

Standard salvage contract forms: The scope of best endeavours – reasonableness and foreseeability

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Abstract

The Paper examines the contractual duty of a salvor to perform with best endeavours while engaged in salvage operations, as required by a number of standard salvage contract forms in use, such as the LOF, Scandinavian Salvage Contract, MARSALV Form, 1994 China Form, 1991 JSE Form and the TOF. The standard of ‘best endeavours’ is compared to the standard of ‘due care’ as promulgated by the 1989 Salvage Convention, and to the standard required by those standard salvage contract forms according to which a different criteria of salvor’s performance is expected, such as is the case with the Boat Owners’ Associations of the United States Standard Form Yacht Salvage Contract and the MAK form. The purpose of the examination and comparison is to determine what the salvor’s ‘reasonable’ conduct consists of, as compared with the principle of reasonableness as found in the common law and civil law jurisdictions.

As neither the 1989 International Salvage Convention nor the commonly used salvage forms define the contents of the standard of care, the salvor’s performance is governed by the general non-contractual and contractual liability rules, subject to the particularities of salvage services, depending on whether the main salvor’s obligation is an obligation of result or an obligation of means. Whereas the 19th and early 20th century salvor’s duty of care corresponded to that of an ordinary seaman, the development of the tort of negligence and professional liability rules in the second part of the 20th century created a division of performance expectation between professional and non-professional salvors, with different consequences in terms of the scope of the overall liability exposure. The 1989 Convention introduced two separate duties of care, one concerning the general salvage operation and the other concerning the environmental services performed during a salvage operation. The duty to perform with due care while protecting the environment was made mandatory, causing a possible overlap with a general duty to protect the object of salvage. Coincidentally, a number of commonly used salvage

forms incorporate a clause on the exclusion of liability, this being in direct contradiction with the 1989 Convention and general domestic contractual and non-contractual liability rules.

1 Introduction

In January 2008, following the grounding of the merchant vessel *Serine* on the island of Unije in the Adriatic Sea, a salvage tug was called in by the local port authority to aid the vessel and prevent a possible threat to the marine environment.¹ The salvor undertook a number of off-board activities in an effort to prevent a possible escape of bunker oil (eg placing the protection nets), but failed to perform any tasks on board the vessel, allowing an undisturbed flow of seawater into the vessel. The escape of oil never occurred, but the seawater caused damage to the engine room and the cargo on board. Nevertheless, the salvor claimed special compensation and the salvee counterclaimed damages. Whereas the salvor contended that because he was called in by the port authority his prime concern had been the protection of the environment and that, owing to this mandatory obligation as stipulated by the 1989 Salvage Convention, he could not have reasonably performed any (additional) tasks in regard the salvee's vessel and property on board, the salvee claimed that the salvor had failed to exhibit (any) proper care regarding the wellbeing of the vessel and cargo. As the issue was resolved through a settlement,² the main question concerning the possible primacy of the duty to preserve the environment over the general duty to protect the imperiled object of salvage was not addressed by the Croatian court.

The paper will address this issue in an effort to provide different

¹ For more information on the case, see M Mudrić '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' (2012) *The Journal of International Maritime Law* vol. 18 issue 5.

² The *Serine* case, Pž 4900/09--7, High Commercial Court of Republic of Croatia (19 May 2011).

considerations with regard to the possible conflict of anteriority between the duty to exhibit a certain level of care during the performance of salvage services in general and the duty to exhibit a certain level of care during the performance of environmental services. Two major impediments prevent a clear and uniform understanding of the possible clash of primacy: (i) these duties originate from two different sources (the 1989 Salvage Convention and domestic law liability rules) and (b) these duties are differently worded in international and private law documents (the 1989 Salvage Convention and standard salvage contract forms).

In order to approach the issue it is necessary, first, to assess how the issue of standard of care is perceived (a) in general, and, (b) in the context of salvage operations. This presupposes a general understanding of the relevant national law liability provisions and court practice, and the general understanding of the standard of care as expected from salvors. In addition, it is important to assess to what extent the different standards, as present in the 1989 Convention and most commonly used standard salvage contract forms, differ or are mutually compatible. What is of particular interest is an occurrence when salvage contracts exclude the application of liability when a particular standard, approved by the 1989 Convention, is not adhered to. Finally, the difference in performance expectation from a non-professional and a professional salvor will be taken into consideration when determining what the appropriate minimal standard of behavior is expected from each class of salvors.

2 General liability rules applied in salvage cases

2.1 Domestic law as basis of case law practice

Most of the ground-breaking decisions regarding the scope of the duty of salvors concerning good performance were made prior to the adoption of the standard of care as stipulated by the 1989 Convention (common

law jurisprudence in the 1960s and civil law jurisprudence in the 1980s), and were assessed based on general domestic law liability rules and the relevant general and salvage-related court practice. The general (professional and non-professional) standard of (proper) care is regularly defined in both the contractual and non-contractual rules of national law provisions and/or relevant general case law. Bearing this in mind, it was possible to omit such a provision in the 1989 Convention (as was the case with the 1910 Salvage Convention), especially because most salvage services are regulated by standard salvage contract forms, all of which incorporate a certain standard of care.

2.2 England and Wales

In the famous salvage case *Tojo Maru*³, London arbitration held (and the House of Lords confirmed) that a salvor can be held liable in damages caused through negligent performance of salvage services, based on the lack of proper care as required during the performance of such a service.

The decision was made on the merits of English law, where, in principle, a contractual obligation is strict (a breach of contract arises out of a failure to complete a contractual obligation),⁴ although a more recent case law clearly recognizes the necessity of proving the lack of adequate performance in order to claim the breach of contractual duty.⁵ In *Hadley v Baxendale*,⁶ the court determined that losses must be qualified as typical losses usually resulting from a breach of contract of a similar nature and, if special circumstances are present, it is necessary to establish the defendant's awareness of such circumstances at the time of the conclusion of contract (the factor of foreseeability).⁷ With regard to the tort of neg-

³ *Owners of the Motor Vessel Tojo Maru v NV Bureau Wijsmuller (The Tojo Maru)* [1972] AC 242.

⁴ See generally E McKendrick *Contract Law* (Oxford University Press 2012) 754-755.

⁵ See *Platform Funding Ltd v Bank of Scotland plc* [2008] EWCA Civ 930, [2009] 2 W.L.R. 1016, and, N Andrews *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell 2011) 87-88.

⁶ *Hadley v Baxendale* (1854) 9 Exch 341.

⁷ See *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 528, [1949] 1 All ER 997 and *Koufos v C Zarnikow Ltd (The Heron II)* [1969] 1 AC 350, [1967] 3 All

ligence, liability, as established in *Donoghue v Stevenson*,⁸ arises in instances where a general duty of care has been breached.⁹ The claimant needs to prove on the balance of probabilities¹⁰ that the defendant has been negligent in applying the duty of care,¹¹ and that the negligent conduct caused such harm¹² to the claimant that is not too remote¹³ and that is recoverable.¹⁴ Negligence is understood as a lack of care leading to the breach of duty of care¹⁵ and is not presumed, therefore requiring the claimant to prove the lack of care on the part of defendant¹⁶. With regard to the standard of care, English courts regularly apply the ‘reasonable man’¹⁷ test, according to which a behavior is deemed negligent in cases where a person does not behave in accordance with a standard of care required from the ordinary reasonable man. The duty of care may be expressly inserted into a contract, implied by a contract, regulated (in certain situations) by statute or encompassed in a general duty to take reasonable care for others¹⁸ (as established in *Hedley Byrne v Heller*¹⁹). In cases where the defendant is a professional, a person claiming to be an expert in a specific field or claiming to possess certain skills, a different standard of the ‘reasonable professional’ is applicable.²⁰ The so-called

ER 686; M Simpson *Professional Negligence and Liability* (LLP 2004) 2--33; Stone (n 5) 473.

⁸ *Donoghue v Stevenson* [1932] AC 562.

