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The Modern World of Salvage

Lloyd's Open Form 2011

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1.0 Introduction

Shipping is a fundamental part of the global trade and economy and facilitates the transport of goods from production site to the place of consuming and connects the world of trade together. The ships carrying the goods have, accordingly with the technology in general, developed together with the increasing volumes of goods shipped by the highways of the seas. Ships today are equipped with navigational tools which not only enhances the ships commercial and environmental performance, but also creating the traffic at sea safer.

The increase of modern technology in shipping connects the parties in the business together, such as ships, coastal authorities, pilots, etc., causing many of the traditional marine perils to be considered as less dangerous today. Radar and communicating equipment are good examples of such technologies eliminating more traditional marine perils. The technological improvements make the planning and execution of the voyages less unpredictable, creating a better overview of the marine traffic. Accurate navigation and ship traffic systems, optimum track routing, well trained mariners are factors which contribute to a more connected shipping industry.

Despite the technological improvements, ships will still need assistance and accidents will still occur. But what happens when the ship is in danger?

When the casualty has occurred, and the ship is unable to operate in a safe manner, shipowners rely on the expertise of salvors, who offer their services to ships in distress. The shipowner is responsible for the crew and the cargo onboard the ship and must act fast before the situation deteriorates further. In the case of casualty, the shipowner must act fast to ensure the interests of the interesting parties of the ship.

The business of salvage requires that those engaged must enter dangerous situations and take risks where other mariners seek shelter, such as bad weather or entering dangerous waters from where others are trained to avoid etc. Every casualty and the following salvage operation are unique in respect of the type and size of the ship, its location, number of passengers, cargo and political implications.

The salvor is first and foremost concentrated on saving property, ships and lives in distress, while minimizing the environmental damage from the casualties. This requires technical

knowledge to ensure a successful salvage operation in a time critical business. The modern salvors also needs to take an increasingly number of interesting parties into account, such as the environmental aspect and other community interests. Without the expertise of the salvors, the potential losses to the shipowners, seafarers, consignees, insurers, ports and governments and other legitimate parties could be enormous and would thus result in costs hindering the transport of goods by sea.

The salvor gets remunerated for his efforts in form of a salvage award, which is based on the salvaged values and other criteria defined in Section 446 of the Norwegian Maritime Code, such as their performed skill and efforts. We will come back to this in chapter 2.0. A professional salvor have the specialized equipment needed for the salvage operations and the technical knowledge, but they want to know they have an agreement where they will be awarded for their efforts as well. In situations where time is of the essence, it can be advantageous to have an agreed form contract to avoid commercial haggling when life, property and environment can be at risk.

One contract has traditionally been the most frequently used contract in emergency responses – the Lloyd’s Open Form. The Lloyd’s Open Form provides a “*regime for determining the amount of remuneration to be awarded to salvors for their services in saving property at sea and minimizing or preventing damage to the environment*”¹. The main advantage of Lloyd’s Open Form is that it enables salvors to provide their services promptly without commercial haggling, and that the salvor further undertakes to use his best endeavors with the settlement of the agreement often happening after the conclusion of the services. However, in the last decades, the number of issued Lloyd’s Open Forms have seen a significant decrease.

As the world of salvage is changing, the aim of this thesis is to analyze the how the current Lloyd’s Open Form fits the contemporary industry. The thesis will further research the underlying reasons for the decrease of issued Lloyd’s Open Forms. Due to the historical importance and dominance of the Lloyds Open Form, the thesis will solely focus on this particular contract. There are other salvage contracts being used, such as the Turkish Open Form and Scandinavian Open Form, but the Lloyd’s Open Form is recognized as the leading salvage

¹ Lloyd’s (u.d.)

contract. This thesis will research the topicality of the latest edition of the Lloyds Open Form, issued in 2011.

In addition to the topicality of the Lloyd's Open Form, the thesis will discuss potential changes in relation to Special Compensation. The discussion will focus on environmental protection and the salvage of human life. The reason for this is the prioritizing the salvor undertakes to follow in during a salvage operation. In salvage operations, protection of the environment and the salvage of human life has a higher priority than the salvage of property².

Chapter 2 will provide relevant information for the discussion in Chapter 3. The topics will include salvage operations, the related legislations and the parties involved, which will be used as background information for the discussion in Chapter 3. The first subchapter in Chapter 3 will discuss how an improved communication have changed the need for an emergency contract. The second subchapter will discuss the increase in use of sideletters to the Lloyd's Open Form, before the third subchapter will discuss an alternative edition of the Lloyd's Open Form 2011, called Lloyd's Open Form Light. We will come back to this in Chapter 3.3. Thereafter, subchapter 4 and 5 will discuss contemporary issues and possible amendments in regards of remuneration, respectively for environmental protection and salvage of human life.

The background information used to discuss in Chapter 3 have been collected through textbooks and online research. However, in order to more precisely discuss the contemporary issues, most of the research is based on discussions with large players in the salvage industry. To reflect the views of insurance companies with experience in the salvage industry, Norwegian Hull Club, Skuld and Gard have kindly assisted us with insight and knowledge on the contemporary issues, as well as their views on the future use of Lloyd's Open Form.

Furthermore, in order to get the salvors' opinion on the same matters, BOA Management contributed with valuable input. As one of the largest players in the Norwegian salvage industry, BOA Management also provided textbook materials for further research. In pursuance of a more global approach, The International Salvage Union contributed with a unified global voice as their

² Hoddinott (2015)

position is important for legal and commercial development concerning marine salvage³.

Finally, the international law firm Wikborg Rein and the Nordisk Legal Services, more or less an independent law firm within Nordisk Defence Club, have given their insights from a more neutral perspective as they are involved in the different parties' interests.

³ International Salvage Union (u.d.)

2.0. Salvage

A salvage operation is defined in the Norwegian Maritime Code Section 441 a) as: *any act the purpose of which is to render assistance to a ship or other object which has been wrecked or is in danger in any waters*. A ship is further defined as *any ship or ship and also any other construction capable of navigation*, in the same Section letter b) in the Norwegian Maritime Code. Letter d) of Section 441 defines object as *any object not permanently attached to the coastline*.

The scope of the rules covers everything capable of navigating on water, in all forms of water. By including both ship and objects, there should be no doubt for any salvor if there is a reason to engage a salvage operation in order to save either the structure or the environment. If only ships would have been included, the bar for engaging a salvage operation for another object would be considerable higher as there was no remuneration for salvage of other objects.

To demonstrate, this could imply that an object in danger, with people on board or in a threatening situation to the environment could risk not being salvaged as the salvor would have to undertake considerable risks without having the possibility of being rewarded for their efforts.

For many years there have been two distinct, symbiotic, and equally important elements of the salvage operations, namely (1) saving property at risk at sea and reducing environmental damage, and (2) all the actions taken aboard and ashore to resolve a marine casualty and to save property at risk at sea. The salvage industry is difficult, time critical and often dangerous which often involves a high degree of risk⁴.

Salvors must understand both the technical and commercial aspects of the salvage operations in order to recognize the behavior of ships under normal and abnormal circumstances. At the same time, salvors must approach the industry as a commercial enterprise where the target is to make as much money as possible and manage it accordingly⁵. As the three largest salvage companies

⁴ Milwee (1996) p. 4

⁵ Milwee (1996) p. 4

start each year with a USD 100m deficit combined in running costs, the salvors must understand the commercial and financial aspects of the industry⁶.

In order to profit from their successful efforts, the salvage award is essential for the salvors to survive. To earn a salvage award, the salvor must fulfill four criterions:

1. There should be a recognized subject matter
2. The object of salvage should be in danger at sea
3. The salvors must be volunteers
4. There must be success by either preserving or contributing to preserving the property in danger⁷

A salvor can be either professional and casual. A professional salvor will in most cases have invested a greater amount of money in equipment explicitly meant for salvage operation. Under letter j) and i) in Norwegian Maritime Code Section 446 it is stated that the state of readiness of the salvors equipment is taken into account when a salvage award is fixed. Such equipment can be tugs, ready to depart as soon as the salvage situation has occurred.

The combination of ready and efficient equipment is important when assessing the salvage award, as more regularly maintained pumps and compressors will experience fewer faults. Professional salvors who have invested more to fulfil these demands and are therefore rewarded with a greater award than a casual salvor will. A professional salvor will have designated for a salvage operation, whereas a casual salvor will have to make the best use of what is available in the situation. In addition, the value of the equipment will also be relevant when determining the salvage award. It is normal procedure to state the market or replacement values of the salving tugs or other ships when assessing the salvage award⁸.

Marine salvage and the laws governing the industry are unique to maritime law. Considering other industries ashore, there is no industry with similar rules which entitles a person or company

⁶ Personal conversation with Roger Evans, secretary general at the International Salvage Union. 27th November 2019.

⁷ Mandaraka-Sheppard (2007) p. 647

⁸ Brice (2011) p. 167

which saves the property of another, where this person's property is in danger of being lost or seriously damaged, to make a claim for an award for this operation. Even though there exist services which responds to casualties they do not operate with the same conditions as at sea. To compare, the fire department are not under any contract but need to assist when a fire occurs. When the firefighters have completed their services there does not exist a salvage award, no matter how extraordinary the service have been⁹.

An act of salvage can be within a range of different operations. Examples of such situations are; to refloat a grounded ship, pumping water out of a ship which is in distress, fire extinguishing or the act of standing by. The common denominator of a salvage operation is that the ship must be in distress and in a degree of danger and the salvor must produce a successful result¹⁰.

Degree of danger

Section 446 letter e) of the Norwegian Maritime Code concerns the nature and degree of danger, a central criterion in the fixing of the salvage award. The nature of the danger can be a wide specter of events, and can be destructible like fire, explosion or when a ship has grounded and the damages which follows.

One of the most essential rules for determining if the ship is a salvage object is whether the ship is in danger or not. It is difficult to set a clear criterion for when a ship is danger, but this is decided to be when a ship is in more severe danger than the ordinary perils of the sea¹¹. If there were no rules regarding the degree of danger, salvors could have attempted a higher number of salvage operations where the ship was in no or limited danger in pursuit of receiving a salvage award.

If the degree of danger is considered high and the ship is in imminent danger, the need for emergency response from the salvors are urgent. Typical situations which requires such urgent emergency response, can for instance be if fire breaks out in the engine room or if there has been an explosion onboard. If the degree of danger is lower, the urgency for the emergency response

⁹ Falkanger (2016) p. 479

¹⁰ Sæther (2018)

¹¹ Falkanger (2016) p. 483-484

will be reduced accordingly. Typical situations can be loss of engine power outside immediate proximity to shallow waters, shores, structures, etc.

A salvage award will be affected by the degree of danger experienced by the ship in distress. The more urgent the danger, the higher will the salvage award be. The Norwegian Maritime Code Section 446 letter e) determines *the nature and the degree of danger* and is one of the most influencing criterions to affect the salvage award alongside with letter a), *the value of what was salvaged*. If there is established that danger is present, the degree of danger will determine the award. According to Falkanger and Bull there is in practice no need for a clear definition danger as the degree of danger influences the size of the salvage award. If there is no danger present, a salvage operation could be deemed a towage operation.

