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Whatever Happened to the Salvage Convention 1989?

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I
INTRODUCTION

The International Convention on Salvage, 1989,[1] became part of the law of the United States on July 14th, 1996.[2] Because the Convention by its own terms creates privately enforceable rights, it is a "self-executing" treaty that took effect as part of U.S. law when it came into force internationally, without the need for Congress to pass implementing legislation.[3] Since 1996, many cases about salvage have been litigated in U.S. courts without any reference to the Convention, which seems largely to have been forgotten or ignored. There seems to be only one reported judicial decision applying the Salvage Convention since 1996.[4] The Convention is mentioned occasionally in briefs,[5] but most salvage cases since 1996 have been decided without

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[1]International Convention on Salvage, Apr. 28, 1989, S. TREATY DOC. No. 102-12, 1953 U.N.T.S. 193 (hereafter Salvage Convention 1989).

[2]The Senate gave advice and consent to ratification of the Salvage Convention 1989 on October 29th, 1991. Legislative Activities Report, S.Rep. 103-35, 49-50 (1993). Although advice and consent by the Senate is a necessary stage in the process of treaty ratification, the United States only becomes party to a treaty once the President makes a proclamation ratifying the treaty. Staff of Senate Comm. on Foreign Rel., 95th Cong., 1st Sess., The Role of the Senate in Treaty Ratification 2-3 (Comm. Print 1977). The date of formal ratification of the Salvage Convention 1989 by the President is not easy to trace. On December 19th, 1991, the President signed legislation to amend 46 app. U.S.C. §§ 729, 731 (now 46 U.S.C. § 80107) to give effect to changes made by the Salvage Convention 1989, which suggests that formal ratification had taken place by that date. Coast Guard Authorization Act of 1991, Pub. L. No. 102-241, § 40. Although ratification was effective in 1991, a treaty does not become "the supreme law of the land" under U.S. CONST. art. VI, § 2 until it comes into force internationally. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312, Comment j (1987); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 204 (2d ed. 1996). The Salvage Convention came into force internationally on July 14th, 1996.

[3] Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 458 (1888); Medellin v. Texas, — U.S. —, 128 S.Ct. 1346, 1356-57 (2008).

[4]International Towing & Salvage, Inc. v. F/V Lindsey Jeanette, 1999 AMC 2465 (M.D. Fla. 1999).

[5]See, e.g., Plaintiff's Reply to Defendants' Response to the Motion for Summary Judgment, Key Tow Inc. v. Fortenberry, No. 02-22508-civ-moreno/garber, 2003 WL 23815096 (2003).

mention of the Convention.[6] To make matters worse, the United States is still party to the Salvage Convention 1910,[7] despite calls by the Maritime Law Association of the United States for it to be denounced to avoid confusion.[8] The Association seems to be right about the possibility for confusion, as there is at least one reported decision since July 14th, 1996 considering and applying the 1910 Convention.[9] Although a later self-executing treaty supersedes any inconsistent provisions of an earlier one as a matter of U.S. domestic law,[10] the United States still owes treaty obligations under the 1910 Convention to countries that are party to the 1910 Convention but not the 1989 Convention.[11] Because the 1910 Convention applies when either the salving vessel or the salved vessel 'belongs to' a Contracting State, American courts should therefore apply the 1910 Convention to cases involving salvage of vessels 'belonging to' those countries.[12]

In some cases, failure to acknowledge the applicability of the Salvage Convention 1989 has no practical impact, as the Convention would have the same effect as the pre-existing general maritime law of salvage. In many cases, though, the outcome of the case would (or might) be different under the Convention than under the general maritime law. The purpose of this

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[6]For example, the West Key Number Digest entry for Salvage (No. 344), lists 22 separate decisions since July 14th, 1996. None makes any reference to the Salvage Convention 1989. The American Maritime Cases series of reports contains 114 cases under the topic heading Salvage since July 14th, 1996. Only 14 contain any reference to the Salvage Convention 1989. Of those 14 cases, two are Canadian, one is English, one is Australian, one American decision refers in passing to the fact that the Convention is part of the law of France, and four are arbitration awards. Arbitration awards about salvage more frequently refer to the Convention, principally because it is incorporated by reference into the most widely-used contracts for recreational boat salvage in the United States: see Section II(B) below. Of the remaining five cases in American Maritime Cases that mention the Salvage Convention 1989, one rejected the application of the Convention (see infra notes 227-229 and accompanying text), one referred to the fact that arts. 13 and 14 are incorporated into one of the standard form contracts for recreational boat salvage (see infra note 32 and accompanying text), one made passing reference to the Convention without applying it and one applied the Salvage Convention 1910 (see infra note 9). Only one of the cases actually applied the Convention: see supra note 4.

[7]Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, Sep. 23, 1910, 37 Stat. 1658, T.S. 576 (hereafter Salvage Convention 1910).

[8]Maritime Law Association of the United States, *Spring Meeting, May 4, 2001*, 12617-18, MLA Doc. No. 758 (2001).

[9]Smit Americas, Inc. v. M/V Mantinia, 33 F.Supp. 2d 109, 2003 AMC 1096 (D.P.R. 2003). The court did refer to the existence of the Salvage Convention 1989, saying that it had "updated" the Salvage Convention 1910 (id., 33 F.Supp. 2d at 110 n.4, 2003 AMC at 1061 n.1) but it applied the 1910 Convention: see id., 33 F.Supp. 2d at 115, 2003 AMC at 1069. It must be acknowledged that on the point at issue, the two-year limitation period, there is no difference between the 1910 and 1989 Conventions.

[10]Restatement (Third) of Foreign Relations Law § 115(2) (1987).

[11]Countries in this position include Japan, Luxembourg, Malta, Singapore and Turkey: see U.S. Department of State, *Treaties In Force 2007: Section 2, Multilateral Agreements* (2008) (available at http://www.state.gov/documents/organization/89668.pdf)(last visited 17 July 2008).

[12]Salvage Convention 1910, supra note 7, art. 15.

Article is to show that the practice of ignoring or forgetting the Salvage Convention 1989 is often not a harmless one. The Convention was not a futile exercise of codification of the existing law. It wrought substantive changes to the law of salvage that are unquestionably part of the law of the United States and so ought to be applied by U.S. courts. Section III of this article compares and contrasts the Salvage Convention 1989 and the general maritime law of salvage. Section II sets out the circumstances in which the Salvage Convention 1989 applies to salvage in the United States.

II
THE PRACTICAL AND LEGAL CONTEXT FOR APPLICATION OF THE SALVAGE CONVENTION 1989 IN THE UNITED STATES

Article 2 of the Salvage Convention 1989 provides that the Convention applies "whenever judicial and arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party." It follows that the Convention should be applied to any litigation or arbitration in the United States about a salvage claim, regardless of where the salvage took place.

It is customary to separate "pure salvage," rendered by a volunteer without pre-existing agreement, from "contract salvage," performed under a contract for salvage services.[13] The Salvage Convention 1989 applies to "pure salvage" claims litigated or arbitrated in the United States.[14] So far as "contract salvage" is concerned, the Salvage Convention 1989 applies to any salvage operations "save to the extent that a contract otherwise provides expressly or by implication."[15] Thus, if the parties to a salvage contract agree to terms that are inconsistent with the Salvage Convention 1989, their agreement prevails to the extent of any inconsistency. However, a provision in a salvage contract choosing U.S. law or the law of a particular state to be the governing law is not enough in itself to exclude the operation of the Salvage Convention 1989 under art. 6(1) because the Convention *is* U.S. law and the law of every one of the states by virtue of the Supremacy Clause.[16]

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[13]Martin J. Norris, et al., 3A *Benedict on Admiralty* § 159 (7th rev. ed. 2007)(hereafter 3A *Benedict*). This paragraph of 3A *Benedict* has been cited many times by courts as authority for the distinction between pure and contract salvage. See, e.g., Smit Americas, Inc. v. M/V Mantinia, 259 F.Supp. 2d 118, 121, 2003 AMC 1096, 1098 (D.P.R. 2003); New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F.Supp.2d 101, 105 n.1, 2003 AMC 488, 489 n.1 (D.Mass. 2003).

[14]Salvage Convention 1989, supra note 1, art. 2.

[15]Id., art. 6(1).

[16]U.S. CONST., art. VI, cl. 2. There is a considerable body of authority to the like effect concerning the analogous provision in the Convention on the International Sale of Goods (CISG), which permits parties to exclude the application of the Convention expressly or by implication. United Nations Convention on Contracts for the International Sale of Goods, art. 6, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S.

Outside the United States, the most widely used standard form of salvage contract is the Lloyd's Open Form, the most recent version of which is known as LOF 2000.[17] Far from purporting to exclude the Salvage Convention, the LOF 2000 form makes explicit reference to it, noting that it is incorporated into English law, the governing law of the contract.[18] Thus, if salvage services are provided in U.S. waters under an LOF 2000 form, the parties' rights will be governed by the Salvage Convention 1989, not because the Convention forms part of U.S. law but because it forms part of English law and because any claims arising under the contract must be settled by arbitration in London.[19]

However, salvage under LOF 2000 terms in U.S. waters is relatively uncommon, for two main reasons.[20] First, salvage of recreational vessels is usually done under American standard forms or on a "pure salvage" basis without prior agreement.[21] Second, the U.S. Coast Guard plays the principal role in handling vessel casualties that involve actual or threatened pollution, with the result that private commercial salvors are often relegated to consulting positions.[22]

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3. See B.P. Oil Intern., Ltd v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003)(contractual choice of Ecuadorian law not effective to exclude CISG because CISG is part of Ecuadorian law); Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1149-50 (N.D. Cal. 2001)(same *re* choice of British Columbia law); Valero Marketing & Supply Co. v. Greeni Oy, 373 F. Supp. 2d 475, 480 (D.N.J. 2005), *rev'd on other grounds* 242 Fed. Appx. 840 (3d Cir. 2007) ("[T]o exclude the CISG a party must not only provide that the law of a particular state will apply, it must also expressly state that the CISG will not apply"); American Mint, L.L.C. v. GOSoftware, Inc., No. Civ.A. 1:05-CV-650, 2005 WL 2021248 at *3 (M.D.Pa. 2005)(contractual choice of Georgia law not sufficient to exclude operation of CISG); Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp., No. 06-14553, 2007 WL 2875256 at *3 (E.D. Mich. 2007)(contractual choice of Canadian law not effective to exclude CISG because CISG is part of Canadian law); Travelers Property Cas. Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd, 474 F.Supp.2d 1075, 1081-82 (D.Minn. 2007) (contractual choice of Minnesota law not sufficient to exclude operation of CISG). *Cf.* American Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61, 63-64 (D.R.I. 2006).

[17]Copies of LOF 2000 can be obtained from the Lloyd's of London website at http://www.lloyds.com/NR/rdonlyres/5B84549E-C44C-4A65-8AB8-1D1831667FE1/0/AgencyLOF2000.pdf (last visited March 12th, 2008).

[18]LOF 2000, supra n. 17, cls. D (Effect of Other Remedies), J (Governing Law).

[19]Id., cl. I (Arbitration and the LSSA Clauses).

[20]Use of the LOF form is in general decline in the rest of the world, too. There were 255 LOF salvage cases arbitrated in London in 1980 but only 80 in 2006 and 107 in 2007. International Salvage Union, *ISU Puts Forward Plan for a New Lloyd's Form*, Salvage World, Sep. 2007 at 1; Lloyd's Worldwide, *LOF Statistics*, (available at http://www.lloyds.com/Lloyds_Worldwide/Lloyds_Agents/Salvage_Arbitration_Branch/LOF_facts_And_figures.htm).

[21]See generally Edward V. Cattell, Jr., *Recreational Vessel Salvage Arbitration: An Interim Report*, 29 J. Mar. L. Com. 257 (1998).

[22]Committee on Marine Salvage Issues, National Research Council, *Reassessment of the Marine Salvage Posture of the United States*, 13 (1994).

A. Recreational Vessel Salvage

Until the 1980s, the majority of recreational vessel salvage was performed by the U.S. Coast Guard.[23] In 1988, Congress amended 14 U.S.C. § 88 to require the Commandant of the Coast Guard to "make full use of all available and qualified resources, including . . . individuals licensed by the Secretary" when rendering aid "in nonemergency cases."[24] The Coast Guard then declared that it would no longer provide nonemergency assistance to vessels when a source of commercial assistance is reasonably available.[25] As a result, the Coast Guard does not provide assistance unless there is a threat to the lives of those aboard the vessel, confining its services to those of monitoring the situation.[26] A large number of small salvage companies came into existence as a result, with the objective of providing readily available assistance to recreational vessels on a commercial basis.[27]

Initially, recreational vessel salvors made contracts with their customers on Lloyd's Open Form (LOF) terms, but beginning in 1992, a series of federal court decisions refused to enforce the London arbitration requirement of the LOF form, holding that it was not enforceable in a contract between U.S. citizens as there was no "reasonable relation" with the United Kingdom, as required by 9 U.S.C. § 202.[28] Recreational vessel salvors responded by abandoning the LOF.[29] Two American alternatives are now in common use for recreational vessel salvage, the U.S. Open Form Agreement or MARSALV, created by the Society of Maritime Arbitrators,[30] and the BOAT/US Standard Form Yacht Salvage Contract, created by the Boat Owners' Association of the United States.[31]

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[23]Cattell, supra note 21, at 257.

[24]14 U.S.C. § 88(2), inserted by Pub. L. 100-448, § 30(a) (1988). The "Secretary" referred to in § 88(2) is the Secretary of the Department of Homeland Security. Upon a declaration of war, the Coast Guard operates as a service of the Navy if Congress or the President so directs; in peace time it is part of the Department of Homeland Security. 14 U.S.C. § 3.

[25]Andrew Anderson, *Salvage and Recreational Vessels: Modern Concepts and Misconceptions*, 6 U.S.F. Mar. L.J. 203, 204-5 (1993).

[26]Id.

[27]Id.; Cattell, supra note 21, at 257.

[28]Brier v. Northstar Marine, Inc., 1993 AMC 1194 (D.N.J. 1992); Jones v. Sea Tow Services Freeport N.Y., Inc., 30 F.3d 360, 1994 AMC 2661 (2d Cir. 1994); Reinholtz v. Retriever Marine Towing & Salvage, 1994 AMC 2981 (S.D. Fla. 1993).

[29]Cattell, supra note 21, at 257.

[30]Copies of MARSALV can be obtained from the Society of Maritime Arbitrators, Inc. website at http://www.smany.org/sma/salvform.html (last visited March 12th, 2008).

[31]Copies of the BOAT/US Standard Form Yacht Salvage Contract can be obtained from the Boat Owners' Association of the United States website at http://www.boatus.com/salvage/contract.pdf (last visited March 12th, 2008).