⁹ See J Steele *Tort Law: Text, Cases and Materials* (Oxford University Press 2007) 109, and, C van Dam *European Tort Law* (Oxford University Press 2006) 367

¹⁰ *ibid* 134; van Dam (n 9) 381.

¹¹ *ibid* 109.

¹² See generally D R Howarth, J A O’Sullivan *Hepple, Howarth and Matthews’ Tort: Cases and Materials* (Butterworths 2000) 414.

¹³ R Stone *The Modern Law of Contract* (Routledge 2009) 461; C Turner *Unlocking Contract Law* (Hodder & Stoughton 2004) 451.

¹⁴ *ibid* 136 and 176.

¹⁵ See *Blyth v Birmingham Water Works* (11 Ex 781, 784, 156 ER 1047, 1049, Ex 1856).

¹⁶ U Magnus, H W Micklitz *Liability for the Safety of Services* (Nomos 2006) 92.

¹⁷ See *Vaughan v Menlove* (1837) 132 ER 490 (CP); V Harpwood *Modern Tort Law* (Cavendish Publishing Limited 2003) 116--117.

¹⁸ See Simpson (n 7) 1--7 and 1--10.

¹⁹ *Hedley Byrne and Co Ltd v Heller & Partners Ltd* [1968] AC 465. See also Simpson (n 7) 1--33.

²⁰ See *Greaves & Co (Contractors) Ltd v Baynham, Meikle & Partners* [1975] 1 WLR 1095

Bolam test adopted in *Bolam v Friern*²¹ refers to an ordinary competent person (or skilled person) exercising a particular profession,²² where proper conduct is set in accordance with the opinion of the body of professionals of that particular profession.²³

2.3 United States

In the United States, two landmark salvage cases have explored the effect of poor salvage performance on the salvor's exposure to liability -- the *Noah's Ark*²⁴ and the *Kentwood*²⁵ cases. In the *Noah's Ark*, the court found the lack of care on the part of a (non-professional) salvor, who caused 'distinguishable' damage (ie damage that would not have occurred but for the action of the salvor) to the salvee's vessel, and held the salvor liable for damages. The *Kentwood* established a rule according to which a professional salvor may additionally be held liable for damages even if the damage caused through his poor performance was not distinguishable. Both decisions were made on the basis of the US law.

In general, according to US legislation and court practice, contractual responsibility²⁶ arises in instances of non-performance or bad performance.

1100; *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172; and *Matrix Securities Ltd v Theodore Goddard (a firm)* [1998] PNLR 290, 322.

²¹ *Bolam v Friern Hospital Management Company* [1957] 1 WLR 582, generally reconfirmed in *Adams v Rhymney Valley District Council* [2000] Lloyd's Rep PN 777, 786.

²² Steele (n 9) 109.

²³ See *Sansom v Metcalfe v Metcalfe Hambleton & Co* [1998] PNLR 542 (CA); van Dam (n 9) 151.

²⁴ *The Noah's Ark v Bentley & Felton Corp.*, 292 F.2d 437, C.A.Fla.1961 (5th Cir. 1963), 322 F.2d 3, 1964 A.M.C. 59.

²⁵ *Kentwood v United States*, 930 F. Supp. 227, 1997 A.M.C. 231 (E.D. Va. 1996).

²⁶ American Law Institute, Restatement (Second) of Contracts, 1 IN NT (1981), current until April 2012 (2012) § 235; G Klass *Contract Law in the USA* (Wolters Kluwer 2010); E A Farnsworth *Farnsworth on Contracts* (Aspen Publishers 2004) 189 ff; and G E Maggs 'Ipse dixit: The Restatement (Second) of Contracts and the modern development of contract law' (1998) *Geo. Wash. L. Rev* 66. See *Ocean Reef Club, Inc. v UOP, Inc.*, 554 F.Supp. 123, 130, S.D.Fla. 1982 and *Magnusson Agency v Public Entity Nat. Company-Midwest*, 560 N.W.2d 20 (Iowa 1997).

In order to succeed in a claim for negligence,²⁷ the claimant needs to establish the existence of a duty of (reasonable) care,²⁸ a breach of that duty, a causal link and damage.²⁹ Negligence³⁰ is understood as a failure to exercise reasonable care in accordance with a standard of care as expected from a reasonable person³¹ under the same circumstances.³² The principle of ‘the reasonable man’³³ was examined in *United States v Carroll Towing Co.*,³⁴ employing a method of assessing the standard of care known as the ‘Hand’ test, according to which a person is under an obligation to behave in accordance with the standard of care required, provided that the cost of taking precautions is less than the harm caused, multiplied by the probability of harm.³⁵ In other words, the test provides a ‘cost-benefit’ analysis aimed at determining whether a specific behavior is negligent, depending on whether the magnitude of risk is greater than the burden of taking precautions.³⁶ As in English law, the US jurisprudence adopted the principle according to which a standard of care required from a professional person is higher than a standard expected from an ordinary person,³⁷ and where special knowledge and skills are taken into consideration when considering whether such a person has performed reasonably.³⁸

²⁷ See generally R A Epstein *Torts* (Aspen Law & Business 1999) ch 1.

²⁸ See J M Church, W R Corbett, T E Richard and J V White *Tort Law: The American and Louisiana Perspectives* (Vandeplas Publishing 2008) 18 and Steele (n 9) 141. See *MacPherson v Buick Motor Co.* (1916) 217 NY 382.

²⁹ See J W Glannon *The Law of Torts: Examples and Explanations* (Aspen Publishers 2005) 69. See *The Gov Ames*, 108 Fed. 969 (5th Cir. 1901).

³⁰ See American Law Institute, Restatement (Third) of Torts (n 28) GP S.4 and Epstein (n 25) 110 ff.

³¹ W L Prosser, W P Keaton *Law of Torts* (West Pub Co 1984) 174; R E Barnett *Contracts: the Oxford Introduction to US Law* (Oxford University Press 2010) 190.

³² American Law Institute: Restatement (Third) of Torts (n 28) 8.

³³ For more on the standard of a reasonable man see K S Abraham, A C Tate *A Concise Restatement of Torts* (American Law Institute Publishers 2000) 33 ff.

³⁴ *United States v Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947).

³⁵ See Glannon (n 39) 73 and Church (n 26) 136. See *McCarty v Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987) and *Conway v O'Brien*, 111 F.2d 611, 612 (2nd Cir. 1940).

³⁶ American Law Institute, Restatement (Third) of Torts (n 28) 31.

³⁷ See for example: *Lasley v Shrake's Country Club Pharm., Inc.*, 880 P.2d 1129, 1132--33 (Ariz. 1994) and *O'Hare v Merck & Co.*, 381 F.2d 286, 291 (8th Cir. 1967).

³⁸ American Law Institute, Restatement (Third) of Torts (n 28) § 12 ‘Knowledge and

2.4 Germany

The German courts affirmed the above mentioned common law practice in several salvage case decisions, such as the one made in the case 6 U 207/83³⁹, according to which a salvor can be held liable for damages caused through poor performance, based on general domestic law liability rules.⁴⁰

The German law regulates basic responsibility arising from contractual obligations in Article 280 of the *Bürgerliches Gesetzbuch* (BGB), and non-contractual obligations⁴¹ in Article 823 BGB.⁴² In the contract law, the claimant must prove that the defendant is responsible for a breach of duty, and it is up to the defendant to prove that the conduct did not amount to intention or negligence in order to escape liability⁴³.

Non-contractual responsibility is set *ex lege*, and the claimant must prove that the defendant harmed one of the protected interests⁴⁴. The conduct is perceived as negligent (Article 276(2) BGB), when it shows a disregard of the standard of care as expected from a reasonable person in the same circumstances.⁴⁵ If a person is part of a specialist group, special knowledge and a higher standard of care is required, bearing in mind the ability to foresee and avoid the harm.⁴⁶

Skills' 141.

³⁹ *Urteil des OLG Hamburg* vom 5.1.1984 (6 U 207/83). A similar more recent case is *ÖLG Karlsruhe Beschluss* vom 2.2.2009 (22 U 3/08 BSch).