Norwegian Hull Club, one of the world's leading marine insurance companies, divides the degree of danger into three categories¹²:

1. Low degree of danger.

When a ship is in category 1, the degree of danger is low or absent, and a towage contract would be sufficient and preferred. The low degree of danger does not require an emergency response, and it is therefore seldom from the shipowners' or H&M-underwriters' point of view necessary to involve a salvage contract in this scenario. A towage contract is more suited for such described scenario. One of the main differences between a towage contract and a salvage contract is that the former is based on a fixed towage rate and the remuneration a tug can claim by using these are significantly lower than what a salvor could have claimed under a salvage contract.

2. Moderate danger

A more critical situation is where the ship is dependent on assistance but is not in a time critical situation. The accident can therefore have occurred, but the ship will not be further damaged without immediate assistance. An example of such situations is where a ship is stranded on a sandbank and needs assistance to sail further. In such circumstances, the ship would be considered to be in moderate danger as the shipowner has sufficient time analyse and get an

¹² Personal conversation with Åge Solberg, Chief Claims Officer at Norwegian Hull Club. November 1st, 2019.

overview of the situation. This would further provide the shipowner with the possibility to communicate with insurers and other interests in the ship, in order to determine a solution.

3. Ship in imminent danger

The final category describes a situation where the ship is in imminent danger and is dependent on urgent emergency response from salvors. In such situations, there are normally no textbook-solution, and the urgent nature of the situations in this category gives the shipowner limited time to consult with his underwriters. In such circumstances the shipowner normally communicates directly with the salvor and agrees upon a salvage contract.

Categories of salvage

There are in practice several categories of salvage¹³:

1. Assistance of disabled ships following a breakdown of the machinery, where the ship may be in danger of grounding. In cases like this, the conditions for salvage will be fulfilled.
2. Refloating of grounded ships, typically where the ship is unable to refloat under its own power.
3. Bilge pumping on a sinking ship and the extinguishing of a fire onboard or at a place where the fire could spread to the ship.
4. Standing by. In such situations, the salvage service is the act of remaining close to the disabled ship, and thereby providing necessary comfort to the crew who does not have to abandon the ship. The salvor are thus indirectly assisting in the salvaging of property.

No cure – no pay

In salvage, one of the essential rules are that a salvor can only claim an award if the salvage operation has produced a useful result according to Section 445 of the Norwegian Maritime Code, 1st sentence. The principle of no cure no pay is also one of the main characteristics of the Lloyd's Open Form, which will be described in more detail below. The principle indicates that if there has been no successful salvage or no property is salvaged, there is no basis for granting a salvage award no matter the effort put in by the salvor¹⁴.

¹³ Falkanger (2016) p. 485-486

¹⁴ Falkanger (2016) p. 486-487

In the general rules of a Lloyd's Open Form, the no cure no pay principle is a standard, which means that there has to be a clear and express agreement if the principle should not be applicable in the contract¹⁵. The principle of no cure no pay is not absolute and can be negotiated. Involved parties have the opportunity to come to an agreement which sets the principle aside, and the salvor to be paid by the hour or similar.

In salvage operations where the salvor puts in a lot of resources and is performing the salvaging by his best endeavors, factors which he cannot control can occur. One of the most common factors is weather, as storms, waves and similar incidents which can make the salvage operation close to impossible. By the means of "no cure no pay", an aborted or failed salvage operation due to the mentioned circumstances does not give the salvor any right to any salvage award. In other words, no cure no pay is absolute when invoked no matter of the reason for a failed salvage operation.

2.0.1. Lloyds Open Form

According to Section 443 of the Norwegian Maritime Code, the provisions of Chapter 16, which concerns salvage, will not apply where there has been agreed alternative regulations by way of contract. In most salvage cases however, there will exist a contractual relationship between the ship in distress and a salvor. This contractual relationship which is extensively used internationally is the Lloyd's Open Form¹⁶.

For over 100 years have the Lloyd's Open Form contributed to the maritime industry as the leading standard contract for salvage operations and has been regularly revised in order to meet the needs of the industry's insurers. In the Lloyd's Open Form, fees are not agreed prior to the operation, but agreed through negotiations between the salvor, the shipowner, cargo interests and their insurers when the operation is completed¹⁷.

The Lloyd's Open Form has traditionally been the most frequently used emergency response salvage contract. The main purpose of the Lloyd's Open Form is to provide a regime for determining the amount of remuneration to be awarded to a salvor for his services in connection with salvaging a ship or other property covered by the Norwegian Maritime Code, as well as his

¹⁵ Falkanger (2016) p. 487

¹⁶ Falkanger (2016) p. 487-488

¹⁷ Busch (u.d.)

effort in preventing and minimizing damage to the environment in a salvage operation. Lloyd's Open Form is administered by the Lloyd's Salvage Arbitration Branch, which is working to provide a reliable and secure framework within which the Lloyds Open Form arbitration can operate¹⁸.

Lloyd's Open Form dates back to the 1890s, from Colonel Sir Henry Hozier, which was the secretary of Lloyd's, and his efforts to reach an understanding with the salvors in the Dardanelles/Black Sea region. Through the years have Lloyd's Open Form been revised several times, with 2011 being the latest edition¹⁹. The Lloyd's Salvage Group is in charge of amending and creating the new Lloyd's Open Forms. The Lloyd's Open Form is a result of meetings and debates through 2010 and 2011, discussing the flaws of the previous contract from 2000²⁰.

When a salvor agrees to the terms of Lloyd's Open Form, he agrees to use his best endeavors to salvage the ship and its cargo, for a sum which will be fixed by the involved parties, or by arbitration if they do not come to an agreement. According to Section 444 1st paragraph of the Norwegian Maritime Code is the salvor duty bound to (a) *perform the salvage operation with due care*; (b) *take due care during the salvage operation to prevent or limit environmental damage*; (c) *seek the assistance of other salvors when this is reasonable under the circumstances*; and (d) *accept the intervention from other salvors when this is reasonably requested from the reder, master or owner of other objects at risk* when agreeing upon a Lloyd's Open Form.

While the salvor is duty bound to the latter demands, the owner is duty bound to (a) *fully co-operate fully with the salvor*; (b) *take due care during the salvage operation to prevent or limit environmental damage*; and (c) *accept redelivery, when reasonably requested by the salvor after what has been salvaged has been brought to safety* according to Section 444 2nd paragraph of the Norwegian Maritime Code.

The ship in distress is contractually obliged to co-operate with the salvor and to allow the use of the ship's machinery gear equipment anchors chains stores and other appurtenances in a

¹⁸ Lloyd's (u.d.)

¹⁹ Sæther (2018)

²⁰ Bizon (u.d.)

reasonable manner according to letter F in the contract²¹. If the arbitrator is to fix the award, it is fixed in accordance with the general principles of salvage²².

Article 8 in the International Convention on Salvage provides strict demands which explicitly states that the salvor shall perform the salvage operation with due care and with his best endeavors. The Article further states that if the master of the salvor causes a salvage situation or have acted faulty or negligent the salvor may be deprived of the entire award, or parts of it according to Section 450 3rd paragraph of the Norwegian Maritime Code. Therefore, the demand that a salvor has to use his best endeavors in a salvage operation is essential to get paid for his services.

In the Lloyd's Open Form 1980, the environmental concern was introduced to the contract. Clause 1(a) included that the Contractor undertakes to use his best endeavors to prevent the spillage of oil from the assisted ship whilst he carries out the operations for the salvage of the ship, of her cargo, of the bunker and of the stores. This clause was the most important change of wording in the Lloyd's Open Form of 1980²³.

Also, the Lloyd's Open Form 1980 introduced the possibility to get rewarded, even if the salvage operation not was a success, thus deviating from the traditional and well-known no cure no pay-principle of the Form. An award could therefore be rewarded if the salvor had prevented the cargo of a tanker from escaping and causing damage by pollution by using his best endeavors. This change in the Lloyd's Open Form amplifies the environmental focus related to salvage operations²⁴.

The exception of no cure no pay is related to the salvaging of tankers and can only be affected if one of three specified circumstances has occurred. These circumstances must be present without being caused by negligence or fault of the salvors, their employees or agents, namely²⁵:

²¹ Grime (1991) p. 304

²² Burgess (2017)

²³ Vincenzini (1992) p. 101-103

²⁴ Vincenzini (1992) p. 101-103

²⁵ Vincenzini (1992) p. 104-106

1. The services are not successful
2. The services are only partially successful
3. The salvor is hindered from completing the services

In the Lloyd's Open Form 1980, the no cure no pay-principle was effectively lessened by the new conditions mentioned in clause 1(a), as there now existed a possibility to collect a salvage award, or a part of a salvage award, even though the operation was considered a success²⁶.

Alongside with the International Convention on Salvage in 1989, the new Lloyd's Open Form of 1990 was established. The most noticeable development is the environmental focus shown in the new contract at the time. Lloyd's Open Form 1990 embodies several provisions drawn from the International Convention on Salvage 1989, with Articles 8(1)(b), 13(1)(b) and 14 the most important ones regarding the preventing and/or minimizing damage to the environment. The new international rules put the salvor in a position where he is incumbent to prevent or minimize damage to the environment. This condition is not debatable and the salvors has a duty to do use his best endeavors to fulfil this demand²⁷.

Article 8(1)(b) in the COS from 1989 is clear that the duty to exercise due care to prevent or minimize damage to the environment rests with both parties involved in the operation; both the salvor and of the owner and master. In the second paragraph of Article 8, letter b, the conventions states that the owner and master of the ship or the owner of other object in danger shall owe a duty to the salvor in so doing, to exercise due care to prevent or minimize danger to the environment.

In September 2000, the Lloyd's Open Form 2000 was introduced. In contrast to previous editions, it was made to be simple and therefore only includes the most essential terms on just

²⁶ Vincenzini (1992) p. 107

²⁷ Vincenzini (1992) p. 200

one sheet excluding the procedural provisions, which are separately provided in the Lloyd's Standard Salvage and Arbitration Clauses and are incorporated by reference²⁸.

The main purpose of the Lloyd's Open Form is not to settle in detail the incidents of the parties relationships, as in most standard form contracts, but for providing a reference to arbitrations to determine of the amount to be paid for the performed service in accordance with the principles of maritime law of salvage. Standard contracts have not always been a common feature but became more of a normal practice when the industry shifted from sail to motor powered ships and from rendering of salvage on ad hoc terms to its provisions by professional salvors under the terms of standard contracts²⁹.

One of the characteristics of the Lloyd's Open Form is the principle of no cure no pay, increasing the risk on the salvor for offering assistance as an unsuccessful salvage operation will result in no award of any kind. Consequently, in order to encourage salvors to engage in dangerous, high-risk circumstances, the salvors expect to be remunerated accordingly. Subsequently, successful salvage operations therefore can result in high salvage awards to the salvors.

Special compensation and SCOPIC

Sometimes the salvage award a salvor is entitled to based on Section 446 of the Norwegian Maritime Code, does not reflect the situation and the effort performed by the salvor when an operation includes other efforts than only salving the ship. Section 446 is the general Section used to fix the salvage award where the remuneration a salvor is entitled to is based on ten different criterions.

These criterions are described in detail in chapter 2.2 regarding the salvage award. However, there exist a possibility for a salvor to claim a special compensation for his actions. A special compensation is an additional compensation a salvor is entitled to if he has prevented or minimized damage to the environment in connection with a salvage operation.

In the 1980s, the environmental part of the salvage industry was heavily discussed due to several oil pollution incidents. The environmental part of the salvage operations is the salvors actions

²⁸ Mandaraka-Sheppard (2007) p. 668

²⁹ Rose (2012) p. 417

which prevent or minimizes environmental damage. This can be preventing an oil spill from an oil tanker or rescuing hazardous cargo from a ship which could cause a threat to the environment.