Each of the American standard forms contains four alternative bases for payment for the salvor's services: (1) no-cure, no pay, with compensation to be fixed pursuant to the Salvage Convention 1989, arts. 13 and 14 (which are reproduced on the back of MARSALV); (2) no-cure no-pay, but for a fixed price; (3) an agreed daily or hourly rate; or (4) an unspecified "Other" to be agreed when the form is signed.[32] Both forms provide for arbitration of salvage claims in the United States.[33] The choice of U.S. arbitration would be sufficient in itself to make the Salvage Convention apply (at least if the agreement is observed and arbitration in the U.S. ensues),[34] although the Convention's method for fixing the salvage reward would be excluded if the parties were to select the second, third or fourth options for payment because the Convention does not apply to the extent that the parties contract on a different basis.[35] Obviously, the whole of the Convention would apply if the first option were to be chosen.

In practice, the MARSALV and BOAT/US forms are seldom signed until after the salvage operation has been completed successfully, because it is often not practicable to agree the terms in advance, particularly if the peril faced by the vessel is acute.[36] If the form is not signed until after the salvage has been completed successfully, the salvor understandably asks for payment under the first option, which is the most lucrative from its point of view.[37] The signed form then effectively acts merely as an acknowledgement by the vessel owner that the salvor's services were provided on a "no cure no pay" basis under the Salvage Convention 1989. That would be the position even if the document were not signed, as the salvor's services would constitute "pure salvage" entitling it to a reward under the Convention in any event. There is long-standing authority for the proposition that a salvage agreement made by the master of a vessel after salvage services have been rendered is not binding on the parties,[38] although arbitrators regularly hold otherwise.[39] Because the Salvage Convention 1989 applies whether or not a subsequently-signed MARSALV or BOAT/US form is a binding contract,

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[32]MARSALV, supra note 30, cl. THIRD; BOAT/US Standard Form Yacht Salvage Contract, supra note 31, cl. 3. The BOAT/US form makes the third option "no cure no pay," as well.

[33]MARSALV, supra note 30, cls. THIRD, FOURTH and SIXTH; BOAT/US Standard Form Yacht Salvage Contract, supra note 31, cls. 3(a), 5, 6. See also Cattell, supra note 21, at 260-65.

[34]Salvage Convention 1989, supra note 1, art. 2.

[35]Id., art. 6(1); see sup*ra* note 15.

[36]Anderson, supra note 25, at 220-21; Vickey L. Quinn, Comment, *Hard Aground: A Primer on the Salvage of Recreational Vessels*, 19 U.S.F. Mar. L.J. 321, 341 (2007).

[37]Anderson, supra note 25, at 220-21; Quinn, supra note 36 at 341.

[38]Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co., 280 F. 334 (4th Cir. 1922); The Inchmaree, [1899] P. 111.

[39]In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Sea Robin, S.M.A. No. 3632, June 29, 2000 (Arb. A.J. Siciliano); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/Y Answer Too, S.M.A. No. 3776, March 25, 2003 (Arb. A.J. Siciliano); In re Coastal

there is little significance in the point, at least so far as the rights and obligations of the parties in relation to the salvage itself are concerned.

Whether or not a subsequently-signed MARSALV or BOAT/US form amounts to a binding *salvage* contract, it can clearly amount to a binding *ad hoc* agreement to arbitrate any disputes between the parties. Vessel owners occasionally try to challenge that obligation to arbitrate, usually without success,[40] unless the right to arbitrate has been waived by participation in litigation.[41] However, if the vessel owner challenges the agreement on the basis of fraud, misrepresentation or over-reaching, the legal status of the subsequently-signed form may prove to be significant in determining the appropriate forum to consider the challenge. Under the *Prima Paint* doctrine, a claim of fraud in the inducement of an entire contract including an arbitration clause must be decided by the arbitrators, but if the claim is of fraud in the inducement of the arbitration agreement itself, it must be adjudicated by a federal court, if that court has jurisdiction over the underlying claim.[42] Thus, if the vessel owner claims that it (or its master) was induced to sign a salvage form after a successful salvage by fraud or misrepresentation about the effect of the form, the operation of the *Prima Paint* doctrine will depend on whether the signed form has any legal effect other than as an arbitration agreement. If the only legal effect of the subsequently-signed salvage form is as an arbitration agreement, a claim that the signature was induced by fraud or misrepresentation is an issue that goes to the making of the arbitration agreement and so it must be decided by the court and not by the arbitrators under the *Prima Paint* doc-

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Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Freedom, S.M.A. No. 3789, May 27, 2003 (Arb. Austin Dooley); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Ovation, S.M.A. No. 3801, Sep. 12, 2003 (Arb. Charles Cushing), *aff'd* S.M.A. No. 3805, Oct. 3, 2003 (App. Arb. Manfred Arnold); In re Triple Check, Inc. and M/Y My Way, S.M.A. No. 3851, June 25, 2004 (Arb. Robert Umbdenstock); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Dunn Deal, S.M.A. No. 3913, Jan. 10th, 2006 (Arb. William Peters).

[40]See, e.g., In re B.H.R.S., Inc. (d/b/a Sea Tow Miami) and M/V Big Daddy, S.M.A. No. 3773, Feb. 20, 2003 (Arb. William Peters)(rejecting challenge to agreement to arbitrate in MARSALV form signed after salvage); Royal Ins. Co. of America v. B.H.R.S., L.L.C., 333 F. Supp. 2d 1293, 2004 AMC 1192 (S.D.Fla. 2004)(affirming award made in previous case); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Ovation, S.M.A. No. 3801, Sep. 12, 2003 (Arb. Charles Cushing)(rejecting challenge to agreement to arbitrate in MARSALV form signed after salvage), S.M.A. No. 3805, Oct. 3, 2003 (App. Arb. Manfred Arnold)(affirming award); In re Triple Check, Inc. and M/Y My Way, S.M.A. No. 3851, June 25, 2004 (Arb. Robert Umbdenstock)(rejecting challenge to agreement to arbitrate in MARSALV form signed after salvage); Stevenson v. October Princess Holdings, L.L.C., No. 05-240PS, 2006 WL 1519160 (D.Me. 2006), *aff'd* 2006 WL 1720169 (D.Me. 2006)(compelling arbitration under BOAT/US form signed after salvage).

[41]See, e.g., Triplecheck, Inc. v. Creole Yacht Charters Ltd, No. 05-21182-CIV, 2006 WL 3507971 (S.D.Fla. 2006)(waiver of right to arbitration under MARSALV form signed after salvage).

[42]Prima Paint Corp. v. Flood & Conklin Mfg Co., 388 U.S. 395, 87 S.Ct. 1801 (1967).

trine.[43] If, however, a subsequently-signed salvage form operates as a binding salvage agreement that includes an arbitration clause, a challenge to the validity of the form is a challenge to the entire contract and so must be decided by the arbitrators under *Prima Paint*.[44] Given that arbitrators generally take the view that a subsequently-signed form is a binding *salvage* agreement,[45] it is not surprising to find several examples of arbitrators hearing and deciding challenges to the agreement based on fraud or misrepresentation.[46] It is, however, questionable whether an arbitrator has jurisdiction to make such a decision under the *Prima Paint* doctrine, given the long-standing authority for the proposition that a subsequently-signed document is not a binding salvage contract.

Many recreational vessel owners are members of towage assistance schemes, which give them a contractual right to a free tow or assistance in a "soft grounding" in return for a pre-paid annual fee. The companies who provide these services are usually franchisees who operate within a defined geographical area under the terms of a franchise agreement with a national franchisor.[47] The same companies provide salvage assistance to recreational vessels, if necessary. As a result, there are often disputes about whether the services provided to a member amount to salvage, in which case salvage reward is payable, or a simple tow or "soft grounding" assistance, for which the member has already paid, by paying its membership fee.[48]

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[43]Id., 388 U.S. 395, at 403-4, 87 S.Ct. at 1806.

[44]Id. In *Runnin' Easy 3, Inc. v. Offshore Marine Towing, Inc.*, 314 F. Supp. 2d 1246, 2004 AMC 1773 (S.D. Fla. 2004) the court applied *Prima Paint* to refer a challenge to a salvage agreement to arbitration. Although the vessel owner claimed that the salvage form, a BOAT/US form, was not signed until after the salvage had been completed successfully, the court held that to be a disputed question to be decided by the arbitrator, the salvor having provided ample evidence that the form had been signed before salvage services commenced. Because the court held that the challenge was to the entire contract, *Prima Paint* required that it be considered by the arbitrator. *Runnin' Easy 3*, id., 314 F. Supp. 2d at 1251-2, 2004 AMC at 1779.

[45]Supra note 39.

[46]See, e.g., In re Sea Tow Services Cape Cod Bay and Baer, S.M.A. No. 3405, Jan. 5, 1998 (Arb. Ronald T. Carroll); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and Karney, S.M.A. No. 3866, Nov. 5, 2004 (Arb. Lawrence Jacobson).

[47]The two main franchisors are Sea Tow (see http://www.seastore.com/index.asp)(last visited May 12th, 2008) and TowBoatU.S., which is associated with the Boat Owners' Association of the United States (see www.towboatus.com)(last visited May 12th, 2008).

[48]See, e.g., In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/Y Answer Too, S.M.A. No. 3776, March 25, 2003 (Arb. A.J. Siciliano); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Island Time, S.M.A. No. 3783, May 6, 2003 (Arb. William Peters); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Freedom, S.M.A. No. 3789, May 27, 2003 (Arb. Austin Dooley); In re Coastal Towing & Salvage, Inc. (d/b/a Sea Tow Fort Lauderdale) and M/V Who Knew It, S.M.A. No. 3802, Sep. 23, 2003 (Arb. John F. Ring, Jr.); In re Sea Tow of Beaufort and M/V Reel Nauti, S.M.A. No. 3832, Feb. 12, 2004 (Arb. Harry Hunter); In re Triple Check, Inc. and M/Y My Way, S.M.A. No. 3851, June 25, 2004 (Arb. Robert Umbdenstock); In re Islamorada Boat Club, L.L.C. (d/b/a Sea Tow Key Largo) and Kalert, S.M.A. No. 3969, July 12, 2007 (Arb. William Peters); In re Stevenson (d/b/a Pen Bay Towing) and M/Y October Princess, S.M.A. No. 3982, Oct. 10, 2007 (Arbs. Ronald T. Carroll, Stephen H. Busch, David Farrell, Jr.).

B. Salvage When There is a Threat of Environmental Harm

The U.S. Coast Guard plays the principal role in handling vessel casualties that involve actual or threatened pollution.[49] The National Strike Force Coordination Center (NSFCC) at U.S. Coast Guard Headquarters in Elizabeth City, North Carolina, is authorized to act as the National Response Unit under the Federal Water Pollution Control Act (FWPCA) as amended by the Oil Pollution Act 1990.[50] The NSFCC maintains three Strike Teams, one for the Atlantic Coast, one for the Gulf Coast and one for the Pacific Coast, which are required by statute to maintain personnel who are trained, prepared and available to carry out the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and to keep adequate pollution control equipment and material.[51] The Strike Teams provide rapid response support with highly trained, experienced personnel and specialized equipment whenever there is a threat of maritime pollution from oil or other hazardous substances. As a consequence, the Coast Guard Strike Teams often perform many of the tasks formerly performed (and still performed in some parts of the world) by professional salvors.

The Coast Guard's response to an incident threatening pollution may be supplemented by the U.S. Navy, which has statutory authorization to provide equipment and gear to provide salvage facilities to prevent, abate or minimize damage to the environment from public or private vessels.[52] The Navy's Salvage Operations Division been designated as a "Special Team" available to Federal On-Scene Coordinators under the NCP.[53] Thus, the Navy may provide assistance in responding to commercial oil or hazardous substance spills (or potential spills) if requested to do so by the Coast Guard officer acting as Federal On-Scene Coordinator.[54]

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[49]Committee on Marine Salvage Issues, National Research Council, *Reassessment of the Marine Salvage Posture of the United States*, 13 (1994).

[50]33 U.S.C. § 1321(a)(23), (j)(2).

[51]33 U.S.C. § 1321(d)(2)(C). The NCP is mandated by 33 U.S.C. § 1321(d)(1). For details of the functions of the NFSCC and the Strike Teams, see the NSFCC page at the U.S. Coast Guard website: http://www.uscg.mil/hq/nsfweb/nsfcc/nsfccindex.html (last visited March 3rd, 2008).

[52]10 U.S.C. § 7361(a),(e).

[53]See "Doc2 Salvage" on the "Sea Doc" website of the Office of the Director of Ocean Engineering, Supervisor of Salvage and Diving, U.S. Navy, at http://www.supsalv.org/00c2_home.asp?destPage=00c2&pageId=2.1 (last visited April 11th, 2008).

[54]Id. The Federal On-Scene Coordinator is designated in the National Contingency Plan (NCP). 33 U.S.C. §§ 1321(a)(21), 1321(d)(2)(K). The Federal On-Scene Coordinator coordinates all containment, removal and disposal efforts and resources and is the point of contact between federal agencies and local responders. The U.S. Coast Guard has 46 Marine Safety Offices spread among the nine U.S. Coast Guard districts, each of which is headed by a Captain of the Port, who is designated as a Federal On-Scene Coordinator under the NCP.

The U.S. Coast Guard cannot claim to be a salvor and so cannot seek salvage reward for performing its obligations under the FWPCA to protect the environment from marine pollution because it is not a volunteer when performing those obligations, which are mandatory.[55] Rather surprisingly, the U.S. Navy can claim to be a salvor in similar circumstances: there is specific statutory authorization for the Secretary of the Navy to claim payment for salvage services performed in connection with a marine salvage operation intended to prevent, abate or minimize damage to the environment.[56]

Although the Coast Guard is not a volunteer when combating the threat of marine pollution, it may be a volunteer when performing other rescue functions and so may be entitled to salvage reward in non-pollution cases. The Coast Guard has been held to be a volunteer entitled to salvage reward when engaged in fire-fighting operations because it has no statutory duty to engage in such activities.[57] Treating the Coast Guard as a volunteer in non-pollution cases is consistent with the considerable body of authority holding that the United States cannot be held liable for a failure by the Coast Guard to provide rescue services because of the "discretionary function" exception to the Suits in Admiralty Act, the Public Vessels Act and the Federal Tort Claims Act or because the Coast Guard has no statutory duty to undertake search and rescue services.[58] Of course, it does not follow that the Coast Guard or the Navy will always seek to recover salvage reward, merely that they are entitled to do so.