⁴⁰ R Herber *Seehandelsrecht: Systematische Darstellung* (Walter de Gruyter 1999) 394--99; H Prüssmann, D Rabe *Seehandelsrecht: fünftes Buch des Handelsgesetzbuches; mit Nebenvorschriften und internationalen Übereinkommen* (C H Beck 2000) 1040 ff, K U Bahnsen *Internationales Übereinkommen von 1989 über Bergung* (Lit. 1997) 214 and H J Puttfarken *Seehandelsrecht* (Recht und Wirtschaft 1997) 318.

⁴¹ See generally N Foster, S Sule *German Legal System and Laws* (Oxford University Press 2010) 485 and M Reimann, J Zekoll *Introduction to German Law* (C H Beck 2005) 205 ff.

⁴² See generally B Markesinis, H Unberath and A Johnston *The German Law of Contract: a Comparative Treatise* (Hart Publishing 2006) 446 ff.

⁴³ See P Zumbansen *The Law of Contract*, in: M Reimann, J Zekoll *Introduction to German Law* (Beck 2005) 146, and, Markesinis (no 52) 444-446.

⁴⁴ See H Koch, *The Law of Torts*, in: M Reimann, J Zekoll *Introduction to German Law* (Beck 2005) 205-211.

⁴⁵ See BGH, NJW (1972) 151.

⁴⁶ See RGZ 119, 397 = JW 1928, 1049 (14 January 1928). See also F J Säcker, R Rixecker *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (C H Beck 2009) § 276; J von

2.5 France

In the *Germaine*⁴⁷ case, a French court explored the salvor's possible negligence as a consequence of alleged poor performance and stated, before ultimately dismissing the case, that a salvor, in accordance with French law, can be held liable for damage caused through intentional or negligent performance.⁴⁸

The French law perceives fault⁴⁹ as an objective violation of the standard of behavior normally required.⁵⁰ According to the *Code civil*, if the defendant is under an obligation of result,⁵¹ in cases of non-performance fault is presumed and it is up to the defendant to show the existence of an external cause⁵² in order to escape liability (the defendant may be held liable even for the slightest negligence⁵³). If the defendant is under an obligation of means,⁵⁴ the main obligation is not focused on a specific result but on the defendant's performance, which needs to be conducted as best as possible, compared with a certain standard.⁵⁵ The standard of

Staudinger, K-D Albrecht, C von Bar, C Baldus and J von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch* (Sellier de Gruyter 2009) § 276 and O Palandt, P Bassege *Bürgerliches Gesetzbuch* (C H Beck 2012) 251 ff.

⁴⁷ *Navire 'Germaine'* Cour d'appel d'Aix-en-Provence (8 juin 1983).

⁴⁸ See Cass Ire civ (13 janv 1998). Villeneau, however, reminds that in the salvage context, as visible from the older cases, the have courts regularly considered various mitigating factors when assessing the alleged salvor's fault. See V Villeneau *Contrat d'assistance maritime* (édn 1990), 'tenant compte des innovations de la Convention de 1989 à titre contractuel' (1990) 236 DMF 289 ff, referring to the case *Sent, Dor et Mansâti* (8 mars 1955) DMF (1955). See also A Montas *Le quasi-contract d'assistance: essai sur le droit maritime comme source de droit* (Librairie Générale de Droit et de Jurisprudence 2007) 88--89, 190, 227.

⁴⁹ See generally E Steiner *French Law: a Comparative Approach* (Oxford University Press 2010) 345 ff.

⁵⁰ See van Dam (n 9) 396--98.

⁵¹ See generally J C B Mohr (Paul Siebeck) *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1983) 147.

⁵² J Bell, S Boyron and S Whittaker *Principles of French Law* (Oxford University Press 2008) 342.

⁵³ P le Tourneau, L Cadiet *Droit de la responsabilité et des contrats* (Dalloz 2000) no 6707.

⁵⁴ See generally Mohr (n 68) 147.

⁵⁵ F Terré, P Simler and Y Lequette *Droit civil: les obligations* (Dalloz 2009) no 6.

care is usually defined as the standard of a good father of the family, and if the defendant is professing to possess certain specialist skills the standard is elevated to the standard of a 'reasonable prudent businessman'.⁵⁶ Under the obligation of means, it is up to the claimant to show the existence of fault on the part of the defendant⁵⁷. In addition, the French legal doctrine generally classifies fault as an intentional conduct, under the segment of delicts or, as a non-intentional conduct, which is generally considered to be a quasi-delict,⁵⁸ based on lack of due care expressed through negligent or careless behavior.⁵⁹ The Code regulates basic contractual responsibility in Articles 1137 and 1147 and non-contractual responsibility in Articles 1382--1383⁶⁰.

3 Categorization of salvage services

3.1 Nature of salvage services

As reconfirmed by Article 6 of the 1989 Convention, the parties to a salvage agreement are generally free to regulate their relationship, provided that the mandatory provisions of international and domestic norms are respected. The salvors, before commencing the salvage operation, usually offer their services under one of the commonly used standard salvage contract forms,⁶¹ and it is up to a potential salvee either to accept the service or risk suffering potential damage resulting from the lack of salvage assistance. Salvage services regularly consist of different activities undertaken by salvors. Apart from preventing harm to a salvee's object (eg extinguishing fire, preventing collisions, sinking, washing ashore), a salvor is often asked

⁵⁶ See Cass 3e civ (7 March 1978) Bull civ III No 108.

⁵⁷ See Bell (n 69) 343.

⁵⁸ See generally M Fabre-Magnan *Droit des obligations: responsabilité civile et quasi-contrats* (Presses Univ de France 2010) 14, 88.

⁵⁹ See generally Mohr (n 68) v, vol XI Torts ch 2: 'Liability for one's own act' 5.

⁶⁰ See generally van Dam (n 9) 9.

⁶¹ Magnus (n 19) 573.

to perform additional services (eg partial repairs of hull and machinery, supply of goods) and is generally expected to watch over the salvaged object (eg vessel, cargo, equipment) until handed over to a responsible person. Depending on the nature of services actually performed, salvage contracts can be categorized into a number of different types of contracts, most usually into the contracts for services, contracts for work (and labor) and, in some instances, custodian contracts. Such categorization is significant as it establishes different methods of assessing the parties' obligations, and the effect of salvor's liability in instances of non-performance or bad performance. The service contracts in general require a certain level of performance, the so-called 'obligation of means' principle, according to which a salvor is required to use a certain level of diligence when performing, this performance being considered as the salvor's main duty (ie to use best efforts or best endeavours to save the vessel).⁶²

In the work, labor and custodian contracts, a salvor is required, in accordance with the 'obligation of result' principle, to achieve a certain result (eg to repair the vessel, to refloat a vessel or to protect the salvaged object). Unlike a standard service contract where the conductor (salvee) bears the risk of failure and the locator (salvor) can expect payment provided he has performed as expected,⁶³ the 'no-cure, no-pay' principle, as promulgated by the 1989 Convention and many standard salvage contract forms, prevents payment in the absence of a result, stipulating the aleatory nature of a salvage service.⁶⁴

This leads to the conclusion that a salvage service should be categorized as a contract for work, where the locator bears the risk of failure and the main object of any contract is a positive result.⁶⁵ The exception, again, can be seen in the special compensation instrument where, irrespective of the result as understood under the no-cure, no-pay principle,

⁶² A Fiale *Diritto della Navigazione Marittima e Aerea* (Gnippo Editorials Esselibri -- Simone 2006) 292.

⁶³ *ibid* 290.

⁶⁴ E Volli 'Riflessioni sulla natura giuridica dell'istituto dell'assistenza e salvataggio' (2004) *Il Diritto Marittimo* 3 829--31 and W T Brough 'Liability salvage: by private ordering' (1990) 19(1) *Journal of Legal Studies* 100.

