvage contract is signed. Therefore, irrespective of who initiated the salvage operation, a salvor can claim a salvage award only from a salvee.

[8] P-541/2008-30, Commercial Court, Rijeka, 5 June 2009.
[9] P-4900/09-7, High Commercial Court, Zagreb, 19 May 2011.
[10] OG, No 8/97.

Special compensation

As the salvor failed to prevent any of the damage that occurred, Article 13 of the 1989 Convention was not applicable, and the salvor could only claim special compensation (Article 14). The salvor based his claim on Article 14/2, asking for *additional 100 per cent uplift of the expenses*. However, Article 14/2 states that such uplift is only possible in circumstances where the salvor has prevented or minimised damage to the environment. As no actual damage to the environment occurred, the salvor could only claim for a sum equivalent to his actual expenses.

Due care

Another point that requires clarification is whether the salvor was under a specific obligation to *act strictly in accordance with the instructions* received from the OCPIMP, or whether the salvor was, at the same time, required to *act with due care towards the salvee's interests* during the performance of salvage services (as stipulated by Article 8 of the 1989 Convention). Closely connected to that issue is the question whether a salvor has a right/possibility to claim that his *obligation to protect the marine environment* and to perform with due care whilst performing such environmental services, *prevented him from providing simultaneous due care towards the object of salvage* – ie the *Serine* and the cargo.

The salvor contented that he had performed as instructed by the OCPIMP, and the later official chronology of the events confirms that claim. In doing so, the salvor fulfilled the mandatory obligation[11] to perform with due care while carrying out environmental services.[12] The salvor, however, potentially failed to carry out the whole of the salvage operation with due care, as no effort was made to protect the vessel herself, allowing the ingress of the seawater to continue, which ultimately led to the destruction of the engine and part of the cargo, and produced further costs concerning the release, towage, and repair of the vessel's engine; costs which, taken together, surpass the amount of a salvage award as claimed by the salvor.

As the salvor was unable to claim for a salvage award as stipulated by Article 1 of the 1989 Convention (as no property was effectively saved), a claim for special compensation was made as a result of measures undertaken to protect the environment. In accordance with Article 14/5, a reduction or a forfeiture of special compensation can only be made in cases of (proven) negligence during the performance of environmental services. If the salvor carried out operations with due care during the performance of environmental services, a salvee cannot ask for a reduction or a forfeiture of a special compensation. A salvee can demand a reduction or a forfeiture of a salvage award based on Article 18 of the 1989 Convention (breach of a general [non-mandatory] duty to take due care during the salvage operation as stipulated by Article 8/1(a) – this being applicable to cases where no special compensation is claimed), and/or based on other relevant national contractual and non-contractual liability rules. (See *The Tojo Maru*,[13] *The Noah's Ark v Bentley & Felton Corp*,[14] *Kentwood v United States*,[15] *Navire 'Germaine'*[16] and 22 U 3/08 BSch[17].) If, however, a salvor an prove that through performing general salvage tasks on the endangered property (vessel, cargo) he would have neglected his specific duty to perform with due care when performing environmental services, and having in mind that the obligation to protect the marine environment with due care has been pronounced mandatory by the 1989 Convention, it is possible that a salvee would fail to succeed with a counterclaim for damages.

Looking at the facts of the present case and the arguments made by the defendant:

(i) the placement of the protection nets was irrelevant with regard to the damage suffered by the vessel and the cargo

[11] 1989 Convention art 6/3.
[12] ibid art 8/1(b).
[13] *Owners of the Motor Vessel Tojo Maru v NV Bureau Wijsmuller* [1972] AC 242.
[14] 292 F2d 437, C.A.Fla.1961 (5th Cir. 1963).
[15] 930 F. Supp. 227, 1997 AMC 231 (E.D. Va. 1996).
[16] Cour d'appel d'Aix-en-Provence, 8 juin 1983.
[17] ÖLG Karlsruhe, Beschluss vom 2. 2.2009 (22 U 3/08 BSch).

(ii) the repeated refusal to permit the captain and (part of) the crew to return to the vessel came from the local port authority, not the salvor, thus rendering this argument equally irrelevant with regard to the salvor's liability

(iii) if proven, the fact that the salvee paid the salvor in advance to clear the oil from the engine room could render the salvor liable for the reimbursement of that particular sum of money paid

(iv) the individual members of the salvage team who plundered the vessel were tried and sentenced individually, thus their actions did not affect the assessment of the salvor's overall performance.

However, as there was no leak of bunker oil, and as salvor's operations consisted of placing the protective nets and bringing the two ETVs to the scene of the accident, a salvee could have argued that the salvor had failed to take the necessary measures to save the endangered vessel and its cargo, since he could have attempted to board the vessel to pump out the seawater and prevent damage to the engine. If the data collected from the day-to-day survey of the salvage operation was sufficient to make the salvor liable, a salvee could have based his counterclaim for damages to the vessel, the cargo and for further costs from the employment of an additional salvor, on general domestic liability rules (such as, for example, the general obligation to act with due care, or an obligation to act with an enhanced due care when carrying out professional services, as stipulated by Article 10 of the Croatian Obligations Act). However, as stated earlier, the recognised settlement prevented the Croatian Court from exploring this issue in more detail.