As well as the salvage services provided by the U.S. military when there is an environmental threat, amendments made by OPA 90 to the FWPCA require commercial ships carrying oil as a primary cargo to adopt vessel response plans (VRPs), which include contractual commitments with an oil spill removal organization (OSRO), so that an immediate response is possible when an incident threatens oil pollution.[59] The implementing regulations also require the owner or operator of such a ship to ensure the availability of "a salvage company with expertise and equipment" and "a company with vessel firefighting capability that will respond to casualties in the area(s) in which the vessel will operate."[60] The regulations provide that these respon-

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[55]U.S. v. Ex-U.S.S. Cabot/Dedalo, 297 F.3d 378, 386, 2002 AMC 1974, 1984 (5th Cir. 2002)("[T]he Coast Guard's duty to respond to a threatened oil spill is mandatory, not optional").

[56]10 U.S.C. § 7363.

[57]In re American Oil Co., 417 F.2d 164, 1969 AMC 1761 (5th Cir. 1969).

[58]46 U.S.C. §§ 30901-18 (2007)(Suits in Admiralty Act)(formerly codified at 46 app. U.S.C. §§ 741-52); 46 U.S.C. §§ 31101-13 (2007)(Public Vessels Act)(formerly codified at 46 app. U.S.C. §§ 781-90); 28 U.S.C. §§ 1346, 2680(a)(Federal Tort Claims Act). See, e.g., Thames Shipyard & Repair Co. v. U.S., 350 F.3d 247, 2004 AMC 112 (1st Cir. 2003); Wilder v. U.S., 2000 AMC 2215 (D.S.C. 2000); Hood v. U.S., 695 F.Supp. 237, 1988 AMC 2598 (E.D. La. 1988); Daley v. U.S., 499 F.Supp. 1005, 1983 AMC 128 (D.Mass. 1980); McLaughlin v. U.S., 671 F.Supp. 72, 1988 AMC 517 (D.Me. 1987).

[59]33 U.S.C. § 1321(j)(5)(D).

[60]33 C.F.R. § 155.1050(k)(1)(i),(ii) (2007).

ders must be capable of being deployed to the port nearest to the area in which the vessel operates within 24 hours of notification.[61] However, the U.S. Coast Guard has repeatedly suspended the 24-hour deployment requirement because of disagreement among salvage contractors, maritime associations and public agencies as to what constitutes adequate salvage and marine fire-fighting resources.[62] The Coast Guard has a long-standing project to propose a new rule that will define the salvage and marine fire-fighting capability that is necessary in the plans, establish how quickly those resources must be on scene, and determine what constitutes an adequate salvage and marine fire-fighting company.[63] Thus, if a commercial oil tanker spills or threatens to spill oil, assistance is usually provided by government authorities or on a pre-planned basis by a pre-contracted OSRO or salvor rather than by a commercial salvor providing assistance on an *ad hoc* basis.

Nevertheless, it should not be concluded that there is never a role for *ad hoc* salvage in such cases. A professional salvor without a pre-existing contract may be the first on the scene of a casualty and may be better placed to provide assistance than the Coast Guard, the OSRO or the pre-contracted salvage company in terms of ready availability of personnel and equipment. In such a case, the salvor will proceed with the salvage, usually on a contract basis, but under the supervision of the Coast Guard, which must still approve the salvor's salvage plan.[64]

C. Remaining Cases: Commercial Contract Salvage

Salvage of small commercial vessels, such as fishing boats, is often done under one or other of the American standard forms used for recreational vessel salvage, for much the same reason that the American forms were developed in the first place.[65] Because both vessel owner and salvor are usually American citizens in such cases, the London arbitration clause in the LOF

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[61]33 C.F.R. § 155.1050(k)(3) (2007).

[62]Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil, 72 Fed. Reg. 6168, 6170 (Feb. 9, 2007)(suspending 33 C.F.R. § 155.1050(k)(3) until Feb. 12, 2009).

[63]Id., at 6169.

[64]An example of this procedure in operation can be seen in the salvage of the motor tanker *White Sea* and its cargo of 548,000 barrels of Low Sulfur Fuel Oil (LSFO) on July 12th-13th, 2007. *ASA Member Responds to Grounded Tanker off Coney Island*, 5 Soundings, Fall 2007, at 4-5 (available at http://www.americansalvage.org/Soundings/Fall2007_web.pdf (last visited April 18th, 2008)). The professional salvor arrived at the stranded tanker "within hours of the casualty" and successfully removed the tanker's cargo once approval was obtained from the Coast Guard. Id.

[65]See, e.g., In re Sea Tow Shinnecock Moriches and One Beacon America Insurance Co., S.M.A. No. 3991, Jan. 18th, 2008 (Arb. David W. Martowski)(arbitration of claim for salvage of commercial fishing vessel under MARSALV form).

2000 form would be unenforceable because there is no "reasonable relation" with the United Kingdom, as required by 9 U.S.C. § 202.[66]

For vessels not owned by American citizens, which includes most "blue water" commercial ships, there is no similar impediment to contracting on an LOF basis, although any casualty involving a threat of environmental pollution will often be handled by the U.S. Coast Guard rather than by *ad hoc* salvors. Even then, there would be nothing to prevent the salvor from using an American form providing for arbitration in the United States, although professional salvors usually prefer to use LOF 2000 when they are free to do so, apparently because of a perception that London salvage arbitrators are more experienced than their American counterparts.[67] As well, although the American forms incorporate arts 13 and 14 of the Salvage Convention 1989, they make no provision for incorporation of the SCOPIC clause, which provides better and more detailed benefits than art 14 for salvors responding to casualties where damage to the environment is threatened.[68]

III
THE SALVAGE CONVENTION 1989 AND GENERAL MARITIME LAW COMPARED

A. The Blackwall Factors and Measures to Protect the Environment

Under the general maritime law, the factors to be taken into account in determining the amount of reward to be paid to a successful salvor are those listed in *The Blackwall*.[69] The six venerable *Blackwall* factors are still routinely cited and applied in salvage cases after 1996,[70] even though the

[66]See supra note 28.

[67]See John A. Witte, Jr. *Lloyd's Open Form: 100 Years in the Making*, 113 Marine Log, March 2008, at 59-60 (LOF "will remain the contract of choice for the marine salvage community"). Mr. Witte is currently the President of the American Salvage Association.

[68]See above nn 30, 31.

[69]77 U.S. (10 Wall.) 1, 14, 19 L.Ed. 870, 2002 AMC 1808 (1869).

[70]See, e.g., Offshore Marine Towing, Inc. v. MR23, 412 F.3d 1254, 1257, 2005 AMC 1800, 1804 (11th Cir. 2005)(citing and applying the *Blackwall* factors); R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 286 F.3d 194, 203 n.*, 2002 AMC 1136, 1147 n.1 (4th Cir. 2002)(citing *Blackwall* factors); Southernmost Marine Services, Inc. v. One (1) 2000 Fifty Four Foot (54') Sea Ray named M/V Potential, 250 F. Supp. 2d 1367, 1377-78, (S.D.Fla. 2003)(citing and applying *Blackwall* factors); New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F. Supp. 2d 101, 115, 2003 AMC 488, 502 (D.Mass. 2003)(same); Joseph v. J.P. Yachts, L.L.C., 436 F. Supp. 2d 254, 271, 2006 AMC 2786, 2806-7 (D.Mass. 2006)(same); Reiss v. One Schat-Harding Lifeboat No. 120776 No. 1, 444 F.Supp. 2d 553, 557, 2006 AMC 1401, 1404 (D.S.C. 2006)(same); Sea Tow Portland/Vancouver v. Yacht High Steaks, 2007 AMC 2705, 2711-13 (D.Or. 2007)(same); Boat Raising and Reclamation v. Victory, a 56' Dania Custom Boat, No.

Salvage Convention 1989 art. 13(1) contains a differently-worded list of factors to be taken into account when fixing the salvage reward.[71] Although anachronistic, American courts' nostalgia for the *Blackwall* factors is mostly harmless because, with one important exception, the general maritime law and the art. 13(1) factors cover much the same, although not identical, ground.

- The first *Blackwall* factor, "The labor expended by the salvors in rendering the salvage service" is equivalent to the "efforts" part of the Salvage Convention 1989, art. 13(1)(e), "the skill and efforts of the salvors in salving the vessel, other property and life;"

- The second *Blackwall* factor, "The promptitude, skill, and energy displayed in rendering the service and saving the property" is approximately equivalent to the "skill" part of Salvage Convention 1989, art. 13(1)(e)(quoted in the previous paragraph) plus art. 13(1)(f), "[T]he time used and expenses and losses incurred by the salvors" and art. 13(1)(h), "[T]he promptness of the services rendered," although the territory covered by art. 13(1)(f) seems rather broader than that covered by the word "energy" in the second *Blackwall* factor;

- The third *Blackwall* factor, "The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed" is approximately equivalent to Salvage Convention 1989, art. 13(1)(g), "[T]he risk of liability and other risks run by the salvors or their equipment" and art. 13(1)(j) "[T]he state of readiness and efficiency of the salvor's equipment and the value thereof," although here too the Convention factors seem rather broader than the *Blackwall* factor;

- The fourth *Blackwall* factor, "The risk incurred by the salvors in securing the property from the impending peril" is also approximately equivalent to Salvage Convention 1989, art. 13(1)(g), quoted in the previous paragraph;

2:06-cv-78-FtM-29DNF, 2007 WL 4462995, **9-10 (M.D. Fla. 2007)(applying *Blackwall* factors without citation); Miami Yacht Divers, Inc. v. M/V All Access, 2008 AMC 170, 173 (S.D.Fla. 2007)(citing and applying *Blackwall* factors); Cape Ann Towing v. M/Y Universal Lady, No. 07-13237, 2008 WL 647095, *1 n.1 (11th Cir. 2008)(citing *Blackwall* factors).

[71]Salvage Convention 1989, art. 13(1) provides, in pertinent part:

"1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;
(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
(c) the measure of success obtained by the salvor;
(d) the nature and degree of the danger;
(e) the skill and efforts of the salvors in salving the vessel, other property and life;
(f) the time used and expenses and losses incurred by the salvors;
(g) the risk of liability and other risks run by the salvors or their equipment;
(h) the promptness of the services rendered;
(i) the availability and use of vessels or other equipment intended for salvage operations;
(j) the state of readiness and efficiency of the salvor's equipment and the value thereof."

• The fifth *Blackwall* factor, "The value of the property saved" is equivalent to Salvage Convention 1989, art. 13(1)(a), "[T]he salved value of the vessel and other property;"

• The sixth *Blackwall* factor, "The degree of danger from which the property was rescued" is equivalent to Salvage Convention 1989, art. 13(1)(d), "[T]he nature and degree of the danger."

Three paragraphs of art. 13(1) find no exact equivalent in the six *Blackwall* factors but two of them are equivalent to other general maritime law principles.

Salvage Convention 1989, art. 13(1)(c), "[T]he measure of success obtained by the salvor" is not listed as one of the six *Blackwall* factors, but the *Blackwall* court did say that "Success is essential to the claim,"[72] and the Supreme Court later stated, in *The Sabine*, that "Success in whole or in part, or that the service rendered contributed to such success" is a necessary element of a salvage claim.[73]

The Salvage Convention 1989, art. 13(1)(i) includes as a relevant factor "[T]he availability and use of vessels or other equipment intended for salvage operations," which is designed to reward professional salvors liberally in order to give them an incentive to keep and maintain equipment with the special purpose of saving life and property at sea. Although that is not one of the six listed *Blackwall* factors, it too has long been recognized as a principle of the general maritime law of salvage,[74] one that has also been applied regularly (as a general maritime law principle rather than as the art. 13(1)(i) factor) after 1996.[75]

One of the art. 13(1) factors goes beyond any principle found in the general maritime law; indeed, it was designed to do just that.[76] Article 13(1)(b)

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[72]The Blackwall, 77 U.S. (10 Wall.) 1, 12, 19 L.Ed. 870, 2002 AMC 1808 (1869).

[73]The Sabine, 101 U.S. (11 Otto) 384, 384, 25 L.Ed. 982 (1879).

[74]Norris, 3A *Benedict*, supra note 13, § 81. See also The Lamington, 86 F. 675, 684 (2d Cir. 1898); Bureau Wijsmuller v. United States, 702 F.2d 333, 340, 1983 AMC 1471, 1479 (2d Cir. 1983)("[A] professional salvor is entitled to a more liberal award than a chance salvor"). Until *The Camanche*, 75 U.S. (8 Wall.) 448, 19 L.Ed. 397, 2003 AMC 2979 (1869), the rule was that professional salvors could not claim salvage reward at all.

[75]H.R.M., Inc. v. S/V Venture VII, 972 F.Supp. 92, 96, 1998 AMC 9, 15 (D.R.I. 1997); New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F. Supp. 2d 101, 115, 2003 AMC 488, 502 (D.Mass. 2003)("Professional salvors are granted more liberal awards because they possess unique skills and must maintain expensive equipment to continue rendering services to those in need"); Triplecheck, Inc. v. Creole Yacht Charters Ltd, No. 05-21182-CIV, 2006 WL 3507971 at *2 (S.D.Fla. 2006); Miami Yacht Divers, Inc. v. M/V All Access, 2008 AMC 170, 175 (S.D.Fla. 2007)("A professional salvor is entitled to an increment in its salvage award to encourage the professional salvage profession"). *Cf.* Atlantis Marine Towing, Inc. v. M/V Elzabeth, 346 F. Supp. 2d 1266, 1276 n.1 (S.D. Fla. 2004)(rejecting salvor's request for an enhancement of reward based on its status as professional salvor); Sea Tow Portland/Vancouver v. Yacht High Steaks, 2007 AMC 2705, 2713 (D.Or. 2007)(same).

[76]Michael Kerr, *The International Convention on Salvage 1989 – How It Came To Be*, 39 Int'l & Comp. L.Q. 530, 542 (1990)("Article 13(1)(b) is a wholly novel provision").

requires the court to consider "[T]he skill and efforts of the salvors in preventing or minimizing damage to the environment" when fixing the reward in cases of successful salvage. In *Trico Marine Operators, Inc. v. Dow Chemical Co.*,[77] the U.S. District Court for the Eastern District of Louisiana suggested that a similar principle be adopted as part of the general maritime law of salvage. The *Trico* court anticipated the effect of the Salvage Convention 1989, which at the time of decision had been adopted by the United States but had not yet come into force.[78] Nevertheless, in *Margate Shipping Co. v. M/V JA Orgeron* (popularly known as the *Cherry Valley* case),[79] the U.S. Court of Appeals for the Fifth Circuit said that "the extra-*Blackwall* environmental protection factor announced in *Trico*...has never been endorsed by this court."[80]

The *Cherry Valley* case was decided after the Salvage Convention 1989 came into force but it concerned a salvage occurring before July 14th, 1996.[81] Whatever the merits of *Trico's* adoption of the new factor before the Convention came into force, it has undoubtedly formed part of U.S. salvage law since July 14th, 1996. The U.S. District Court for the District of Massachusetts adopted and applied the environmental factor in *New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc.*,[82] a post-Convention case, citing *Trico* and not the Salvage Convention 1989, art. 13(1)(b). As recently as 2006, the same court observed that "a number of courts outside this circuit consider the salvor's skill and effort in preventing or minimizing environmental damage,"[83] as if the factor were to be adopted circuit by circuit as part of the general maritime law, rather than being binding everywhere by operation of the Salvage Convention 1989. It is, of course, a mistake to think that a district court has any discretion about considering the factor as part of the canonical list. The factor may not be relevant on the facts of the case (as it was not in the *Cherry Valley* case) but it is undoubtedly part of the law.

