MARINE SALVAGE AT A GLANCE

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I. Introduction

The purpose of this article to inform the reader about the current state of salvage law and the differences between "pure" salvage and "contract" salvage.

II. Choice of Law Governing Salvage Agreements

Salvage agreements are governed under admiralty/maritime law including relevant statutes and treaties. *Triplecheck, Inc. v. Creole Yacht Charters, Ltd.*, 2007 U.S. Dist. LEXIS 20902 (S.D. Fla. 2007).

III. Types of Salvage

The two (2) types of salvage facing yacht owners and their underwriters. The first is "pure salvage" which arises where there is no preexisting agreement between the parties. The second is "contract salvage" where the salvor enters into an agreement to use "best endeavors" save maritime property.

IV. Elements of Pure Salvage

The elements of salvage are:

1. There must be a marine peril placing the property at risk of loss, destruction, or deterioration;

2. The salvage service must be voluntarily rendered and not required by an existing duty or by special contraction; and,

3. The salvage efforts must be successful, in whole or in part.

Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953 (M.D. Fla. 1993).

i. Marine Peril Placing the Property at Risk of Loss, Destruction, or Deterioration

In determining whether there is a marine peril, the court must decide whether, at the time the assistance was rendered, the vessel was in a situation that *might* expose her to loss or destruction. *Markakis v. S/S Volendam*, 486 F. Supp. 508 (S.D.N.Y. 1995). To constitute marine peril, the

danger need not be imminent or actual. All that is necessary is a reasonable apprehension of peril. *Reynolds Leasing Corp. v. Tug Patrice McAllister*, 572 F. Supp. 1131 (S.D.N.Y. 1983).

ii. Salvage Service Must be Voluntarily Rendered and Not Required by an Existing Duty or by Special Contraction

The determination of voluntarily service calls for a determination of whether the salvor had a legal duty to assist. For example, a contract or other obligation between the salvor and the vessel owner may preclude voluntariness. *Flagship Marine Services, Inc. v. Belcher Towing Co.*, 966 F.2d 602 (11th Cir. 1992). Further, those having a preexisting duty to saving property such as firefighters cannot claim a salvage award. *Firemen's Charitable Ass'n v. Ross*, 60 Fed. 456 (5th Cir. 1893).

iii. The Salvage Efforts Must be Successful, in Whole or in Part

This is self explanatory, however, courts require that at least some of the properly be saved in order for there to be a salvage award. *The Blackwall*, 77 U.S. 1 (1869).

V. Elements of Contract Salvage

In contrast to "Pure Salvage" where there is no preexisting agreement between the parties, in "Contract Salvage", the salvor acts to save property after entering into an agreement to use "best endeavors" to do so. The two (2) most popular contracts are the Lloyd's Open Form ("LOF") and MARSLAV Form. These agreements provide that the salvor is engaged on a "no cure, no pay" basis, meaning that he is compensated only if he is successful.

VI. Salvage Award

A. Common Law (Pure Salvage)

Because the circumstances of each salvage case are unique, no specific rule for determining the amount of the award can be given. Salvage awards based on a percentage of the salved vessel's value should be adjusted so that the salvor is fairly compensated without undue hardship to the vessel owner. It would be a rare case in which the salvage award would be greater than 40 percent of the value of the vessel. More commonly, salvage awards amount to 5 to 25% of the value of the vessel and property salvaged. However, courts recognize that generous salvage awards should be allowed when the value of the salved property justifies an award, to "compensate salvors for services that are frequently performed where the property is so small that adequate remuneration cannot be given without a hardship to the owner." *The Neto*, 15 F. 819 (S.D. Fla. 1883).

At common law, courts have discretion to fix the award, upon consideration and weighing the benefit conferred upon the property owner using the following criteria:

1. Time and labor expended by the salvors in rendering the salvage service;

2. Promptitude, skill and energy displayed in rendering the service and saving the property;

3. Value of the property risked or employed by the salvor, and the degree of danger to which this property was exposed;

4. Value of the property salved; and,

5. Degree of danger from which lives and property are rescued.

The Blackwall, 77 U.S. (10 Wall) 1, (1870).

B. International Convention on Salvage (Contract Salvage)

In 1989, the International Convention on Salvage updated the common law criteria to reflect modern salvage concerns. Both the LOF and MARSALV contracts require the salvage award be assessed under the Convention's criteria if a fixed cost for the salvage project was not agreed upon. These criteria are:

1. Salved value of the vessel and other property;

2. Skill and efforts of the salvors in preventing or minimizing damage to the environment;

3. Measure of success obtained by the salvor;

4. Nature and degree of the danger;

5. Skill and efforts of the salvor in saving the vessel, other property and life;

6. Time used and expenses incurred by the salvors;

7. Risk or liability and other risks run by the salvors and their equipment

8. Promptness of the services rendered;

9. Availability and use of vessels or other equipment intended for salvage operations; and,

10. State of readiness and efficiency of the salvor's equipment and the value thereof.

VII. Recent Salvage Awards

See the below table for recent salvage awards given by Florida Courts

VIII. Arbitration vs. Litigation

Most salvage is preformed under contract as opposed to "pure" salvage. Both of the LOF & MARSALV contracts provide for arbitration should any dispute arises from the agreement. The LOF requires London arbitration while the MARSALV form requires arbitration in the United States. As such, should the yacht owner or its underwriters wish to challenge the amount charged for the salvage operation, it has little choice but to arbitrate the case as opposed to litigate it in court.

Courts, however, have found the LOF's *London* arbitration provision unenforceable where salvage services where preformed in the United States on recreational vessels owned by United States citizens. *Reinholtz v. Retriever Marine Towing & Salvage*, 1994 AMC 2981 (S.D. Fla. 1993).

Arbitration does have its advantages as it is more cost effective and resolution of the claim will be quicker than proceeding in Court. Furthermore, should a case be arbitrated, there is less of a chance that the arbitral panel will give the salvor an excessive (30% or grater) or de minimis (5% or less) awards.

IX. Attorney Fees

Though not common, attorney fees may be given in salvage cases where one party (the yacht owner) or (salvor) acts in bad faith. Bad faith is typically assessed when either a yacht owner refuses to pay a reasonable salvage demand or a salvor makes an excessive salvage demand. *Southernmost Marine Services, Inc. v. One (1) 2000 Fifty Four Foot (54') Sea Ray*, 250 F. Supp. 2d 1367 (S.D. Fla. 2003); *Triplecheck*, 2007 U.S. Dist. LEXIS 20902. The best way to avoid imposition of attorney fees is for underwriters to take in account the *Blackwall* or *Convention* criteria and affix a valuation of a salvage services. If the salvor's demand is comparable to the independent valuation, the best course it attempt to negotiate a quick settlement or simply pay the demand. If the salvor's demand is excessive, underwriters should provide the salvor a counter offer in writing explaining the basis of the counter demand using the *Blackwall* or *Convention* criteria. When making a counter offer, underwriters should, as a rule of thumb, give a figure within 15 to 25% of the post-loss value of the vessel. This should place underwriters in the position to avoid the imposition of attorney fees.