⁶⁵ I H Wildeboer *The Brussels Salvage Convention* (A W Sythoff 1965) 48--49, 134--41.

a salvor can recover expenses provided he has rendered environmental services, irrespective of whether such services were successful,⁶⁶ leading to the conclusion that such service is to be considered as a contract for services.⁶⁷ What also needs to be taken into consideration is the fact that, in practice, a salvage operation often consists of numerous activities, involving the utilization of various materials and equipment, and employing a number of third parties.

Therefore, whether a salvage contract, owing to its particular nature and utilization in practice, can be understood as a nominated contract,⁶⁸ or whether a salvage service can only be classified under one or more of the previously mentioned (or other) contracts, is a matter of domestic law construction.⁶⁹

3.2 Types of salvage services

In US law, a salvage contract is usually perceived as a contract for services,⁷⁰ although some reported salvage cases indicate the use of a contract of employment, where a payment is owed regardless of success of the operation.⁷¹ In English law, a salvage contract is usually understood as a contract for work and labor⁷² or a contract for services.⁷³ In addition, English practice

⁶⁶ J L P Begines 'El contrato "Lloyd's Open Form of Salvage Agreement 2000"' (2002) 20 *ADM* 117; A Antonini *Trattato Breve di Diritto Marittimo* (vol III 2010) pt 5 'Le obbligazioni e la responsabilità nella navigazione marittima'.

⁶⁷ See generally S Jelinić *Spasavanje ljudskih života i imovine na moru* (Sveučilište u Osijeku 1979) 178 ff; M J C Gomes *O Ensino do Direito Marítimo* (Almedina 2004) 217--218.

⁶⁸ J L G Garcia, J M R Soroa *Manual de Derecho de la Navegacion Maritima* (Marcial Pons 2006) 748 and Begines (n 69) 117--118.

⁶⁹ H R Baer *Admiralty Law of the Supreme Court* (Michie Co 1979) 575; G Camarda *Il soccorso in mare* (Giuffrè Editore 2006) 196--97, 361 ff.

⁷⁰ See *The Bayamo*, 171 F. 65 (C.C.A. 5th Cir. 1909).

⁷¹ See *The Camanche*, 75 U.S. 448, 19 L. Ed. 397, 1869 WL 11454 (1869), and especially *Canadian Government Merchant Marine v U.S.*, 7 F.2d 69 (C.C.A. 2d Cir. 1925) (payment allowed despite no result having been achieved).

⁷² F D Rose *Kennedy and Rose: Law of Salvage* (Sweet & Maxwell 2010) 515.

⁷³ G Brice *Brice on Maritime Law of Salvage* (Sweet & Maxwell 2003) 493--94. See generally on service contracts S Whittaker 'Contracts for Services in English Law and in the DCFR' in R Zimmerman *Service Contracts* (Mohr Siebeck 2010).

takes into consideration the fact that a salvage contract may contain elements of a contract for the supply of services,⁷⁴ a contract for the sale of goods⁷⁵ and a contract for the supply of goods.⁷⁶ The custodian element (ie a salvor in possession of a vessel and goods on board) is also recognized as a part of a salvage contract.⁷⁷ In German law, a salvage contract⁷⁸ can be construed either as a contract for services⁷⁹ or as a contract of work⁸⁰. According to some German salvage cases, it is additionally possible to construe a salvage service as a hiring contract⁸¹ and a benevolent intervention into another's affairs.⁸² In French law⁸³ the distinction between a contract of work and a contract for services can be expressed through a specific obligation required by each contract.⁸⁴ In addition, it is possible to construe salvage services as custodian contracts⁸⁵ or, similar to the German older case law, as a benevolent intervention into another's affairs.⁸⁶

⁷⁴ J Chitty, A G Guest and H G Beale *Chitty on Contracts* (Sweet & Maxwell 2004) ch 39.

⁷⁵ Rose (n 89) 499--500.

⁷⁶ *ibid* 501--505; Brice (n 90) 493--95.

⁷⁷ See *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 and *The Winson* [1982] AC 939.

⁷⁸ See generally U Magnus *Bergungsverträge in Staudinger BGB* (Neubearbeitung 2011) Rn 122 123.

⁷⁹ Markesinis (n 52) 153.

⁸⁰ F Kastenbauer 'Bergung und Hilfeleistung in Seenot von Sportschiffen' (1980) 13(A) *VersR Heft* 305--14; Rabe (n 50) 1019; L F Schrock 'Das International Übereinkommen über Bergun' (28 April 1989) 9 *TranspR Heft* 303 and K H Thume 'Gemischte Verträge mit Gemischtbetrieben' (1994) *TranspR* 383.

⁸¹ See 'Urteil' (26 March 1996) X ZR 100/94 (BGH Frankfurt am Main); R Saller 'Die Rechtsnatur des Autokran-Vertrages' (1995) 4 *TranspR* 145--46.

⁸² D A Kley *Hulp-en Bergloon* (M Witt & Zonen 1904) 104 ff.

⁸³ See generally Bell (n 55) 417 ff, Montas (n 51) 281 ff and at 331, G Ripert *Droit maritime* (Tome III Éditions Rousseau 1950) 140; B Fauvarque-Cosson, D Mazeaud *European Contract Law: Materials for a Common Frame of Reference* (Sellier 2008) 35 ff and M Remond-Gouilloud *Droit maritime* (A Pedone 1988) 198--99. See also A L Deschamps 'La convention internationale de Londres sur l'assistance maritime et le droit français des contrats' (1993) 533 *DMF Sommaire* 684--85, referring to C Com (14 octobre 1997) *Navire 'Tevera'* DMF 577 1080 (décembre 1997).

⁸⁴ E Clive, C von Bar *The Common European Law of Torts* (Oxford University Press 2000) vol 1 bk III 1:102 673 and Deschamps (n 86) 693.

⁸⁵ F Moussu-Odier 'La responsabilité de l'assistant' (1975) *Annuaire de Droit Maritime et Océanique* 301-303.

⁸⁶ *ibid* 303; R Rodière, E du Pontavice *Droit maritime* (DaIloz 1997) 457 ff; Ripert (n 100) 142--43; and Wildeboer (n 82) 42.

4 Due care and best endeavours

4.1 Historical background

The wording of the 1989 Salvage Convention refers to the salvor's duty of care, which created an undesired effect as to the choice of the term used, since the practice preferred and still prefers the use of best endeavours, and neither the Convention nor the relevant preparatory work on the subject matter provided a definitive answer as to the relationship of these two terms, their contents and definition, or the prevalence of the one over the other. This is especially important when comparing the liability of professional as opposed to non-professional salvors, and applying sanctions in cases of breach of duty.

A duty of care can be defined as a standard of behavior subject to contractual and non-contractual regulation and case practice,⁸⁷ based either on the legal norms enforced as *ius cogens* (ie the standard of due care present in Article 8[1a and 1b] of the 1989 Salvage Convention)⁸⁸ or, on the contractual stipulations, either expressly stated or implied owing to the nature of a specific contractual relationship. Bearing in mind that salvage services were not always provided almost exclusively in a contractual form, the scope and understanding of the salvor's duty of care evolved independently of contractual stipulations, during the second half of the 19th century.⁸⁹ A good example can be found in the *Cape Packet*⁹⁰ case, where it was determined that a salvor is under a general duty to exercise ordinary skill and prudence equal to the behavior of persons conducting similar activities.⁹¹ At that time, a salvor was required

⁸⁷ Fauvarque-Cosson (n 100) 3.

⁸⁸ See generally Simpson (n 9) 1--27.

⁸⁹ J L Rudolph 'Negligent salvage: reduction of award, forfeiture of award or damages?' (1975--1976) 7 *J. Mar. L. & Com.* 420 ff. See *The Blaireau*, 6 U.S. (2 Cranch) 240 (1802); *The Duke of Manchester* 6 Moore (1847) PC 100; *The Marie* 7 PD 203; and *The Capella* (1892) P 70.

⁹⁰ *The Cape Packet* (1848) 3 W Rob 12.