Use of the *Blackwall* factors instead of the art. 13 criteria may lead to undervaluation of the salvor's reward in cases where the salvor's efforts successfully avert the threat of damage to the environment. For example, in *Southernmost Marine Services, Inc. v. One (1) 2000 Fifty Four Foot (54') Sea Ray named M/V Potential*,[84] salvors successfully salved a vessel that had

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[77]809 F.Supp. 440, 1993 AMC 1042 (E.D. La, 1992).

[78]Id., 809 F.Supp. at 442-43, 1993 AMC at 1046-47.

[79]143 F.3d 976, 1998 AMC 2383 (5th Cir. 1998).

[80]Id., 143 F.3d at 988-89, 1998 AMC at 2398.

[81]The salvage occurred during the "dark and very stormy night" of November 14th-15th, 1994. Id., 143 F.3d at 980, 1998 AMC at 2384.

[82]240 F. Supp. 2d 101, 118, 2003 AMC 488, 506 (D.Mass. 2003).

[83]Joseph v. J.P. Yachts, L.L.C., 436 F. Supp. 2d 254, 273, 2006 AMC 2786, 2809 (D.Mass. 2006).

[84]250 F. Supp. 2d 1367 (S.D.Fla. 2003).

crashed into a rock jetty at full speed and had "impaled" itself on the jetty, filled with "sea water, oil and fuel from the 600 gallons of diesel fuel loaded aboard prior to departure."[85] The vessel owner urged the court to set a low value salvage award because (among other reasons) there was no pollution to the environment. The court rightly rejected that argument, holding that "extensive cleanup of the environment afterwards was not necessary due to the prompt and immediate corrective measures taken by the salvors on the site."[86] However, instead of *increasing* the award because the salvors' "prompt and immediate corrective measures" had averted the damage to the environment threatened by the vessel's ruptured fuel tanks, the court treated the threat of pollution as a "non-issue."[87] If the court had applied the Salvage Convention, art. 13 instead of the *Blackwall* factors (as it should have done) it would have realized that the salvors' success in protecting the environment while also protecting the vessel was not "an issue . . . having little relevancy to the issues of the case,"[88] but quite the opposite. There was no effect on the overall result because the parties had made a settlement agreement setting the amount to be paid for salvage reward but in the absence of that agreement, the salvors would quite possibly have been under-compensated as a result of the court's use of the *Blackwall* factors rather than the Salvage Convention, art. 13 criteria.[89]

B. The Relative Importance of the Factors to be Taken into Account When Assessing the Award

In *Bureau Wijsmuller v. United States*,[90] a pre-Convention case, the U.S. Court of Appeals for the Second Circuit ranked the *Blackwall* factors in descending order of importance, adopting the position advocated by *Benedict on Admiralty*.[91] Ranking the criteria in order of relative importance is inconsistent with the Salvage Convention 1989, art. 13(1), which states

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[85]Id., at 1368.

[86]Id., at 1378.

[87]Id.

[88]Id.

[89]If the court had applied the Salvage Convention 1989, art. 13 criteria, it would first have had to determine whether the 600 gallons of diesel fuel on board the vessel posed a threat of "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto," which is the Convention's restrictive definition of "damage to the environment." Salvage Convention 1989, supra note 1, art. 1(d). If so, the salvor's success in averting that threat would have been relevant to the fixing of salvage reward under Salvage Convention 1989, art. 13(1)(b).

[90]702 F.2d 333, 1983 AMC 1471 (2d Cir. 1983).

[91]Id., 702 F.2d at 339; 1983 AMC at 1478-79, citing Martin Norris, 3A *Benedict on Admiralty* § 237 (6th ed. 1980). See also Jones v. Sea Tow Services Freeport N.Y., Inc., 30 F.3d 360, 364, 1994 AMC 2661, 2667 (2d Cir. 1994).

that the criteria are to be taken into account "without regard to the order in which they are presented below." Nevertheless, the idea that the criteria can be ranked in order of importance has persisted – wrongly – after July 14th, 1996.[92] Significantly, the ranked list still appears in *Benedict*.[93]

C. Special Compensation for Salvage Operations on Vessels Threatening Environmental Damage

The most significant innovation in the Salvage Convention 1989 was the inclusion of art. 14, which requires the owner of a ship to pay "special compensation" to a salvor who has carried out salvage operations on a ship that by itself or by its cargo threatened damage to the environment.[94] "Special compensation" equal to the salvor's expenses is payable if those expenses exceed the salvage reward that would be payable under art. 13 for salving the ship and property.[95] Article 14 was included in the Convention to give salvors some incentive to provide salvage services to vessels that pose a threat to the environment but where there is doubt about whether the vessel and its cargo can be salved successfully.[96] It constitutes an important exception to the fundamental "no cure, no pay" principle of salvage law, because it gives salvors the opportunity of recovering compensation sufficient, at least, to cover their costs if that compensation exceeds what would be payable as reward for salving the ship and cargo.[97] Thus, to take the simplest but clearest example, art. 14 "special compensation" is payable to a salvor who carries out salvage operations on a vessel that threatens damage to the environment, even if the property salvage is completely unsuccessful and the ship and its cargo are lost. Similarly, if the salvage is successful but the value of the salved property is very small, "special compensation" may become payable because Salvage Convention, art. 13(3) provides that the salvage reward payable under art. 13 in the event of successful salvage cannot exceed the salved value of the vessel and other property.[98]

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[92]New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F. Supp. 2d 101, 115, 2003 AMC 488, 502 (D.Mass. 2003)(applying *Blackwall* criteria in the *Benedict/Bureau Wijsmuller* ranked order of importance). *Cf.* Southernmost Marine Services, Inc. v. One (1) 2000 Fifty Four Foot (54') Sea Ray named M/V Potential, 250 F. Supp. 2d 1367, 1377-78, (S.D.Fla. 2003)(citing *Blackwall* factors in the order stated by the *Blackwall* court).

[93]Norris, 3A *Benedict*, supra note 13, § 237.

[94]Salvage Convention 1989, art. 14(1).

[95]Id.

[96]Kerr, supra note 76, at 533.

[97]Id., at 534.

[98]See, e.g., International Towing & Salvage, Inc. v. F/V Lindsey Jeanette, 1999 AMC 2465 (M.D. Fla. 1999)(special compensation payable under art. 14 because salvor's expenses exceeded salved value of vessel).

The act of carrying out salvage operations on a vessel threatening environmental damage is enough in itself to entitle the salvor to "special compensation" under art. 14(1) whether or not the salvor's efforts to protect the environment are successful. However, if the salvor is successful in preventing or minimizing damage to the environment, the "special compensation" may be increased by an increment of up to 30% of the salvor's expenses or, in some cases, by an increment of up to 100%.[99] Importantly, though, art. 14 provides only for compensation of out-of-pocket, indirect and overhead expenses, without including any element of profit for the salvor.[100] Furthermore, art. 14 "special compensation" is payable only when the ship or its cargo threatens "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto."[101] Thus, it is not payable where salvage services are provided to a vessel posing a threat of environmental damage on the high seas far from any coastline.[102]

Article 14 of the Salvage Convention 1989 has less practical significance in the United States than in other Convention countries because, as noted above, vessels seldom need to rely on *ad hoc* assistance from salvors when involved in an incident threatening environmental damage, as the response to the situation generally comes from the U.S. Coast Guard or from pre-existing vessel response plans (VRPs), not on a salvage basis. As a result, the situation to which art. 14 was designed to respond will seldom arise in the United States. Although the United States is entitled to recover the actual costs of pollution removal and restoration of natural resources if there has been a discharge of oil or a hazardous substance from a vessel, there is no provision for the percentage uplift basis provided for in art. 14 of the Convention.[103] As noted above, the U.S. Coast Guard cannot claim to be a

[99]Salvage Convention 1989, art. 14(2). In *International Towing & Salvage*, id., the court awarded the maximum increment of 30% under art. 14(2).

[100]Semco Salvage & Marine Pte Ltd v. Lancer Navigation Co. Ltd (The Nagasaki Spirit), [1997] App. Cas. 455 (H.L. on appeal from Eng.). Professional salvors took the view that reimbursement of their expenses under art. 14 on a *Nagasaki Spirit* basis that included no element of profit was insufficient to give them enough incentive to intervene in casualties posing a threat of environmental harm. As a result, the International Salvage Union and the International Group of P. & I. Clubs negotiated a clause, known as the Special Compensation Protection and Indemnity Club Clause, or SCOPIC Clause, which can be included in a salvage contract and which provides for payment of expenses according to an agreed tariff. The latest version of the SCOPIC Clause (SCOPIC 2007) can be found on the International Salvage Union website at http://www.marine-salvage.com/documents/SCOPICJuly2007.pdf (last visited March 3rd, 2008).

[101]Salvage Convention 1989, art. 1(d).

[102]Nicholas J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 Tul. Mar. L.J. 1, 38-39 (1991).

[103]33 U.S.C. § 1321(f)(1),(4).

salvor when performing its obligations under the FWPCA to protect the environment from marine pollution.[104]

Nevertheless, there may be situations in which a "pure" salvor incurs expenditure in providing services to a vessel that threatens damage to the environment (as defined in the Convention) in circumstances where those expenses would exceed the salvage reward payable to the salvor. In those circumstances, special compensation is payable to the salvor under art. 14, although there is only one reported instance of that occurring since the Convention became part of U.S. law.[105]

It has been held that there can be no salvage reward under the general maritime law where the peril is a potential hazard to the marine environment alone.[106] That appears to be unchanged by art. 14, which entitles a salvor to special compensation only where the salvor "has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment."[107] For there to be salvage operations "in respect of a vessel," the vessel itself must be in some peril because "salvage operation" is defined by art. 1(a) to mean activity undertaken to assist a vessel or other property in danger. Thus, there can be no art. 14 "special compensation" when a salvor provides salvage services to cargo but not a vessel,[108] nor in a situation such as that in *Fine v. Rockwood*,[109] where there is a potential threat to the marine environment but where the vessel itself is not in any peril that might expose it to loss or destruction. For that reason, the International Salvage Union, representing professional salvors, continues to lobby internationally for what it calls "Environmental Salvage Awards," which would be payable purely for pollution prevention, independently of the recovery of property.[110]

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[104]U.S. v. Ex-U.S.S. Cabot/Dedalo, 297 F.3d 378, 386, 2002 AMC 1974, 1984 (5th Cir. 2002)("[T]he Coast Guard's duty to respond to a threatened oil spill is mandatory, not optional").

[105]International Towing & Salvage, Inc. v. F/V Lindsey Jeanette, 1999 AMC 2465 (M.D. Fla. 1999).

[106]Fine v. Rockwood, 895 F.Supp. 306, 310 (S.D. Fla, 1995); New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F. Supp. 2d 101, 118, 2003 AMC 488, 506 (D.Mass. 2003)(applying general maritime law despite applicability of the Salvage Convention 1989).

[107]Salvage Convention 1989, art. 14.1.

[108]Gaskell, supra note 102, at 56-57 (no art. 14 special compensation for raising cargo posing a threat of pollution).

[109]895 F.Supp. 306, 1995 AMC 2048 (S.D. Fla, 1995)(boat with hole in the hull settled to the bottom while moored to the berth; decks remained above water; fuel oil had to be removed before tow to repair yard; no salvage).

[110]International Salvage Union, *Salvors to Press Case for Environmental Awards*, Salvage World, Dec. 2007 at 1; International Salvage Union, *ISU Puts Forward Plan for a New Lloyd's Form*, Salvage World, Sep. 2007 at 1.

D. Property Subject to Salvage – Shipwrecks, Historic and Otherwise, and the Law of Finds

There was some small doubt about whether the right to salvage under the general maritime law was confined to salvage of a vessel or goods coming from a vessel.[111] The generally accepted view is that it was not so confined.[112] Any remaining doubt is put to rest by the Salvage Convention 1989, which provides that a salvage operation may be undertaken to assist "a vessel or any other property in danger," and which defines "property" to mean "*any* property not permanently and intentionally attached to the shoreline and includes freight at risk" (emphasis added).[113]

In practice, the Convention's broad definition of "property" is most likely to be significant in relation to what is sometimes called (rather inaccurately) "treasure salvage," the retrieval of property from shipwrecks. At first, it might seem that the Salvage Convention 1989 cannot apply to such cases because the property in question is not in "danger," as required by art. 1(a). However, the broad definition of "property" in art. 1(c) seems expansive enough to include a sunken vessel and cargo, and that seems to have been the opinion of the delegates at the Diplomatic Conference that adopted the Convention.[114] Furthermore, art. 30(1)(d) permits Contracting States to reserve the right not to apply the provisions of the Convention "when the property involved is maritime cultural property of prehistoric, archeological or historic interest and is situated on the sea-bed."[115] The clear implication is that if Contracting States do not make the permitted reservation (as the United States did not), the Salvage Convention 1989 will apply to historic shipwrecks,[116] which in turn supports the proposition that the Convention applies generally to all salvage

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[111]Norris, 3A *Benedict*, supra note 13, §§ 32, 34, 43.

[112]Id. See, e.g., Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F.Supp. 115, 1947 AMC 1523 (E.D.N.Y. 1947)(salvage reward for retrieving money found in wallet of floating corpse).

[113]Salvage Convention 1989, supra note 1, art. 1(a)(salvage operation), art. 1(c)(property). The exclusion of property permanently and intentionally attached to the shoreline mirrors the decision in *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 7 S.Ct. 336 (1887)(floating drydock permanently moored to shore not property subject to salvage).

[114]At the 1989 Diplomatic Conference, the Federal Republic of Germany proposed an amendment that would specifically have applied the Convention to sunken ships. Gaskell, supra note 102, at 35. In contrast, Argentina would have excluded wreck salvage altogether except when performed immediately after the sinking. Id. at 35-36. Neither amendment was adopted, apparently on the assumption that floating vessels were salvable property under art. 1(b) and sunken vessels were salvable property under art. 1(c). Id. at 36-37; Kerr, supra note 76, at 548 n.28.

