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MARINE SALVAGE LAW, SUPERTANKERS AND OIL POLLUTION NEW PRESSURES ON ANCIENT LAW

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Résumé de l'article

Le droit du sauvetage maritime remonte aux premières manifestations de la navigation commerciale en Méditerranée, soit avant même l'époque romaine. D'abord coutumières, ces règles furent ensuite codifiées par les grandes puissances maritimes d'Europe pour ainsi devenir une branche viable du droit maritime contemporain. Largement reconnu sur le plan international, le droit du sauvetage en mer se distingue en ce que le sauveteur n'est rémunéré, remboursé ou indemnisé que dans la mesure où il y a effectivement valeur sauvée. En cas d'échec de la tentative de sauvetage, aucune compensation n'est due. En 1910, sous les auspices du Comité Maritime International (CMI), le droit du sauvetage en mer fut l'objet d'une Convention internationale; cette Convention voulut unifier le droit en mettant un frein aux interprétations de plus en plus divergentes des règles coutumières par les États. Avec le temps, le contrat de sauvetage maritime du Lloyd's (Lloyd's Standard Salvage Agreement) devint le contrat-type en matière de sauvetage en mer, sous le vieux régime du « Pas de succès... Pas de paiement ». Malheureusement, notre monde moderne technologiquement avancé, politiquement instable et soucieux de préserver l'environnement ne peut plus se satisfaire du droit actuel en matière de sauvetage maritime. L'arrivée des super-pétroliers dont le naufrage peut provoquer un désastre écologique le long des côtes illustre de façon éloquente les lacunes du droit actuel. L'existence de tels navires implique qu'en plus des sauveteurs et du navire lui-même d'autres parties, ignorées jusqu'à maintenant, ont des intérêts certains à faire valoir quant au fonctionnement d'un service de sauvetage, particulièrement lorsque le navire transporte une cargaison de matières polluantes.

Par conséquent, il est non seulement souhaitable, mais urgent qu'on procède à une restructuration des règles du droit international relatives au sauvetage en mer. La révision de la terminologie du contrat-type entreprise récemment par la société Lloyd's ne suffit pas. Elle ne solutionne qu'une partie des problèmes et ne tient pas compte des cas de pollution causée par des navires autres que les pétroliers.

La révision de la Convention de 1910 sur le sauvetage en mer sera au coeur des discussions du XXXIIe Congrès du CMI qui aura lieu à Montréal en 1981. De concert avec l'Organisation intergouvernementale consultative de la navigation maritime, l'organisme des Nations-Unies spécialisé en matières maritimes, le CMI tentera d'obtenir un consensus sur les questions politiques et juridiques du sauvetage en mer, consensus qui satisfasse non seulement l'industrie maritime, mais également l'ensemble de la communauté mondiale.

MARINE SALVAGE LAW, SUPERTANKERS AND OIL POLLUTION NEW PRESSURES ON ANCIENT LAW*

par Edgar GOLD**

Le droit du sauvetage maritime remonte aux premières manifestations de la navigation commerciale en Méditerranée, soit avant même l'époque romaine. D'abord coutumières, ces règles furent ensuite codifiées par les grandes puissances maritimes d'Europe pour ainsi devenir une branche viable du droit maritime contemporain. Largement reconnu sur le plan international, le droit du sauvetage en mer se distingue en ce que le sauveteur n'est rémunéré, remboursé ou indemnisé que dans la mesure où il y a effectivement valeur sauvée. En cas d'échec de la tentative de sauvetage, aucune compensation n'est due. En 1910, sous les auspices du Comité Maritime International (CMI), le droit du sauvetage en mer fut l'objet d'une Convention internationale; cette Convention voulut unifier le droit en mettant un frein aux interprétations de plus en plus divergentes des règles coutumières par les États. Avec le temps, le contrat de sauvetage maritime du Lloyd's (Lloyd's Standard Salvage Agreement) devint le contrat-type en matière de sauvetage en mer, sous le vieux régime du "Pas de succès ... Pas de paiement". Malheureusement, notre monde moderne technologiquement avancé, politiquement instable et soucieux de préserver l'environnement ne peut plus se satisfaire du droit actuel en matière de sauvetage maritime. L'arrivée des super-pétroliers dont le naufrage peut provoquer un désastre écologique le long des côtes illustre de façon éloquente les lacunes du droit actuel. L'existence de tels

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navires implique qu'en plus des sauveteurs et du navire lui-même d'autres parties, ignorées jusqu'à maintenant, ont des intérêts certains à faire valoir quant au fonctionnement d'un service de sauvetage, particulièrement lorsque le navire transporte une cargaison de matières polluantes.

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SUMMARY

I. Introduction

There is little doubt that the maritime law related to salvage is considered to be intriguing and exciting as it embodies a wide range of human interests — generally lacking in other areas of shipping law — or, for that matter, in other areas of law in general.

Not only is the actual salvage operation often a hazardous and exciting undertaking, pitting man against nature often at its worst, but success in the operation usually results in generous awards for the salvor handed out by a shadowy and secretive tribunal in the city of London. Furthermore, the whole operation is often based on a legal sort of gamble curiously known as the "No Cure — No Pay" principle, which rewards the salvor only upon success but which makes him slink away, licking his wounds, if he fails. The "No Cure — No Pay" principle, quite unknown to the medical profession, is unique to marine salvage and is derived from very ancient Mediterranean codes[1] which laid down the rule that a volunteer who salves maritime property ought to be rewarded by receiving a share of what he saves. Of course, if he saves nothing, there is nothing to reward him for or from — a remarkably simple rule which, with only peripheral refinements, has survived almost three millenia. As a result, salvage law based on such ancient principles has become almost sacrosanct within an industry not known for radicalism, and any changes that have been made were usually the result of very lengthy discussion and negotiation amongst maritime states.

Sacrosanct or not, salvage law as presently laid down and interpreted no longer serves the world community adequately and must be changed radically — if not totally replaced. Our aim in this paper is to state why we hold these heretical views.

II. The Present Law

Present-day salvage law, as already indicated, derived from Roman and pre-Roman sources, has generally been codified by inclusion in the national shipping legislation of the various maritime states.[2] In addition, the law has been strengthened through case law resulting from litigation, particularly in the

1. See Martin J. NORRIS, *The Law of Salvage* (Mt. Kisco, N.Y.: Baker, Voorhis & Co., 1958) p. 4.

2. Belgium: Code de Commerce, Livre II, Titre VIII; France: Loi du 29 avril 1919 Sur l'Assistance et le Sauvetage Maritimes; F.R. Germany: Handelsgesetzbuch, Buch IV, 8. Abschnitt; Netherlands: Wetboek van Koophandel, Boek II, Titel 7; United Kingdom: Merchant Shipping Act, 1894, Part IX; United States: U.S. Code, Ch. 46.