Since the salvors were not used to salvage operations with an environmental focus and were not as eager to engage in these type of salvage operations as the traditional salvage operations since they would not be rewarded in the same manner. It then became necessary to encourage the salvors to take high risk salvage contracts where the main aim was to prevent or limit damage to the environment. The high risk was connected with a low degree of knowledge connected to this type of salvage. In addition, were salvors not guaranteed a significant salvage award if they were to prevent environmental damage but the value of what was salvaged was considered low.

Thus, the Article 14 of the COS regarding Special Compensation were introduced. This Article were meant to encourage a salvor to also prevent environmental damage by rewarding them with an additional remuneration. Article 14 of the COS is equivalent to Section 449 of the Norwegian Maritime Code. Section 449 were at this time only applicable in coastal and inland waters.

Section 449 of the Norwegian Maritime Code is the main Section which regulates the remuneration a salvor can receive as regards to operations which leads to special compensation. The special compensation is based on the out-of-pocket expenses incurred by the salvors. These expenses are what is reasonably incurred by the salvor in the course of the salvage operation, plus a fair rate for the equipment and personnel employed in the work according to Section 449 3rd paragraph.

A salvor can be awarded a special compensation which are described in the Norwegian Maritime Code Section 449 if his expenses incurred exceeds the salvage award entitled to a salvor from Section 446. The special award *shall correspond to the expenses incurred by the salvor in the salvage operation*, according to Section 449 2nd paragraph. A salvor can receive a special compensation for up to 30 percent of his expenses. Salvors can in some cases be compensated

for 100 percent of their expenses. However, this is unlikely to happen and are yet to be rewarded to any salvor³⁰. The reasoning for this percentage will be discussed in chapter 3.4 below.

The accident involving Nagasaki Spirit spilled 12,000 tonnes of crude oil out in the Malacca Strait and is one of the worst marine disasters of all time. This disaster only entitled a special compensation equalling to 65% of the salvors' expenses connected to the operation. Accordingly, it seems like the possibility of reaching a compensation of 100% is just theoretical, and not realistic. The salvors involved in this case earned the special compensation in addition to the salvage award they were entitled to in the aftermath of the operation³¹.

However, Section 449 created new concerns for both the shipowners and for the salvors. The salvors were concerned mainly about the applicability of Section 449 since it was only applicable in coastal and inland waters and the salvor itself had to prove that there was a threat to the environment for it to be applied. Salvors wanted this Section to be applicable in all waters, and not only be limited to certain areas³².

The concerns on the shipowners and P&I clubs' side were that salvors could unnecessarily prolong the salvage operation to claim more expenses under Section 449. This could for example be if a salvor waited until an oil spill had occurred or there was a threat to the environment to engage in salvage operation which would thus lead to the salvor being able to claim a special compensation in addition to the salvage award.

In order to solve the issues and concerns for both the shipowners and salvors, the Special Compensation P&I Club Clause (SCOPIC) were introduced. The SCOPIC clause is also a way to entitle the salvors to special compensation, but here the special compensation is based on tariff rates which is settled in the clause itself and not the out-of-pocket expenses incurred by the salvor as it is in Section 449.

The SCOPIC clause was decided to be incorporated in the Lloyd's Open Form without any changes being made to the salvage convention. Unlike Section 449 is the SCOPIC clause

³⁰ Bishop (2012)

³¹ Bishop (2012)

³² Chauhan (2018)

applicable in all geographical locations and not limited to coastal and inland waters. In addition is the SCOPIC clause applicable even if there was no threat to the environment present. The Clause also includes a requirements of a USD 3 million security deposit within 2 days, which is there to ensure the salvors that they will absolutely receive their payments³³. This security deposit is to be made from the shipowner, according to the SCOPIC clause paragraph 3. point (i).

Point 7 in Lloyd's Open Form 2011 asks the question if the SCOPIC shall be incorporated into the agreement or not. It is the contractor, or salvor, who decides if the clause is to be invoked according to paragraph 2. in the SCOPIC clause. The clause is invoked via a written notice to the shipowner. A salvor normally wants to invoke the SCOPIC in situations where there is a threat to the environment to be able to claim a special compensation subsequently to the salvage operation.

However, there is no requirement that there should be a threat of damage to the environment when the clause is invoked according to paragraph 2 of the clause. The SCOPIC-clause can be invoked at any time during the salvage operation by the salvor. The decision of whether to include it or not will decide how the salvage operation is performed.

When agreeing on incorporating the SCOPIC clause, the salvor is derived from special compensation based on Section 449 which means that he cannot make any claims of special compensation pursuant to this Section. However, when the SCOPIC is used this incorporates the provisions of Section 449 of the COS. The salvage services shall still be assessed with Section 446 of the Norwegian Maritime Code, even if the SCOPIC clause is invoked. This means that when the SCOPIC clause is invoked the general salvage award will still be fixed in accordance with Section 446.

According to GARD, the main features of the SCOPIC clause is as follows³⁴:

- a) The salvor is given a unilateral option where he can invoke SCOPIC regardless of the circumstances in the operation. This means that the salvor decides himself if the clause is

³³ Chauhan (2018)

³⁴ Gard (2001)

to be invoked or not, and when it should be invoked. The assessment of the SCOPIC remuneration starts when the salvor gives the notice

- b) The salvor, which in practice is his P&I club, will provide security for SCOPIC remuneration
- c) Time, material used, and a standard 25% uplift will decide the remuneration, no matter the result of the operation. Rated for tugs, personal and equipment are included in the tariff rates provided in the SCOPIC clause
- d) The remuneration is only payable to the extent it exceeds the remuneration assessed on the basis of the “no cure no pay” principle. If this award is greater than the SCOPIC remuneration the salvor will face a reduction of 25% on the Section 446 of the Norwegian Maritime Code award
- e) The contract can be terminated by both the shipowner and the salvor
- f) Once the SCOPIC clause has been invoked the shipowner and the P&I club can get better access to information regarding the salvage operation through the Special Casualty Representative (SCR)

If the salvor has invoked the SCOPIC clause, but the award based on Section 446 exceeds the SCOPIC remuneration will the salvage award be reduced by 25 percent of the difference between the salvage award and the assessed SCOPIC remuneration. This is defined in paragraph 7 of the clause and prevents salvors of invoking SCOPIC in every salvage operation or in situations where there is no threat of damage to the environment present³⁵.

By including this criterion, the SCOPIC also took care of the owners and P&I clubs’ interest, in addition to the salvors issues. By these means, the SCOPIC clause has proved to be helpful to both the shipowners and the salvor which have made it widely accepted by both parties. This discount in the salvage award has ensured that the SCOPIC clause is only invoked when needed³⁶.

An example of the use of the SCOPIC clause under a Lloyd’s Open Form contract is the salvage of the container ship *Rena*. The ship was transporting 1,368 containers and 1,700 tons of heavy

³⁵ Bishop (2012)

³⁶ Chauhan (2018)

fuel oil in the tanks when it ran aground on October 2011. About 400 tons of heavy fuel oil leaked out after the accident, polluting the sea and killing more than 2,000 birds.

The salvage operation was very dangerous, and the ship were in a constant danger of breaking in two. Salvors managed to recover about 1,298 containers and 1,041 tons of scrap had been disposed of by April 2012. The salvage operation was agreed under a Lloyd's Open Form which included the SCOPIC clause which guaranteed the salvors to be compensated for their effort in preventing environmental damage even though the ship did not get salvaged³⁷.

The special compensation is a central part of the remuneration for a salvor when he in addition to salvaging the ship is also protecting the environment. Special compensation is in today's regulations calculated on the out of pocket expenses incurred by a salvor. This includes a fair rate for equipment and personnel involved in the operation. The way a salvor is remunerated for his efforts connected to environmental protection will be discussed below in chapter 3.4.

Risk

In a salvage operation agreed upon Lloyd's Open Form, the salvor undertakes a large extent of risk on his behalf. The salvor invests resources in salvaging the ship in distress, and with the principle of no cure no pay involved, there are not much room for errors as this can have major implications on the salvage award. The large risk the salvor undertakes should be reflected in the salvage award for producing a successful result.

If the successful operation resulted in a small remuneration or compensation, the threshold to engage in such operations would be higher. Therefore, in order for the salvor to accept such terms, he must be encouraged to enter situations where he bears all the risk and there is a high possibility of the salvor ending up with no result. A generous award would set the bar lower for a salvor to engage a rescue mission, even though the risk involved is considered high.

³⁷ Schröder (2012)

2.0.2. Salvage award

The salvage award is established as an encouraging factor for salvors to engage in a salvage operation and help to save ships or object which are in danger. The award shall counteract the temptation to embezzlement of wreckage and motivate the salvors to save a ship or object in danger³⁸. If the salvage is successful, it will exceed the normal payment for the work done and for the use of the salving ship with equipment. The salvage award is measured on the basis of how much of a danger the ship or object are in. The bigger risk for the salvor's ship being damaged and the ship in danger is to be lost – the bigger the award.

The award depends on the value saved. A salved ship with a value of NOK 15.000.000 will generate a higher reward than a salved ship with a value of NOK 5.000.000. The principle of “no cure no pay” is also a part of the encouragement factor, as it requires the salvors to put in their best effort if they are going to receive the remuneration. If a salvage is not successful there is no award to be claimed and the salvor has put in a lot of time and money to no use. “No cure no pay” will therefore push the salvors to perform their best and stay motivated through the whole operation. The principle of encouragement means that salvage awards can be claimed even if there does not exist any arrangement regarding salving³⁹.

The salvage award does not have a standard amount. According to Section 445 1st paragraph of the Norwegian Maritime Code, the award shall not exceed the salved value of the ship and other property. This means that the salvage award can be anywhere between 0% to 100% of the value of the salved property. A salvage award is discretionary and varies from operation to operation. The award provided to the salvor will cover two main aspects; the expenses occurred for the salvor and a reward for his efforts.

