ASSISTANCE, LAST RESPONSE TO FIGHT AGAINST THE POLLUTION

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Before submitting my text, it appears me important to reveal my experience about this specific topic. Son of a maritime pilot, I was lucky to be immersed very early in the maritime world and to be in position to appreciate its complexity. The maritime world is a varied world where different interests and different outlooks meet. Next, I was lucky to be able to study in two countries that have a legal approach entirely different (France, country of Civil Law; England, country of Common Law). These studies were finalized by a thesis on Salvage and on the Convention of April 28th 1989. This thesis was largely completed by my working experiences (Legal assistant in France and in England, legal adviser for insurers hull and cargo, legal adviser for a Protection & Indemnity Club). My talk may appear tendentious or intentionally polemical but however it remains the outcome of my thoughts.

INTRODUCTION

Historical elements:

Salvage was originally an activity of "wreckers". In the Middle Age, the term " salvors" covered the persons who were entitled over any type of properties or goods left or abandoned on the seabed or on the beaches. A codification of the Rules applicable to the rights or the obligations of the "salvors" was very soon adopted. This codification is known as the "Oleron Rules". During a long part of the Marine History, Salvors were not at all guided by very friendly goals. At that time, it was clear that any vessel passing close over a rocky costs was potentially at risk to be "wrecked". During the 18th and 19th, with the increase of the exchanges by sea transport between the leading countries and their colonies, Salvage started to adopt its current profile: a salvage was the operation rendered by a ship to another ship who was in danger or in distress.

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On the early 20th century, the various maritime lawyers of the developed nations founded the Comite Maritime International (CMI). The goal of this Association was to edict common Rules covering the various fields of the marine activity. The CMI adopted various conventions in 1910. A specific one was enacted regarding Salvage. The aim of this Convention was to standardize the various rules that applied to Salvage. This Convention had governed any dispute arising out of salvage operations for more than 80 years.

The two main features of this Convention were:

- Salvage operation was exclusively an operation conducted and performed for the benefit of private interests, and,
- The remuneration of the services rendered were payable only if these services had been useful. This second rule is known as the "No Cure No Pay" principle.

After the Second World War, the development of the port services led the creation of larger tug fleets. In fact, very few companies were at that time specialized in offshore towing. In France, the only real one who could have pretended to have some expertise in this field at was the Union des Remorqueurs de l'Ocean.

The services rendered by these towage companies to vessels in distress were exclusively towage services. The Salvors were consequently paid for the celerity and the expertise shown during their interventions. Their remuneration was mainly assessed upon the value of the properties saved.

Following the first important pollution casualty in the sixties, some companies were sufficiently wise or visionary enough to understand that for the next decades, Salvage will not be any longer limited to a mere towing exercise. These companies understand that in the future, Salvors would be in the future requested to provide assistance to more complex casualty involving various equipments and materials other than a tug but also a quite deep organisation permitting to ensure a prompt and efficient result of their intervention.

Salvage would also not be limited to the physical intervention in respect of the ship but also to the cargo permitting to prevent or reduce the threat to the environment. Therefore, in order to successfully meet such a challenge, very heavy investments were made by some towage companies. Due to such an intelligent move, companies like SMITTAK is today in position to globally respond to any type of casualty on any sea of the world.

The second main development, which occurred after the Second World War, was the increasing concern of the States in respect of pollution. Following the Amoco Cadiz, the French government decided to implement and

organisation permitting to promptly intervene with its own tugs and equipments in case of any casualty representing a threat of pollution to the French costs.

Salvage was therefore not any longer a private operation performed for the exclusive benefit of private interest but also an operation made for the public interest.

The International Maritime Organisation (IMO) following the catastrophe of Amoco Cadiz entrusted to the CMI a study regarding the needs to modify or enact a new convention covering the new challenges of Salvage.

This study led to the adoption of the Convention, 28th April 1989. This convention and the contracts drafted after this convention have to be admitted as the Salvage Rules for the present century.

I- The state of the current salvage law: the Convention of April, 28th 1989

The Convention of 1989 has for interest to adopt a contemporary point of view of the salvage operations. This point of view takes into account the technical but also the economic realities of the Salvage industry.

