

Implementing the 1989 Salvage Convention: Casualty or Cure?

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Introduction

The International Convention on Salvage, 1989 ("the Convention") comes into force worldwide on 14 July 1996. The international community's reaction to the Convention has been overwhelmingly positive. The UK has already given domestic effect to it, and several other maritime jurisdictions, including Canada, Australia, the USA, South Africa and the Scandinavian countries, are in the process of doing so (see generally the Merchant Shipping (Salvage and Pollution) Act 1994 (UK), now incorporated into the Merchant Shipping Act 1995 (UK); the Canada Shipping Act (RS, c S-9), as amended by the Canada Shipping Act 1993; and the Navigation Act 1912 (Cth), as amended by the Transport Legislation Amendment Act 1995 (Cth)).

New Zealand, too, has signalled its intention to give domestic effect to the Convention by enacting Part XVII of the Maritime Transport Act 1994 ("the MTA"), and in particular s 216, which provides that the Convention "shall have the force of law in New Zealand". Unlike the coastal shipping issue which dominated the passage of the MTA, implementing the Convention was regarded as a relatively straightforward and uncontroversial opportunity to update traditional salvage law and enhance New Zealand's protection of the marine environment (see, eg, statements by R Storey (1993) 535 NZPD 15244; M Williamson, (1994) 541 NZPD 2093).

However, a year after the brouhaha surrounding the MTA has subsided, and four years after the Ministry of Transport first recommended that "New Zealand accede to the International Convention on Salvage, 1989, following the incorporation of its provisions in New Zealand law" (*Review of the Shipping and Seamen Act 1952* (Wellington, 1992) p 99), Part XVII of the MTA has still not been brought into force, and New Zealand has still not ratified the Convention. A more recent Ministry of Transport discussion paper

(*Harbours Management: A Review of the Harbours Act 1950* (Wellington, 1995) p 40), while still supportive of the Convention, recommends that its implementation be delayed until the wreck regime in the Harbours Act and Part IX of the MTA has been revised. The Maritime Safety Authority seems to be of like mind (see *The Maritime Transport Act 1994: Your Guide to the Legislation* p 30: “[t]he new rules will not apply until the existing wreck law (tied closely to salvage) is revised”). In short, the implementation process has been put on hold.

Against this background, it seems timely to consider three questions: (1) how will implementation of the Convention regime affect existing New Zealand salvage law; (2) should implementation of the Convention be further delayed; and (3) will Part XVII of the MTA, as currently drafted, implement the Convention effectively?

The Convention regime

The Convention fundamentally realigns salvage law. It moves away from the traditional “no cure – no pay” principle, which focused narrowly on the value of salvaged property as the primary measure of success. The Convention adopts a broader, more balanced approach which takes into account both commercial and environmental considerations. Only a thumb-nail sketch of the more significant aspects of the Convention regime can be provided here; more detailed discussion can be found in the references at the end of this article.

The Convention definition of “salvage operations” (art 1) will significantly extend the traditional concept of maritime salvage. First, art 1(a) defines salvage operations as “any act or activity undertaken to assist a vessel or any other property in danger” (my emphasis). Success, in the traditional sense of preservation of valuable property, is therefore no longer a requisite element of the Convention definition of salvage. That does not mean that success is wholly irrelevant; a “useful result” is still required before salvage operations qualify for a reward under art 13, and the measure of the salvor’s success affects the quantum of that reward. However, even unsuccessful salvage operations will be eligible for special compensation under art 14 if they prevent or minimise environmental damage. Secondly, the Convention jettisons the ill-conceived traditional distinction between maritime property, which could be a legitimate object of salvage (ships, their equipment, cargo and freight, wrecks, and, by statutory extension, aircraft) and non-maritime property, which could not (eg, buoys and navigational aids: see *The Gas Float*

Whitton (No 2) [1897] AC 337). The Convention allows for maritime salvage of all property, subject to three exceptions. The Convention does not apply to:

- (i) property “permanently and intentionally attached to the shoreline” (art 1(c) – eg wharves, jetties, submarine cables and pipelines);
- (ii) fixed or floating platforms or mobile offshore drilling units on location engaged in “exploration, exploitation or production of sea-bed mineral resources” (art 3); and
- (iii) warships and other non-commercial state-owned ships, unless States decide otherwise (art 4 – in New Zealand, the Convention will apply to salvage of (and salvage by) New Zealand warships and state-owned ships, subject to the restrictions on actions *in rem* in the Crown Proceedings Act 1950: ss 217, 218 MTA).