⁹¹ See *The Lockwoods* (1845) 9 Jur 1017 and *The Magdalen* (1861) 31 L.J. Adm. 22.

to exercise ordinary skill and prudence inherently present in the group of persons (common sailors) performing salvage operations⁹² and his performance was to be judged according to the circumstances of each case.⁹³

The standard has been ‘enhanced’ in modern times, emphasizing the ‘professional skill and knowledge’ criteria as required from modern day professional salvors. The 1989 Salvage Convention applies the term due care, whereas most standard salvage contract forms in use utilize the term best endeavours. However, despite a theoretical possibility of a state of affairs under which the norms of the 1989 Convention would regulate salvage operations in one way, whereas the private law would utilize other rules and methods (such as is the (exceptional) example of the SCOPIC clause), it needs to be stressed that the drafting procedure of the new convention was heavily influenced by the provisions and clauses of the commonly used standard salvage contract forms, and that such contracts usually originate from jurisdictions that are parties to the 1989 Salvage Convention. As will be analyzed below, it can be argued that the norms of the Convention and the standard contract forms are interdependent and complementary.

4.2 Standard(s) utilized by salvage contracts

Most standard salvage contract forms currently in use⁹⁴ differ from the

⁹² See *The Perla* (1857) Swab 230, 166 ER 1111; *The Neptune* (1842) 1 W Rob 297, 300.

⁹³ See *The Cato* (1930) 37 Lloyd’s Law Rep 33.

⁹⁴ For information on older standard salvage contract forms see the International Shipowners’ Association (INSA) ‘Salvage contract “no cure -- no pay” 1974’, ‘Common Market Form of Salvage Agreement’ and the French standard salvage contract ‘L. D’; see also P Stanković *Spašavanje Poseban Institute našeg prava pomorsko i unutrašnje plovidbe* (Sveučilište u Zagrebu 1975) 164--68; J G R Griggs *Aspects of Salvage* (Redazione ed amministrazione 1965) 211--217, 321--30; G Darling, C Smit *LOF 90 and the New Salvage Convention* (Lloyd’s of London Press Ltd 1991) 116--117. For the French Maritime Assistance Contract (1990 edn), see Villeneuve (n 65) and N Hesiter *La notion d’assistance en mer* (1975) 347. For the Yugoslavian Standard Form 84 (no-cure, no-pay, recognising to a certain extent the liability salvage principle) see Stanković (ibid) 78 and Appendix No 20 and for the Bugsig Contract Form see W Schimming *Bergung und Hilfeleistung im Seerecht und im Seeversicherungsrecht* (Versicherungswirtschaft 1971) 162 and Darling (ibid) 99 ff.

1989 Salvage Convention's standard with regard to the choice of the term defining the main salvor's obligation. Under clause A of the LOF 2011, salvors agree to use best endeavours to save the salvee's property, and under clause B the same standard is expected regarding the efforts to prevent or minimize the damage to environment. The Scandinavian form applies the same standard in clause 1, the Chinese form follows such practice in clause 1 and clause 4, and the same can be observed in clause 1 of the JSE 91 form, as well as in the Turkish Open Form (TOF) in Article 2(1). The standard form Yacht Salvage Contract makes no special mention of the protection of the environment as regards the standard of care, whereas regarding property, the salvor is expected to endeavour to protect the salvee's property (clause 1). MARSALV refers back to the best endeavours principle, but as with the previously mentioned standard Yacht form, it concentrates solely on the standard of care to be employed in an effort to salvage property. The MAK form mentions no particular standard of care.

4.3 The 1989 Convention's standard

Article 8 of the 1989 Salvage Convention regulates duties of the salvor and the owner or master of the vessel.⁹⁵ Article 8, paragraphs (1a) and (1b) stipulate that a salvor: '*... shall owe a duty to the owner of the vessel or other property in danger: (a) to carry out the salvage operations with due care; (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment*'. The 1989 Convention incorporated a standard of care (Article 8) as an expected model of behavior. Despite the fact that a particular salvor's standard of care was already present in the standard salvage contract forms, even prior to the adoption of the 1910 Convention, the 1989 Convention clearly enables a remedy for such a breach, even in the absence of a contractual setting (as discussed below).

⁹⁵ For a focused analysis of salvors' and salvees' duties according to Article 8 of the 1989 Salvage Convention see N J J Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991--1992) 16(1) *Tul. Mar. L.J.* 5--6.

However, the choice of the formulation of the standard of care expected from a salvor as incorporated in the 1989 Salvage Convention, led to a variety of proposals and discussions during the drafting procedure.⁹⁶ What proved to be particularly troublesome during the drafting process was the fact that a number of proposals called for the parallel utilization of the terms due care and best endeavours, casting serious doubt as to the meaning, definition and interaction between the two terms. According to one interpretation made available during the discussions,⁹⁷ the two use a different method of assessment; ‘due care’ refers to an objective criterion of the standard of care and ‘best endeavours’ incorporates a subjective criterion encompassing a duty to employ all available means during a salvage operation.⁹⁸ Other opinions⁹⁹ supported the notion that due care and best endeavours are to be understood as a different measure of the same standard of care. Since many delegations were wary of the possibility that the incorporation of two different standards could produce unwanted confusion,¹⁰⁰ the due care standard was chosen

⁹⁶ See Report by the Chairman of the International Sub-Committee ‘Document Salvage 5/IV-80’ in CMI *The Travaux Préparatoires of the Convention on Salvage 1989* (2003) 219; CMI ‘The Montreal Draft Salvage Convention’ (Winter 1985) CMI News Letter; ‘Document Salvage-18/II-81’ and LEG 52/4-Annex I: Montreal Draft, available in CMI *Travaux on Salvage* (ibid) 219--20; LEG 56/9 Report on the Work of the 56th Session, available in CMI *Travaux on Salvage* (ibid) 231. As noted by some delegations see LEG 52/9 Report on the Work of the 52th Session, available in CMI *Travaux on Salvage* (ibid) 227 and LEG 56/9 (ibid) 231--32.

⁹⁷ CMI ‘The Montreal Draft Salvage Convention: the work of the Legal Committee of IMO at its 56th session’ (Spring 1986) CMI News Letter 10.

⁹⁸ See R Shaw, M Tsimplis *The Liabilities of the Vessel in IML Southampton on Shipping Law* (Informa 2008) 173 (the standard of best endeavours seen as a ‘subjective measure of care’, while the standard of due care seen as a ‘standard of professional care and skill’).

⁹⁹ For more on this issue see B Makins, P McQueen and B White ‘Salvage and the environment’ (1987) 4 *MLAAZ Journal* 227 and LEG 52/9 (n 99) 227.

¹⁰⁰ See LEG 54/7 Report on the Work of the 54th Session of the Legal Committee, available in CMI *Travaux on Salvage* (n 99) 227 and Committee of the Whole of the Diplomatic Conference to Change the 1910 Salvage Convention in 1976 available in CMI *Travaux on Salvage* (ibid) 217. See LEG 57/12 (ibid) 232--33. Also see A Mandaraka-Sheppard *Modern Admiralty Law With Risk Management Aspects* (Cavendish Publishing Limited 2001) 706--709 (concerning the appearance of the term best endeavours in the 1989 Convention).

regarding both the protection of property and the prevention of marine pollution.¹⁰¹ However, no definition of the standard utilized by the Convention has been made available,¹⁰² thus allowing (or rather, forcing) the courts and arbitral panels to define the term¹⁰³, subject to the applicable national law regulation and case law.¹⁰⁴

4.4 The content of duty of care

The standard of care is particularly important in service contracts, where the main obligation of a service provider is stipulated as an obligation of means and where, owing to a certain level of uncertainty as to the possibility of reaching a specific result (ie a situation where it is not certain whether a vessel can or cannot be salvaged), the focus is placed on the performance of certain activities, and a service provider is under an obligation (duty) to exhibit a certain level of effort and diligence (care) during the performance of that service. A breach of care will not result as a consequence of a failure to reach a specific result but from the lack of diligent performance as expected from a service provider. A duty of care, therefore, refers to an express or implied duty to perform in accordance with a certain standard of care as normally (reasonably) expected. The standard of care, understood as a measure of a specific duty to take care, is determined by specifying the level of knowledge and diligence required during the performance of certain activities (professional expectation). This level of knowledge and diligence is usually referred to as an obligation to take due care, to endeavour to behave in a certain way or to use (all) reasonable or best endeavours during the

¹⁰¹ See LEG 56/9 (n 99) 229.