common law states. At the same time, it should be stated that marine salvage law has neither been particularly contentious nor, certainly in the past fifty years, the subject of excessive litigation. Its equitable beginnings made the salvage concept rather difficult to be absorbed into the common law of England and, subsequently, the U.S.A. and the British Commonwealth states. The common law evolved much more narrowly and discouraged the volunteer from saving property on land by never allowing him to be compensated for such an act. On the other hand, the basic right of a salvage reward is based on the equitable principle that he who has encountered a danger and has voluntarily expended effort on another's maritime property, which has been preserved due to his exertions, should not only be compensated, but even be rewarded. In time, this legal principle was seen to clearly reflect public policy that such efforts should be undertaken and rewarded in "the general interests of ships and marine commerce".[3] The reward is assessed by courts on equitable principles which, over the years, became quite systematized. This means that the reward may not be based on any contract stipulating the payment of a reasonable award:

> "The jurisdiction ... is of a peculiarly equitable character. The right to salvage ... is a presumption of law arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it should make remuneration to those who have conferred the benefit upon him notwithstanding that he has not entered into any contract on the subject."[4]

This "contract by implication" was a sufficiently sharp departure from the general law to require the imposition of strict conditions which must be met before the saving of maritime property can be regarded as salvage. This led to the famous triumvirate of: (i.) the existence of danger; (ii.) the voluntary character of the service; and (iii.) success of the operations. Over the years, all three have been so well interpreted[5] not to need further elaboration here, but they have resulted in a salvage service being defined as:

> "... a service which saves or helps to save maritime property — a vessel, its apparel, cargo, or wreck — or lives belonging to any vessel, when in danger, either at sea or on the shore of the sea, or in

3. Dr. LUSHINGTON, in *The Fusilier* (1865), Brown & Lush. 341, 347.

4. Sir J. HANNEN, in *Five Steel Barges* (1890), 15 P.D. 145, 146.

5. See for example: Edwyn JONES, *The Law of Salvage* (London: Stevens & Haynes, 1870); Kenneth C. McGUFFIE, ed., *Kennedy's Civil Salvage*, 4th ed. (London: Stevens, 1958).

> tidal waters, if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty."[6]

So far we have described the most basic rules of salvage in cases where no agreement between salvor and salved exists at all. Provided that the triple requirements of danger, voluntariness and success are met, a salvage service will be deemed to exist. This basic law was not affected by subsequent legislation, both international as well as national, which imposed actual duties on ships to go to the assistance of others. For example, colliding vessels are required to stand by each other, but even the wrongdoing vessel can claim salvage.[7] Also, life salvage has become a statutory duty everywhere,[8] and a breach of this duty is a criminal offence. Yet even such "non-voluntary" salvage will not preclude an award, as such a salvor is still considered a volunteer defined by Lord Stowell to be one:

> "... who without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship."[9]

In general, there are two parties to a salvage operation. On the one hand the salvors, consisting usually of owner, master and crew of the salving vessel or, in the case of professional salvors, of a salvage company. On the other hand, the owners of the salved property usually consist of the owners of vessel, cargo and freight saved. It is, of course, possible that more than one salvor may be involved.

The right to a salvage award arises the moment the salvage service commences and remains inchoate until successful termination of the service. At that time the salvor has a vested right in the salved property until his award is paid. This right includes a maritime lien, which travels with the *res* regardless of change of ownership as well as the right to proceed *in personam* against the owners of the salved property.[10]

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6. *Kennedy's Civil Salvage*, note 5 above, p. 5.
7. *S.S. Melanie and S.S. Onofre*, [1925] A.C. 246.
8. *Canada Shipping Act*, R.S.C. 1970, c. S-9, Part X, s. 516.
9. *The Neptune* (1824), 1 Hagg. 227, 236.
10. O.C. GILES, *Chorley and Giles' Shipping Law*, 7th ed. (London: Pitman, 1980) p. 316-7.

As no salvage award may go beyond the total value of salved property, it is of extra importance that an accurate valuation of the salved property be made. The three salved interests — ship, cargo and freight — contribute rateably according to their salved values. In other words, in the case of the ship, not only her value as a structure is considered but also her value to her owners as a going concern. We will return to this point again as it has become one of the aspects which we consider to be highly relevant in making modern salvage often unattractive for salvors. In addition, cargo is valued at the end of the salvage service after deductions of expenses for discharge, storage, sale, etc. Freight also contributes if it was earned only due to the salvage service.

Although we have so far referred to the "two" parties to the salvage service — the salvors and the salved — the latter may not only be subdivided into ship, cargo and freight but, in actual fact, all three will almost always be quietly represented by the "grey eminences" of their respective underwriters. For that matter, the actual owners of salved property, usually well-insured, may not really be seriously affected by the salvage service. It is the underwriter who will not only pay for losses incurred but also for the salvage service which prevented a total loss which, had it occurred, would also have been paid for by him. In other words, we must from the beginning remember that the underwriter holds the key to any change the salvage law of the future must undergo. We will return to this point later. What should, however, be clear is that within the traditional concept of salvage law only those directly involved in maritime adventure and salvage service — i.e. shipowner, master and crew, cargo owners, salvors and the respective underwriters — were also directly concerned. Public interest was confined to the public good, which the preservation of private maritime property and, of course, lives would entail. However, there was clearly no direct community consequence from the loss of maritime property. On the contrary, it might even be said that there might often have been a perverse benefit for those living in isolated coastal communities who would not only take advantage of frequent strandings on their shores by carrying out salvage services but who might also be enriched from the wreckage and its contents. Apart from this, the public cared little about the effects of maritime disasters save for the exciting accounts in the media.

Thus salvage law as derived from its ancient roots appeared to be well established within the legal systems of the main commercial and maritime states by the end of the nineteenth century. However, although the rules were simple, there was less uniformity in their

interpretation by the various maritime courts. This problem was already apparent at the first international Congress dedicated to commercial law in Brussels in 1885. This congress, and its successor in 1888, dealt *inter alia* with marine collisions and salvage. In 1897, again due to Belgian initiatives, the Comité Maritime International (CMI) was founded — with its main aim being the unification of maritime law. Marine collisions and salvage was prominently on the agenda of the first two CMI Congresses, held in Paris in 1900 and in Hamburg in 1902. During the latter conference, drafts of two conventions were produced and the final text refined during four sessions of diplomatic conferences in Brussels in 1905, 1909 and 1910.[11] Thus, after almost a decade of negotiations and close to 3,000 years of actual practice, the international maritime community appeared to have unified the rules of salvage law into the "Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea".[12] Ratified by and acceeded to by most maritime and commercial states,[13] this Convention remains the only international legal instrument relating to salvage in effect to this time.[14]

There is no need to say much about the 1910 Salvage Convention. It has been exhaustively analysed elsewhere.[15] The Convention did not really have its expected unifying effect. It did codify the basic legal principles related to salvage, which had become customary law from earliest times, but the interpretation of the rules by the various national tribunals remained diverse. The commercial codes of Belgium, France, F.R. Germany, and the Netherlands incorporated the Convention text almost verbatim, but English law continued to deviate from the language of the Convention. This is despite a strong belief, fed by late Victorian English chauvinism,

11. See Ina H. WILDEBOER, *The Brussels Salvage Convention* (Leyden: Sythoff, 1965) p. 1.

12. Signed at Brussels, September 12, 1910. Original in French entitled: 'Convention Pour L'Unification de Certaines Règles en Matière d'Assistance et de Sauvetages Maritimes.' For text see, *The Brussels Salvage Convention,* note 11 above. Also, Nagendra SINGH, *International Conventions of Merchant Shipping*, 2nd ed. Vol. 8 — British Shipping Laws (London: Stevens, 1973) p. 1422.