Thirdly, art 1(a) of the Convention provides that salvage may take place “in navigable waters or in any waters whatsoever”. This represents a significant extension of the geographical ambit of maritime salvage in jurisdictions like the UK which do not recognise salvage in non-tidal waters (see, eg, *The Goring* [1988] AC 381 (HL); Hastings “Non-tidal Salvage in the United Kingdom: *Goring, Goring, Gone*” (1988) 19 JML&C 473). As New Zealand does not restrict salvage to tidal waters, this part of the Convention restates existing New Zealand law (ss 113, 114 MTA; and s 4(4)(b) Admiralty Act 1973, read with the s 2 definition of “New Zealand territorial waters”).

Art 6(2) of the Convention will grant a blanket authority to masters to conclude salvage contracts on behalf of ship owners, and to masters and owners to conclude salvage contracts on behalf of cargo interests. This provision reverses the decision of the English Court of Appeal in *The Choko Star* [1990] 1 Lloyd’s Rep 516 that a master has no authority to bind cargo interests to salvage agreements without their express consent, or when acting as an agent of necessity. Art 6(2) will be welcomed by carriers, as it relieves them of the irksome responsibility of having to track down cargo owners and haggle with them over salvage terms in often fraught circumstances. Cargo interests might well have a more jaundiced view of art 6(2). While they are protected from fraud, collusion or misrepresentation by art 7 of the Convention, which gives the courts broad powers to annul or modify inequitable salvage contracts, cargo interests may nonetheless find themselves bound (and perhaps inconvenienced) by compulsory foreign arbitration, jurisdiction or choice of law clauses in salvage agreements concluded on their behalf, but without their knowledge. As discussed below, however, it is possible to contract out of virtually all Convention provisions. Cargo interests with sufficient bargaining power may therefore choose to exclude the operation of art 6(2) in their carriage contracts.

Articles 12, 13 and 14, which have been described as the heart of the Convention, significantly qualify the traditional “no cure – no pay” principle, and enhance awards to recognise salvors’ efforts in preventing and minimising environmental damage. Art 13 provides for a reward which is modelled on the traditional salvage award: it is not available unless the salvor has produced a useful result (art 12(2)); it cannot exceed the salvaged value of the vessel or other property; its quantum is fixed with reference to the traditional list of factors (see Davies “Salvage on the New Zealand Coast” [1982] NZLJ 39, 41). To these traditional factors, art 13(1)(b) adds “the skill and efforts of the salvors in preventing or minimizing damage to the environment”, which courts must take into account as a criterion for enhancing, or decreasing the reward. Equally significantly, art 13(1) expressly requires courts to fix salvage awards “with a view to encouraging salvage operations”. In the past, New Zealand salvage awards have sometimes been parsimonious by international standards (see, eg, *Foster v The Yacht “Dolphin Queen”*, HC Rotorua, AD 1/88, 8 February 1991, noted [1993] NZLJ 46; but cf *Blair v The Ship “Golden Star 1”*, HC Greymouth, CP1/92, 1 July 1994, for an appropriately generous approach). The wording of art 13 will hopefully encourage courts to fix liberal salvage awards, and embolden appellate courts to intervene whenever awards are simply too stingy to comply with the policy directive contained in art 13.

Art 14 breaks entirely new ground in general salvage law by allowing courts to compensate properly efforts which may have averted an environmental disaster, but have produced an inadequate salvage fund – whether because of the extreme dangers or difficulties involved, or perhaps because the salvaged property was so noxious or hazardous that it ultimately had to be destroyed. Under art 14(1), a salvor attempting to save a vessel or cargo which poses a threat to the environment is entitled to special compensation equivalent to the salvor’s expenses, regardless of whether salvage attempts were successful. If salvage operations do prevent or minimise damage to the environment, art 14(2) provides that the court may add to the salvor’s art 14(1) special compensation an increment of up to 30% of the salvor’s expenses; or, if the court “deems it fair and just”, an increment of up to 100% of the salvor’s expenses. This provision, which is not happily drafted, represents a compromise reached after lengthy debate; it is apparently intended that the higher level of increment will be awarded only in exceptional cases. The definition of “salvor’s expenses” in art 14(3), and in particular the issue of exactly what constitutes a fair rate for equipment and personnel used in salvage operations, is the subject of ongoing litigation in the UK (*The Nagasaki Spirit* [1995] 2 Lloyd’s Rep 44 (HC), noted (1995) 9 Oil &