[115]Id., art. 30(1)(d).

[116]David Bederman, *Historic Salvage and the Law of the Sea*, 30 U. Miami Inter-Am. L. Rev. 99, 110-11 (1998)[hereafter Bederman, *Historic Salvage*]; David Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 Widener L. Symp. J. 163, 171 (2002)[hereafter Bederman, *Old Challenges, New Trends*]; Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. Mar. L. & Com. 309, 347 (2003).

from shipwrecks. Before the Convention came into force, courts often held that the general maritime law of salvage applied to the retrieval of property from shipwrecks,[117] including perhaps the most famous shipwreck of all, the *Titanic*.[118]

The general maritime law of salvage did not apply to *abandoned* shipwrecks, which were governed by the "harsh, primitive, and inflexible" common law of finds, which expressed "the ancient and honorable principle of 'finders, keepers.'"[119] Thus, a preliminary question in many "treasure salvage" cases was whether the wreck or other property had been abandoned.[120] If it had, the "salvor" was entitled to keep the property retrieved.[121] The Salvage Convention 1989 does not contain a definition of abandonment, nor does it specifically provide that it does not apply to abandoned property, such as an abandoned shipwreck. Thus, it is at least possible to argue that the Convention applies to abandoned shipwrecks, as well as shipwrecks claimed by their original owners (or descendants in title).[122] After all, the Salvage Convention 1989 applies to salvage of "*any* property not permanently and intentionally attached to the shoreline."[123] If so, the Salvage Convention 1989 has replaced the law of finds, a development unlikely to be much lamented given that courts in admiralty have historically favored applying salvage law rather than the law of finds.[124]

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[117]Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978); Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing vessel, 549 F.Supp. 540, 1983 AMC 1018 (S.D. Fla. 1982).

[118]The U.S. District Court for the Southern District of Florida declared R.M.S. Titanic, Inc. to be salvor-in-possession of the wreck of the *Titanic* on June 7th, 1994. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 920 F. Supp. 96, 97 n 1; 1996 AMC 2986, 2987 n 1 (S.D. Fla. 1996). The U.S. Court of Appeals for the Fourth Circuit recently confirmed the status of R.M.S. Titanic, Inc. as salvor by refusing to award the company title to artifacts raised from the wreck. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521; 2006 AMC 305 (4th Cir. 2006). The United States signed the international *Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic*, negotiated by Canada, France, the U.K. and the United States, on 18 June 2004. Because this treaty is not self-executing, it cannot become effective for the United States without implementing legislation: see supra note 3. No such legislation has been passed by the U.S. Congress.

[119]Hener v. U.S., 525 F.Supp. 350, 356, 1982 AMC 847, 856 (S.D.N.Y. 1981)("harsh, primitive and inflexible"); Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065, 1988 AMC 1109, 1116 (1st Cir. 1987)("finders, keepers").

[120]See, e.g., *Martha's Vineyard Scuba*, 833 F.2d at 1064-65, 1988 AMC at 1116; R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521, 2006 AMC 305 (4th Cir. 2006)(holding that the law of finds did not apply to the sunken vessel *Titanic*); Adams v. Unione Mediterranea di Sicurta, 220 F.3d 659, 2000 AMC 2788 (5th Cir. 2000)(whether salvage or finds applied to sunken cargo).

[121]See, e.g., Marex Intern., Inc. v. Unidentified, Wrecked and Abandoned Vessel, 952 F.Supp. 825, 1998 AMC 484 (S.D.Ga. 1997).

[122]JOHN REEDER, BRICE ON MARITIME LAW OF SALVAGE, para. 4-35, p. 277 (4th ed., 2003); FRANCIS ROSE, KENNEDY AND ROSE THE LAW OF SALVAGE, para. 215, p. 106 (6th ed. 2002).

[123]See supra note 113 and accompanying text.

[124]Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 460, 1992 AMC 2705, 2714 (4th Cir. 1992).

However, the basic structure of the Salvage Convention 1989 is to give the salvor the right to payment of salvage reward by the owners of the salved property in proportion to their respective salved values.[125] As a result, it might also be argued that if the owners of the salved property cannot be identified, the Salvage Convention 1989 cannot apply. If that is so, the preliminary choice between salvage law (meaning, now, the Salvage Convention 1989) and the law of finds remains important. If, however, the Salvage Convention 1989 applies even to retrieval of abandoned property, it would seem that the only workable solution would be to award the salvor the retrieved property itself. The Salvage Convention 1989, art. 12(1) provides only that successful salvage operations "give right to a reward;" it does not state that the salvor's reward must be money rather than the salved property itself. The operation of the Salvage Convention 1989 would then produce the same result as the law of finds.[126]

Some courts applying the general maritime law have supplemented the traditional *Blackwall* factors in cases involving historic shipwrecks, expressly stating that the salvage reward should reflect the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved.[127] A court applying the Salvage Convention 1989 should still be able to take that factor into account if it were inclined to do so, because the list of criteria in art. 13 is apparently not exclusive, leaving room for consideration of other relevant criteria.[128]

Neither the law of finds nor the law of salvage applies to abandoned shipwrecks governed by the Abandoned Shipwreck Act 1987 (hereafter ASA).[129] The ASA applies to shipwrecks that are both: (i) abandoned, and (ii) either embedded in the submerged lands or coralline formations beneath state waters (in most cases, three nautical miles from the coastal baseline),[130] or

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[125]Salvage Convention 1989, supra note 1, art. 13(2). See also, id., art. 21(1) (duty of person liable for salvage reward to provide security on request).

[126]In *M.D.M. Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F.Supp. 308, 1987 AMC 537 (S.D.Fla. 1986), the court awarded the successful salvors the salved artifacts *in specie*, saying that in such a case the law of salvage and the law of finds "merge to give the first finder/salvor sole possession of the property." Id., 631 F.Supp. at 311-12, 1987 AMC at 541-42.

[127] See, e.g., Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468, 1992 AMC 2705, 2728 (4th Cir. 1992). See also Bederman, *Old Challenges, New Trends*, supra note 116, at 168.

[128]See infra, notes 194-195 and accompanying text.

[129]43 U.S.C. § 2106(a).

[130]The ASA provides that the term "submerged lands" means "lands beneath navigable waters" as defined in the Submerged Lands Act. 43 U.S.C. § 2102(f)(1). The Submerged Lands Act provides that "lands beneath navigable waters" extend three nautical miles from the coast line, except where the boundary of a State extended beyond three miles at the time that State became a member of the Union. 43 U.S.C. § 1301(a)(2). The submerged lands of Texas extend three marine leagues (about nine nautical miles) from the coast line, a legacy of the fact that Texas was a sovereign republic when it became a member of the

found to be of historic significance by being listed on the National Register of Historic Places.[131] If a wreck satisfies those criteria, title over it is claimed by the federal government, then transferred (or quitclaimed) to the relevant state (or commonwealth) government.[132] The "salvor" finding or retrieving property from such a shipwreck takes nothing.[133] The numerous remaining controversies about the operation of the ASA are beyond the scope of this article; they are ably considered elsewhere.[134] What is important for present purposes is simply that if the ASA applies, the Salvage Convention 1989 does not.

Union. U.S. v. Louisiana, 363 U.S. 1, 65, 80 S.Ct. 961, 997 (1960); U.S. v. Texas, 339 U.S. 707, 712-13, 70 S.Ct. 918, 921 (1950). The submerged lands of Florida extend to three marine leagues (about nine nautical miles) on the Gulf Coast but three nautical miles on the Atlantic Coast, because the U.S. Congress approved the three-league Gulf Coast limit when admitting Florida to the Union. U.S. v. Louisiana, 363 U.S. 1, 123-29, 80 S.Ct. 961, 1027-30 (1960); U.S. v. Florida, 420 U.S. 531, 95 S.Ct. 1162 (1975). Florida state courts have asserted that Florida's territorial *waters* (as opposed to the submerged lands) on the Atlantic side extend to the eastward edge of the Gulf Stream, which can exceed the territorial sea of the United States. See Benson v. Norwegian Cruise Line, Ltd., 859 So.2d 1213 (Fla. App. 3 Dist., 2003), *aff'd without opinion* 885 So.2d 388 (2004)(Table). The submerged lands of Puerto Rico also extend three marine leagues (about nine nautical miles). 43 U.S.C. § 2102(f)(2); 48 U.S.C. § 749(2). The submerged lands of Guam, the Virgin Islands and American Samoa extend three nautical miles. 43 U.S.C. § 2102(f)(3); 48 U.S.C. § 1705. Although the ASA provides that the term "submerged lands" includes the lands of the Commonwealth of the Northern Mariana Islands (43 U.S.C. § 2102(f)(4)), the Commonwealth has no submerged lands. In *Northern Mariana Islands v. U.S.*, 399 F.3d 1057 (9th Cir. 2005), it was held that the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 801 (Pub. L. 94-241, § 801 (1976), *reprinted in* 48 U.S.C. § 1801) transferred all submerged lands to the United States, leaving the Commonwealth with no sovereignty over submerged lands. It would seem to follow that any historic shipwreck embedded in the sea-bed off the Northern Mariana Islands is not subject to the ASA.

[131]43 U.S.C. § 2105(a).

[132]43 U.S.C. § 2105(a),(c); Bederman, *Old Challenges, New Trends*, supra note 116, at 165-66. For these purposes, the term "State" means any state of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa and the Northern Mariana Islands. 43 U.S.C. § 2102(e).

[133]See, e.g., Fairport Intern. Exploration, Inc. v. The Shipwrecked Vessel Known As The Captain Lawrence, 245 F.3d 857, 2001 AMC 1741 (6th Cir. 2001).

[134]The operation of the ASA depends on the scope of some difficult concepts, such as embeddedness, abandonment and eligibility for inclusion on the National Register. See Roberto Iraola, *The Abandoned Shipwreck Act of 1987*, 25 Whittier L. Rev. 787, 807-19 (2004); J.P. Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. Mar. L. & Com. 205, 223 (1999). For example, in a recent case the state of Michigan insisted that the salvor disclose the location of an historic shipwreck so that a determination of embeddedness could be made for the purposes of the ASA. Great Lakes Exploration Group, L.L.C. v. Unidentified, Wrecked and (For Salvage-Right Purposes) Abandoned Sailing Vessel, 522 F.3d 682 (6th Cir. 2008). Despite the existence of decisions suggesting or holding the ASA to be constitutionally valid (see Zych v. Unidentified, Wrecked and Abandoned Vessel, 19 F.3d 1136, 1994 AMC 2672 (7th Cir. 1994); Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 857 F.Supp. 1129, 1995 AMC 1515 (D.V.I. 1994)), distinguished commentators continue to express doubts about the constitutionality of the Act. See Jones, id., at 223-25; Joseph Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archeology*, 30 J. Mar. L. & Com. 185, 223 (1999); Bederman, *Old Challenges, New Trends*, supra note 116, at 165.

E. Volunteer Status

Rather oddly, the Salvage Convention 1989 does not contain any definition of "salvor," but merely a broad definition of "salvage operation," which is "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."[135] The only reference in the Salvage Convention 1989 to the issue of who may claim salvage reward is to be found in art. 17, which provides:[136]

> No payment is due under the provisions of this Convention unless the services rendered exceed what can reasonably be considered as due performance of a contract entered into before the danger arose.

According to one view, art. 17 is the only restriction on who can claim salvage reward, with the result that the Salvage Convention 1989 applies to any person performing a "salvage operation" that goes beyond the scope of a pre-existing contract.[137] If that is so, the right to claim salvage reward is about the same under the Salvage Convention 1989 as under the general maritime law, although some of the traditional general maritime law restrictions may now be have to be justified in different terms. For example, under the general maritime law, neither the crew of the salved ship nor a pilot nor a passenger is ordinarily entitled to claim salvage reward for services rendered in saving the ship or its cargo.[138] In the case of crew members and passengers, the restriction has always been justified on the basis that crew members and, to a much lesser extent, passengers are contractually obliged to save the ship when in danger, with the result that they are only entitled to salvage reward if their efforts go beyond what was contractually expected of them.[139] The position would clearly be the same under art. 17, the key question being whether the crew member or passenger did more than was required by the pre-existing contractual obligation.

In the case of pilots, however, the restriction was phrased by the Supreme Court in *Hobart v. Drogan* in terms of the "ordinary official duties" of the pilot's "office," rather than the scope of the pilot's contract of engagement.[140] The Salvage Convention 1989 specifically saves the operation of national law relating to salvage operations performed by "a public authority under a

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[135]Salvage Convention 1989, supra note 1, art. 1(a).

[136]Id., art. 17.

[137]Gaskell, supra note 102, at 25.

[138]Norris, 3A *Benedict*, supra note 13, § 68.

[139]See, e.g., The Neptune, 1 Hagg. Adm. 227, 236-37, 166 E.R. 81, 84-85 (1824)(crew); Towle v. The Great Eastern, 24 F.Cas. 75, 82 (S.D.N.Y. 1864)(No. 14,110)(passengers).

[140]35 U.S. (10 Pet.) 108, 120-22, 9 L.Ed. 363 (1836).

duty to perform salvage operations,"[141] which preserves the existing general maritime law restrictions on recovery by entities performing statutory or public functions, such as the U.S. Coast Guard[142] or fire departments.[143] It is questionable, however, whether a pilot can be viewed as "a public authority under a duty to perform salvage operations" for the purposes of the Salvage Convention 1989. If not, the restriction on recovery of salvage reward by pilots must be re-cast in terms of the scope of the pilot's contract with the shipowner, rather than the quasi-public duties of her or his "office," in order to fall within the terms of art. 17.

Article 17 does not stipulate that the services must be due performance of a contract *with the owner of the salved property* in order for a salvage claim to be barred, merely that they be performance of a pre-existing contractual duty. That would be significant if the master and crew of a ship in distress (or, indeed, a passenger or pilot) were to claim salvage reward from the owners of the cargo on board in circumstances where they would be precluded from claiming salvage reward from the shipowner because of their pre-existing contractual duty to save the ship. The master and crew owe no contractual duty to the cargo-owner. Their duty is to their employer, who owes a contractual duty to the cargo-owner. Nevertheless, the position under the general maritime law seems to be that the master and crew are not entitled to salvage reward from the cargo-owner in such a case because they are performing services ordinarily to be expected of them under their existing contracts of employment.[144] The same result would seem to flow from art. 17, if it is interpreted to refer to an existing contractual obligation *to anyone*, not just the owner of the salved property.