13. For ratifications see *International Conventions of Merchant Shipping,* note 12 above, p. 1425-6.

14. With the exception of a Protocol to amend the 1910 Salvage Convention signed at Brussels in 1967 for the purpose of including salvage services to and by warships and non-commercial government vessels. However, this Protocol is not yet in effect. *Ibid.*, p. 1426-8.

15. *The Brussels Salvage Convention,* note 11 above.

that the Convention had in actual fact adopted English law. The origins of the ancient law of salvage appeared to be totally disregarded when a speaker in the British House of Commons, when referring to the Convention, said that it:

> "... represents, on the whole, a rally of the other maritime nations to the maritime law of this country. There are just one or two points on which alteration has to be made."[16]

The point we are attempting to make is that even this sole piece of international legislation was far from the international law of salvage the CMI had hoped it would be. After almost a decade of negotiation and preparation, the Convention had simply become the lowest common denominator for divergent interpretation of the ancient customary law. Thus the Convention attempted to codify, sometimes in relatively unclear terms, what was already widely accepted. On the other hand, the next step involving the unifying effect of examining the real differences in the various interpretations of the content of the law was never taken. It is important to place the 1910 Salvage Convention in this realistic perspective. Attempts to revise or review it can thus be seen in a much more constructive light.

In examining the present law of salvage, a final, albeit important, area must be discussed. This concerns salvage agreements, wherein the salvor bargains with the ship to be salved for his reward beforehand. This is today the most common method of establishing terms between the two parties to the salvage service. The most widely used form of agreement is, of course, Lloyd's Standard Form of Salvage Agreement (LSA) as approved and published by the Committee of Lloyd's. The LSA evolved in the 1890's[17] — around the same time that discussions which culminated in the 1910 Salvage Convention first took place. In 1892, Lloyd's published the first LSA for general use as it was felt that a standard-form contract may be the best way to ensure that a salvage agreement, often entered into quickly and under adverse conditions, would have a widely-known content. By 1908 Lloyd's had decided that the LSA should be their sole acceptable form of salvage contract. Since that time the LSA has been regularly amended and,

16. House of Commons, Parliamentary Debates (1911) Vol. 32, p. 2662.

17. For the history of the LSA see *Kennedy's Civil Salvage*, note 5 above, p. 299; also, D.R. THOMAS, "Lloyd's Standard Form of Salvage Agreement — A descriptive and analytical scrutiny." [1978] 2 *LMCLQ* 276.

until the 1980 revision to be referred to below, the latest amendment took place in 1972.[18]

Once again, there is no need to enter into a discussion of the LSA, which has been the subject of much analysis as well as frequent litigation.[19] The LSA incorporates many of the ancient customary salvage principles and is simply a convenient legal instrument governing the relationship between the salvor and the owner of the vessel to be salved. Its only concern is with the saving of property as it makes no provision for the saving of life and life salvage. The LSA binds the salvor ("The Contractor") to use his best endeavours to salve the subject matter of the services upon the principle of "No Cure — No Pay". On the other hand, the master of the vessel to be salved binds his owners to negotiate a reasonable salvage award. In recent years no stipulated amount is ever included in the LSA which, since 1953, is truly an "open form" contract. The whole object of the LSA appears to be to leave negotiation for payment to the principal parties until after the emergency. Furthermore, should such negotiation not succeed, the LSA lays down an elaborate arbitral system. This has, of course, resulted in the majority of all salvage agreements being arbitrated by the venerable Lloyd's Salvage Arbitrators in London. This very skilled group of practitioners examines each case arising out of a LSA, being fully apprised of all the details of the salvage service, including the salved value, arrives at a salvage award. If not satisfied with legal aspects related to the decision, the parties can appeal to a group of Appeal Arbitrators and, failing there, can resort to court action. There is much mystique as well as mystery attached to this system as the proceedings of the arbitration and the awards arrived at are never published. For that matter, relatively little is known about the whole methodology of arriving at acceptable salvage awards.[20] This has probably contributed to some of the widely-held, but erroneous, beliefs, both within and outside the maritime community, of the riches that await deserving salvors at

18. For the text of the 1972 LSA see [1978] 2 *LMCLQ* 145 — or any *Lloyd's Nautical Year Book* 1973-1979.

19. See THOMAS, note 17 above. Also, J.G.R. GRIGGS, "An Examination of Lloyd's Standard Form of Salvage Agreement" [1974] 2 *LMCLQ* 138; J.G.R. GRIGGS, "Lloyd's Standard Form of Salvage Agreement" in W.F. Searle, ed. *Proceedings of the International Symposium on Marine Salvage, New York 1979* (Washington: Marine Technology Society, 1980) p. 125 (henceforth cited as *International Salvage Proceedings*). See also *Kennedy's Civil Salvage*, note 5 above.

20. The only analysis of the area being: Charles T. SUTTON, *The Assessing of Salvage Awards* (London: Stevens, 1949).

the receiving end of Lloyd's Salvage Arbitrators. In actual fact, even the scant information available shows the fallacy of this belief. It was recently disclosed that Lloyd's annual turnover, based only on the LSA, to be around £20 million. In addition, the total annual turnover derived from salvage proper of all professional salvors is estimated to be between $50-100 million.[21] These estimates must be seen in proper perspective — a single modern tanker would probably cost more, a large LNG carrier probably twice as much! Information supplied by the International Salvage Union discloses that salvage awards over the past ten years have averaged just over 6% of the value of the salved property.[22] There have, obviously, been awards very much in excess of 6%, but these tend to occur when property values are depressed and the salvage service is substantial. In any case, the great majority of LSA claims are either settled by negotiation or at the first level of arbitration. Although at times the arbitrators are accused of not matching their awards with the escalating cost of providing world-wide salvage services, the system is generally considered to be reliable and fair. Also, there appears to be no satisfactory, internationally accepted alternative. However, we will have to examine below whether the LSA, as amended, adequately represents *all* the interests involved in a salvage service.

Finally, it should be understood that salvage law does not prohibit the parties to a salvage service from seeking contractual arrangements other than that set out in the LSA. The "freedom to contract", that hallowed term cherished by all common lawyers, presents almost complete liberty in all aspects of a salvage service. As a matter of fact, this system must be resorted to if the time-honoured "No Cure — No Pay" contract appears to be too risky to the salvor in a particularly difficult case.[23]

In summary then, it can be stated that the present law of salvage is based on relatively simple rules, tested and tried over a very long period, understood by those directly involved in the salvage service, approved by the respective underwriters, and accepted by

21. Comment by John Van BOINNING, *International Salvage Proceedings*, p. 85. This information appears to be borne out by the activities of the much smaller U.S. Salvage Awards Committee which, in a 30-year period, made 103 awards totalling almost $13 million based on salvaged property amounting to just under $165 million.