Gas Leg & Tax Rev 361; *Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd*, CA, 21 December 1995, noted (1996) 2 Int Mar Law 47). While the ship owner and cargo interests contribute to the art 13 reward *pro rata* according to salvaged values, special compensation under art 14 is recoverable from the ship owner only. Special compensation under art 14 must be set off against any reward under art 13: art 14 is designed to top up inadequate art 13 rewards, rather than to permit double recovery of salvors' expenses (see art 14(4)). The relationship between arts 13 and 14 is further clarified by a "Common Understanding" of the Diplomatic Conference attached to the Convention, which states that courts are not required to fix an art 13 reward up to the maximum salvaged value of the vessel and other property before assessing special compensation under art 14. In other words, art 14 is not only triggered in cases where an art 13 reward exhausts the salvaged fund; courts are entitled to calculate and award special compensation in all cases where the art 13 reward is lower than the appropriate art 14 compensation.

The Convention itemises the salvor and salvee's contractual duties towards each other: both parties have a duty to prevent or minimise environmental damage; the salvor must carry out salvage operations with due care, and seek assistance from, and accept the intervention of, other salvors where reasonable; and the salvee is required to cooperate with the salvor, and accept redelivery of salvaged property when reasonably requested to do so (art 8). The Convention also preserves existing rights of coastal states involved in salvage operations (art 9); confirms that mere performance of a pre-existing contract "entered into before the danger arose" will not attract compensation under the Convention (art 17); provides that salvors' compensation may be reduced or withheld due to "fault or neglect" or "fraud or other dishonest conduct" (arts 18; 14(5)); bans compensation for salvage operations conducted in the face of the salvee's "express and reasonable prohibition" (art 19); and provides for sundry procedural matters (arts 20-27).

When brought into force, the Convention will apply to all judicial and arbitral proceedings brought in New Zealand in respect of matters covered by it (art 2). Notwithstanding art 2, art 6(1) allows parties to contract out of the Convention regime expressly or by implication, save for those provisions dealing with the courts' powers to annul or modify inequitable salvage contracts, and the parties' duties to prevent or minimise environmental damage, which are mandatorily applicable. Claims brought under the Convention are time-barred if not instituted within two years after salvage operations have terminated, unless the defendant agrees to an extension (art 23). By virtue of art

6(1), the parties can presumably contract out of art 23 and agree to a longer (or shorter) limitation period.

Delayed implementation

As discussed above, the Ministry of Transport has decided to delay implementation of the Convention. This decision seems to be premised on the close relationship between wreck and salvage law; the need for revision of the existing wreck regime in Part IX of the MTA; and the perception that an updated wreck regime would usefully supplement the Convention's new salvage regime. These premises are undoubtedly correct: there is a significant overlap between wreck and salvage law, in the sense that most "wet salvage" involves wreck raising and removal; and the existing wreck regime should certainly be updated to take into account the restructuring of the Ministry of Transport and Harbour Boards, the creation of port companies and the Maritime Safety Authority, and the passage of the MTA (as well as international developments – for a recent comparative survey, see Tetley "Special Legislative Rights and Wreck Removal" (1995) 55 Louisiana LR 861).

However, it does not follow that the proposed revision of the wreck regime – which, in the context of the Harbours Act review, could take several years to complete – should further delay implementation of the Convention. The wreck regime, which is largely concerned with ownership and protection of wrecks, administrative matters, and navigational safety, is conceptually distinct from salvage law, which focuses on contractual rights and duties, compensation, and environmental protection. Moreover, the Convention provides a complete and self-contained regime which can be successfully implemented without having to revise wreck law (as the UK has demonstrated: Part IX of the Merchant Shipping Act 1995 implements the Convention while still retaining a wreck regime that derives largely from the Merchant Shipping Act 1894).

The Convention deserves a much higher priority than it has thus far been accorded; it will modernise and rationalise existing salvage law, and, more importantly, provide salvors with a powerful commercial incentive to protect New Zealand's marine environment. As such, the Convention will complement and strengthen environmental protection measures in the Resource Management Act 1991, the Conventions enacted in the Marine Pollution Act 1974, and MARPOL (once New Zealand's embarrassingly belated implementation of that Convention has been completed). The Convention should therefore

be implemented as soon as possible after necessary amendments to the MTA and other statutes, which are discussed below, have been enacted.