¹⁰² Brice (n 90) 488 and F Berlingieri *Le Convenzioni Internazionali di Diritto Marittimo e il Codice della Navigazioni* (Giuffrè Editore 2009) 522 ff.

¹⁰³ For more information on LOF arbitral decisions concerning the standard of care see Lloyd's List *LOF Digest* (Lloyd's List 2005) 63.

¹⁰⁴ For more on the issue of applicable law see J Trappe 'L'arbitrage en matière d'assistance maritime' (1989) 18(7) *European Transport Law*, especially at 732 ff; P Mankowski *Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht* (Mohr 1995); Bahnsen (n 50) 317.

performance of a particular service.¹⁰⁵

In this context, due care is to be understood as a standard of care requiring behavior comparable to that of an ordinarily reasonable (prudent) person, aimed at preventing an occurrence of harm to others, under the same or similar circumstances. This is an objective evaluation of behavior, based not on a subjective understanding of the circumstances and conduct required, but on an objective comparison of the actual (poor/non-) performance with a performance as expected from a reasonable person.¹⁰⁶ If a person is claiming to possess certain skills and knowledge, the standard of care required is higher, when compared with the expectations from a non-professional person. In this context, best endeavours can be understood as due care applicable for professionals or, in other words, as an enhanced version of due care with specific (elevated) levels of diligence expected. In the salvage context, due care can be perceived as a minimal standard of behavior, applicable in any circumstance (ie non-professional salvage), whereas the term best endeavours is utilized when a salvage service is performed by a professional salvor through a standard salvage contract form incorporating such a standard. Whereas under due care a (usually non-professional) salvor is required to (or commits himself to endeavour to) exhibit such knowledge and diligence as expected from a reasonably prudent sailor offering assistance at sea, according to the best endeavours criteria, a (usually professional) salvor is expected to perform in accordance with the behavior of a reasonably prudent salvor, including (employing) all possible (all reasonable) actions (means) that can be undertaken under the given circumstances.¹⁰⁷ The limitation of such performance is based on reasonably assessed boundaries (ie a departure from the activities based on the certainty of a

¹⁰⁵ For a general comparison of ‘best endeavours’, ‘all reasonable endeavours’ and ‘reasonable endeavours’ see K Lewison *The Interpretation of Contracts* (Sweet & Maxwell 2011) 739--41.

¹⁰⁶ For the salvage context see L S Chai *Une introduction au droit maritime Coréen* (Pau-Aux-Marseille 2006) 215 and Y Baatz *Maritime Law* (Sweet & Maxwell 2011) 256.

¹⁰⁷ See *IBM United Kingdom v Rockware Glass Limited* [1980] FSR 335 and *Bloor v Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979); Clive (n 87) 208 ff.

commercial failure or a commercial write-off).¹⁰⁸

Another term sometimes employed in the salvage forms is the reasonable endeavours standard, which, in accordance with the general case law practice, requires the utilization of at least one reasonable effort aimed at a successful performance, thus decreasing the level of commitment as required under the term best endeavours.¹⁰⁹

4.5 The interaction between the terms

According to Brice,¹¹⁰ the term best endeavours was introduced into the 19th century contracts in order to clarify that a salvage service was focused on the expected performance, rather than on a specific result. The first issue of LOF (LOF 1908) incorporated a duty to take best endeavours to save the vessel and cargo on board (clause 1).¹¹¹ According to the general case practice in the first part of the 20th century,¹¹² such a duty included all possible activities necessary to complete the service, unless such activities are unreasonably harmful to a service provider. Another standard salvage contract form, the International Salvage Union Ltd's Agreement

¹⁰⁸ See generally *Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234, *Pips (Leisure Prods) Ltd v Walton* (1981) EGD 100 and *Jet2.com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417. In a salvage context, Gaskell (n 112) at 323 enumerates case law examples where it is reasonable for a salvor to stop the service, referring to clause G of LOF 2000. Similarly, concerning clause H of LOF 2000 see Brice (n 90) 547--48; Bahnsen (n 50) 343; and M Kerr 'The International Convention on Salvage 1989: how it came to be' (1990) *Int'l & Comp. L.Q.* 512.

¹⁰⁹ See *Rhodia International Holdings Limited v Huntsman International LLC* [2007] EWHC 292; *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 and *LTV Aerospace and Defense Co. v Thomson (In re Chateaugay)*, 186 B.R. 561, 594 (Bankr. S.D.N.Y. Aug. 23, 1995). Also see RE Scott, G G Triantis 'Anticipating litigation in contract design' (2006) 115 *Yale L.J.* 835--36; K A Adams 'Understanding "best efforts" and its variants (including drafting recommendations)' (2004) *Prac. Law.* 50; Farnsworth (n 24) § 7.17 and § 7.17b. For a case concerning the term all reasonable endeavours (the recent case law practice seems to favour the opinion that there is no substantive difference between that term and the term best endeavours) see *Trecom Bus. Sys., Inc. v Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997).

¹¹⁰ Brice (n 90) 547.

¹¹¹ Courtesy of Mr Mike Lacey, Secretary General of the ISU, email correspondence (17 August 2012).

¹¹² See *Sheffield District Railway Co v Great Central Railway Co* (1922) 27 TLR 451.

Salvage Contract 1897,¹¹³ incorporated an obligation to endeavour to (to use due care to) save the vessel and her cargo (clause 1). Both forms predated the 1910 Salvage Convention, but the drafters of the 1910 Convention decided against incorporating any specific duties into the text of the 1910 Convention.¹¹⁴

Gaskell is of the opinion that, in salvage related matters, the term best endeavours requires a salvor to do more than a reasonable salvor would do under the same circumstances, and further considers the term due care to be below the standard required when contracting under best endeavours.¹¹⁵ Kerr states that the application of the 1989 Convention's much lower standard of care enables an easier method of avoiding negligence claims¹¹⁶. Based on such notions, it can be argued that the use of a more onerous standard in standard salvage contract forms places more responsibility on a salvor acting through contractual relations than that generally expected under the convention's standard. If it is not clear which standard of care to apply (a term present in the 1989 Convention or a term present in a standard salvage contract form), Gaskell suggests that tribunals should apply such understanding of salvor's duty which is most appropriate for encouraging salvage operations.¹¹⁷ It seems, however, that such wide discretion would allow too much space for arbitrary decisions leading to further confusion regarding the expected performance of salvors in general. Brice theorizes that it is possible to define the best endeavours standard as nothing more than exercising due care,¹¹⁸ as many standard forms presuppose the application of national law, subject to the 1989 Convention. Montas warns that a general salvor's obligation to act with due care is already present in domestic (French) legislation,¹¹⁹

¹¹³ Courtesy of Mr Mike Lacey, Secretary General of the ISU, email correspondence (6 August 2012.)

¹¹⁴ J Villeneau *Répertoire pratique de l'assistance* (Librarie Générale 1952) 290.

¹¹⁵ Gaskell (n 112) 41 and Garcia (n 71) 747.

¹¹⁶ Kerr (n 125) 511--512.

¹¹⁷ Gaskell (n 112) 48.

¹¹⁸ Brice (n 90) 549; Gaskell (n 112) 42.

¹¹⁹ Montas (n 51) 86; I Arroyo 'Comentarios al Convenio de Salvamento de 1989' (1993) 10 *Anuario de Derecho Marítimo* 92 ff.

subject to the professional liability regulation and case practice. Accepting such reasoning, however, neglects the fact that the standard salvage contract forms support a different standard of performance when compared with the convention and that a different service is expected from a professional salvor as opposed to a non-professional salvor, which is also evident from the cost of the service.