22. A.B. WILBRAHAM, "The Salvor's Perspective," *International Salvage Proceedings*, p. 50, 53.

23. As in the case of the grounding of the Shell VLCC *Metula* in the Stait of Magellan — see A.F. DICKSON, "Environmental Pollution — The New Dimension of Salvage," *International Salvage Proceedings*, p. 75, 77.

the national marine community. Unfortunately, it no longer adequately serves the needs of the international community as a whole.

III. New Pressures on Old Law

The fact that a certain area of law is derived from very ancient beginnings does not automatically make such law archaic and in need of complete revision. Much modern law is virtually unchanged from early times and is yet perfectly acceptable. However, if we have an area of law which is specifically designed to deal with certain commercial and technical sectors, then historical changes in such sectors must inevitably affect their regulations. Thus, if the law is not revised to meet these changes, then it will no longer adequately meet the demands placed on it.

It is almost unnecessary to state that maritime commerce, as well as marine technology, in the late 20th century is vastly different from that of the late Victorian era — let alone Rhodian or Roman times. It is inconceivable to apply regulations dating from a more leisurely horse-drawn age to modern highway transportation. Yet salvage rules, dating from the era of the sailing ship and early steamship, are still applied in the age of the Ultra Large Crude Carrier (ULCC), the LNG carrier, the 3rd generation container vessel and, perhaps soon, the nuclear-powered vessel. In other words, the general evolution of time is the first pressure on the elderly legal principles relating to marine salvage. To be fair, Lloyd's has at least paid lip-service to some of these changes — after all, who could be more qualified than Lloyd's — with periodic revisions of the LSA, but it appears that such amendments have not really come to grips with what was ailing the whole system on which the contract was based on in the first place.

Although the world was experiencing a "shipping slump" in mid-1978, the world fleet consisted of over 6,000 vessels totalling almost 700 million Deadweight tons (DWT). Of this total, almost 340 million DWT consisted of oil tankers, of which almost 180 million DWT were vessels in excess of 200,000 DWT.[24] As the world fleet, even during the present "lean" period, has steadily increased by at least 20 million DWT annually, we are probably very close to the three-quarter billion DWT mark at this time. There should be no doubt that this is a formidable fleet, matched by nothing the world

24. Information from OECD, *Maritime Transport 1979* (Paris: OECD, 1979) pp. 152-154. (Latest statistics available).

has ever seen. Despite the vastness of the oceans, much of this immense traffic is concentrated in a few areas of the world. The density of traffic in North European waters, the Japan Sea and the North Atlantic is well known. So is the frequency of passage through the major straits of the world — in particular, Dover, Hormuz, Malacca, Gibraltar, etc. — where 30 to 60 ships an hour pass in an almost continuous line regardless of weather conditions. In other words, the potential for collision, breakdown and stranding is greater than ever purely in terms of traffic density and numbers of ships. At the same time, the giant steps taken in ship construction and equipment technology which produced the supertanker, followed by VLCC and ULCC, the LNG Carrier, as well as a whole new generation of other types of vessels, appear to have given scant consideration to the human element involved. Despite innovative technology, maritime safety has decreased from year to year — certainly in the past decade.[25] Although the shipbuilding industry (unlike the aircraft industry), almost completely unregulated and willing to build whatever shipowners want, has not had the influence it should have in constructing the safest possible vessels, very few maritime accidents are actually *caused* by equipment inefficiency and breakdown. Even as spectacular an accident as the *Amoco Cadiz,* which commenced with a steering gear failure, was not *caused* by this fault. Like at least 90% of all other maritime accidents, this one was also consummated by human error and/or failure. Despite the fact that many maritime states attempt to train seamen to the highest standards required to meet the demands of modern technology, the time needed to train skilled seamen, plus the rapidly increasing world tonnage, have operated against the best endeavours to create higher standards. This serious problem was only recently examined by the Inter-Governmental Maritime Consultative Organization (IMCO) and resulted in the new 'International Convention on Standards of Training, Certification and Watchkeeping for Seafarers'.[26] Thus in the 1970's and 1980's, the world's sea routes were filled by more numerous and larger vessels than ever before, accompanied by accident statistics not even contemplated a decade ago. One might say that it could almost be seen as a scenario for a "salvor's paradise"! One would, of course, be wrong.

25. See for example, Editorial, "Tankers in Trouble," *The Shipbroker,* April 1980, p. 7. See also, C.P. SRIVASTAVA, "The Importance of Salvage for Safer Shipping and Cleaner Oceans," *International Salvage Proceedings,* p. 10.

26. See *IMCO News,* No. 4, 1978, p. 6.

Accompanying the increased world fleet/vessel size was also an almost total restructuring of the marine underwriting business which, as always, adapted itself to the new demands placed on it. Whereas in the 1950's and 1960's a $25 million risk on a single ship would severely test the capacity of the insurance market, by the 1970's and 1980's risks ten times as high would be routine, half-billion dollar risks could be handled relatively smoothly, and billion dollar risks on oil production platforms would still be within the capacities of both insurers and re-insurers. As long as premium income kept reasonably ahead of policy claims, the market appeared to be almost elastic in its expansiveness. However, policy claims were increasing steadily as new actors began to take interest in the drama.

Like its shipping counterpart, the provision of salvage services had become a skilled and viable industry. As a matter of fact, salvage service as an industry was probably never contemplated when the first rules of salvage law were drawn up. However, professional salvors had become established in the latter part of the 19th century and had soon set up their salvage stations in strategic parts of the world where tugs would be stationed ready to race out and compete for a stricken vessel in the hope of getting their line on board first. Of course, the occasional salvage service, usually one ship taking another in tow, still occurred, but as marine accidents increased in frequency as well as complexity, the age of the professional salvor had been well and truly ushered in. Only the professional salvage company had the skill and equipment to deal with fire and explosion at sea, to transfer cargoes from sinking vessels, to free large stranded vessels, to raise sunken wrecks, to tow the new generation of superships, etc. By the late 1970's, this had resulted in salvage techniques being improved to the extent that the industry had not only kept abreast with shipping developments but was, in actual fact, anticipating the next generation of ships and oil rigs.[27] This "new look" salvage industry was, of course, achieved at some cost. Due to the capital intensity of the new salvage technology, a salvage company could no longer afford to wait for one or two lucrative salvage jobs which would pay for the waiting period in between. It was simply uneconomic to have skilled men and complex equipment tied up in relative idleness. As a result, within a comparatively short time, manned salvage stations at strategic points on the globe had disappeared. The salvage industry became concentrated in about a dozen companies, and of these only

27. P.K. van WILLIGEN, "Salvage as a Dynamic Concept: Where do we go from here?" *International Salvage Proceedings*, p. 293.

about five could handle really large salvage cases. Of course, rapid and reliable communications, faster salvage vessels, and the possibility of airlifting salvage crews, had counteracted the shrinking of the industry to a certain extent. Nevertheless, today a professional salvage company is a highly skilled, complex and consequently expensive operation. Fairly brisk competition between the large salvage companies has given the "consumer" of the service some breathing space in this trend. The point that is being made is that the 'salvor' part of the salvage operation is today vastly different from that contemplated when present salvage laws were drawn up.