Effective implementation

The MTA provides in s 216 that the English text of the Final Act of the Convention, which is attached to the MTA as Schedule 6, “shall have the force of law in New Zealand”. This method of enacting the Salvage Convention (which has also been adopted in the UK, Canada, and Australia) is vastly superior to the technique of “translating” international Conventions into domestic statutes, which often produces interpretation problems and substantive inaccuracies (cf Part VII of the MTA, which is supposed to give domestic effect to New Zealand’s international obligations under the 1976 Limitation Convention, but which substantially distorts its provisions). However, while the general method of enactment adopted in the MTA cannot be faulted, Part XVII fails to deal with several specific policy and drafting issues. These issues are significant, and have been addressed by other jurisdictions implementing the Convention. Based on this overseas experience, it is submitted that the following amendments are required to implement the Convention successfully in New Zealand:

- The relationship between the existing salvage and wreck regime in Part IX of the MTA and the new Convention regime in Part XVII should be clarified. First, s 114 MTA, which provides for “a reasonable amount of salvage” to be paid for property salvage in certain circumstances, should be repealed. This provision would be rendered otiose by arts 13 and 14 of the Convention, which should determine compensation in all future salvage cases. Moreover, s 114 would conflict with the new regime by imposing a narrower geographical ambit on salvage than the Convention definition. Secondly, s 113 MTA, which deals with life salvage, should be amended and integrated into the Convention regime. Art 16 of the Convention entitles life salvors to a fair share of any reward or special compensation payable for property salvage. However, the Convention does not provide for situations where the total fund is inadequate to compensate life salvors. For that reason, s 113(3), which allows the Minister of Transport to top up compensation for life salvage where appropriate, should be retained and integrated into Part XVII. The current s 113(1), which is drafted in equivalent terms to s 114, should be repealed, for the reasons given above. Thirdly, the

“salvage” and “salvage services” definitions in s 98 MTA should be amended, pending the review of the wreck and salvage regime in Part IX. The amended definitions should make it clear that all references to salvage in Part IX must be interpreted in accordance with the Convention regime.

- The salvage-related definitions in Part VII of the MTA should be amended to bring them in line with the Convention regime. In particular, s 86(2)(a), which provides that “claims for salvage” are not subject to limitation of liability under the 1976 Limitation Convention, should be amended to exclude expressly both art 13 and art 14 claims from the ambit of the Liability Convention.
- References to salvage in s 97(1)(b) of the MTA should be deleted. This currently provides for a mandatory two-year limitation period for salvage claims, subject only to the High Court’s discretion to extend it. This conflicts with the rather more flexible limitation of action in art 23 of the Convention, which may be extended by the defendant, or by the parties’ agreement under art 6(1). (Cf the Merchant Shipping Act 1995 (UK), which repeals such references in the equivalent provisions in the Maritime Conventions Act 1911 (UK).)
- Jurisdiction and enforcement issues in respect of Convention claims should be addressed. In particular, s 4(1)(i) of the Admiralty Act 1973 should be extended to include all salvage claims made under the Convention. Otherwise, it could be argued that admiralty claims against the ship owner for art 14 special compensation do not come within the jurisdiction, since they are not “claims in the nature of salvage” as traditionally defined (s 20(2)(j) Supreme Court Act 1981 (UK), and s 27(1)(f) County Courts Act 1984 (UK) have been amended to meet precisely this concern). Further, either the MTA or the Admiralty Act should expressly provide that compensation for life salvage under art 16 of the Convention continues to rank ahead of all other salvage claims (as s 113(2) MTA currently provides). While art 20 of the Convention preserves the status of salvors’ existing maritime liens, this would not adequately protect life salvage claims, which enjoy a preferential statutory priority rather than maritime lien status *per se*.

- The two Attachments to the Convention, which are currently omitted from Schedule 6 of the MTA, should be included and given the force of law in New Zealand. The Attachments were concluded to resolve potential interpretation difficulties. As discussed above, Attachment 1 contains a “Common Understanding” clarifying the relationship between arts 13 and 14. Attachment 2 contains a resolution to the effect that special compensation paid by the ship owner under art 14 cannot thereafter be recovered from cargo interests as a general average claim. New Zealand courts are arguably entitled to interpret the Convention by reference to the Attachments regardless of whether they are included in Schedule 6, because they form part of the *travaux préparatoires*. However, omitting the Attachments increases the risk that they will be overlooked, or not be accorded their proper significance. Moreover, s 215 MTA, which defines “Convention” as “the International Convention on Salvage, 1989, as set out in the Sixth Schedule” (my emphasis), may assist technical arguments that the Attachments have no legal status and should be ignored. Significantly, the UK, Canada and Australia have all enacted the Attachments.
- Finally, Part XVII of the MTA should be amended to indicate clearly New Zealand’s decision in respect of four reservations to the Convention allowed under art 30. At present, Part XVII is silent on this matter, which can only lead to confusion. Art 30 enables New Zealand to exclude the Convention from operating:

- “(a) when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;
- (b) when the salvage operations take place in inland waters and no vessel is involved;
- (c) when all interested parties are nationals of [New Zealand]; [or]
- (d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.”