The Norwegian Maritime Code lists ten factors to be considered when deciding the award which is listed in Section 446. These factors are:

³⁸ Falkanger (2016) p. 479

³⁹ Brækhus (1967) p. 19-21

a) *The value of what was salvaged.*

No ship is alike, which means that the value of the salvaged property or ship has to be individually estimated in each incident. The value of the ship is often based on the market value immediately after the salvage operation is completed

b) *The skill and effort the salvors put into salvaging the ship, other objects and human life.*

Under this criterion will the experience and expertise of salvors be decisive. A salvor is rewarded for his qualities in salvaging both ship and human lives. Salvors are expected to use their best endeavors in a salvage operation and are rewarded thereafter.

c) *The skill and effort the salvors put into preventing or limiting environmental damage.*

In addition to salvaging the ship, the environmental factor is important as a ship can cause severe damage to the environment. The salvor is expected to use his best endeavors to fulfill this demand. Section 441 letter d) of the Norwegian Maritime Code defines damage to the environment as *substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.*

d) *To what extent the salvor was successful.*

The most common contracts are based on the principle of “no cure no pay” which means that the salvor is only entitled to a salvage award if the operation is successful. However, there can be agreed a special compensation which means that there is a possibility for claiming parts of the award, even if the operation is not considered successful. . One of the most important criteria is the consideration of the operation and if it has been a success. Here the involved parties look at if the whole ship has been salvaged or only parts of it.

e) *The nature and degree of the danger.*

Here the danger will be evaluated and why the ship was in the situation and how urgent the salvage operations were needed will affect the amount of award rewarded. Level of danger is also important to determine when determining the award – the more precarious the position of the ship, the greater the award

f) *The time spent and the expenses and losses incurred by the salvors.*

These factors are varying from one operation to another, which then are reflected in the assessment of the salvage award. The expenses can be for example, supplies consumed,

the hire of a salvage ship and the equipment which belongs to the ship, damage to the salvors ship during the salvage operation and tort liability imposed on the salvor because of damage affecting third parties.

g) *How quickly the assistance was given.*

A salvage operation requires caution and precision to be able to produce a successful result. The service rendered has to comply with demands of a well-executed operation. As well as the precision of the operation, the time used before engaging the operation is important. The quicker a salvor is able to reach the ship in distress, the more he is rewarded.

h) *The risk that the salvors incur liability for damages, and other risks to which the salvors and their equipment were exposed.*

Salvage operations can be dangerous both for the crew and the ship and its equipment, and a salvor is therefore rewarded hereafter by taking the risk of the operation into account.

i) *That ships and other equipment were used or kept on hand during the salvage operation.*

A ship which is close by and available with the correct equipment will engage the operation faster which increases the chances of successfully completing the salvaging.

j) *The degree of preparedness and the effectiveness of the salvors' equipment, and also the value of the equipment.*

Newer equipment will often be favorable as it is more efficient and therefore faster ready to use than older equipment often can be. A salvage operation is carried out when the ship is in danger which make efficient equipment a critical part of the operation.

However, if an operation has been poorly executed and the expenses are much higher than they should be, the salvage award can be modified. The risk of exposure to liability against a third party is of primary importance. The dangers of which the salvor himself faces and the chance of the attempt being unsuccessful, notwithstanding considerable investment, are also relevant. A ship and equipment used or kept available during the operation are also a factor that should be taken into account. Also relevant is the value, degree of readiness and efficiency of the salvors

equipment. Finally, it's worth mentioning the likelihood that the salvage operation would be a success or a failure as an important factor⁴⁰.

In other words, there is a lot of different factors to consider when determining a salvage award. No operation is alike, and no award is the same.

The right to salve

As there often is a severe amount of money involved in a salvage award, there can in some situations arise a competition between several salvors. With more than one salvor the ship in distress are more likely to get the help they need in a more effective way than if there are just one salvor available. Sometimes, the salvor's ship is not strong enough to tow the ship in distress but if there were three ships with the same capacity, the operation could be performed with success.

However, if there are several salvors and there is no need for all of them there can be an unfortunate situation where there will be a disagreement of who is going to perform the salvage. The risk of salvors interfering with each other and lack of coordination are just some of the problems which may occur. Understandably, every salvor on the site wants to take part of the operation to be able to claim an award. Therefore, it is important to have guidelines on how situations like these shall be treated. The ship in need should never be put in a larger danger because of unclear rules of who has the right of salving.

The main rule in salvage is that as long as the shipowner is in control of the ship in distress, he can in most situations decide if he is need of assistance and hereafter who has the right to perform the salvage operation. The shipowner is in the position to choose who is going to perform the salvage⁴¹.

If the ship in distress has not assigned the right to salvage to any of the salvors, the salvor who has starts to salve a ship has the right to carry on with the operation. The right to salve is not absolute, and a salvor which cannot perform the operation on his own are required to ask for help

⁴⁰ Falkanger (2016) p. 490-492

⁴¹ Brækhus (1967) p. 46

by other salvors or accept that other salvors are brought into the operation, according to Norwegian Maritime Code Section 444 first paragraph, letter c) and d)⁴².

When a salvor is removed, this is because of nautical necessity. The nautical necessity is a requirement taken where the initial salvor simply cannot carry out the salvage operation himself. This decision can be made by the owner of the ship in distress or by the independent intervention of another salvor. This scenario is also described in Section 444 1st paragraph letters c) and d) of the Norwegian Maritime Code.

When a salvor is removed, he does not necessarily lose the right of a salvage award as the initial salvor may claim parts of the award if the operation turns out to be successful. If the initial salvor can claim a part of the award, this will most likely lower the bar for giving up control to someone which can perform the operation and increase the chances of a successful operation.

As the salvors have already invested in the salvage operation, giving up the operation and the entire award would be a great loss for the salvor. Therefore, by giving the initial salvor the right of a part of the salvage award, the bar for giving up control to someone else or for the shipowner of the ship in distress to remove him will be lower, which ultimately makes the chances for a successful salvage operation larger⁴³.

The initial salvor has the priority for conducting the salvage operation. The first paragraph of Article 8 in the International Convention on Salvage point (d), states *if the request of another salvor is unreasonable, the initial salvor will receive the full salvage award if the operation is successful*. Accordingly, there must be provided a thorough reasoning for justifying the removal of the initial salvor.

2.0.3. When it is not a salvage operation

A ship which has experienced a casualty may not always be subject to salvage. If the degree of danger is considered low or absent, the situation may be deemed a towage situation instead. On the other hand, if the ship is wrecked and not to be considered a ship any longer, there can be a wreck removal operation present.

⁴² Falkanger (2016) p. 488-489

⁴³ Falkanger (2016) p. 489

The difference between a salvage operation and a towage situation may in some situations not differ too much from each other. The differences in the remuneration however, are in most cases significant. A towing company often charges the shipowner on hourly rates and will in the end not be a considerable amount of money for the other company compared to a salvage award. This will be exemplified in the case regarding “Kvitnos” which will be explained further below.

As mentioned above in chapter 1.1 there are four requirements which has to be met in order to claim a salvage award. That means that if these are not present, there is no salvage situation which thus does not make the salvor entitled to claim a salvage award if he has engaged in a towage of a ship. Salvage operation also has to be voluntary which means that if there exist a contract before a ship is towed, no salvage award can be claimed⁴⁴.

Section 443 3rd paragraph of the Norwegian Maritime Code states that no payment is due unless the service which is rendered has exceeded what can be reasonably considered as due performance of a contract entered into before the danger arose. Hence a towage company cannot claim a salvage award, unless the service rendered is of exceptional quality⁴⁵.

When there is no longer a danger present, and the accident already have happened there is neither a salvage nor a towage situation present. When it is beyond these situations it is to be considered a wreck removal operation. For it to be a wreck removal, the ship is no longer to be considered a ship as it is badly damaged or even broken to pieces. There can also be a situation where there are no longer any values to salvage. These operations have often pre-arranged agreements where the payments are settled before engaging in the removal of the wreck⁴⁶.

A ship can also come to the point where it is considered to be a total loss by its insurers and thus behind the point of where it can be salvaged through a salvage operation. This is called a constructive total loss, and happens when the ship is so badly damaged that the costs of repairing it is higher than the value of which the ship is insured for⁴⁷.

⁴⁴ White (2000)

⁴⁵ Brice (2011) p. 94

⁴⁶ Sæther (2018)

⁴⁷ English Marine Insurance Act §60

When deciding if a ship should be deemed a constructive total loss, it is the costs relating to one single accident or one sequence of damages arising from the one and same accident which should be taken into account⁴⁸.

2.0.4. Salvage of human life

The salvaging of a human life is an intricate part of the salvage industry. With a main focus on ships and other properties, the rules regarding life salvage is more unclear. According to Section 135 3rd paragraph of the Norwegian Maritime Code, *the master is duty bound to give all possible and necessary assistance to any person in distress at sea or threatened by danger at sea.*

Salvaging or rescue of a human life does not give rise to a right to a salvage award itself. This means that if the salvage operation of a ship is not considered successful, but the salvor manages to save a human life, he cannot claim salvage award. On the other hand, if a human life is saved in addition to a ship or another object, this will in fact be taken into consideration when the salvage award is assessed according to Norwegian Maritime Code Section 446 letter b). Additionally, it is stated in Section 445 2nd paragraph that a salvor is entitled to a reasonable share of the salvage award when salvaging human life.

A salvor has to remain at the scene of the salvage operation and participate in a successful salvage operation of either a ship or property before the award can be claimed. The salvor which saves a human life will not receive an award unless he also has been participating, to some extent, in a successful property salvage effort, either alone or in partnership with others⁴⁹.

The term *human life* refers to persons onboard of the salvaged ship, including persons who have had to escape from the ship in connection with the incident which made the salvage operation necessary. It is not relevant whether the person is a passenger, stowaway or member of the crew⁵⁰.

The reasons for not allowing life salvage awards in the absence of salvage of ship, cargo, and accessories are twofold. Firstly, it is considered as a moral duty to aid those in danger at sea.

⁴⁸ Cefor (u.d.)

⁴⁹ WCS (2001)

⁵⁰ Falkanger (2016) p. 479

Secondly, it is said that the ship owner is unduly burdened when he must pay salvage even though none of his property was recovered.

Salving of human life is considered a duty for seamen in Section 135 paragraph 3 and is thus not considered a voluntary service. Section 135 3rd paragraph states that *as far as possible without any risk to the ship or those on board, the master is duty bound to give all possible and necessary assistance to any person in distress at sea or threatened by danger at sea.*

Since the definition of salvage is that the service rendered must be voluntary, the salvage of human life is not remunerated in form of a salvage award. However, the saving of human life has a lot of similarities to a salvage operation; hindering an object of being lost.

If there were to be an award for saving people at sea, additional questions would arise. Questions regarding the degree of danger the people involved found themselves in, and the question of the value of a human life. It is possible to estimate the value of property salvaged at sea, but not for a human life. Therefore, it would be hard to incorporate this calculation in a salvage award.

It could however be established a standard amount which not necessarily reflected the value of one person's life, but which gave the salvor an additional remuneration included in the salvage award for saving a human life at sea. The topic regarding salvage award when saving a human life will be discussed further below in chapter 3.4.

Ship operators are carriers owing a duty to their passengers and crew. They have an insurable interest in their safety and must respond in money damages for negligence in performing their duty. To this extent operators have a direct, pecuniary interest in their passengers and crew. In this sense life salvors are protecting the operators' property when they save lives. For this service they should be entitled to compensation even in the absence of other property salvage.

Maritime law distinguishes between three situations which potentially confront the life salvor: (1) the salvor saves life alone, (2) the salvor saves both life and property, and (3) one set of salvors saves life and another set saves property. In the third situation, section 445 2nd paragraph attempts to ameliorate the harshness of the life salvage doctrine by giving the life salvor a reasonable share of the property salvor's award. Under this statute, however, the first and second

situations remain unchanged, and only entitles a salvor the reasonable share if the salvage operation is considered successful.

The maritime law have tended to focus on three considerations in deciding whether to grant life salvage under the statute: first, was the life salvor faced with a choice to save life or property; second, if the life and property salvage operations were not simultaneous, how much time must have elapsed between the saving of life and the salvage of property before the life salvor's claim will fail; and third, against whom or what did the life salvor's remedy lie.

2.0.5. Environmental protection

One of the main tasks for a salvor is the protection of the marine environment⁵¹. Therefore, the skill and effort a salvor puts into preventing and minimizing environmental damage in connection with a salvage operation is a part of the fixing of the salvage award under Section 446 of the Norwegian Maritime Code. Similarly to human salvage, is the prevention of environmental damage is higher prioritized for a salvor than the salving of ship and cargo.

Modern ships are larger and carries more dangerous cargo than before. An incident involving one or more ships are a potential environmental disaster. In history it has been proven through accidents that ships can cause catastrophically consequences and cause serious danger to the environment. Protection of the marine environment includes for example clean up from oil spills, pumping bunkers from ships in danger and salving ships before they sink or breaks apart which can cause further environmental damage.