1) Salvage and not maritime salvage

The Convention of 1989 has for interest to adopt a contemporary point of view of the salvage operations. A salvage operation covers any type of operation made to save any type of property but also to prevent or reduce any type of pollution. The property can be in danger at sea or any other type of waters.

a) Consequences for the property saved

- The extension of the Salvage concept:

With the previous convention, a salvage operation was covering only the services rendered by a ship to another ship. Article 1 (a)[1] of the new convention does not restrict the salvage operation to the ones performed to the benefit of a ship. Now, a "salved" property could be a ship but also any type of vessels or crafts as well as any type of property regardless of the situation of this property: the property can be afloat or not, sunk or not. This convention will have a great impact for any country making a distinction of regimes between salvage and

law of the wrecks, there is not any longer distinction between these two types of property. For example, once this Convention will be finally and fully adopted by France, some specific laws covering the operation performed to a wreck will need to be modified.

A broader approach of the notion of risks is made by the new convention. It was traditionally considered and defended that a salvage operation was exclusively covering the services rendered to a vessel in danger. This notion of danger was analysed from the salved angle: the vessel was in danger because its situation was risky for her and she could be damaged or lost. The 1989 convention has slightly re-orientated this approach. The danger is not exclusively linked to the danger suffered or potentially suffered by the property. The danger may also cover the danger, which is caused or potentially caused by the property in danger.

Last but not least the environmental factor: It may be easily understood that under the previous regime, the environment was not at all taken into account. The new aim of the 1989 convention is to ensure that all steps taken by the salvors will permit to kill or at least reduce the effect of the casualty on the environment. The convention has therefore inserted a definition of threat to the environment[2]. This definition is my opinion the most sensible one bearing in mind that this definition is based on the biological consequences of damage to the environment. This approach permits to cover the broadest scenarios possible and include all kind of marine pollution.

b) Consequences for the salvor

- The Salvor is not only the rescuer of assets but also indirectly, the potential rescuer of responsibilities.

  Under the previous regime, it was considered that the services were useful only for the property saved, ignoring also the very positive consequences for the owner of the property if the operation had been successful. Therefore, the concept of salvage of responsibilities had always been quite strongly rejected. Although the new convention does not expressly recognise or refer to this notion of salvage of liability, it should be underlined that it was quite frequently indirectly referred to this concept during the preparatory

[1] Article 1 (a): "*Salvage operations means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.*"
[2] Article 1 (d): "*Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major accidents.*"

work of the convention. The undersigned would not be very surprised that once the 1989 Convention incorporated within the French maritime Legal system, French arbitrators may not hesitate too long to directly refer to this concept when assessing the Salvors' reward.

- The concept of salvage is no longer limited to a material service involving necessarily two ships. It covers all kinds of services, material or intellectual. Therefore, it could be legitimately envisaged that a salvage service could now be rendered to a vessel even if the salvors are not physically on the scene of the casualty or even on board the property in danger. This element may have some impact regarding the technical developments of the future performance of the salvage operations.
- The methods of payment for the services rendered are no longer exclusively subordinated to a useful result. The new remunerations allow in the long-term the economic survival of professional salvors.[3]

  As per the previous conventions, a salvor was entitled to claim a reward only and only if the services he performed put the ship in a safer position she was before his intervention. This principle is known as the No cure No Pay Principle. Although, this principle is maintained and even confirmed with the New Convention, the redactors of the Convention organised the possibility for the Salvors to have a specific safety net covering a large part of the expenses incurred by the Salvors even in the absence of any useful result of the operation.

  The New convention also offers quite expressly the possibility that public authorities directly perform salvage operations. Although, the undersigned considers that it was quite legitimate to reserve such type of intervention, one may regret that the Convention does not fully assimilate Private and Public Salvors.

[3] Article 14

1. *If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the Owner of that vessel equivalent to his expenses as herein defined.*
2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimised damage to the environment, the special compensation payable by the Owner to the salvor under paragraph 1 may be increased up to a maximum of 30 % of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1 may increase such special compensation further, but in no event shall the total increase be more of 100 % of the expenses incurred by the salvor.*
3. *Salvor's expenses for the purpose of paragraphs and 2 means the out of pocket expenses reasonably incurred by the salvor in the salvage operations and a fair rate for the equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13 1 (h) and (J).*
4. *The total compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.*
5. *If the salvor has been negligent and has thereby failed to prevent or minimise damage to environment, he may be deprived of the whole or part of any special compensation due under this article.*

The Public Salvors will always intervene with the backing of a State, which will not automatically accept to endorse same standard of responsibilities than the private ones. This difference of regime may create some complications during the performance of the salvage operations.

Additionally, one may legitimately think that the absence of any specific procedure organising a constructive cooperation between private and public salvors will prevent to ensure that the most efficient result is obtained.