5 The effect of the 1989 Salvage Convention

5.1 Environmental salvage

Unlike the 1910 Salvage Convention, where the public policy principle of encouraging salvage services and the protection of life at sea were the main objectives to be achieved through the adoption of the international instrument, the main drive of the 1989 Salvage Convention was centered on an effort to provide greater incentives towards protection of the marine environment.¹²⁰ Whereas the 1910 Convention was, in principle, founded on the core relationship between a salvor and a salvee, the 1989 Salvage Convention makes third-party interests a vital part of the salvage operation. According to one opinion, in the hierarchy of the 1989 Convention's salvage objectives, the salvage of property (Article 12) comes in third place, preceded first by the saving of life (Article 10) and, secondly, by the preservation of the marine environment (Article 14).¹²¹

In addition to the practice as already established through private law salvage contracts,¹²² the Convention's rule introduced a wider application of the effort to protect the marine environment. The private law contrac-

¹²⁰ See CMI 'Presentation of the Draft Salvage Convention' made at the Legal Committee of IMCO (December 1981) CMI News Letter 2.

¹²¹ LEG 54/7 (n 117) point 32 at 228.

¹²² J B Wooder 'The new salvage convention: a shipowner's perspective' (1990) 21 *J. Mar. L. & Com.* 81--83; P Coulthard 'A new cure for salvors? A comparative analysis of the LOF 1980 and the CMI Draft Salvage Convention' (1983) 14 *J. Mar. L. & Com.* 52 ff.

tual obligations¹²³ referred to specific operations that, as a consequence, lead to the protection of the environment as a part of a general effort to save a vessel and property on board. The 1989 Convention clearly separates the two objectives by referring to two separate duties of care: one regarding the salvage operation *in generali sensu* and the other regarding the protection of the environment *in speciali sensu*. This, however, does not suggest that the duty to protect the marine environment stands out as a separate, public duty, irrespective of a salvage operation. Article 8(1b) clearly stipulates that such an obligation is only relevant during a salvage operation, and Article 8 is only applicable for the relationship of private parties (ie a salvor and a salvee).

5.2 Direct application of the Salvage Convention

Unlike the position in the 1989 Salvage Convention, the 1910 Salvage Convention refrained from regulating any specific duties of care. Looking back at the drafting procedure of the 1910 Convention, the little discussion that was held around this particular issue reveals that the delegations were of the opinion that salvors are under a general duty of care present in domestic non-contractual and, to a certain extent, contractual liability rules, and that there is, therefore, no need to implement an express duty in an international instrument.¹²⁴ In this sense, Rodière considers Article 8 to be superfluous,¹²⁵ as the general domestic liability rules already contain sufficient provisions with regard to the mandatory general duty to take care. The drafters of the 1989 Convention, however, considered it necessary to incorporate such duties into the text of the Convention in order to confirm that they are not the exclusive subject of contractual relations.¹²⁶ For example, the standard form Yacht Salvage Contract

¹²³ Such as the example of a duty to use best endeavours in preventing an escape of oil as present in the LOF 1980.

¹²⁴ Villeneau describes the drafting procedure of the 1910 Convention, stipulating that this issue of incorporating a standard of care was never thoroughly considered; see J Villeneau (n 131) 290 ff.

¹²⁵ Rodière (n 103) 458.

¹²⁶ Committee of the Whole (n 103) 244--45 and International Conference Committee of the Whole, LEG/CONF.7/3 (20 April 1989), available in CMI *Travaux on Salvage* (n

utilizes the term ‘to endeavour to’ in reference to the protection of the salvee’s property, whereas the MARSALV form utilizes the term ‘best endeavours’ in reference to the protection of the salvee’s property. No mention is made of the duty to protect the environment, although both forms refer to Articles 13 and 14 of the 1989 Convention in respect of compensation. As US law is valid for both forms (and the US is a contracting party to the 1989 Convention), the mandatory duty to protect the environment as envisaged by the 1989 Convention is directly applicable regarding the environmental services performed during a salvage operation contracted under these forms.¹²⁷

5.3 The issue of primacy

Bearing in mind that one of the criteria for assessing a salvage award as set out in Article 13(1b) includes an effort to protect the environment, the lack of the exhibited skill and care in combating a threat to the environment may be perceived as a negative factor for the assessment of a salvage award. Based on this assumption, it is possible to interpret the salvor’s specific duty to preserve the marine environment (when possible and necessary) as being included within the scope of the general duty to act with due care while rendering salvage services. According to that hypothesis, there are no grounds to define the environmental services as a separate existing entity, irrespective of the general salvage service and requiring an extra effort. However, as the duty to protect the marine environment during a salvage operation has been pronounced mandatory (unlike the general duty to take due care) and clearly annotated as a specific duty required during the performance of salvage services, it could be argued that this duty has primacy in a salvage operation and that the interests of the salvee’s property have a secondary value in the overall salvage effort.

99) 242--43. In addition, it would be most uncommon to incorporate a mandatory provision regarding a specific obligation during the performance of salvage services, but at the same time omitting at least to stipulate a general duty of care required during the overall performance of a salvage service.

¹²⁷ A R M Fogarty *Merchant Shipping Legislation* (Informa Law 2005) ch 8 at 8.39. The same can be observed regarding the MAK form.

The scope and availability of sanctions regarding the breach of a general duty to take due care during the performance of salvage services is significantly broader when compared with sanctions available in cases of breach of duty to take due care during the performance of environmental services (Article 18 as opposed to Article 14[5] of the Convention, as briefly discussed in later text). Based on this comparison, it could be argued that the former is more important than the latter. Such a conclusion would suggest that salvors will continue to be primarily concerned with the salvage of property (owing to the scope of sanctions available to the salvee in cases of poor performance) and will undertake environmental services only in exceptional cases (ie when this is profitable).

5.4 Inequitable terms in salvage contracts

In certain instances, contracts may establish a standard of care and obligations different from those as understood to be within the concept of negligence liability in the law of tort (non-contractual liability).¹²⁸ The parties are, as stated earlier, free to contract out of the 1989 Salvage Convention (Article 6[1]), but if such contracts contradict mandatory rules (Article 7) of the Convention (as in the example of Article 8), certain contractual clauses or the entire contract may become void. Although most salvage contracts allow remedies in damages for the breach of duty of care,¹²⁹ there are a few examples where contracts include the so-called ‘knock-for-knock’ or ‘hold harmless’ clauses, stipulating an exclusion of liability for, *inter alia*, negligent conduct.¹³⁰

For example, according to clause 19.3 of the SALVCON 2005,¹³¹ breach of contract, negligence or any other type of fault will not produce the effect of liability and compensation, and the damage so sustained is for the sole account of the party suffering the damage. This particular contract is, however, utilized by salvors when hiring the services of third

¹²⁸ Markesinis (n 52) 14.

¹²⁹ Gaskell (n 112) 14.

¹³⁰ Darling (n 111) 123.

¹³¹ International Salvage Union Lumpsum Sub-Contract and SALVHIRE 2005 contracts, both available at www.marine-salvage.com.

parties. However, the TOF, unlike any other previously observed standard salvage contract forms, incorporates a clause (Article 3(4) of the TOF¹³²) relieving a salvor from liability. Furthermore, Article 6(1) of the TOF creates a duty on the salvee to provide remuneration for salvage services. Thus, the salvee's duty to pay the salvage award is confronted with the lack of salvor's obligation to act with due care to prevent the harm from occurring, as there are no appropriate sanctions for such behavior.¹³³ As the TOF stipulates Turkish law as applicable and as Turkey is as of yet still not a party to the 1989 Salvage Convention, the possible invalidity of such a clause can only be determined by comparing this clause with Turkish general non-contractual liability rules. Taking into consideration that the new Turkish Commercial Code¹³⁴ incorporates the material provisions of the 1989 Convention, the problematic clause present in Article 3(4) should be considered as void.