2.1. Legislation

The rules currently governing the world of salvage is set out in the International Convention on Salvage from 1989. Before the implementation of the current convention, the latest edition of an International Convention on Salvage dated back to 1910. The Convention from 1910 implemented the no cure no pay principle in the legislation covering salvage.

⁵¹ Hoddinott (2015)

In most cases the Convention of 1910 worked very well, but it did not include the environmental factor in its philosophy. Salvors which prevented major pollution incidents without saving the ship were in danger of not receiving any awards which led to little incentives for salvors to undertake these types of missions⁵².

The need for a new and more topical Convention regarding salvage was therefore much awaited to reflect the modern maritime industry. As the IMO stated before the 1989 conference; *perhaps the most important single development which altered the attitude of the international community to marine salvage was the massive increase in the maritime carriage of substances with a proven potential for polluting the marine environment, as well as a spate of incidents which showed clearly that casualties involving these substances could cause serious damage to the interest of States and parties other than the owners of the ship or the consignees of the cargoes involved*⁵³.

The convention of 1989 was a consequence of the incident involving the VLCC Amoco Cadiz in 1978, which revealed several weaknesses in the rules existing at that point of time⁵⁴. The 1989 Convention replaced the previous convention from 1910 and entered into force in 1996. Per January 2017, the Convention had been ratified by 69 states.

These 69 states include all the Nordic countries, and in Norwegian law, the convention was incorporated in Chapter 16 of the Norwegian Maritime Code⁵⁵. According to Section 442 in the Norwegian Maritime Code, the provisions of chapter 16 shall apply when cases considering salvage are brought before a Norwegian court or arbitration tribunal.

The International Convention on Salvage governs the salvage industry on a global basis. Section 443 of the Norwegian Maritime Code states that Chapter 16 of the Nordic Maritime Code shall apply to any salvage operation otherwise it has been provided expressly or implicated otherwise.

⁵² International Maritime Organization (u.d.)

⁵³ Lloyd's of London Press (1990) p. 3-4

⁵⁴ Falkanger (2016) p. 480

⁵⁵ Falkanger (2017) p. 571

2.2. Parties involved

2.2.1. Salvors

A salvor is the contractual counterpart in a salvage operation with a shipowner and carries out salvage operations to prevent or minimize damage to ships and the environment. In order to carry out salvage operations with a successful result, the salvors must have enough manpower and modern equipment.

The salvor can either be a casual or a professional salvor, whereas the casual salvors are not specialized in the business of salvage, and their ships may not be properly equipped for salvage operations. These casual salvors may however indeed become salvors as they happen upon a marine casualty or are called upon by a ship in distress. The work is normally performed without a contract, but the fundamental principles on danger must still be present.

The professional salvors are on the other hand specialized in the business of salvage and are thus equipped especially for salvage operations and have invested accordingly to be able to perform efficiently and with high quality.

The salvage company profits from salvage awards resulting from successful salvage operations. As the business of salvage is neither predictable or regular, a part of the salvage award is based on an encouragement factor to maintain a high level of readiness and a satisfactory level of equipment. Furthermore, in periods without salvage missions, one of the most common sources of income to salvors results from towage⁵⁶.

BOA

To obtain a better understanding of the salvors position in the salvage industry, BOA Management, one of the largest Norwegian salvors, have contributed to the research by providing their views on contemporary challenges in the salvage industry. Their perspective has in contrast to the International Salvage Union particularly highlighted the local challenges in a

⁵⁶ Brice (2011) p. 23-24

competitive, international industry. Furthermore, BOA Management also provided textbook material for further research.

BOA Management is a part of BOA Shipping AS and is one of the leading salvors in Norway with their head office on Trondheim and an office in Huston, Texas. Up until 2015, BOA Management performed 151 salvage operations in 40 years⁵⁷.

The International Salvage Union

For the thesis to obtain a more global approach from salvors, the International Salvage Union provided their unified voice from industry players worldwide. The International Salvage Union is a membership organization for salvors and others with interests in salvage and provides a unified and global voice for its members. Amongst the members are salvage companies from 30 different countries worldwide.

Other organisations and professionals with interests in salvage, including P&I clubs, marine insurers, marine law firms, marine consultancies, national response organisations, environmental organisations, clean-up specialists are also members of the International Salvage Union⁵⁸.

The members were in 2014 responsible for over 90% of all the salvage activity provided worldwide, and assisted more than 200 ships involved in collisions, groundings, fires, structural failures and similar accidents. In 1978 the ISU started to publish statistics regarding their service operations and their numbers tells that between 1978 and 2005, the union performed 5,135 salvage operations.

7,701 of these were performed under the salvage contract Lloyd's Open Form. This contract will be explained further below. Ships and carbo salvaged in this period added up to USD 32.32 billion. The ISU also started to publish their annual Pollution Prevention Survey in 1994 and showed that over 14 million tons of pollutants from ship casualties, including over 11 million tons of oil were salvaged between 1994 and 2007⁵⁹.

⁵⁷ Myhre (2015) p. 6-7

⁵⁸ International salvage union (u.d.)

⁵⁹ Sæther (2018)

2.2.2. Shipowner

The shipowner is the legal owner of a ship, either in the form of a person or as a shipping company. The shipowner *shall be liable to compensate damage caused in the service by the fault or neglect of the master, crew, pilot, tug or others performing work in the service of the ship*, according to Section 151 1st paragraph in the Norwegian Maritime Code. The shipowner involved in a casualty is highly involved in the salvage operation as his primary source of income is at risk.

Compared to the salvage company is the shipowner the contractual counterpart and is responsible for removing the grounded or sunk ship either by a salvage operation or a wreck removal. A ship does not necessarily have to be removed if considered a wreck. If a ship is considered a wreck at the coast of Norway, it is the state who decides if it shall be removed or not⁶⁰.

2.2.3 Insurance Companies

An insurance company offers insurance cover to the assured who will be entitled to be indemnified for damage. The insurer covers loss of or damage to ship, the cargo and cover for claims from third parties against the shipowner⁶¹. Hull & Machinery-insurers are the most involved insurer in a salvage operation. However, cases involving special compensation will indirectly involve the P&I-insurer to the salvage operation.

2.2.4. Hull Insurance

The essence of the hull insurance is the cover of ships and its equipment. Hull insurance is provided by clubs which specializes in the insuring of hull and machinery. The Hull and Machinery insurers are the main provider of cover for a shipowner in relation to salvage awards entitled to a salvor from Section 446 of the Norwegian Maritime Code. The hull insurer wants the award to be as low as possible because they are liable for the remuneration.

Norwegian Hull Club, Gard and Skuld, some of the leading Hull & Machinery insurers, have contributed to the research of the thesis.

⁶⁰ Falkanger (2016) p. 213

⁶¹ Willhelmsen (2012) p. 133

Norwegian Hull Club

Norwegian Hull Club is the world's largest pure marine underwriter and are insuring more than 10.000 unique ships and units in total. The company is a mutual insurance company which serves Members and Clients worldwide. Norwegian Hull Club aims to be the leading marine insurer, and have a large experience in handling casualties and salvage situations both in cooperation and on behalf of shipowners worldwide⁶².

Skuld

Skuld is one of the world's leading marine insurers within Hull & Machinery and P&I-insurance. Skuld is assessing and surveying shipping risks, conducting comprehensive casualty response service and performing extensive loss prevention programmes which aim at safeguarding casualties and preventing injury to people, environment and property. P&I is Skuld's largest line of business. Skuld is also a mutual association and Assuranceforeningen Skuld (Gjendisige) is owned and controlled directly by its members⁶³.

Gard

Gard is the leading P&I and one of the leading H&M insurers in the maritime industry. The company insures 12.800 ships above 1000 gross tonnage and has for the past 100 years focused on providing the maritime industry with insurance products which offers protection and practical assistance when disaster strikes. One of the key priorities of Gard is to identify risks and find ways to reduce and prevent them. The name Gard itself means "the one who guards" which is quite fitting with their company's vision⁶⁴.

2.2.5. P&I Insurance

The shipowner's Protection & Indemnity (hereafter P&I)-insurance is primarily his ordinary liability insurance. P&I-insurers covers personal injury and loss of lives in relation to crew, passengers and third parties. In addition, they cover damage to, or loss of property or cargo in connection with the initial casualty, or if the damage has occurred in the connection of a salvage operation.

⁶² Norwegian Hull Club (u.d.)

⁶³ Skuld (2019)

⁶⁴ Gard (u.d.)

Whereas the Hull & Machinery insurer prefers a low salvage award, it is beneficial for the P&I-insurer with a higher salvage award, as they are only liable of the special compensation or SCOPIC-remuneration exceeding the salvage award

3.0 A world of salvage in alteration

As the intended purpose of the Lloyd's Open Form is to be the preferred contract of choice for emergency response services, its standardized form brings continuity to all parties involved. The number of issued Lloyd's Open Forms have seen a sharp reduction in recent decades. Around the year 2000, the number of issued Lloyd's Open Forms averaged on around 100 contracts every year, reducing to around 60 each year until 2010⁶⁵.

Since then, the number seemed to stabilize around 40 each year, with a record low 37 signed Lloyd's Open Forms in 2014. Even though one could notice a needed increase with 55 issued Lloyd's Open Forms in 2018 compared to 46 in 2017, the numbers are significantly lower compared to earlier levels ⁶⁶. What are the underlying reasons for the decrease in use of the traditional contract? Does it not work in relation to its function in the modern world of salvage?

In today's salving industry, there is an abundance of salvors compared to ships that needs salving. This capacity leads to an intense competition amongst salvors in order to become the chosen salvor to preform the salvage operation.

One of the biggest advantages of the LOF-contract is for the parties involved to avoid commercial haggling in order to allow the salvor to address the risk or casualty immediately. It has thus traditionally been rare with modifications or alterations in the contract. However, in recent years the Lloyd's Open Form-contract have gained a reputation of being an expensive contract, which combined with less casualties in the shipping industry in general, are strong contributors to the decline in the use of Lloyd's Open Form ⁶⁷.

The industry's view on the Lloyd's Open Form-contract being an expensive one has resulted in a tendency to use other commercial contracts in fitting situations. However, the H&M-insurers are still in favour of the Lloyd's Open Form and its onerous duties put on the salvors in form of the no cure no pay-principle.

⁶⁵ Steen (2013)

⁶⁶ International Salvage Union (2018)

⁶⁷ Personal conversation with Åge Solberg, Chief Claims Officer at Norwegian Hull Club. November 1st, 2019.

This chapter will discuss the world of salvage in alteration. Subchapter 3.1. will discuss how the improved communication in the industry have made its impact on the Lloyd's Open Form. Thereafter, subchapter 3.2. will discuss the increasing use of sideletters and what impact it has had on the contract.

Subchapter 3.3. will further discuss the possibility of establishing a "Lloyd's Open Form Light", an alternative contract recently discussed in big parts of the industry. As the SCOPIC has established as an important possibility to feature in the Lloyd's Open Form-contract, subchapter 3.4. will discuss how the ever-increasing importance of environment can justify establishing a separate environmental award for salvors. The final subchapter will discuss the topic of life salvage, and how this is rewarded according to today's regulations.