We have already referred to the large concentration of huge oil tankers in the present world fleet. The world's preoccupation with energy supply and demand is, of course, directly responsible for this rapid increase in size and numbers of tank ships. It is here that present salvage law receives its greatest pressure. A modern ULCC loaded with some 300,000 tons of crude oil is a very valuable piece of equipment. For example, after a recent spectacular collision involving a 292,000 DWT and a 210,000 DWT vessel, the larger vessel was valued at $45 million and its cargo at $55 million.[28] When one of the largest LNG vessels in service, loaded with 99,000 m^3 of LNG, grounded in the Strait of Gibraltar, the vessel alone was insured for $160 million.[29] Furthermore, in the last two years there has been an appalling incidence of major tanker disasters ranging from the world's largest ship-generated oil spill caused by the stranding of the *Amoco Cadiz* on the coast of Brittany in March of 1978,[30] to the world's most spectacular collision — the *Atlantic Empress/Aegean Captain* disaster — in the Caribbean in July 1979.[31] In the 1978-1980 period, large tanker losses amounted to almost one per month, totalling almost 3 million DWT.[32]

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28. The *Atlantic Empress/Aegean Captain* disaster. See Anthony RENOUF, "Counting the Cost of The Tobago Collision," *Seatrade*, August 1979, p. 47.

29. The *El Paso Paul Kayser*. See Trevor LONES, "One successful LNG Salvage does not mean it's safe," *Seatrade*, October 1979, p. 97.

30. See, for example, Denzil STUART, "Salvage in the wake of the *Amoco Cadiz*," *Nautical Review*, September 1978.

31. See RENOUF, note 28 above. Also D.B. FOY, "Double Greek Tragedy," *Seaways*, January 1980, p. 1.

32. See Lloyd's Loss Statistics, 1978-80. Also, "Tankers in Trouble," note 25 above; E. BLANCHE, "Shipping Industry Fears Rise in Tanker Disasters," *International Herald Tribune*, March 17, 1980, p. 5.

The uninitiated might ask why these increasing losses should concern the salvage industry or adversely affect the laws governing salvage. After all, does the industry not thrive on disaster — the more spectacular the better? If the marine insurance industry has the capacity to absord major tanker disasters, what is the problem? If one seeks answers in legal terms, one would look in vain. Once again we have to return to the area of public policy — not always comfortable with lawyers — to explain the problem.

Concern for protection of the environment in general, and the marine environment in particular, began in the 1960's and strengthened in the 1970's. In 1967, the *Torrey Canyon* disaster,[33] in addition to spilling some 100,000 tons of oil on the British and French coasts, finally brought home the dangers and effects of massive oil pollution to coastal states and the world community as a whole. There is no question that the 1967 disaster did more for environmental consciousness than a dozen international conferences could have done. It certainly gave IMCO the necessary impetus to become the main public voice in international marine law and policy and commence its environmental initiatives for "clean seas and safe ships".[34] Within a comparatively short time, outdated international marine pollution legislation was updated under IMCO auspices and new private law conventions dealing with oil pollution compensation followed.[35] The oil and tanker industries also tightened up their whole operation, and international compensation schemes, such as CRISTAL and TOVALOP,[36] were initiated. All this in response to worldwide environmental concerns and very strong coastal state representation at a whole variety of international conferences, ranging from the Stockholm Conference in 1972 to the 3rd U.N. Conference on the Law of the Sea, in session and preparation, since 1968.

The point we are attempting to make is a crucial one. Almost imperceptibly, with the advent of an enlarged world fleet and the new superships capable of carrying up to 500,000 tons of oil, a new

33. *Torrey Canyon* Report, 1967 A.M.C. 569.

34. See, for example, H.B. SILVERSTEIN, *Superships and Nation-States* (Boulder, Colo.: Westview, 1978); also, R.M. M'GONIGLE & M. ZACHER, *Pollution, Politics and International Law — Tankers at Sea* (Berkeley: U. of California Press, 1979).

35. *Ibid.* Also Edgar GOLD, "Pollution of the Sea and International Law: A Canadian Perspective," 3 *J. Mar. L. & Comm.* 13 (1971).

36. TOVALOP — Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution Damage. CRISTAL — Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution Damage. See *IMCO News*, No. 4, 1978, p. 4.

third party interest had been superimposed on marine safety or the lack thereof. In other words, salvage was no longer of direct concern only to the traditional two parties, but also to coastal states and their interests which might be at the receiving end of a major oil spill. This problem was graphically illustrated by the *Amoco Cadiz* disaster in 1978, which spilled some 220,000 tons of crude oil on the coast of Brittany. As we have indicated already, the accident commenced with a small technical fault which was then exascerbated by indecision on board the vessel. The master consulted his owners regarding salvage, thus displaying the further new problem where modern communication methods force a ship's master to consult, when in the past he always made the final decision. Valuable time was lost as the vessel would not accept the LSA "No Cure — No Pay" until it was too late, and finally vessel and cargo were lost totally. However, surprisingly, the total loss of a modern vessel and its valuable cargo, worth together at least $60 million, was the lesser part of the total damage cost. The case is not yet concluded, but at last count an aggregate of $1.3 billion in U.S. lawsuits were in progress against Amoco by French public and private interests.[37] Given that this staggering amount is probably exaggerated, even one tenth of the amount would still be more than double the value of vessel and cargo. There is no question that a third party has now a real interest in the avoidance of marine accidents and the outcome of salvage services. In this case, a relatively quick decision to agree to the LSA and, perhaps, asking for additional assistance by the salvor involved, might have resulted in a fairly routine towage operation to a place of safety. If the London arbitrators would have been in a generous mood, the award would have been $4-5 million.

The *Amoco Cadiz* caused worldwide attention due to the total media coverage it received. The case was exhaustively discussed by IMCO which, during the 35th session of its Legal Committee, requested the IMCO Secretariat to prepare a report on legal questions arising out of the disaster. This report dealt with a variety of salvage aspects in some detail and finally raised the question of whether the international law of salvage was in need of revision and whether the 1910 Salvage Convention should be superseded by a new convention.[38] We will return to this report in our concluding section.

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37. RENOUF, note 28 above, p. 47.

38. IMCO, "Coastal State Protection against Major Maritime Disasters," IMCO Doc. LEG. XXXVII/2 — 22 September 1978.

The *Atlantic Empress/Aegean Captain* collision in July 1979 in the Tobago/Grenada passage, already referred to above, further emphasized other serious problems for the international law of salvage. As usual the collision was completely avoidable, being caused by unseamanlike negligence of the most basic sort.[39] Nevertheless, it occurred, professional salvors were on the scene quickly, and the LSA was accepted by both vessels. The *Atlantic Empress* was on fire, and salvors desperately attempted to extinguish it. At the same time, none of the neighbouring Caribbean states would allow the stricken vessel into their territorial waters where the fire could have been fought more easily. Instead, the vessel headed out into the Altantic with flames leaping 30 metres from the deck and leaking oil. After several heavy explosions the vessel became a total loss. The smaller vessel, though badly damaged, was safely towed to Curacao. Several important points related to our subject were to arise out of this tragic case. They all strengthen the case against the viability of present salvage law and practice.