This interpretation of art. 17 explains the result in the recent case of *In re City of New York, as Owner and Operator of M/V Andrew J. Barberi*.[145] The Staten Island ferry "Andrew J. Barberi" crashed into a maintenance pier near the Staten Island Ferry Terminal, killing eleven passengers and injuring more than seventy.[146] The tug "Dorothy J" rendered assistance almost immediately after the accident, successfully stabilizing the stricken ferry and bringing it and its passengers to safety at the ferry landing. The tug then remained in position for several days at the request of the City of New York, continuously pushing on the ferry to hold it in position. The owner and master of the tug later claimed salvage reward from the City of New York as

[141]Salvage Convention 1989, supra note 1, art. 5(3).
[142]See supra notes 55, 57-58 and accompanying text.
[143]Norris, 3A *Benedict*, supra note 13, § 82.
[144]The Sava Star, [1995] 2 Lloyd's Rep. 134, 142 (Q.B.(Adm.)).
[145]534 F. Supp. 2d 370 (E.D.N.Y. 2008).
[146]Id. at 373.

owner of the ferry. The U.S. District Court for the Eastern District of New York held that the tug-owner was entitled to salvage reward for the assistance rendered in stabilizing the ferry immediately after the allision, but not for the later service of holding the ferry in position, because the tug-owner was obliged to provide such services by the terms of its existing contract with the City. The services performed during the tug's immediate response to the disaster went beyond what was required by that contract but the later services did not.[147]

The tug master was entitled to share in the salvage reward for the immediate response, but he claimed that he was also entitled to salvage reward for the subsequent service of holding the ferry in position, because his right to salvage reward was "independent of and not affected by the existence of" the contract between the tug-owner and the City.[148] The court rejected that argument, holding that the work done by the master during the period of keeping the ferry in place at the slip did not differ from the ordinary work that he was hired to do as part of the tug's crew.[149] The court made no reference to the Salvage Convention 1989 but its conclusion should properly have been based on art. 17, rather than the general maritime law authorities upon which the court relied. The tug-master owed no contractual duty to the City of New York but his actions in holding the ferry in position were exactly the kind of thing he was obliged to do under his contract of employment. Interpreting art. 17 literally, the existence of the master's contractual obligation to his employer was sufficient to deprive him of the right to salvage reward, despite the fact that that obligation was not owed to the owner of the salved property.

F. The Authority of the Master to Bind Cargo-Owners to a Salvage Contract

Under the general maritime law, the master of a ship has implied authority to bind the owners of cargo to the terms of a salvage contract only if the master acted as agent of necessity.[150] For agency of necessity to arise, there must be an unforeseen emergency and it must be impracticable for the mas-

[147]Id., at 381-82.

[148]Id., at 382-83.

[149]Id., at 384-85.

[150]American Metal Co. v. M/V Belleville, 284 F.Supp. 1002, 1006, 1970 AMC 633, 639 (S.D.N.Y. 1968). See also Industrie Chimiche Italia Centrale & Cerealfin, S.A. v. Alexander G. Tsavliris & Sons Maritime Co. (The Choko Star), [1990] 1 Lloyd's Rep. 516, 525 (Eng. Ct. App.); Tsavliris Salvage (International) Ltd v. Guangdong Shantou Overseas Chinese Materials Marketing Co. (The Pa Mar), [1999] 1 Lloyd's Rep. 338, 341-42.

ter to communicate with his or her principal (in these circumstances, the cargo-owner) before taking whatever measures he or she reasonably believes to be necessary to prevent loss to the principal.[151] Thus, the cargo-owner is not bound to the salvage contract under general maritime law if the master has the time and the means to communicate with the cargo-owner before signing the contract, but does not do so.[152]

The English case of *The Choko Star*[153] provides a notorious example. The "Choko Star" grounded in the Paraná River while carrying soya beans and sun seeds in bulk from Rosario in Argentina to ports in Italy.[154] The master could not refloat the ship without assistance, so he signed a salvage contract under Lloyd's Open Form (LOF 1980) with European salvors, who successfully refloated the ship.[155] The cargo-owners argued that they were not bound by the salvage contract because the master had no authority to engage salvors on their behalf. Local salvors with more experience in the conditions of the Paraná River were available more cheaply than the European salvors and the cargo was in no immediate peril as a result of the grounding.[156] Because the conditions for agency of necessity were absent, the issues between the parties narrowed down to the question whether the ship's master would have authority to bind the cargo-owners even if it was reasonably practicable for him to communicate with them and obtain their instructions before doing so, but he had not done so.[157] The English Court of Appeal held that there was no basis for implying a term into the contract of carriage of the cargo authorizing the master to contract with third parties, except as agent of necessity.[158]

Another principle of the general maritime law relating to the master's authority to bind the cargo was stated in *The North Carolina*,[159] where the Supreme Court held that salvage contracts signed by the master are not binding unless subsequently ratified by the owners or unless "*bona fide* and such as a discreet owner, placed in the like circumstances, would probably have made."[160]

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[151] *American Metal Co.*, 284 F.Supp. at 1006, 1970 AMC at 639. See also Restatement (Second) of Agency § 47 (1958). The Restatement (Third) of Agency (2006) does not use the expression "agency of necessity." Id., § 2.02, comment b.

[152] *American Metal Co.*, 284 F.Supp. at 1006, 1970 AMC at 639.

[153] Industrie Chimiche Italia Centrale & Cerealfin, S.A. v. Alexander G. Tsavliris & Sons Maritime Co. (The Choko Star), [1990] 1 Lloyd's Rep. 516 (Eng. Ct. App.).

[154] Id., at 518.

[155] Id.

[156] Id., at 519.

[157] Id., at 520.

[158] Id., at 524-25, 527.

[159] Houseman v. The Cargo of the Schooner North Carolina, 40 U.S. (15 Pet.) 40, 10 L.Ed. 653 (1841).

[160] Id., at 45.

Thus, under the general maritime law, if a vessel is grounded but not in danger of sinking and there is no immediate threat to the cargo, the cargo-owner is only bound by the terms of a salvage contract for the refloating of the vessel if it expressly approves the contract.[161]

The situation is quite different under the Salvage Convention 1989. Article 6.2 of the Convention provides:

> The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.

The second sentence of this paragraph is in peremptory terms. It authorizes the master to bind the cargo (and other property) on board the vessel, regardless of whether the circumstances giving rise to an agency of necessity are present.[162] Thus, cargo-owners can no longer question the master's authority to bind them to salvage contracts, subject to a minor exception that is considered below.[163] For example, in *Evanow v. M/V Neptune*,[164] the plaintiff salvors settled with the cargo-owners and conducted the subsequent litigation against the shipowner on the basis of their "belief that their contract salvage claim against the cargo owner was barred by [the master's] failure to obtain approval for the contract from the cargo owners."[165] That belief may have been well-grounded in the case itself, where the salvage contract was agreed before the Convention came into force (although the case was decided after),[166] but it would no longer hold good, with the result that the plaintiff in *Evanow* would now have a contract salvage claim against the cargo owner even if the master failed to obtain approval from the cargo-owners.

G. The Rights of a Salvor in Possession

Under the general maritime law, a salvor has a right to possession of the property being salved and no-one, not even the owner or master of the

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[161]See, e.g., American Metal Co. v. M/V Belleville, 284 F.Supp. 1002, 1006, 1970 AMC 633, 639 (S.D.N.Y. 1968).

[162]Kerr, supra note 76, at 552, n.31 (1990); ALEKA MANDARAKA-SHEPPARD, MODERN MARITIME LAW, 638 (2d ed. 2007).

[163]Salvage Convention, art. 6.3 provides that nothing in art. 6 affects the application of art. 7, which allows for the annulment or modification of inequitable contracts. Article 7 is considered in Section II(K).

[164]163 F.3d 1108, 1999 AMC 516 (9th Cir. 1998).

[165]Id., 163 F.3d at 1118, 1999 AMC at 528.

[166]The salvage contract was agreed in "early January 1995." Id., 163 F.3d at 1112, 1999 AMC at 518.

salved vessel, has the right to dispossess the salvor without its consent.[167] Thus, if the salvor in possession appears able to complete the salvage successfully, it has the right to exclude others from participating in the salvage operations, even if the owner requests the salvor to accept assistance from subsequent salvors.[168] Here, too, the law is different under the Salvage Convention 1989. Article 8(1)(d) provides:

> The salvor shall owe a duty to the owner of the vessel or other property in danger . . .
>
> (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

The owner of the vessel or property being salved might well take the view that the salvage would be completed more quickly or effectively if the original salvor were to be assisted by additional salvors. So long as that view is reasonable in the circumstances, the original salvor must comply with the owner's request that it accept assistance, even if it would probably be able to achieve a successful result if it continued alone.

It is important to note that the Salvage Convention 1989, art. 8 only modifies the general maritime law position when the owner or master of the salved vessel requests the salvor to accept assistance. Thus, for example, if the vessel or other property is derelict, the Convention does not affect the general maritime law right of the salvor in possession to exclude other potential salvors, provided it continues to exercise due diligence and to be reasonably successful in its efforts.[169]

H. Salvor Fault

In considering the effect of salvor negligence, the general maritime law treats "distinguishable" and "indistinguishable" harms differently.[170] There is

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[167]Norris, 3A *Benedict*, supra note 13, § 151; The John Wurts, 13 F.Cas. 903, 905 (S.D.N.Y. 1847)(No. 7,434)("The law will protect [the salvor] against all interference by others, even the true owners"); The Yucatan, 30 F.Cas. 893, 896 (D.Fla 1847)(No. 18,194)("Even the master of a ship himself would not have a right to dispossess a salvor without his consent who had earned a clear right to salvage by rendering actual meritorious service"); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 961 (M.D. Fla, 1993)("Once [the salvor is] in possession, no other person can lawfully intrude upon that possession, including the salved vessel's master or owner").

[168]Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 567, 1981 AMC 1857, 1865 (5th Cir. 1981).

[169]See, e.g., R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 924 F.Supp. 714, 1996 AMC 2481 (E.D. Va, 1996).

[170]See generally Norris, 3A *Benedict*, supra note 13, § 120.

indistinguishable harm when the claimed damage or injury to the salved vessel is the same as the damage or injury the vessel was exposed to before the salvage efforts were undertaken.[171] In *The Noah's Ark v. Bentley & Felton Corp.*, the U.S. Court of Appeals for the Fifth Circuit said that, in a broad sense, salvor negligence leading to indistinguishable harm is ineffectual salvage.[172] The general maritime law treats ineffectual salvage "with considerable lenience," holding that there can only be liability for damages if the salvor was guilty of gross negligence or willful misconduct.[173] Distinguishable harm, on the other hand, is some type of damage that is different in kind from the harm the vessel would have suffered if it had not been salved.[174] For distinguishable, or independent, harm done by the salvor, the general maritime law holds the salvor to the usual standard of ordinary prudence.[175]

So far as salvor liability for damages is concerned, the general maritime law distinction between distinguishable and indistinguishable harm is not affected by the Salvage Convention 1989. However, the consequences of "ineffectual salvage" have been changed by the Salvage Convention, art. 18, which provides:

> A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

It is a mistake to apply the general maritime law approach to salvor liability for damage when considering whether to reduce the award on account of ineffectual salvage. Whether or not the salvor's fault led to indistinguishable harm, the award can be reduced or removed under art. 18 if "ordinary" fault on the part of the salvor made the salvage operations "more difficult."

In *Joseph v. J.P. Yachts, L.L.C.*,[176] professional salvors went to the assistance of the yacht "Lady Mazie" aground in shoal waters broadside to and just off a rocky shore, lurching toward the shore each time a wave hit the yacht's side.[177] The salvors attached lines to the yacht, keeping them under strain to keep the yacht from being washed by the waves onto the rocky

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[171]LaPlante v. Sun Coast Marine Services, Inc., 279 F. Supp. 2d 678, 687, 2003 AMC 1267, 1275-76 (D.S.C. 2003).

[172]292 F.2d 437, 441, 1961 AMC 1641, 1647 (5th Cir. 1961).

[173]Id., 292 F.2d at 440-41, 1961 AMC at 1647.

[174]*The Noah's Ark*, 292 F.2d at 440-41, 1961 AMC at 1647.

[175]Id., 292 F.2d at 440, 1961 AMC at 1647.

[176]436 F. Supp. 2d 254, 2006 AMC 2786 (D.Mass. 2006).

[177]Id., 436 F. Supp. 2d at 260; 2006 AMC at 2792.

shore, and eventually pulled the yacht off the bottom.[178] The salvors then told the yacht's skipper that it would be necessary to test the yacht's engines while the lines were still attached, to avoid releasing the lines prematurely only to discover that the yacht could not move and would be washed back onto the rocks.[179] The engines started when the yacht's skipper tried them but the resulting movement of the yacht caused one of the salvage boats to capsize.[180] The yacht owner argued for a reduction of the award on account of negligence by the salvors in the testing of the engines. The U.S. District Court for the District of Massachusetts rejected that argument, stating:[181]

> Finally, there is no reason to reduce the award based upon any claimed negligence on the part of [the salvors] regarding the testing of the engines. In rejecting a similar argument, the court in *Ocean Services* aptly explained that:
>
> Proof of negligence requires a showing of a duty, a breach of the duty, proximate cause, and actual loss or damage resulting to the interests of another. The damages component of such negligence would be a depressed sale price of the salved "Asylum," such that defendants would have received less from the sale of the boat than they would have absent the negligence. But there can be no economic damage presumed here without proof that the ship was actually damaged as a result of the groundings.
>
> Here, as well, the Lady Mazie suffered no damage as a result of the grounding.

The elements described by the *Ocean Services* court and applied by the *Joseph* court are relevant to salvor liability for damage. They are not relevant to the question of reduction of the award on account of salvor negligence. Article 18 flatly contradicts that proposition. The question the *Joseph* court should have considered was whether the claimed negligence had made "the salvage operations...more difficult" for the purposes of art. 18. On the facts of the case, that seems highly unlikely, so the court seems to have reached the right result for the wrong reason.[182] Nevertheless, art. 18 makes it clear that salvor fault may lead to a reduction of the award even if it does not cause damage to the vessel and even if it does not amount to gross negligence or willful misconduct.

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[178]Id., 436 F. Supp. 2d at 262; 2006 AMC at 2794-95.

[179]Id., 436 F. Supp. 2d at 263; 2006 AMC at 2796.

[180]Id., 436 F. Supp. 2d at 263-64; 2006 AMC at 2796.

[181]Id., 436 F. Supp. 2d at 273; 2006 AMC at 2809, *quoting* Ocean Services Towing and Salvage, Inc. v. Brown, 810 F. Supp. 1258, 1264, 1993 AMC 2701 (S.D. Fla. 1993).