3.1. Communication

In a more modern shipping industry, the different parties are today more connected to one another, and combined with technological advances and better safety cultures, the shipowner is less exposed than before. Contrary to the more traditional industry, today's shipowners normally have more time to assess the situation before entering into any salvage contracts with salvors. In challenging situations, the H&M-insurers can more easily be involved due to the modern technology and are thus in a better position to give commercial advice and counsel to the shipowner.

In circumstances where the degree of danger is low or the urgency is low, the shipowner can thus communicate with his insurers and other involved parties more easily and can further collect accurate information from the crew and master. Today's advanced forms of communicating between people on the sea and people ashore makes it possible to give frequent updates on the situation at sea and creating an overview of the situation which has not been possible in the past.

This, combined with the contractual freedom, provides the shipowner with the possibility to reach out several salvors to discuss terms and perhaps adjusting the Lloyd's Open Form by adding sideletters to cap the salvage award of Section 446 in the Norwegian Maritime Code. This will be discussed more in chapter 3.2.

One of the effects of the improved communication may result in more clarity between which situations will be deemed a salvage operation or a tug operation. Compared to a salvage operation, the remuneration from a tug operation will be significantly reduced due to the low degree of danger. The industry has previously pointed out a frustration of the Lloyd's Open Form providing high salvage awards in situations where the actual danger has been low, and hopefully the improved communication in the industry can lead to fewer disputes (ISU).

By entering into a salvage contract where it is not necessary could consequently lead to a large and unnecessary extra cost for the shipowner. Thus, by having the opportunity to communicate with the master to clarify the situation and decide on a possible tug contract would significantly reduce both the salvage award and the industry's discontent with the practice of the Lloyd's Open Form.

The dispute between “Nor Lines” and “Shipping AS” can demonstrate the possible difference between a salvage award and a remuneration for towing. The ship “Kvitnos” experienced a machine breakdown and drifted towards shore outside of Fredrikstad, Norway. When the accident occurred, the master of “Kvitnos” contacted “Sjøtrafikksentralen” (the vessel traffic service) to check the possibility of receiving assistance from a tug. The master of “Kvitnos” got in touch with Anders Buner, the master of “BOA Sund”, being a Norwegian based salvage company. Mr. Buner was made aware of the weather conditions during the initial conversation, but not whether it was considered a tow or a salvage operation.

The crew of “Kvitnos” further contacted “Det Stavangerske Dampskibsselskap” (DSD), who has the technical responsibility for the ship, which then contacted their H&M insurer, Codan where different options were discussed, but no other decisions regarding the situation were made at this point. The master of “Kvitnos” decided to drop the anchor to slow down the drift 30 minutes before “BOA Sund” arrived. The statement of facts shows that at this moment, the waves were between 5 to 6 meters and the wind was classified as strong gale with gusts between 17 and 20 meters per second. “BOA Sund” arrived at estimated time and after 20 minutes of positioning started the ship towing “Kvitnos”.

The disagreement in this case regards whether or not there has been entered into an agreement. Mr. Einar Samset from the H&M-insurer sent an email to DSD 15 minutes prior to the arrival of “BOA Sund” at “Kvitnos”, indicating the situation to be regarded as a towage operation. The email was solely sent to DSD and not Trond Kittelsen, the owner of “BOA Sund”. The court process which followed was to decide if this was a towage operation or salvage operation, and if there had been any form of agreement.

As the involved parties disagreed on whether the case was a salvage or towage situation, the case went to trial. At first, the case went through the District court where it was decided to deem the case as a salvage operation, entitling “BOA Sund” a salvage award of NOK 7.500.000. Based on the described weather conditions, including high waves and strong gale, it was clear for the tribunal that “Kvitnos” were in need of a salvor to prevent the ship from running aground. In this court the situation was analysed, and the degree of danger involved were one of the decisive factors for the tribunal to decide the operation to be a salvage operation.

The decision made by the tribunal in the District court was appealed by Nor Lines and went through to the Appeal court, where the case was decided to be a towage situation, entitling the “BOA Sund” NOK 450.000 based on towage rates. The tribunal perceived this as a tow situation since there had been talks about tow rates and contracts, and no mentioning of it being a salvage operation or any salvage contracts. Mr. Samset from the H&M-insurer had, according to the tribunal, no reason to believe that it was anything else than a tow situation present, and therefore should Nor Lines only be liable for the costs of a tow based on market rates.

Accordingly, the judgement from the District court entitled BOA to a salvage award of NOK 7.500.000 were changed to BOA being entitled a payment based on tow rates which amounted to NOK 450.000 in the Appeal court. The difference of the outcome resulted in the salvor being remunerated more than NOK 7.000.000 less.

This case illustrates two central situations in a potential salvage situation by (1) showing the difference between remuneration in salvage and tow and (2) how communicating is decisive when entering into agreements. It further substantiates the shipowners’ frustration on salvage contracts being expensive, especially in circumstances where the shipowners clearly do not perceive the situation as a salvage operation. Where there is doubt on whether the situation is a salvage situation or not, the agreeing of the “wrong” contract can prove to be very costly.

3.2. Lloyds Open Form with sideletters

A possible explanation for the increase in the number of issued Lloyd's Open Forms from 2017 to 2018 can be explained by the introduction of sideletters in addition to the contract. A sideletter is a private side-agreement between the shipowner and the salvor, and can take several forms, such as hybrid, amended or zombie versions, basically regulating or amending different parts of the original Lloyd's Open Form.

The sideletter can introduce other metrics in the salvor's engagement, but its main objective and aim is normally to restrict the salvage award. This is called capping of the salvage award, and calculates the salvage award under alternative means, and will not follow the Section 446 of the Norwegian Maritime Code in a normal procedure⁶⁸. An unamended form of the contract, an original Lloyd's Open Form, will further be addressed as a "clean Lloyd's Open Form".

As pointed out in chapter 1.1, Norwegian Hull Club divides the degree of danger into three categories. The increase in use of sideletters have been used in collaboration with the degrees of danger:

As it seldom is necessary from the H&M-underwriters' point of view to involve a Lloyds Open Form contract relating to circumstances falling within the first degree of danger, both the salvor and the H&M-insurer normally acknowledges such situations as towage. Due to the lack of or low degree of danger and urgency of the situation, other commercial contracts are considered to be better suited.

One of the differences between the towage contracts and the Lloyd's Open Form is that the former is based on a fixed towage rate and the remuneration received from a tug operation are significantly lower than what a salvor could have claimed under a salvage operation.

Furthermore, the degree of danger combined with the number of competing salvors gives the H&M-insurers a strong position to negotiate a contract with better financial terms than a clean Lloyd's Open Form, considering the somewhat uncertainty regarding the size of the salvage award.

⁶⁸ Freeman (2019)

In the second category, the vessel is considered to be in a moderate degree of danger, where the shipowner can through the improved technology and communication have a better overview of the situation. Considering the moderate degree of danger, the situations are normally considered to be urgent enough to engage in Lloyd's Open Form-contracts but capped with sideletters.

By capping the Lloyd's Open Form, the H&M-insurers are ensured a contract which puts the risk on the salvor due to the no cure no pay-principle, whilst also reducing their exposure to the salvage awards by capping the Section 446 of the Norwegian Maritime Code. Compared to the first degree of danger will the H&M-insurer's negotiating position in this second category still have a strong position to negotiate better financial terms and to dictate a cap of the salvage award.

On the other hand, should the situation occur in an area where there are only one salvor present, the negotiating position of the salvor is strengthened, which enables the salvor to negotiate a higher salvage award or even a clean Lloyd's Open Form in order to maximize their profits. It is therefore depending on each individual situation, but due to the high competition between salvors, the H&M-insurer will often find themselves in a strong negotiating position.

In the third and final category of NHC's degree of danger, the urgent nature of the situation gives the shipowner no to little time to discuss his possibilities with the insurers, thus altering the negotiating position in favour of the salvors. In such situations the shipowner will normally communicate directly with the salvor and agree on a clean Lloyd's Open Form and are therefore willing to pay hefty salvage awards. Even though the salvage award will be expensive under a clean Lloyd's Open Form, the sum of the salvage award and the repair of the vessel is significantly lower compared to the costs of a total loss⁶⁹.

A potential downside of such categorization of danger is the difficulty to determine the actual degree of danger the ship finds itself in. Every situation is different, and even though salvors can be confident that the case can be categorized as a Lloyd's Open Form, some shipowners may be equally determined to not accept a Lloyd's Open Form-contract in such a situation. However, it is not unnormal to finish the operation and conclude the contractual discussion afterwards, even

⁶⁹ Personal conversation with Mats Sæther, Lawyer at Norsk Skibsrederforening. October 11th, 2019.

if it involves going to arbitration. On the other hand, looking at the result from the Kvitnos-casualty as described in chapter 3.1., salvors may need to change their business model to stand their ground more firmly, and perhaps await the assistance of the ship in distress until the Lloyd's Open Form is actually signed⁷⁰. The risk of doing this will on the other hand invite other salvors to engage in the situation on less profitable terms or on a different contract if the situation allows negotiating.

H&M-insurers are increasingly looking into framework agreements with salvors in order to be able to mobilize salvors without discussing contractual matters before an assessment of the assignment have been made. First and foremost, having such framework agreements with salvors creates a clear understanding between the salvors and the insurers on the contractual matters in each situation.

Furthermore, the preferred salvors are thus making sure they are being given assignments in a competitive industry, and the H&M-insurers are in a better position to predict the size of the salvage award due to the categorization of the situation. This way, the salvors can engage in the situations before they start discussing contractual alternatives or amendments to the Lloyd's Open Form, and thus enabling the Lloyd's Open Form to function to its intended purpose; to be an emergency contract without having to discuss financial terms before entering into situations⁷¹.

The introduction of sideletters have been controversial and have been heavily discussed in recent years, with an increasing fear of the salvors not being fairly rewarded for their efforts, especially when compared to compared to a significantly higher salvage award under a clean Lloyd's Open Form. One can argue that this can contradict one of the underlying principles of the contract by not sufficiently encouraging the salvors to enter into dangerous situations and save, but due to the high competition between salvors, they must accept the terms in order to become the preferred salvors⁷².

⁷⁰ Personal conversation with Eskil Bjørnevik, Director Business Development at BOA. November 7th, 2019.

⁷¹ Personal conversation with Åge Solberg, Chief Claims Officer at Norwegian Hull Club. November 1st, 2019.

⁷² Personal conversation with Roger Evans, secretary general at the International Salvage Union. November 27th, 2019.

As a consequence of the competition between salvors and a safer traffic of modern ships, the salvors must wait longer between the salvage operations than before. The competition of larger players competing for every salvage operation with their stand-by ships and crew has forced other salvors to change their business model to operate in more local and less trafficked waters, with possibly one salvage operation each year compared to around twenty salvage operations some years ago. In order to maintain a positive cash-flow, salvors have further altered their business model to change from being exclusively salvage companies to offering other services, such as harbour towage ⁷³.

Even though offering services such as harbour towage can have a positive effect on their cash-flow and does not require additional investments in equipment or vessels, salvors still need to invest in equipment or vessels to be able to compete against their competitors to get proper salvage contracts. However, due to fewer salvage operations every year, such investments can consequently lead to dead capital as the technical requirements cannot be used for other means. The technological enhances on vessels with improved engine-performances have reduced the number of potential casualties, and due to less salvage operations, Norwegian salvors does not have any particular experience with Lloyd's Open Forms with sideletters.⁷⁴

A potential consequence of lower salvage awards from capped Lloyd's Open Forms and fewer professional salvors on stand-by can raise the bar for investing in modern equipment to handle larger ships and more difficult salvage operations⁷⁵. That being said, no salvors will invest in a crane large enough to raise a modern cruise ship alone, and the preferred salvors with specialised equipment will still be able to salve modern ships without directly needing the profits from a clean Lloyd's Open Form⁷⁶.