The above described problematic clause, if present in a contract governed by the national law of a jurisdiction party to the Convention, would be void not only by virtue of Article 7 of the 1989 Convention, but also due to its incompatibility with general non-contractual/tort regulation and general case practice. Such is the example of the French standard salvage form (not in active use anymore) that incorporated a so-called 'draconian' clause, according to which a salvee was responsible for all damage arising out of a salvage operation.¹³⁵ However, it must be emphasized that the existence of a 'hold harmless' clause does not necessarily exempt a salvor from liability *in toto*. Villeneau reported¹³⁶ a Dutch case occurring in 1925,¹³⁷ where a reduction of salvage remuneration was made despite the fact that a salvage contract contained a 'hold harmless' clause, as the salvee made a claim in tort and succeeded in proving the existence

¹³² Darling (n 111) 102.

¹³³ *ibid* 111--114 (the German form and the French form incorporated a similar clause as that found in the TOF).

¹³⁴ The Turkish Commercial Code, No. 6102.

¹³⁵ Moussu-Odier (n 102) 305.

¹³⁶ Villeneau (n 131) 275.

¹³⁷ Commercial Court of Antwerp (13 July 1925) (Jwr Aimers 1925 at 280; Dor T XII at 60).

of fault on the side of the salvor, which in effect rendered the clause void.¹³⁸ Since the 1910 Salvage Convention did not contain any provisions regarding the duty to take reasonable care, the Dutch court applied the general domestic non-contractual liability provisions, and found such a clause to be in direct contradiction with a general duty to take (due) care.

5.5 Breach of duty to protect the environment

During the discussions preceding the adoption of the 1989 Convention, the French delegation proposed¹³⁹ a provision to sanction a salvor who failed to make an(y) effort to preserve the environment.¹⁴⁰ The majority of delegations considered this option as being already present within the draft article concerning special compensation. Although the French delegation insisted that the option other delegations were referring to covered the application of sanctions strictly in relation to the award of special compensation and not the salvage award, it was generally perceived that recognition of such a provision would diminish the positive aspects of the special compensation instrument in general. Although the 1989 Convention is clear regarding the salvor's duty to perform with due care when attempting to prevent or minimize damage to the environment, it is arguable whether a salvor is under a duty to render environmental service whenever such a threat arises, or only when actually engaged in such services. It is possible to argue, bearing in mind the provisions of Article 14(5) of the Convention, that a situation in which a salvor could easily engage in environmental activities during a standard salvage operation without increased costs or putting himself in significant danger, but omits to do so, falls outside of the scope of the Convention. Or, in other words, the sanction in Article 14(5), available for the breach of duty stipulated in Article 8(1b), cannot be utilized in instances where no actual environmental services were provided and where a salvor does not claim

¹³⁸ See generally J Beatson, A Burrows and J Cartwright *Anson's Law of Contract* (Oxford University Press 2010) 197; Camarda (n 86) 362.

¹³⁹ See LEG/CONF.7/24 (n 117) 436. For more on this issue see Berlingieri (n 105) 591 ff.

¹⁴⁰ For a lengthy discussion on this issue see LEG/CONF.7/VR.126--28, LEG/CONF.7/VR.163--65 and LEG/CONF.7/VR.170--71 (n 117) 436--43.

special compensation. This leads to the conclusion that a salvor can be negligent through non-performance when failing to engage in environmental services, or may be negligent during the performance of environmental services but at the same time successful in the performance of salvage services in general and thus earning a right to a salvage award (Article 13), without having to answer for poor (non-) performance of environmental services.¹⁴¹

Having in mind the overall aim of the Convention, this is a rather limited remedy. Had the French proposal been accepted, it would have been made clear that a mandatory duty to protect the environment is applicable in all instances of a salvage operation, and that a failure to, at least, attempt to render environmental services (non-performance) when required, or a failure to perform adequately (provided a negligent performance can be ascertained), may result in the application of sanctions available through (a modified) Article 18 (salvor's misconduct) or (a modified) Article 14(5).¹⁴² The predominant opinion among delegations present at the drafting discussion considered, however, that the key purpose of Article 14 was to attract more environmental services not through an introduction of sanctions but through a promise of a reward in the case of environmental services being successfully rendered.

6 Conclusion

Keeping in mind the differentiation between due care and best endeavours discussed above, it could be argued that the general standard of due care is more suitable for instances of non-professional salvage services, and it is likely that this is exactly what the drafters of the 1989 Salvage Convention had in mind when considering the provisions of Article 8. Ac-

¹⁴¹ See the speech of the Japanese delegate in LEG/CONF.7/VR.93-103, available in CMI *Travaux on Salvage* (n 117) 242 and the speech of Mr Jacobsson before the International Oil Pollution Compensation Fund in LEG/CONF.7/VR.60, W/1500e/d1 2--3. See also Bahnsen (n 50) 142.

¹⁴² Shaw (n 115) 223; Camarda (n 86) 323.

ording to such a hypothesis, the Convention established a minimal requirement of the standard of care, which is, at the same time, *de facto* mandatory, based on the established salvage principles in practice and domestic law regulations, and applicable to all instances of salvage activities performed either by professional or non-professional salvors in both contractual and non-contractual salvage operations.¹⁴³

The parties are free to agree the utilization of a more enhanced level of care, and courts and arbitral panels are free to employ a higher standard of care when considering the performance of a professional salvor, irrespective of the contractual stipulations (or the lack of them). Had the general duty of care been pronounced mandatory, it would have been more difficult to determine the applicable standard of care in cases when a different standard of care is present in a salvage contract subject to the 1989 Convention's applicability. In such a scenario, the *ius cogens* standard of the 1989 Convention would necessarily have to prevail. With this in mind, the choice of a proper standard regarding the mandatory duty to protect the environment is problematic, as the 1989 Convention refers to 'due care', whereas salvage contracts usually utilize 'best endeavours'. A salvor could argue that the mandatory provision of the 1989 Convention should prevail and that his environmental conduct should be reviewed in accordance with the standard included in the Convention. This implies, for example, that the term best endeavours used in the LOF contract should be evaluated in accordance with the due care requirement in the 1989 Convention. Should such an assumption be correct, an odd situation could arise where a salvor would be required to act in accordance with a contractual obligation to use best endeavours during the performance of a (general) salvage operation, whereas with regard to the activities undertaken to protect the environment during the same operation a different (lower) standard would apply, despite the fact that the contractual stipulation concerning the environmental activities refers to the best endeavours standard.

¹⁴³ Especially when recalling that a general duty to take due care is regularly present in both the contractual and non-contractual domestic law regulations. See W D White *Australian Maritime Law* (The Federation Press 2000) 253.

Such reasoning directly contradicts the main purpose of the 1989 Convention to enhance the means of protecting the marine environment, as the salvor would be required to use less care when protecting the environment than when protecting the salvee's property. A reasonable interpretation would be to interpret the mandatory provision of Article 8(1b) as a minimal standard applicable in all contractual and non-contractual salvage operations, subject to stricter degrees of the standard of care present in contractual provisions. In support of this notion, the recent revision of the LOF 2011 reconfirmed the best endeavours standard, indicating that the industry is interested in maintaining high professional standards of conduct and is prepared to offer a high-performance service.

On the basis that best endeavours are more onerous than due care, as suggested above, the overall duty under the best endeavours standard should correspondingly incorporate the overall duty as expected under the term due care, thus fulfilling the requirements of the mandatory provisions of Article 8(1a and 1b) of the 1989 Convention. This is in accordance with the possibility as anticipated in Article 6(1) of the 1989 Convention, according to which the parties have an opportunity to contract (expressly or by implication) otherwise, including a possibility to agree on a more stringent obligation on the part of a salvor, subject not to interpretation and evaluation of the Convention's terminology (due care), but to the interpretation of the term best endeavours in practice.

Thus, the standard of best endeavours, if stipulated in a contract, should take precedence in all contractual settings, irrespective of the (non-professional) nature of the service provided, and should additionally apply to professional salvors irrespective of the existence of a contract (in a non-contractual salvage setting). To be more precise, the standard of due care as stipulated by the 1989 Convention serves as a general 'reminder' of the existence of a duty of due care in salvage operations, and is subject to further clarification by the domestic statute and/or case law determinations regarding the standard of care as expected from a reasonable person (ie a non-professional salvor) or a reasonable professional person (e a professional salvor).