[182]It seems more likely that any negligence in the testing of the engines was on the part of the yacht's skipper, who did not follow the salvor's instructions, with the result that the salvage was made considerably more difficult for one of the salvors, who was thrown into the cold sea, but no more difficult for the salvage of the yacht itself. Id., 436 F. Supp. 2d at 263-64; 2006 AMC at 2796.

In the *Ocean Services* case cited by the *Joseph* court, a pre-Convention decision, the salved vessel grounded several times while being towed by salvors to safety although, as the quotation above shows, it suffered no damage as a result. It is apparent from the report of the case that the groundings occurred because of the salvor's decision to tow the salved vessel through a shallow strait.[183] If the same facts were to recur under the Convention regime, the court would be required at least to consider whether the salvage had been made "more difficult" by the salvor's decision and whether the salvor's reward should accordingly be reduced under art. 18.

I. Liability Salvage

The phrase "liability salvage" is a convenient but inaccurate way of expressing the idea that the reward for a successful salvage should reflect the extent to which the salvors relieved the owners of the salved property from liability to third parties that would have been incurred but for the salvors' efforts.[184]

In two district court decisions, it was held that liability salvage was not available under the Salvage Convention 1910.[185] In *Allseas Maritime, S.A. v. M/V Mimosa*,[186] the U.S. Court of Appeals for the Fifth Circuit commented, *obiter*, that there is "considerable merit . . . in the position that salvors should be compensated for liability avoided," and that the salvor's contribution to avoiding damage to third parties should be recognized under "traditional salvage law." On the facts of the case, the court declined to make a "liability salvage" award for averted liability because the owner of the salved ship would have been entitled to limit its liability under the Limitation of Shipowners' Liability Act.[187] In denying a petition for rehearing, the Fifth Circuit made it clear that the only reason for not making an award for averted liability was the operation of the Act.[188] More recently, the U.S. District Court for the District Court of South Carolina took averted liability into account as a relevant factor in *Reiss v. One Schat-Harding Lifeboat No.*

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[183]Ocean Services Towing and Salvage, Inc. v. Brown, 810 F.Supp. 1258, 1264, 1993 AMC 2701 (S.D. Fla. 1993).

[184]Kerr, supra note 76, at 537.

[185]Westar Marine Services v. Heerema Marine Contractors, S.A., 621 F.Supp. 1135, 1142-44, 1988 AMC 1122, 1132-36 (N.D.Cal. 1985); Hendricks v. Tug Gordon Gill, 737 F.Supp. 1099, 1104, 1989 AMC 1960, 1965 (D.Alaska 1989).

[186]812 F.2d 243, 247, 1987 AMC 2515, 2519-20 (5th Cir. 1987).

[187]46 U.S.C. §§ 30501-12 (formerly codified at 46 app. U.S.C. 181-89).

[188]Allseas Maritime, S.A. v. M/V Mimosa, 820 F.2d 129, 130, 1987 AMC 2515, 2523 (5th Cir. 1987).

120776 No. 1,[189] without further comment. However, in *Trico Marine Operators, Inc. v. Dow Chemical Co.*,[190] the U.S. District Court for the Eastern District of Louisiana declined to adopt a rule of compensation for averted liability, despite the *Allseas Maritime* dicta. The court's conclusion was partly based on the fact that the Salvage Convention 1989 (which was not then in force) contains no mention of the concept of liability salvage, which was rejected in the negotiations at the Diplomatic Conference.[191]

The concept of liability salvage was considered at the Diplomatic Conference because of a recommendation made by an international sub-committee of the Comité Maritime International (CMI), which had been invited by the Legal Committee of IMCO (as the IMO was then known) to review the principles of the law of salvage.[192] The recommendation was rejected because it would have required salvage arbitrators to conduct a mini-hearing on the hypothetical question of what liability would or might have occurred but for the salvors' efforts.[193] The CMI sub-committee's alternative recommendation, of enhanced awards for efforts to protect the environment from pollution, was eventually reflected in the Salvage Convention 1989, arts. 13(1)(b) and 14.

Now that the Salvage Convention 1989 has come into force, it seems clear that liability salvage cannot be taken into account in the manner originally suggested by the CMI sub-committee, with a detailed consideration of the existence and extent of the liability averted by the salvor's actions. Does that mean that the Convention actually prohibits any consideration of averted liability? The Federal Court of Australia recently held that it does not, in *United Salvage Pty Ltd v. Louis Dreyfus Armateurs, S.N.C.*[194] After an extensive consideration of the *travaux preparatoires* of the Salvage Convention 1989, academic commentary and judicial authorities from other jurisdictions, the court concluded:[195]

> The Court should consider that the factor of potential exposure to third party liability operates generally to inform the fixation of the global figure, which results from the evaluation of the criteria listed in Art. 13 that may be relevant in the particular case. It would not be appropriate to investigate, admit and consider detailed evidence as to the nature and extent of such liability.

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[189]444 F.Supp. 2d 553, 558, 2006 AMC 1401, 1406 (D.S.C. 2006)("In the present case, by taking the lifeboat under tow, the Plaintiffs removed the SKS TORRENS from potential liability from claims for damage or injury to vessels which might have collided with the lost Lifeboat").

[190]809 F.Supp. 440, 443, 1993 AMC 1042, 1047 (E.D.La. 1992).

[191]Id., citing Gaskell, supra note 102, at 7 n.16.

[192]Kerr, supra note 76, at 537.

[193]Id., at 538.

[194](2006) 163 F.C.R. 151 (Fed. Ct. Austl.), *aff'd* (2007) 163 F.C.R. 183 (Full Ct. Fed. Ct. Austl.).

[195]Id., 163 F.C.R. at 165.

> Having considered the authorities, the Travaux, the 1989 Convention history and the detailed submissions made by the parties, I conclude that consideration of the vessel's exposure to liability is not excluded by the Convention. It may be appropriate in particular circumstances to take into account the consideration that some liability on the part of the vessel may have been avoided by the intervention of the salvors. And, in appropriate circumstances, this may inform the fixing of the reward as an enhancement without any determination, detailed investigation, consideration of detailed evidence or attempt to form any definitive conclusion as to the amount of any such liability. The possible existence of such liability can be relevant but it does not warrant consideration as an independent factor. In some circumstances, it may not be of any significant weight.

On the facts of the case, the court concluded that little weight should be given to the "general enhancing factor" of averted liability.[196] On appeal, the Full Court of the Federal Court of Australia affirmed the trial judge's decision, its only observation on the subject of liability salvage being that the appellants (the salvors) had not established any error in the judge's findings.[197] The Full Court must therefore be taken to have impliedly approved the significance of the factor.

The approach adopted in the Australian *United Salvage* case seems to be the best way to give effect to the *Allseas Maritime* court's *obiter* sentiments in a manner consistent with the Salvage Convention 1989. The negotiating history of the Convention makes it clear that the *Trico* court was right to reject a general rule of compensation for averted liability. Nevertheless, it seems appropriate to take the factor into account in general terms in some cases. The facts of the *Allseas Maritime* case provide a good example. After two vessels collided in Galveston Bay, one of them steamed out of control in ever-widening circles, threatening to strike nearby oil rigs and platforms.[198] The errant vessel was guided into an open area and brought under control by four tugs. The damage that would have been caused by the vessel would have been considerable and, but for the presumed operation of the Limitation of Shipowners' Liability Act, its liability might have been extensive.[199] It might even be said that the salvage of the vessel itself was a fairly minor feature of the success of the salvage operation, the main benefit being

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[196]Id., at 166.

[197](2007) 163 F.C.R. 183, 196.

[198]Allseas Maritime, S.A. v. M/V Mimosa, 812 F.2d 243, 244, 1987 AMC 2515, 2516 (5th Cir. 1987).

[199]When considering the salvors' challenge to the right of the salved ship to limit its liability, the court held that the salvors had not discharged their initial burden of proving negligence or unseaworthiness on the part of the salved ship. Id., 812 F.2d at 248, 1987 AMC at 2521. The salvors petitioned for rehearing to consider further evidence of negligence on the part of the salved ship, but the Fifth Circuit rejected the petition, saying "We cannot try the issue on appeal." Allseas Maritime, S.A. v. M/V Mimosa, 820 F.2d 129, 130, 1987 AMC 2515, 2523 (5th Cir. 1987).

the aversion of a catastrophic series of subsequent collisions. The out-of-control vessel posed a threat to the environment, because oil might have been spilled if the vessel had struck the rigs and platforms it was approaching. The aversion of that threat could now be taken into account under the Salvage Convention, art. 13(1)(b) if the facts were to recur. It would seem appropriate also to take into account, at least in the general terms suggested in *United Salvage*, the fact that the salvors averted the risk of liability for physical damage and perhaps loss of life or personal injury – unless, of course, the salved vessel could successfully limit its liability to third parties.

J. Life Salvage

There is pre-Convention authority for the proposition that the salvage reward payable to a successful salvor of property should not take into account the salvor's efforts in saving life while also saving property.[200] The theory was that because the Life Salvage Act, 46 app. U.S.C. § 729 (now recodified at 46 U.S.C. § 80107(a)) provides that a life salvor is entitled to a "fair share" of the reward payable for property salvage (and, since 1996, for preventing or minimizing damage to the environment), life salvage should not increase the overall size of the award. It was said that if the same salvor saved both life and property, the statute would entitle the salvor to "nothing more than a participation...in his own property award."[201] As a result, life salvage was said to be payable only as a "derivative right" to salvors "who, if they had not saved life, presumably could have become property salvors."[202] That rather unpleasant rule, which Prof. Friedell has called a "heresy," should now be laid to rest by Salvage Convention 1989, art. 13(1)(e), which unequivocally states that the criteria for fixing the reward payable to a successful property salvor include "the skill and efforts of the salvors in salving the vessel, other property *and life*."[203]

The Convention should also put paid to the related proposition that a life salvor cannot share in a contract salvage award because the Life Salvage

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[200]In re Yamashita-Shinnihon Kisen, 305 F.Supp. 796 (D.Or. 1969); St. Paul Marine Transp. Corp. v. Cerro Sales Corp., 313 F.Supp. 377 (D.Haw. 1970); Markakis v. S/S Volendam, 486 F.Supp. 1103, 1110 n.28, 1980 AMC 915, 925 n.28 (S.D.N.Y. 1980); In re Ta Chi Nav. (Panama) Corp., S.A., 583 F.Supp. 1322, 1329, 1985 AMC 1367, 1375 (S.D.N.Y. 1984).

[201]In re *Yamashita-Shinnihon*, 305 F. Supp. at 800; *Markakis*, 486 F.Supp. at 1110 n.28, 1980 AMC at 925 n.28; In re *Ta Chi,* 583 F.Supp. at 1329, 1985 AMC at 1375.

[202]St. Paul Marine Transp. Corp. v. Cerro Sales Corp., 313 F.Supp. 377, 379, 1970 AMC 1742, 1475 (D.Haw. 1970), aff'd 505 F.2d 1115, 1118 n.1 (9th Cir. 1974); In re *Ta Chi*, 583 F.Supp. at 1329, 1985 AMC at 1375.

[203]See Steven F. Friedell, *Salvage*, 31 J. Mar. L. & Com. 311, 315 (2000).

Statute was intended to apply only to pure salvage.[204] Whether or not that interpretation of the statute is correct (which is questionable),[205] the equivalent provision in the Salvage Convention 1989[206] must be read in context with art. 6, which provides that the Salvage Convention applies to *any* salvage operations, even those governed by contract, unless the contract provides otherwise.[207]

Unfortunately, the Salvage Convention does nothing to change the "hoary, and almost universally condemned"[208] general maritime law rule that salvage reward is not payable for saving human life without an associated (and contemporaneous) salvage of property (or, now, prevention of damage to the environment).[209] The theoretical justification for this highly unpopular rule is that there can be no *in rem* action for pure life salvage, as there is no property to which the salvor's maritime lien securing payment can attach.[210] The Salvage Convention, art. 16(1) repeats the general maritime law rule that "No remuneration is due from persons whose lives are saved" but it goes on to state that "nothing in this article shall affect the provisions of national law on this subject." It is very unlikely that any country's national law would provide for life salvage remuneration to be payable by those saved, but it is quite possible to imagine national law provisions requiring life salvage payment to be made by the owner of the ship from which the people were saved, particularly as insurance against life salvage liability is already provided by Protection and Indemnity (P. & I.) Associations as part

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[204]In re Yamashita-Shinnihon Kisen, 305 F.Supp. 796, 800 (D.Or. 1969); In re Ta Chi Nav. (Panama) Corp., S.A., 583 F.Supp. 1322, 1329, 1985 AMC 1367, 1375 (S.D.N.Y. 1984).

[205]Nothing in the text of 46 U.S.C. § 80107(a) (or that of its predecessor, 46 app. U.S.C. § 729) supports the unreasoned assertion made in the cases cited supra note 204. The provision merely states that a life salvor "is entitled to a fair share of the payment awarded to the salvor for salvaging [sic] the vessel or other property or preventing or minimizing damage to the environment." There is nothing to suggest that the payment from which the life salvor's "fair share" is taken must be pure salvage reward. See generally Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 Mich. L. Rev. 1218, 1240-63 (1979).

[206]Salvage Convention 1989, supra note 1, art. 16(2) provides:

"A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment."

[207]Friedell, supra note 203, at 315 ("[T]he treaty clarifies that the life salvor is entitled to share in a property salvage award made under contract").

[208]Peninsular & Oriental Steam Nav. Co. v. Overseas Oil Carriers, Inc., 553 F.2d 830, 836, 1977 AMC 283, 290 (2d Cir. 1977). For examples of condemnation of the rule, see Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 Yale L.J. 779 (1954); Friedell, supra note 205.

[209]The Emblem, 8 F. Cas. 611 (D.Me. 1840)(No. 4,434); The George W. Clyde, 80 F. 157, 158 (E.D.N.Y. 1897); The Plymouth Rock, 9 F. 413, 418 (S.D.N.Y. 1881)("[T]he saving of human life, disassociated from the saving of property, is not a subject of salvage compensation").

[210]See The Zephyrus, 1 W. Rob. 329, 331, 166 Eng. Rep. 596, 596-97 (Adm. 1842); Friedell, supra note 205, at 1226-27.

of their standard cover.[211] An alternative approach is used in the United Kingdom, where the Secretary of State may make a discretionary payment to a successful life salvor when the vessel or other property is destroyed, or when the life salvor's "fair share" of the property salvage reward under art. 16(2) of the Salvage Convention 1989 is less than a reasonable amount for the services rendered.[212] Until the United States makes some provision for pure life salvage reward, however, it will remain true that ships, cargo and even the environment are better protected by salvage law (and the Salvage Convention 1989) than is human life.