First, the total loss of one vessel and cargo and the constructive total loss of the second vessel has presented the marine insurers with their largest-ever loss so far. Total losses will exceed well over $100 million.[40] The accident not only displays staggering costs of such a disaster but, in this case, also shows the fortunate side of fate. The two vessels were loaded with some 470,000 tons of crude oil, that is more than twice as much as the oil spilt from the *Amoco Cadiz* and more than four times as much as the *Torrey Canyon* spill. Fortunately, much of the cargo on the smaller vessel was saved, and the larger vessel's oil was spilt some 300 miles east of Barbados. A scenario for real disaster would have existed if both cargoes had been lost close to land.

A second point concerns the salvage of the smaller 11-year old vessel which was valued at only $7.5 million before the accident. After the collision the vessel was declared a constructive total loss, which meant that salvors had no salved hull value to be compensated from. If the vessel had not also been loaded with a valuable cargo, the salvors might very easily have been out of luck by receiving minute compensation from the vessel's scrap value. New construction costs are today often lower than large damage repairs. In the words of the President of the International Salvage Union, the problem is seen thus:

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39. Foy, note 31 above.

40. Legal and Commercial Notes. [1979] 4 *LMCLQ* 588.

> "Even large, modern, sophisticated vessels now tend to get written off like automobiles after an accident. Engine-room flooding or fire damage can quickly turn a ship into a constructive total loss, although the shell and main structure may have suffered little damage. This means that the professional salvor is often solely dependent on the value of any cargo salved to provide his remuneration."[41]

Of course, the system of declaring a constructive total loss, which has been a marine insurance practice for a long time,[42] was never contemplated to be so widely and frequently used. The obverse side to the problem is that salvors are now reluctant to accept a LSA on badly damaged vessels in ballast or with cargoes of little value.

Thirdly, in the case of the larger vessel, the unfortunate salvors lost their "prize" after a two-week battle involving the use of three tugs, a large crew of salvage and fire-fighting experts, as well as a considerable amount of oil-spill and fire-fighting equipment. When the vessel sank, much of the equipment was lost. For the salvor the gamble had failed, and "no cure" quite literally meant "no pay". On the other hand, had there not been considerable success? Had a major oil spill in the southern Caribbean not been prevented by the action of the salvor? Could the claims against the possible 270,000 ton crude oil cargo spill of the *Atlantic Empress* have exceeded the *Amoco Cadiz* claim? Obviously, pollution underwriters were saved from even paying out the $120 million indemnity they had guaranteed the salvors. The simple answer is that a very large oil spill was successfully averted and a great deal of money, amounting to many millions of dollars, was saved. Was this not a "cure"? Yet there was no "pay" because archaic salvage law does not require it. Again, the obverse side of the problem will be that salvors will be less than willing to undertake a major risk on a LSA basis.[43] The losers will not only be the marine industry but also the unfortunate coastal states which happen to be closest to this type of disaster. On the other hand, when the "No Cure — No Pay" principle first evolved, the immense problems related to the ULCC salvage could not have been contemplated. It appears, therefore, that the archaic principle no longer adequately serves the best interests of either the shipping industry or the world community as a whole.

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41. WILBRAHAM, note 22 above, p. 53.

42. See E.R. Hardy IVAMY, *Chalmers' Marine Insurance Act 1906*, 8th ed. (London: Butterworth's, 1976) section 60, p. 85.

43. See G.R.A. DARLING, "Willing Salvors — A Paramount Need," *Seatrade*, February 1980, p. 160.

Fourth, the Caribbean collision pointed to a further new problem. This relates to the extreme reluctance of coastal states to allow damaged vessels, which may be potential pollutants, into their territories. Although states have such a right of refusal under international law,[44] it has in the past been traditional maritime courtesy and compassion which has always allowed a stricken vessel to enter a "port of refuge". This is no longer so, as borne out not only by the *Atlantic Empress* case but also by (i.) the *Christos Bitas,* where the owner was eventually obliged to have the vessel towed into the Atlantic and scuttled; (ii.) the *Andros Patria,* a VLCC in salvor's hands, which was refused entry into any port and thus remained exposed in damaged condition in the open ocean for six weeks while her cargo of crude oil was transferred; and (iii.) the *Kurdistan* in Canadian waters where, after six days of negotiation, the Canadian Government finally allowed the stern section of the vessel into port after a $50 million bond had been placed by underwriters. Her bow section was not allowed to be salved and was sunk by the Canadian Government. This problem has been coined "maritime leprosy" — a disease forced upon salvors with increasing frequency.[45] The problem is again one never contemplated when salvage evolved, or even when it was codified in 1910.

In addition to the salvage law problem illustrated by the *Atlantic Empress/Aegean Captain* collision, there is a further aspect which has placed modern pressures on old law. This relates to the possible negligence of salvors whilst engaged in a salvage service. Traditionally salvors, as volunteers, believed that, short of wilful misconduct, they could never be held negligible and that whatever methods they employed in their salvage operation would be beyond question — success being the aim. They were, of course, not quite correct in their belief. Although there may be degrees of negligence there are few total exceptions from it. In any case, in the early 1970's the famous *Tojo Maru* case settled the question once and for all when the House of Lords held that salvors could indeed be held negligent and that the cost of such negligence could be set off against any salvage award payable.[46] In addition, the court also

44. See D.W. ABECASSIS, "Some Topical Considerations in the Event of a Casualty to an Oil Tanker," [1979] 4 *LMCLQ* 449, 454.

45. WILBRAHAM, note 22 above, p. 54.

46. *The Tojo Maru* [1971] 1 Ll. Rep. 341 (H.L.) For a particularly thorough analysis of the various aspects of this case, see F.J.J. CADWALLADER, "The Salvor's Duty of Care," 1 *Marit. Stud. Mgmt.* 3 (1973). Also, D.R. THOMAS, "Salvorial Negligence and its Consequences," [1977] 2 *LMCLQ* 167, and J.L. RUDOLPH, "Negligent Salvage:

severely restricted the salvor's application to limit liability. The case awakened salvors to their unlimited liability even on a "No Cure — No Pay" basis, and their concern was quite rightly strengthened by the "black scenario" of being held responsible for causing a major coastal pollution incident while attempting a salvage operation. Once again, nothing like this was contemplated in the framing of present salvage laws within which the salvage operation must function.

These, then, are the immense pressures on the traditional law of salvage which, as a consequence, has been so buckled out of shape that its adequacy to meet the demands of present and, certainly, future needs is most doubtful. We have only highlighted the most obvious problems — there probably are others we have missed. It is also clear that in this part we have dealt with technological, societal and political, rather than actual legal problems. However, in our view, a legal problem arises not only out of problematic legislation and court decisions but also, perhaps even more importantly when, as in the law of salvage, a traditional legal tenet is threatened by the types of pressures just described. Accordingly, we must now, in our final section, examine what the prognosis for revision, review and replacement of present salvage law appears to be.

IV. Towards a New International Law of Marine Salvage

It would, obviously, be surprising if the normally astute international maritime community were not concerned at least about some of the critical problems raised above. In actual fact, efforts to review and revise present salvage law and some of its associated problems are moving on a number of levels. On the other hand, there are other equally important related areas which appear to receive little attention at present. We will, therefore, discuss a selection of both.