2) Private operation carried out in common interest

The interest of the Convention of 1989 is to have an approach based on the target of the salvage operation and not by the circumstances, which imposed this operation. Salvage is more and more a private shipping operation serving the public interest.

a) A constructive approach of the private sector

The Convention of 1989 was better grasped by the private sector. The private sector quite quickly understood the necessity to ensure the continuity of the institution despite the changes caused by the Convention. The Convention created a peculiar payment mode for the services rendered in the absence of any useful result of the operation. The legal difficulties caused by this special remuneration (*Nagasaki Spirit*) [4] bring the owners of the sea properties (Ships and commodities Owners), their underwriters (Hull/P&I Clubs) and the salvors (International Salvage Union) to adopt a system different from the system decreed by the Convention but more viable economically: the SCOPIC Clause.

The Scopic Clause should be legally analysed as an additional contract, which may be incorporated in any salvage contract. However, at the present time, only the LOF contract has taken into account in its last version, the possibility of such incorporation.

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

[4] *Lord Mustill of the House of Lords in this case gave a very restrictive interpretation of the word " fair rate" indicated at Article 14.3 of the Convention. In his opinion, the word fair rate was excluding any idea of profit. In other word, only the effective costs of the material used by the salvor during the operation should be taken into account. Such a solution created some uncertainty about the exact legal effect of Article 14. P&I Clubs and Salvors therefore decided to meet in order to elaborate a contract which was more in line with the initial spirit of the Convention.*
House of Lords - 6 Fevrier 1997 -

As per the Scopic Clause, a salvor may at any time and regardless of the circumstances decides to apply to the salvage operation:

- The Salvor does not have to prove that there is a threat to the environment, and,
- It is not necessary that the property be in danger within the territorial waters or close to this zone.

The Scopic organises a remuneration of the services performed by the salvors on time and materials used. Each type of materials used and the time spent by each employees of the salvage company correspond to a specific rate. A record of the time spent, the personal employed and the equipment used is kept by a Special casualty representative appointed by the Owner and who could be sent on board the vessel to physically attend the operation.

The salvage services will still be rewarded in accordance with the principle " No Cure No pay" (Article 13 of the Convention) but the Scopic remuneration will be payable only to the extent that it exceeds the full remuneration that the salvors may obtained as per Article 13. This remuneration will be paid by the Owner of the vessel and its liability insurer (P&I Clubs). The Salvor may at any time decide to terminate the services if it appears that the total costs of the services provided will exceed the value of the property saved. The Owner of the properties may also decide subject to a prior notice of five days given to the Salvors to put to an end the salvage operations.

The interests of the SCOPIC formula are the following ones:

- The presence of a representative of the property saved will most likely reduce disputes and unnecessary arbitration proceedings.
- Shipowners will have a far better knowledge or control of the salvage operations. This control will greatly assist the shipowners in taking decision regarding other consequences resulting from the casualty.
- The financial backing given by the Scopic permits to the salvors to be concentrated on the most important side of the operation: to save the ship and to prevent or eventually reduce the damages to the environment.

The SCOPIC is a clear illustration of the changes which occurred in the salvage field. From now, two opposite interests (the Salvor and the Owners of the properties in danger) have to cooperate.

"La fin de l'affaire du Nagasaki Spirit : une espérance décue."- Pierre Bonassies - D.M.F 1997 P 451

b) The reaction of the public sector

- A Convention not sufficiently ratified by coastal countries

Although, France has been victim of various and severe pollutions since the Amoco Cadiz, it appears quite clear that the various French governments omitted to give sufficient consideration to the importance of this new Convention. The adoption of this Convention may give the opportunity to the French State to adopt various measures permitting to strengthen the intervention system implemented after the Amoco Cadiz disaster. Additionally, it should be underlined that a large part of the African and Asiatic countries that are exposed to marine pollution have not yet adopted this Convention.

- The ports of refuge

Concurrently, some conditions of this Convention bind indirectly the implement of measures peculiar to the country in the field of the intervention and of the response against pollution (the ports of refuge). The implement of these measures is currently almost non-existent. Following the event of the Castor, the IMO during its 74th session decided that the ports of refuges were an urgent issue to be discussed. However, one may easily remark the evolution made in this respect. It is not any longer talked about "Port of refuges" but only of "Sheltered places or places of refuge". Any one who has been spending some days at sea should be in position to appreciate the very dynamic concept of a "sheltered place". It may be rather difficult to find in winter a shelter in the East Part of the North Atlantic and rather impossible in the channel or in the North Sea. Consequently, if such an issue is not solved internally between the European Countries, this matter will remain still urgent for a very long period of time.