It should, however, be noted that as the intended purpose of the Lloyd's Open Form-contract is to be the preferred contract of choice for emergency response services, and the introduction of sideletters is not interfering with its intended purpose. The salvors are still able to use a clean

⁷³ Personal conversation with Eskil Bjørnevik, Director Business Development at BOA. November 7th, 2019.

⁷⁴ Personal conversation with Eskil Bjørnevik, Director Business Development at BOA. November 7th, 2019.

⁷⁵ Hoddinott (2015)

⁷⁶ Personal conversation with Roger Evans, secretary general at the International Salvage Union. November 27th, 2019.

Lloyd's Open Form in the *correct* circumstances and claim a rightfully high salvage award based on Section 446 of the Norwegian Maritime Code, and the issue points more towards high competition and getting a clear overview of each unique situation and determining the actual degree of danger, rather than sideletters capping the salvage awards.

Capping the salvage awards through sideletters can in the correct situations push the industry back towards using the Lloyd's Open Form. Even though the salvors' revenues will not be as high, one can assume more Lloyd's Open Forms will be issued and can further contribute to reducing the industry's impression of the Lloyd's Open Form being an expensive contract. However, the use of sideletters can also involve the P&I-insurer in different ways than their more traditional position of being responsible for personal injuries of death and the liability of shipowners or crew liability in torts, etc.⁷⁷

The P&I-clubs will on the other hand be indirectly involved in salvage awards from Lloyd's Open Form contracts as they are responsible for the special compensation for environmental salvage through Section 449 of the Norwegian Maritime Code. However, the P&I-clubs normally are involved through an invoked SCOPIC, which have become the new standard. The remuneration the P&I-club is responsible for is often regarded to special compensation which could for example be protection of the environment and if the salvor has not been sufficiently rewarded after Section 446 of the Norwegian Maritime Code.

The P&I-insurer will also be involved if the salvor fails to earn a traditional salvage award through Section 446 of the Norwegian Maritime Code, but has prevented or minimized damage to the environment. In such cases, the SCOPIC functions as a safety net, guaranteeing the salvor to recover his expenses at tariff rates, plus a twenty-five percent uplift⁷⁸. However, if the salvage award is higher than the SCOPIC remuneration, there will be no claim against the P&I-insurer as the salvage award is paid by the H&M-insurer.

The interests of the P&I-club and the H&M-insurer is thus reverse; whereas the H&M-insurer wants a low salvage award, but the P&I-club want the salvage award to be as high as possible,

⁷⁷ Skuld (2013)

⁷⁸ Tatham (2019)

both in order to manage their exposure to the salvors. Even though the P&I-club normally is notified in the case of such events, the H&M-insurer is responsible for negotiating with the salvors and have thus a large influence on the outcome of the salvage award ⁷⁹.

The increased use of sideletters can therefore have an impact on the P&I-clubs' involvement and potential exposure through an invoked SCOPIC, as a capped salvage award based on Section 446 of the Norwegian Maritime Code will result in a lower salvage award. The P&I-clubs are therefore notifying their members that the use of sideletters can alter the terms of the Lloyd's Open Form and the use of SCOPIC and warning them that the use of the sideletters can change the contractual liabilities and the risk allocation with their members. ⁸⁰

The increased risk of the P&I-clubs can be shown in the cases regarding constructive total loss. The "Renos" lost the ships main engine power on 23rd of August 2012 after a fire by the Coast of the Red Sea. The ship required salvage assistance, and a Lloyd's Open Form was signed, with SCOPIC being invoked. After conducting the necessary salvage operations, the Renos was delivered in the Suez Canal on August 31st for initial surveys.

The ship was subsequently towed to Adabiya, Egypt to discharge cargo before returning her to the Suez Canal. After additional surveys, the shipowners drafted their repair specification and forwarded it to their H&M-insurers and several shipyards. There was a large difference in the quotation of the repair, being ranged from USD 2.5 million to USD 8 million. The large difference was the parties mainly disagreeing on the scope of and the estimated cost of the required repairs. ⁸¹

Finally, on February 1st, the owners tendered a Notice of Abandonment (NOA), which the insurers rejected based on the notice being issued too late. The assured argued there had been a total constructive loss while the insurers claimed only a partial loss. Both the High Court and the Court of Appeal decided that the ship was a constructive total loss, based on the pre-NOA costs

⁷⁹ Personal conversation with Hermann Steen, Partner at Wikborg Rein. November 20th, 2019.

⁸⁰ Roppestad (2018)

⁸¹ Macinnes & Vakondios (2019)

and the SCOPIC costs were included, and found it unnecessary to make findings as to the other alleged costs of recovery and repair.

The case was taken to the Supreme Court, who were to decide on two issues:

- 1) If the costs incurred prior to the NOA should be excluded from the constructive total loss-calculation
- 2) Whether SCOPIC costs should be excluded from the constructive total loss-calculation.

On the first issue, the Supreme Court agreed with the lower courts that the cost of repairing the damage for the purpose of determining whether the vessel was a constructive total loss under the Marine Insurance Act 60 (2) (ii) included all the reasonable costs of salvaging from the time of casualty and the prospective of repairing the ship. The cost of repairing the damage was not revoked because part of it had already incurred at the time when the notice of abandonment was given⁸².

On the second issue, the Supreme Court disagreed with the lower courts, and held that the SCOPIC costs should *not* be considered when assessing whether the ship is a constructive total loss. The Supreme Court emphasized that the SCOPIC Costs were to protect the shipowner's potential liability for environmental damage. The Supreme Court further stated that this was no part of the measure of the damage to the ship and had thus nothing to do with the possibility of repairing the vessel. The reasoning for the statement was based on the P&I-clubs being responsible for the environmental damage and held that the H&M-insurer should not be liable for expenditures on a partial loss basis, which would not necessarily mean it cannot be included in the assessment of a constructive total loss.

The Supreme Court's decision on the *Renos* can however affect the use of Lloyd's Open Forms, as the SCOPIC costs can be a great part of the salvage cost. The decision can further affect the use of Lloyd's Open Forms as the conditions under the *Nordic Marine Insurance Plan of 2013 version 2019* would ensure the assured a claim of a constructive total loss.

⁸² Steen & Sonnenschein (2019)

The Nordic Marine Insurance Plan states in its Clause 11-3 that the criteria for constructive total loss are met when the cost of repairing the vessel will amount to 80 percent or more of the insurable value. Pursuant to the named Clause is the cost of repairs and removal reported in the previous 3 years included.

On the other hand, the salvage award is not included, meaning there will be a material difference between a damaged ship which is in a port with or without good possibilities of repair. The commentary states that the expenses must be based on general maritime law criteria:

“The decisive factor must be the situation which the ship was in when the salvor was given the assignment, and not whether the remuneration agreed to on a “no cure - no pay basis” was determined in advance or shall be paid according to accounts rendered”⁸³.

The effect of this will result in the Section 446 of the NMC and the SCOPIC remuneration shall be excluded under the Nordic Plan on the matter of constructive total loss.

The difference in the Renos case would therefore be very different under the Nordic Plan than on English terms. First and foremost, the criteria for a constructive total loss is different, and the assessment of the salvage award in relation to the constructive total loss is different⁸⁴. The use of sideletters can therefore potentially reduce the allowable costs of repair by increasing the SCOPIC costs, and thereby possibly avoiding constructive total loss. The possible financial exposure of the P&I-clubs can therefore be great as the SCOPIC costs may be a large part of the salvage costs⁸⁵.

However, one commonly used form of the sideletter is based on a multiplication system of SCOPIC-expenses in different layers, which includes mechanisms to regulate the P&I-clubs' role if the SCOPIC is invoked. This way, the role of the P&I-club will be taken care of as the P&I-clubs still will not have an active role when the SCOPIC-clause is not invoked⁸⁶. Furthermore,

⁸³ Steen et al. (2019)

⁸⁴ Steen & Sonnenschein (2019)

⁸⁵ Macinnes & Vakondios (2019)

⁸⁶ Personal conversation with Åge Solberg, Chief Claims Officer at Norwegian Hull Club. November 1st, 2019.

the principle of freedom of contract has no limitations on the rights which the parties of a contract can enter into as they see fit.

In conclusion, the introduction of Lloyd's Open Form with sideletters reflect the H&M-insurer's strong negotiating position with many salvors, resulting in profitable pre-arranged agreements with preferred salvors. The sideletters can however include the P&I-clubs to a higher extent than normal and have caused a concern in the P&I-insurance market.

3.3. Lloyds Open Form – A Light Version

The decline in number of issued Lloyd's Open Forms has resulted in a discussion of establishing an alternative version of the Lloyd's Open Form, called Lloyd's Open Form Light. The intention of this alternative edition of the contract is to address the weaker sides of the contract to save the historically important emergency salvage contract. Therefore, it is also supposed to keep the basic principles of the contract to preserve the more attractive parts of the contract, such as reducing commercial haggling by negotiating terms before addressing the emergency.

In order to accomplish this, the underlying template of the Lloyd's Open Form Light will be a standardized contract which differs from the clean Lloyd's Open Form version on the point that it is based on the tariff rates under SCOPIC, and further includes a potential bonus based on the success of the salvage operation. The principle of no cure no pay is thus preserved. The bonus can be agreed upon by signature, during the operations or prior to the conclusion of services, or by a Lloyd's arbitrator if the parties disagree on the size of the bonus⁸⁷.

The more urgent, dangerous or difficult a particular case is, will thus be rewarded accordingly. The salvors shall therefore be rewarded more generously in challenging salvage operations, and thereby also covering the encouragement factor. Reversely, this also implies that the salvage award will be less lucrative in less challenging salvage operations. In less challenging situations, a Lloyd's Open Form Light with no bonus can be useful as it will encourage to avoid negotiations, regardless of the negotiating regarding Lloyd's Open Form with sideletters or other commercial contracts⁸⁸.

Furthermore, as the procedure in regard to sideletters is less transparent and coordinated in the industry today, a Lloyd's Open Form Light can bring trust to the contract. As the industry are not being informed of exactly how the salvage award is calculated, e.g. how much is awarded through the encouragement factor, a tariff and bonus-system can show the industry to a greater extent how it is structured and can further create a precedent for future cases.

⁸⁷ Lowry (2018)

⁸⁸ Personal conversation with Roger Evans, Secretary general at the International Salvage Union. 27th November 2019.

Through the pre-defined bonus-system it could facilitate for H&M-insurers to be more able to control their exposure towards the salvage awards, and thereby removing some of the impression in the industry that the Lloyd's Open Form sometimes result in surprisingly high salvage awards, and thus building trust to the Lloyd's Open Form.

However, it can be difficult to establish the real cost of the salvage operation and thereby the size of the bonus. If the bonus were to be agreed after the end of the salvage operation, the events happening during the operation could result in even more commercial haggling, and in the end resulting in even more hearings on the size of the salvage award. This will contribute to kill the idea of a streamlined LOF Lloyd's Open Form, and the possible increased costs can again push the industry away from the contract⁸⁹.