First, on July 2, 1980 a very thoroughly revised Lloyd's Salvage Agreement came into operation.[47] The new LSA contains a number of alterations, some of which are of relatively minor importance, whilst some appear to have more fundamental consequences arising directly out of some of the tanker disaster problems enumerated above. Although the new LSA appears to retain the "No

Reduction of Award, Forfeiture of Award or Damages?" 7 *J. Mar. L. & Comm.* 419 (1976).

47. For details see: "Revised Lloyd's Standard Form of Salvage Agreement," reproduced in CMI Doc. SALVAGE — 9/VI — 80.

Cure — No Pay" principle it, nevertheless, seems to break the ancient rule of salvage that the salvor is only compensated from the property saved. In clause 1(a) of the new LSA, special reference is made to tankers laden or partially laden with oil. In providing salvage services to such vessels taken on a "No Cure — No Pay" basis, if the service is not, or is only partially, successful, or if the salvor is prevented from completing his services, then he:

> "... shall nevertheless be awarded solely against the Owners of such tanker his reasonably incurred expenses and an increment not exceeding 15 per cent of such expenses but only of and to the extent that such expenses together with the increment are greater than any amount otherwise recoverable under this Agreement. Within the meaning of said exception to the principle of "no cure — no pay", expenses shall, in addition be actual out-of-pocket expenses, include a fair rate for all tugs, craft, personnel, and other equipment used by the Contractor in the services, and oil shall mean crude oil, fuel oil, heavy diesel oil and lubricating oil."

This innovative provision appears to give salvors some financial compensation for preventing pollution from a tanker which may be of no value, or of less value than the salvor's reward at the end of the salvage service. Despite careful retention of the hallowed "No Cure — No Pay" principle, the new provision appears to do considerable violence to it. Although many feel that the new LSA goes far to solve many of the problems facing the salvage industry in general, and salvage law in particular, this is clearly an over-optimistic assumption. Some of the shortcomings and omissions are directly related to areas where further revision of salvage law and practice is required,[48] and will be dealt with below.

Secondly, and directly related to the LSA revision, is the fact that the new document does not include vessels other than fully or partially laden oil tankers. This is surely a significant omission as there is now little encouragement for salvors to prevent pollution or contamination from substances other than oil. This appears to be a void in international pollution prevention in general.[49] It is well known that highly toxic and very hazardous substances are carried at sea — in product tankers as well as non-tankers. Furthermore, the recent *El Paso Paul Kayser* salvage case showed that a large LNG

48. See L.J. KOVATS, "Lloyd's Open Form Salvage Agreement Changed," *Seaways*, July 1980, p. 11. Also, "Lloyd's Open Form — Salvors Gain," *Seatrade*, June 1980, p. 75.

49. Only the 'International Convention for the Prevention of Pollution from Ships 1973' deals with substances other than oil — and it is not yet in force.

carrier cannot only be successfully salved but that the risks involved are very high.[50] Yet such a vessel and its highly volatile, explosive cargo would not be covered under the LSA. Neither would be tankers in ballast nor any other vessels. Yet it must be remembered that a new-generation container carrier might carry anything up to 16,000 tons of fuel oil on board with a pollution potential matching or exceeding that of the well-known *Argo Merchant* and *Arrow* disasters. In other words, the LSA must clearly be extended to cover this type of salvage risk. In addition, there is need for concerted international action, through IMCO, to deal with the handling, carriage and, obviously, clean-up and salvage of hazardous substances carried at sea.

Third, and also related to the LSA revision, is the new provision contained in Clause 3 of the LSA:

> "The master or other person signing an agreement on behalf of the property salved is not authorized to make or give and the contractor shall not demand or take any payment draft or order as inducement to or remuneration for entering into this agreement."

In the first place, this clause appears to be necessary because of recent cases where those in charge of the vessel, in connivance with others, would sell the cargo and then sink the ship.[51] On the other hand, the clause is also designed to protect the shipowner who feels that his master was too hasty in accepting a salvage agreement. Due to modern rapid communication methods, most masters who find their vessels in difficulty are able to communicate with their owners almost instantly. This means, however, that where once a master, cut off from the outside world, was captain between "God and the sea" with commensurate decision-making authority, this very authority is now being eroded. Instantaneous communication may mean, as it did in the *Amoco Cadiz* case, pressures on the master from employers far away, to take decisions which might not suit the situation. Clarification of this onerous situation is urgently required. Perhaps the availability of instantaneous communication should shift the burden of making a salvage contract to the owners upon the master's advice — but it should be stated clearly.[52]

Fourth, and still related to the new LSA, is clause 21 which allows the salvor to limit his liability "as if the provisions of the

50. Nan HALFWEEG, "State of the Art of Offloading Cargo from Stricken Vessels," *International Salvage Proceedings*, pp. 227, 235-238.

51. This criminal type of activity is presently being studied by IMCO.

52. On this general area, see F.J.J. CADWALLADER, "Pollution — The Legal Rights and Obligations of Masters," *Seaways*, July 1980, p. 13.

Convention on Limitation of Liability for Maritime Claims 1976 were part of the law of England." This is, of course, quite ambiguous. The *Tojo Maru* decision,[53] which is the law of England, holds that salvors are liable for their negligence and are restricted in their right to limit liability. This decision can only be overruled by making the 1976 Limitation Convention part of the law of England, and this can only be done by the British Parliament, which has not chosen to do so yet.[54] For other jurisdictions, such as Canada, which may find the *Tojo Maru* decision persuasive and which have not yet moved on the 1976 Limitation Convention, the ambiguity is also clear. It would appear to us that any attempt to change accepted law handed down by Britain's highest court in a contractual arrangement would receive short shrift from any legal tribunal. It is, therefore, most desirable for states to ratify the 1976 Limitation Convention at the earliest opportunity.

Fifth comes the problem already referred to and related to "ports of refuge". It should be clear that a large damaged tanker with nowhere to go is simply a floating disaster potential which will become someone's coastal problem eventually. For coastal states to prevent entry of such vessels into their territory — allowable under international law — simply means sending the pollution problem to a neighbouring state — not allowable under international law. The salvage industry has apparently identified about ten places along major trade routes in the world where a port of refuge or "tanker hospital" could be situated.[55] This is, of course, a volatile political problem, as no national government wishes to experience the domestic emotive-political backlash of designating such areas in its territory. However, it must be done if future disasters are to be prevented. Without such havens, salvors will be most reluctant to accept seriously damaged vessels in the future.

The sixth point relates to another form of political backlash. A number of coastal states, in particular France, in the post *Amoco Cadiz* period, feel that their coastal environment is no longer adequately protected by present salvage law and practice. As a result, these states have adopted legislation, or are in the process of doing so, which would give them the power to intervene in a salvage situation taking place near their coasts. In other words, these states

53. See note 46 above.

54. The Convention is included as Schedule 4 of the new British Merchant Shipping Act of 1979, but this part of the Act is not yet in force.