K. Annulling or Modifying Unfair Contracts or Contract Terms

In *Bisso v. Inland Waterways Corp.*,[213] the Supreme Court of the United States held that an exculpatory clause in a towage contract releasing the towing vessel and its owner from liability for negligence was void as a matter of public policy. This doctrine was stated to be "part of the judicially created admiralty law."[214] The *Bisso* doctrine applies also to clauses requiring the towed vessel to indemnify the towing vessel for liability incurred as a result of the negligence of the towing vessel.[215] Although the *Bisso* doctrine has been applied many times in the context of towage, the U.S. District Court for the Southern District of Texas held in *Harrison v. S/V Wanderer*[216] that the doctrine does not apply to salvage contracts. The *Harrison* court held that the principles applicable to salvage contracts are those of the general maritime law, by which a contract clause providing a release from liability for negligence is valid if it is clearly and unequivocally expressed, unless agreement to it was secured by duress.[217]

The general maritime law standard applied in *Harrison* is quite different from that required by the Salvage Convention 1989, art. 7, which provides:

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[211]See, e.g., U.K. P. & I. Club, *Rules and Bye-Laws 2008*, Rule 2, Section 9, *available at* http://www.ukpandi.com/ukpandi/resource.nsf/Files/2008%20Rules%20&%20Correspondents%20Book%20-%20Web%20edition/$FILE/2008+Rules+&+Correspondents+Book+-+Web+edition.pdf (last visited March 13th, 2008). The cover applies only if the life salvage liability is not recoverable under the ship's hull and machinery insurance, as it would be if the ship were to be salved. Id.

[212]Merchant Shipping Act 1995, s. 224(1), Sch. 11, Part II, para. 5. This provision applies to life salvage from a vessel of any nationality in U.K. waters or a U.K. vessel in any waters.

[213]349 U.S. 85, 75 S.Ct. 629 (1955).

[214]Id., 349 U.S. at 85, 75 S.Ct. at 630.

[215]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697, 83 S.Ct. 967 (1963).

[216]25 F. Supp. 2d 754, 758, 1998 AMC 1774, 1777-78 (S.D. Tex. 1998)

[217]Id., 25 F. Supp. 2d at 757, 758-9, 1998 AMC at 1776, 1778.

A contract or any terms thereof may annulled or modified if:

a. the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or

b. the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

Article 7(b) seems to be equivalent to the general maritime law principle stated in *The Elfrida*,[218] that a salvage contract can be set aside if "the compensation for the work actually done be grossly exorbitant."[219] Article 7(a), on the other hand, seems to be quite different from the general maritime law principles applied to salvage contracts in *Harrison*. The requirement in art. 7(a) that the contract be entered into "under...the influence of danger" seems easier to satisfy than the general maritime law requirement of duress, which demands that the vessel be in imminent peril with little or no time for deliberation before the contract is made.[220] One would think that the "influence of danger" would affect the making of many salvage contracts, even if the peril is not imminent and even if the owner of the threatened vessel has time for deliberation about the alternatives. If the "influence of danger" does have an impact, the contract or any of its terms may be set aside or modified under art. 7(a) if they are "inequitable." A contract term may be "inequitable" even though it is expressed clearly and unequivocally enough to satisfy the general maritime law standard applied in *Harrison*. Indeed, although the *Bisso* doctrine is grounded in public policy rather than fairness between the parties, one of the two policy reasons given by the *Bisso* court was the need "to protect those in need of...services from being overreached by others who have power to drive hard bargains."[221] It is tempting to think that any contract provision that would fall foul of *Bisso* in a towage contract should also be regarded as "inequitable" in a salvage contract, for the purposes of art. 7(a). At the very least, it is clear that the *Harrison* court should have been considering the art. 7(a) standard rather than the general maritime law.

L. Navigable Waters and Inland Waters

The Salvage Convention 1989 applies to salvage operations "in navigable waters or any other waters whatsoever."[222] The words "or any other waters

[218]172 U.S. 186, 19 S.Ct. 146 (1898).

[219]Id., 172 U.S. at 197, 19 S.Ct. at 150.

[220]Id., 172 U.S. at 206, 19 S.Ct. at 153 ("Had the agreement been made with less deliberation or pending a peril more imminent, our conclusion might have been different").

[221]*Bisso*, supra note 213, 349 U.S. at 91, 75 S.Ct. at 633.

[222]Salvage Convention 1989, supra note 1, art. 1(a).

whatsoever" were included at the behest of the delegation from the United States, despite opposition from the United Kingdom, in an effort to ensure that the Salvage Convention 1989 would not be confined to sea-going vessels, as the Salvage Convention 1910 was.[223] Article 30(1)(a) allows Contracting States to make a reservation not to apply the provisions of the Convention to inland waters. Because the United States did not make an art. 30(1)(a) reservation, it follows that the Salvage Convention 1989 applies to salvage operations in inland waters of the United States, as well as in navigable waters.

Of course, a salvage claim can only be brought in the admiralty jurisdiction under 28 U.S.C. § 1333(1) if it concerns salvage in navigable waters, meaning waters that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[224] However, a claim under the Salvage Convention 1989 in relation to salvage operations in inland waters could be brought in federal court under the court's federal question jurisdiction, rather than its admiralty jurisdiction, because the salvor's claim would arise under a treaty of the United States.[225] Such a claim would necessarily have to be against the owner of the salved property *in personam* because an action *in rem* is not available on the "law side" of the federal court's jurisdiction.[226]

In *Historic Aircraft Recovery Corp. v. Wrecked and Abandoned Voight F4U-1 Corsair Aircraft*,[227] the U.S. District Court for the District of Maine held that a claim for salvage of two fighter airplanes at the bottom of an inland lake in Maine did not fall within the court's admiralty jurisdiction because the waters of the lake neither border on nor flow into waters that would allow it sustain interstate commerce. The court also rejected an argument that its admiralty jurisdiction was extended beyond navigable waters by the Salvage Convention 1989, noting only, without further explanation, that "the salvage operation proposed by [the salvor] does not appear to fall within the salvage operations covered by the treaty."[228] That may have been because of the military nature of the property to be salved.[229] If, however, the

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[223]Kerr, supra note 76, at 533.

[224]The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L. Ed. 999 (1871).

[225]28 U.S.C. § 1331.

[226]See, e.g., Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1484 n.7, 1992 AMC 2789, 2793 n.7(5th Cir. 1992)("[A]n action *in rem* is not available in an action 'at law' in federal court").

[227]294 F. Supp. 2d 132, 2004 AMC 625 (D.Me. 2003).

[228]Id. 294 F. Supp. 2d at 140 n.5, 2004 AMC at 636 n.5.

[229]The court referred to the Salvage Convention 1989, art. 4, which provides that the Convention does not apply to "warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity." Id. The court did not address the broad definition of salvable property in the Salvage Convention 1989, art. 1(c), see supra note 113.

property had been civilian property falling within the broad definition of "property" in the Salvage Convention 1989, art. 1(c), there seems to be no reason why it would not have been covered by the Convention. The *Historic Aircraft* court was surely right to hold that the Convention does not extend the admiralty jurisdiction, but it did not need to address the alternative argument that a Convention-based claim would fall within the federal question jurisdiction.

M. State Court Jurisdiction and Pre-Emption of State Law

A salvor cannot bring an *in rem* claim against the salved vessel or property in state court because an *in rem* suit is distinctively an admiralty proceeding and hence is within the exclusive province of the federal courts.[230] In *Phillips v. Sea Tow/Sea Spill of Savannah*,[231] the Supreme Court of Georgia held that state courts do not have jurisdiction over *in personam* salvage claims either, because a claim for salvage reward is "of a character wholly unknown to the common law"[232] and thus is not "saved to suitors" under 28 U.S.C. § 1333(1). That proposition is not beyond question, however. In *Auerbach v. Tow Boat U.S.*,[233] the U.S. District Court for the District of New Jersey declined to follow *Phillips* and refused to allow removal of the plaintiff's claim from state court because it was "an *in personam* action subject to the saving-to-suitors clause, even though it concerns the provision of towage or salvage services."[234] Other federal district courts had remanded *in personam* salvage claims to state courts before *Phillips*.[235] As well, it should be remembered that state courts have concurrent jurisdiction to try federal claims unless Congress expressly makes federal court jurisdiction exclusive.[236] An *in personam* claim arising under the Salvage Convention

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[230]The Moses Taylor, 71 U.S. (4 Wall.) 411, 18 L.Ed. 397 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 18 L.Ed. 451 (1866); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124, 44 S.Ct. 274, 277 (1924); American Dredging Co. v. Miller, 510 U.S. 443, 446-47, 114 S.Ct. 981, 985 (1994).

[231]578 S.E.2d 846, 2003 AMC 750 (Ga. 2003).

[232]Id., 578 S.E.2d at 850, 2003 AMC at 754, *quoting* Southern Pac. Co. v. Jensen, 244 U.S. 205, 218, 37 S.Ct. 524, 530 (1917).

[233]303 F. Supp. 2d 538, 2004 AMC 370 (D.N.J. 2004).

[234]Id., 303 F. Supp. 2d at 543, 2004 AMC at 374.

[235]In re G.W. Contractors, Ltd, Civ. A. Nos. 91-2678, 92-224 and 92-697, 1992 WL 167046 at *1 (E.D. La. 1992)(noting previous remand of salvage action to state court); Carr v. Jetter, 103 F. Supp. 2d 1122, 1123-24 (E.D. Wis. 2000); Sebastian Tow Boat & Salvage v. Slavens, No. 02-759, 2002 WL 32063121 at *1-2 (M.D. Fla. 2002).

[236]13 CHARLES ALAN WRIGHT et al., FEDERAL PRACTICE AND PROCEDURE §3527 (2nd cum. ed. 1987). See, e.g., Tafflin v. Levitt, 493 U.S. 455, 470, 110 S.Ct. 792, 801 (1990)(Scalia J. concurring)("It . . . takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction – an exercise of . . . the power of Congress to *withdraw* federal claims from state-court jurisdiction").

1989 could presumably be brought as a federal question in state court because Congress has not expressly made the jurisdiction to consider Convention claims exclusive to the federal court.

If state courts do have concurrent jurisdiction to hear *in personam* salvage claims, they must still apply the Salvage Convention 1989. Even if there would be any ground for applying state law to such a claim, which is doubtful,[237] the Salvage Convention 1989 *is* state law as well as federal law, by operation of the Supremacy Clause.[238] The Convention does not apply only to salvage *claims*, meaning claims phrased as being for salvage reward. It applies to judicial proceedings relating to salvage *operations*,[239] which are defined as being "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."[240] Thus, it makes no difference what theory or cause of action the plaintiff relies on when making its claim in state court, as the applicable law is the Convention if the claim is for payment for salvage operations. It follows that the *Phillips* court erred in applying the Georgia state law of *quantum meruit* after it held that a plaintiff may bring an *in personam* claim in state court "based on events that could also support a claim in federal admiralty court for marine salvage."[241] Any events that could support a claim for marine salvage in federal court must necessarily be salvage operations, so the relevant state law was the Salvage Convention 1989.

III
CONCLUSION

Self-executing treaties like the Salvage Convention 1989 automatically become "the supreme law of the land" under the Supremacy Clause.[242] They require no legislation to make them operative but they have the same force and effect as an Article I legislative enactment.[243] The fact that no implementing legislation is needed often leads to the paradoxical result that a self-

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[237]In exercising concurrent *in personam* jurisdiction in admiralty under the "saving to suitors" clause, a state court may apply state remedies, so long as they are not inconsistent with substantive federal maritime law. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 224, 106 S.Ct. 2485, 2495 (1986); American Dredging Co. v. Miller, 510 U.S. 443, 447, 114 S.Ct. 981, 985 (1994). It is difficult to imagine how application of state restitution or *quantum meruit* law would not be inconsistent with substantive federal salvage law, as embodied in the Salvage Convention 1989 and general maritime law.

[238]U.S. CONST., art. VI, cl. 2. See supra note 16.

[239]Salvage Convention 1989, supra note 1, arts. 2, 6.

[240]Id., art. 1(a).

[241]Phillips v. Sea Tow/Sea Spill of Savannah, 578 S.E.2d 846, 851, 2003 AMC 750, 756 (Ga. 2003).

[242]U.S. CONST. art. VI, cl. 2.

[243]Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 458 (1888); Medellin v. Texas, —- U.S. —-, 128 S.Ct. 1346, 1356 (2008).

executing treaty is more easily forgotten, perhaps for the simple reason that such treaties do not always appear in the U.S. Code and so are not always easy to find.[244] Perhaps that is the explanation of the curious fate of the Salvage Convention 1989, which does not appear anywhere in the Code.[245] There can be no doubt, however, that when the provisions of a treaty prescribe a rule by which private rights may be determined, as the Salvage Convention 1989 does, a court must resort to the treaty for rules of decision, just as it would do to a statute.[246] A court may only refer to the law that would govern in the absence of the treaty – in the present context, general maritime law – when the treaty leaves an issue unresolved.[247] In short, it is not acceptable for courts to continue to apply the general maritime law of salvage simply because it is broadly equivalent to the Salvage Convention 1989. Even when the general maritime law and the Salvage Convention 1989 would produce identical results the courts should apply the Salvage Convention 1989 and not the general maritime law. When the general maritime law and the Salvage Convention 1989 would (or even might) produce different results – and this article has endeavored to show that that may occur quite often – then there is no justification whatever for applying the general maritime law.

[244]Some treaties are reproduced in the Code as a note to a related Code provision or as an appendix to a Code title. See, e.g., the CISG, supra note 16, which is reproduced in 15 U.S.C. App.; the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958)(the New York Convention), is reproduced in 9 U.S.C. §201 Note.

[245]The Salvage Convention 1989 is reproduced at 1989 AMC 2989-3000.

[246]Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598-99, 5 S.Ct. 247, 254 (1884).

[247]Chan v. Korean Air Lines Co. Ltd, 490 U.S. 122, 134, 109 S.Ct. 1676, 1683-84 (1989)("We must thus be governed by the text – solemnly adopted by the governments of many separate nations -...[W]here the text is clear, as it is here, we have no power to insert an amendment"); Zicherman v. Korean Air Lines Co. Ltd, 516 U.S. 217, 223-25, 116 S.Ct. 629, 633-34 (1996). The position is different in relation to treaties like the CISG, supra note 16, which by their terms (in the case of the CISG, art. 7(2)) authorize courts to develop law under the treaty, thereby authorizing federal courts to develop federal common law rules of decision for issues not directly resolved by the treaty, which they could not otherwise do. See Michael van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 733-34 (1998); Michael van Alstine, *The Judicial Power and Treaty Delegation*, 90 Cal. L. Rev. 1263, 1290-91 (2002).