- The reality of the Oil Pollution Response Convention

In July 1989, a conference of leading industrial nations in Paris called upon IMO to develop further measures to prevent pollution from ships. The purpose of the OPRC Conventions (on Oil and Hazardous and Noxious substances) was to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries. Although, it would be unfair to consider that the OPRC did not provide any result, it seems quite clear that the OPRC will provide stronger and more efficient results if this co-ordination is set up regionally. The EEC should be taken by the European Countries as the most adequate platform to

implement a real coordination between the various States. However, such a co-ordination will be effective only and only if the private sector is call upon participating to the elaboration of this coordination.

Various issues remain however still unsettled.

II- The unsettled issues

The Convention of 1989 must be considered as the introduction to implement of a global system of response against pollution.

However, it is quite clear that this possibility offered by the new salvage convention has been so far overlooked or even ignored. The States have adopted regulations permitting either to reduce the risks of accidents at seas, or to ensure that the victims of these pollutions are correctly indemnified. It remains necessary to adopt regulations permitting to ensure that the most efficient response is given once the risks of the accident is unfortunately realised but before the consequences of this accident are effectively suffered. The salvage operation is the only available response to this always too short but crucial transitional period. The vessel is in danger due to a technical problem but there is only a threat to the environment.

In order to ensure that all the endeavours made will provide the most efficient result, the execution of the response should not repose to one and unique entity: the Salvor but on all parties who may assist in avoiding or reducing the consequences of the accident. An emergency response plan has therefore to be elaborated. This emergency plan should incorporate all parties who may be concerned by the consequences of the event. Prior to elaborating such a plan, it appears necessary to list all potential actors and establish what are the resources they may provide.

1) The necessity of a co-ordination to engineer the different available resources

Today, different entities are in position to provide very valuable information and experiences about how to efficiently fight pollution at sea. These entities are private and public. However, in the absence of any specific forum where these various entities could meet, no methodical approach could be discussed in details and eventually adopted.

a) The necessity to ensure the broadest cooperation

The first issue is to select who should be the parties of this cooperation. A balanced representation between "risks-makers" entities, "risks managers" entities and "risks victims" has to be organised. It is however quite certain that the following entities should imperatively be part of any cooperation made in this respect.

- The private entities

The International Salvage Union:

The Salvage industry has due to the globalisation is forced to accept that in order to ensure its continuity, the services provided should more and more be standardised but adapted to each casualty. Some States have already some " salvage agreement " with some salvage companies permitting to have on demand the intervention of a tug. However, this solution is not enough, the prompt intervention of the salvors is not enough, the intervention should be the most efficient possible. In order to do so, the salvors should be in position if they decide to do so to combine their intervention with other actors. It should be in insured that the Salvors are sufficiently protected from any direct action from the victims or third parties.

Protection & Indemnity Clubs (International Group)

It is usually considered that P&I Clubs have been always very reluctant to be too pro-active during a casualty. This consideration is incorrect. P&I clubs are quite often "the first on board" when an accident arises. P&I Clubs have developed during the last twenty years a quite strong "know-how" in the handling of accidents at sea and are always prepared to share such experiences as long as this transparency does not expose them to greater liabilities than the ones established by the International Conventions.

Oil Companies International Maritime Forum - OCIMF

The OCIMF who represents the Oil industry, frequently exposed to this type of event, was created following the Torrey Canyon. It cannot be denied that the OCIMF has so far provided a great amount of work by making its professional expertise available and its views known to governmental and inter-governmental bodies. It means that collaboration between a public and private authority could be achieved on the Intervention process.

International Tankers Oil Pollution Federation Ltd - ITOPF

ITOPF is and remains a non-profit organisation that is devoted to provide expertise support to respond to oil spills. Quite frequently and unfairly criticised when the pollution takes a more political turn, it should be admitted that this Association has gained over a period of thirty years the largest experience in the oil response field.

- The public entities

IMO

The purposes of this Organization as precisely stated at Article 1(a) of its Statutes, are "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships". Therefore, one may have to definitively accept that the IMO should not be more that a regulatory body and would have only to play an incentive role in respect of the implementation of such a response plan.

Economical European Community - EEC

It is clear that following the ERIKA, the French government as a platform to try to impose new safety regulations used the EEC. Even if it may be alleged that this quite prompt reaction from the French government was not exclusively guided by a real aim to have cleaner seas, this episode has shown that the EEC was a sufficient strong body to adopt regional measures. Therefore, any initiative in the adoption of a regional response plan should be made under the control of this entity for the European countries and a similar organisation for the other regional groups of States.