55. Van WILLIGEN, note 27 above, p. 296-7.

feel that the interests of the parties directly involved in a maritime accident might not necessarily coincide with those of the coastal state. There is no question that such coastal states will almost always give a higher priority to the prevention of damage to their interests than to the salvage of ship and cargo. Accordingly, it will now frequently occur that states with the legislative power and jurisdiction up to 200 miles off their coasts will wish to supervise or direct salvage operations. Furthermore, such states will now also seek to have their own state-owned or – controlled salvage capability.[56] This approach will, obviously, superimpose a completely new slant on traditional salvage concepts. This was quickly recognized by both IMCO[57] and somewhat later by the CMI.[58] It should be clear that any interference or intervention in private salvage services by sovereign states should be subject to international agreements — on the "public" side under the auspices of IMCO and on "private" law matters by the CMI. The 1910 Salvage Convention appears to be totally unsuitable for including any provision covering this type of concern.

Referring to the main responsible international maritime organizations, IMCO and CMI, leads us to our seventh point. Both these organizations must clearly play the essential role in not only developing a new law of salvage but also in finding the necessary common denominator to have it widely accepted. Although we personally have some considerable difficulty with so arbitrary a division, IMCO appears to be responsible for "public" issues of maritime affairs, whilst "private" law matters are left, as much as possible, to the CMI. Having considered the urgency of salvage problems at the CMI Assembly of March 1979, that organization then offered IMCO its co-operation for a full study of the area and:

> "... to explore whether the 1910 Salvage Convention should be revised or a separate Convention should be prepared in order to cover those casualties which may cause a threat of pollution, thereby causing a direct and primary interest of the coastal state in the salvage operations."[59]

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56. See, in general, the section entitled: "Salvage Posture — The Sovereign's View," *International Salvage Proceedings* pp. 157-180 and, in particular, Raymond GRABER, "The Salvage Posture of the French Government," at p. 168.

57. See note 38 above. Also, "Report of the 40th IMCO Session," IMCO Doc. LEG. XL/5 — 19 June 1977. Paras. 31-49.

58. Erling Chr. Selvig, "Report on the Revision of the Law of Salvage," CMI Doc. SALVAGE — 5 — IV — 80, April 1980, p. 4a-5.

59. Ibid., p. 1

As a result, in June 1979 at the 40th meeting of the IMCO Legal Committee, it was decided that:

> "... the CMI should be requested to review the private law principles of salvage, centering its examination of the matter on the 1910 Convention... Such a review would not encompass questions of coastal state intervention or the control of salvage operations by public authorities in the context of intervention."[60]

In September 1979, the Executive Council of the CMI decided to set up an international salvage subcommittee which, under the chairmanship of Professor Erling Chr. Selvig of Norway, was to prepare a substantive report. At the same time, the subject of salvage and the revision of the 1910 Salvage Convention would form the main agenda item for the XXXIInd CMI Conference to be held in Montreal in May 1981. The International Salvage Subcommittee Report would then be used as the Conference's main working paper.

In the interim, Professor Selvig has produced an initial report for use by the CMI Assembly, and subsequent discussions by the various national maritime law associations.[61] This initial report is one of the most far-reaching examinations the international law of salvage has probably undergone since the 1910 Salvage Convention. It sets out in succinct, clear terms the choices available to the international maritime legal community after a thorough discussion of the problems which are facing the present law of salvage. After concluding that revisions to the LSA are not an appropriate remedy for the ailments suffered by the present salvage law, the report presents the following alternatives for revision of the 1910 Convention:

> "i. to adapt a protocol to the 1910 Convention;
>
> ii. to leave cases where only *ship and cargo* are in danger to be governed by the 1910 Convention and to draft a separate new convention for cases where the *ship, cargo and third party interests* are in danger; and
>
> iii. to draft a new comprehensive convention on salvage, while recognizing that the need for law revision varies with the particular salvage situation."[62]

The report concludes as follows:

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60. IMCO Doc. XL/5, note 57 above. Para. 62.

61. SELVIG, note 59 above.

62. Ibid., p. 18.

> "The need to elaborate a coherent and consistent legal regime for salvage, *suitable to modern conditions,* suggests that a new comprehensive convention to replace the 1910 Convention be drafted. Experience has shown that protocols or other additional instruments to existing conventions are likely to create difficulties in practice, particularly as a result of their adverse effect on the uniformity of law."[63]

In light of what we have said already, we agree fully.

The "CMI-Selvig" initial Report leads us also to the eighth and final point to be made in this section. It brings us back to where we started — to the hallowed and unique "No Cure — No Pay" principle. The CMI report states the principle should be retained in accordance with article 2 of the 1910 Convention and subject to the third party preventive measures exception already referred to above. We are questioning whether the salvage industry in this modern age needs to cling to what is surely an anachronistic principle. Certainly its uniqueness is no excuse for retention. On the other hand, if it is so inextricably linked to the fixing of liberal salvage rewards, it may have to be kept. However, we doubt this also. We feel that it is completely out of place in negotiations between sophisticated commercial enterprises such as the modern commercial salvor and the shipowner. Although the actual "cost" of a salvage service, whether successful or not, may not be known until after the emergency, salvors ought to be compensated, in success and failure, for such costs which can be adjudicated, if in dispute, by arbitration. In the case of success, the award will be negotiated or arbitrated as always. In any case, the new LSA pollution prevention/minimization exemption has destroyed what has been left of the principle at this time. In success and failure, salvors are performing a service to their best endeavours. Surely the relationship between ship and salvor is no different than that between ship and tug, ship and pilot, or physician and patient, for that matter. Success should be aimed for, but it should not be the main issue.

Directly related to this peril is, of course, the strong link that exists between the salvor and the underwriter covering the endangered maritime interests. This link must be brought out into the open as it is, under most circumstances, not the owners of maritime property but the insurers who bear the risk of economic loss and who derive economic benefits from a successful salvage operation.[64] In other words, the insurance industry exercises very

63. Id., p. 19. Emphasis added.

64. Id., p. 3.

decisive control and influence over what the salvage law of the future will look like. It would appear to be almost incongruous that the insurance industry, which specifically outlawed a "gaming approach" to underwriting long ago,[65] would still gamble its settlements on the success or failure of a salvage operation!

V. Conclusion

We have attempted to give an insight as to why the ancient law of marine salvage is in urgent need of review and revision. We have not tried to re-state the law, but rather what is wrong with it. In actual fact, there is probably very little wrong with the *actual* law of salvage as it presently exists. It simply does not meet the requirements of the modern environment in which it has to operate. For some lawyers that would appear to take the discussion out of their immediate sphere of interest. They would, in our view, be very wrong. Maritime lawyers, like their brothers in other legal specialties, are most reluctant to become involved in questions of "public policy". That, they exclaim, should be left to the politicians! Such a view must be naive or at least short-sighted. Maritime law in almost all its facets has been undergoing very searching analysis in recent years, and the dividing lines, if they ever existed, between "public marine policy" and "maritime law" exist no longer today. Thus, what may be national or international marine policy today will tomorrow be internationally accepted law. Once the ratification process of integrating the latter into national legal systems has commenced, it is too late for revision and re-examination. Thus the law of salvage presents Canadian and other maritime lawyers with a challenge to bring their practical expertise to bear in reforming an important area of law which will have a wide effect on maritime commerce, the protection of the marine environment, the preservation of scarce resources, and thus the world community as a whole.

65. Marine Insurance Act 1906, Section 4. See *Chalmers' Marine Insurance Act 1906*, note 42 above, p. 8.