Arts 30(1)(a) and (b) were drafted largely to allay the English delegation’s fears that recognising salvage in inland waters would result in a flood of spurious Convention claims involving the recovery of diamond rings dropped into lakes, ponds, or even bathtubs, the dousing of galley fires in house-boats, and the hauling of car wrecks from rivers and canals. Unsurprisingly, the UK has exercised both reservations, and

has included express provisions to that effect in its Act. Australia has adopted a similar approach. It is strongly submitted New Zealand should not follow suit, for a number of reasons. First, a blanket exclusion of salvage claims in situations (a) and (b) cannot be logically justified. Is a fire on board a yacht less dangerous merely because it breaks out in the middle of Lake Taupo, rather than on the Hauraki Gulf? If the blaze is extinguished by the skipper of a nearby yacht, is that necessarily more meritorious than if it is doused from the wharfside (or from the water)? Secondly, there is a real risk of unjust and absurd consequences if claims listed in (a) or (b) are denied out of hand (as is amply illustrated by *The Goring*). Thirdly, a proliferation of undeserving inland water salvage claims seems unlikely. If it occurs, the courts should be able to distinguish between unremarkable services which call for no more than remuneration of basic expenses, and especially meritorious claims which deserve a large reward or special compensation. Arts 13 and 14 of the Convention are flexible enough to provide appropriate results. Fourthly, defining the situations excluded under art 30(1)(a) and (b) would be problematic: even if “inland waters” can be demarcated, how does one sensibly define “vessels ... of inland navigation”? Finally, since New Zealand maritime law currently recognises admiralty claims for salvage services performed in inland waters, exercising these reservations would directly restrict the existing admiralty jurisdiction of the Courts. There are no compelling grounds for tampering with the admiralty jurisdiction in this way.

The Ministry of Transport would not seem to support the art 30(1)(c) reservation (see *Harbours Management* discussion document, cited above, p 40). That view is wholeheartedly endorsed. Applying a separate salvage regime to operations involving only New Zealand parties would be confusing, unnecessarily complicated, and illogical, and would undermine the principle of uniformity of maritime law.

The art 30(1)(d) reservation, by comparison, should definitely be exercised in order to avoid a conflict between the Convention salvage regime, and existing cultural property protection regimes in the Antiquities Act 1975 (the definition of “antiquity” in s 2(1)(h) covers certain historic wrecks) and the Historic Places Act 1993 (again, s 2(1)(a)(ii) classifies some historic wrecks as “archaeological sites” which may not be disturbed), as well as international obligations to protect archaeological and historical objects (see, eg, UNCLOS, arts 149, 303). Part XVII MTA should be amended to make it clear that the Convention regime does not apply in New Zealand to historic wrecks or other maritime cultural property.

Selected references

For the English text of the 1989 Salvage Convention and Attachments, see Brice "The New Salvage Convention: Green Seas and Grey Areas" [1990] LMCLQ 32, 54-63, or Gaskell "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990" (1991) 16 Tul Mar LJ 1, 77-90.

For general discussion of the 1989 Convention, see Allen "The International Convention on Salvage and LOF 1990" (1991) 22 JML&C 119; Binney "Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention" (1990) 65 Washington LR 639; Brice *Maritime Law of Salvage* (2 ed, Sweet & Maxwell, London, 1993; 1995 Supplement); Brice "Salvage and the Marine Environment" (1995) 70 Tulane LR 669; Forte "Salvage Operations, Salvage Contracts and Negotiorum Gestio" [1993] Juridical Review 247; Kerr "The 1989 Convention: Expediency or Equity?" (1989) 20 JML&C 505; Kerr "The International Convention on Salvage 1989 – How it Came to Be" (1990) 39 ICLQ 530; Wooder "The New Salvage Convention: A Shipowner's Perspective" (1990) 21 JML&C 81.

For discussion of specific domestic implementation issues in respect of England, South Africa and Scandinavia, see Gaskell "The Enactment of the 1989 Salvage Convention in English Law: Policy Issues" [1990] LMCLQ 352; Staniland "Should the 1989 International Convention on Salvage be Enacted in South Africa?" (1993) 110 SALJ 292; and *Regeringens proposition 1995/96:16 "Ändrade regler om bärgning"* <http://www.jit.se/offtryck/p959616.html>, *NOU 1994: 23 "Berging"* <http://lu62gw.sds.no/nou/1994-23/index.htm>.