The Civil Servants and public authorities

The role provided by the various public authorities cannot be ignored, however, it should be ensured that sufficient powers are entrusted to the public authorities that has to handle this transition period.

If we take the French administrative organisation as example, it appears quite clear that beyond the quite clear lack of financial resources, the quite legal complex organisation and the very limited powers entrusted to the

State Authorities should be rationalised but the State authorities should be protected of any penal action *a posteriori*. Such a plan may permit to ensure that the primary mission of the Civil servants and Public authorities, serving the public interests, will be safeguarded against any type of pressure, which may be detrimental to the response to be given to the threat of pollution.

"Ad Hoc" organization CEDRE

The Role of organisations like the CEDRE should be more developed. This type of organisation has not only for interest to permit the exchange of views between different parties who are not traditionally called to collaborate but also to ensure that a sufficient formation and information is given.

Victims:

Even without being too cynical, I remain fully convinced that if a representation of the victims is not organised to participate to the elaboration of this plan, this plan will never work by lack of a sufficient support. The victims have to learn and understand the difficulties faced but also the choices to be made once a threat of pollution created by a casualty exists.

- Necessity to control the interpretation of the concept "Pollueur – Payeur (the one who pollutes has to pay).

  I have been always reluctant to admit that such a concept was reflecting the full reality of the various sequent of a pollution event. This concept may appear sensible when it is time to discuss about the compensation of the damages suffered the victims of the pollution. Such a concept should not apply regarding the steps taken to prevent or limit the pollution. This concept is misguiding regarding the steps to be taken against pollution. This concept has for detrimental effect to believe whatever will be at the end of the day the consequences of the event, some one will pay. It does not seem sensible to approach such type of difficulties with such a poor belief. Would it not be far better to adopt a strategy where all steps are taken that at the end, nobody has to pay ?

2) A necessity to have a better knowledge of the Shipping community

The last maritime disasters and especially, the Erika showed the absence of technical skills of some countries. This absence of skills does not mean ignorance but only a lack of knowledge of the maritime sector.

a) These difficulties result from a lack of knowledge of the maritime current world and from an approach more ideological than pragmatic of the maritime private world, making larger the gap between 2 worlds that evolve in the same framework.

This absence of pragmatic approach is showed by the difficulties of some countries to admit that the response against pollution can be partially or totally co-monitored by/with the private sector.

The Lord Donaldson's Review of 1999 and its consequences: an example to mull over and to follow. This report, which was drafted following the Braer and the Sea Empress, has for strong advantages to pinpoint all sectors where improvements have to be made thus permitting a prompter and more efficient intervention. It would not prejudicial for some others States like France to entrust such a study to an independent committee. It will most likely establish that safer seas mean higher financial investments from all actors including from the public sector.

b) The necessity to accept the special features of the maritime activity

- The maritime activity, except the exercise of the sovereignty of each state on its territorial waters is mainly a private activity of transportation of commodities.

  Even if it is a bit overstated, it is not entirely false that the private sector of shipping is mainly guided by financial considerations. However, such financial consideration does not exclude common sense and the necessity to adopt middle and long-term pragmatic solutions.

  This pragmatism may favour a stronger open-minded collaboration with the public sector of the shipping industry.

- This activity is necessary for the whole economy of the developed countries in the absence of a real economic and public support.

  Additionally, it should not be forgotten that all the economies of the leading countries are dependant of the marine transportation.

- Over the last 50 years, this activity has amply known to promote the implement of systems of prevention and of compensation of its proper initiative (TOVALOP/CHRISTAL/IACS). These initiatives highly guided by economical considerations promoted efficient responses against reduction of accidents at sea. The implement of these systems was made easier because these ones were not prescribed or imposed but discussed and negotiated.

Therefore, even if the private sector does not have all the solutions to the problems permitting to ensure that the most efficient responses will be given to a pollution, their participation to such responses will undoubtedly permit that all possibilities have been envisaged: two brains is always better than one.

Conclusion:

The last disasters, thanks to the media pressure, allowed some "national Politicians" to be aware of the necessity of the response against pollution of the marine environment. However, the taking into account too recent of the emergency of this necessity must not lead them in a too fast implementation of useless or incomplete measures. Before any measure, quite wide and accurate assessments of the "needs" and of the "means" should first be made. If any measure has to be taken, the measure should have for main goal to preserve the existing resources, as well as to ensure a better use of these resources. The success of this plan will be highly dependent on the quality of the co-operation prevailing during the study of these measures.

The objective is not to try to fix a system, which is not broken, but to learn how to better use the system.