Moreover, the more commercial based Lloyd's Open Form Light can represent a change in one of the original contract's underlying principles, as the salvors will still bear the same risk as under an original and clean Lloyd's Open Form, but without the potential upside of a high salvage award. The salvage award under a Lloyd's Open Form Light with no or limited bonuses can also result in major funding issues for the salvors, and consequently exposing salvors for even more pressure in an already competitive business⁹⁰.

Reversely, even though a Lloyd's Open Form Light with little or no bonus can be seen as a reaction from H&M-insurers to previous non-emergency cases on a clean Lloyd's Open Form with high salvor awards, it is still difficult to understand why H&M-insurers, from a financial point of view, would accept such terms considering their current strong position to negotiate in a competitive salvage industry.

The idea of a Lloyd's Open Form Light could help P&I-clubs to control their exposure towards an invoked SCOPIC if the pre-arranged bonus-system can become an indication of the size of the salvage award. Nevertheless, the P&I-clubs are simply not interested in becoming more involved in salvage awards as they normally do not participate in any remuneration of the award. Even

⁸⁹ Personal conversation with Roger Evans, secretary general at the International Salvage Union. 27th November 2019.

⁹⁰ Personal conversation with Roger Evans, secretary general at the International Salvage Union. 27th November 2019.

though the Lloyd's Open Form Light could become the "better of two evils" compared to an original Lloyd's Open Form capped with sideletters, a Lloyd's Open Form Light could indicate a formalized form of Lloyd's Open Form with sideletters, thus formalizing a contract which will expose them more to payments in relation to salvage awards. The bonus-system can be seen as a legitimizing of the sideletters, thus including the P&I-clubs more in the salvage award⁹¹.

⁹¹ Personal conversation with Roger Evans, secretary general at the International Salvage Union. 27th November 2019.

3.4. Environment

Today, the environmental focus is at an all-time high and is a larger part of salvage operations than ever before. Protection of the environment is more important now than ever in the history of salvage, and protecting it is also one of the main tasks for salvors. In most casualties involving salvage it is the salvage industry which has the expertise and equipment which eventually contributes to salvaging the ship as well as the environment.

Preventing and limiting the environmental damage is one of the ten criteria when fixing the salvage award according to Section 446 of the NMC, but it is not the criterion which affects the final award the most. Even though *the skill and effort the salvors put into preventing or limiting environmental damage* is rewarded under Section 446 letter c), the reward is restricted by the value of the salvaged property rather than the cost of the damage prevented⁹².

As only the salvaging of human life should be a higher prioritization for a salvor, the remuneration for environmental protection can be considered being too modest considering it is such an important part of the industry and a salvage operation.

Under the current Norwegian Maritime Code, a salvor is only rewarded for his skill and effort in preventing and limiting damage to the environment. Accordingly, the value of the operation is not taken into consideration. This value could for example be the limiting of pollution of escaped oil from a ship or removing hazardous cargo from a vessel hindering it to cause any damage to the environment.

Salvage operations are demanding and includes difficult tasks for a salvor which requires equipment of a high standard and experience within the field. A change in the way the salvage award is being fixed due to environmental protection could increase the chances of a salvor doing his best to protect and prevent damage to the environment. By changing the existing legislation or by implementing a new Section in the Norwegian Maritime Code could increase the possibility for a salvor of being rewarded for protecting the environment which would encourage a salvor to use his best endeavours to prevent or limit environmental damage.

⁹² Bishop (2012)

A potential change in the Norwegian Maritime Code Section would affect the salvage industry in a way that salvors could be rewarded for services they are already performing today, but in a more reasonable way. Salvors have the possibility of being compensated with up to 30 percent of their expenses when the work they have performed actually contributed to protecting the environment.

The Section regarding special compensation has always been seen as a safety net, and not a form of remuneration for a salvor. By describing it as a safety net means that a salvor would be ensured to be compensated for his expenses and in addition receive a small remuneration for his effort. A compensation in the range of 30 percent of a salvors expenses does not necessarily reflect the performance of a salvor under difficult and dangerous operations. Statistically are special compensation applicable in 25 percent of salvage cases. This means that in one fourth of the cases, salvors are only receiving the bare minimum for their environmental protection⁹³.

In the Norwegian Maritime Code is the special compensation regulated under Section 449. To be remunerated according to this Section, a salvor has the burden of proving that his actions has hindered damage to the environment. In the aftermath of the operation, a salvor has to prove on the balance of probabilities that if he had not rendered the service he did, there would have been actual damage to the environment.

If a salvor is not in the possession of compelling evidence which proves his operation prevented environmental damage, he is not likely to be compensated for his efforts. By putting the salvor in a difficult position which could cost him a remuneration for taking high risk protecting the marine environment shows that the services salvors are rendering is not remunerated enough in today's salvage industry.

It would not necessarily be enough for a salvor to prove that there would have been some damage to the environment without his services. He would have to prove that that there would have been *significant physical damage* according to the definition of *environmental damage* in Section 441 letter d) of the Norwegian Maritime Code.

⁹³ Bishop (2012)

Through the discussion of the International Convention of Salvage from 1989, which is the basis of Chapter 16 in the Norwegian Maritime Code, there was a lot of discussion around the percentage a salvor would be able to claim in a case involving special compensation. The conference was split between the delegates which wanted a special compensation of 30 percent and those who wanted a 100 percent compensation.

In the end, the solution became to let the courts of each country to interpret it as they wish. This shows that the structure of the Special Compensation clause is not absolute, and will be different depending on the state. The special compensation a salvor is entitled to claim includes a fair rate for equipment and personnel. This rate does not contain any element of profit⁹⁴.

The thought behind the Section regarding special compensation may have been good, but it has proven not to be functional or successful. Use of the special compensation in accordance has proven to be time-consuming, cumbersome, expensive and uncertain. It is clear that in order to make use of Section 449, there has to be made changes⁹⁵.

Danger to the environment is a factor in nearly every salvage operation today, and every ship is a potential polluter. Today it is possible for public authorities to get involved when there is a pending risk of pollution from a ship in distress. As these authorities has the opportunity to command salvors to engage in for example removing fuel before a salvage operation can commence will this mean that a salvor will have to postpone his operation which potentially can reduce his possibility to perform a salvage operation with success. The removal of bunkers is not necessarily decisive for the success of the operation or even a time critical measure to protect the environment, but more of a precaution to eliminate the possibility for bunkers or similar causing damage to the environment.

The involvement of public authorities can postpone a salvage operation to the point where there is no vessel left to salvage when the environmental issue has been taken care of as demanded by the authorities. BOA management described a case where they were instructed by the public authorities to remove bunker which did not produce a threat to the environment in the current

⁹⁴ Bishop (2012)

⁹⁵ Bishop (2012)

situation. When this service was completed, the vessel they were intended to salvage had broken in two pieces which resulted in a salvage operation turn into a wreck removal⁹⁶.

In this scenario the salvors were not in a position where they would be able to claim a salvage award and thus would not be remunerated for their actions. If a salvor has been ordered to postpone his operation in order to proceed with other tasks which are not intended nor rewarded, he should be able to claim some sort of remuneration for his services.

Today's rules do not entitle a salvor to a salvage award as long as the salvage operations is not deemed successful. Accordingly, if a salvor is able prevent or minimize environmental damage he is not entitled a salvage award. However, It is undoubtedly essential that the public authorities have the possibility of stepping in and commanding salvors to protect public interests such as the environment. It is after all more important to protect the environment than for a salvor to receive a salvage award.

But, if it comes to the point where there is no vessel left to salvage, a salvor can today not claim an award, even if he has prevented environmental damage. The salvage award fixed in accordance with Section 446 does as mentioned include a salvors efforts in preventing environmental damage, but this Section will only have an impact if the ship is salvaged in connection with the salvage operation. Therefore, there is a need for a way to claim special compensation for a salvor where he can be assured a certain remuneration for preventing environmental damage when the ship itself has not been salvaged.

Today, the SCOPIC clause is the preferred way to deal with special compensation and has led to Section 449 being rarely used since the beginning of the 21st century. The SCOPIC clause compensates a salvors expenses for his use of Pollution Control Equipment according to the SCOPIC clause, Appendix A. The SCOPIC clause can be invoked at any time during the salvage operation and is designed to compensate the salvors loss for losses not covered under Section 446.

⁹⁶ Personal conversation with Eskil Bjørnevik, Director Business Development at BOA. November 7th, 2019.

The SCOPIC clause is an optional clause to include in a salvage contract, which means that a salvor is not guaranteed special compensation for his environmental effort without SCOPIC being invoked. Also, by invoking SCOPIC a salvor puts himself at risk of losing parts of his salvage award earned from Section 446 if the clause has not been used. This is to prevent salvors from invoking SCOPIC without reason. However, in a case of emergency, a salvor should not be put in a position where he has to take decisions which could affect his remuneration if the circumstances concerning the situation is seen as unclear.

SCOPIC is however a clause which is fairly accepted by both salvors and the shipowners and their insurance companies. But, by putting the salvor in a position where he can possibly lose a large part of his salvage award, there could be better options to include in the salvage contracts. The SCOPIC clause is based on fixed tariff rates, and are in similarity with the Norwegian Maritime Code not taking the actual value of what was salvaged into the calculation when fixing the special compensation.

An option could be to make letter c), *the skill and effort the salvors put into preventing or limiting environmental damage*, of Section 446 more influential when fixing the award. This change could maintain the encouragement factor for the salvors, and in addition influence the salvage award in a greater way than it is today. Remuneration for protecting and minimizing environmental damage has proven to not be fully functional from Section 446. This is especially proven in cases where the value which is salvaged is considered low. The low value salvaged do affect the final salvage award fixed from Section 446 in a way where the environmental effort is not adequately reflected in the final award⁹⁷.

Also, by making letter c) of Section 446 more topical it would reflect the modern aspects of the maritime industry today, which is to contribute to lower emissions; both considering pollution by air and sea. The shipping industry is already one of the industries which contributes to the highest numbers of pollution. Accidents at sea have a potential huge damage, and it is important to hinder these to occur, or to prevent further damage if the incident already has happened. Thus,

⁹⁷ Bishop (2012)

by making letter c) a more influential part when fixing the salvage award, a salvor will be more rewarded when he in addition to salvaging ship also protects the environment.

As there today is an increasing use of sideletters in connection with the Lloyd's Open Forms, a change in the letters of Section 446 would maybe not have an impact on the way salvage award are fixed, and thus would salvors not be awarded any different than they are today. Therefore, could a change in the way letter c) of Section 446 is interpreted end up not having a significant influence on the way a salvors is remunerated for his environmental actions.

If salvage operations are based on a clean Lloyd's Open Form, a change in Section 446 could potentially have a large influence on the fixing of a salvage award. However, as explained above are sideletters more frequently used and thus are the salvage awards capped to a certain amount. Thereby, would a reinforcement of Section 446 letter c) not have the effect on a salvage award which would encourage salvors to engage in these types of operations more than it already is today.

The Section covering special compensation in today's Norwegian Maritime Code is Section 449. But, is the salvors efforts reflected in this special compensation?

Section 449 of the NMC is proven to not be working as it was intended. As it is being rarely used after the introduction of SCOPIC it may be time to revise the Section and make it more topical for the modern salvage industry. Today, a salvor has the burden of proving that his actions actually prevented environmental damage.

By establishing values for what is actually salvaged and prevented instead of a salvor having to prove this, a new Section 449 could contribute to reward the salvors for their work in protecting the environment in a more reasonable manner than what is the case today. Special compensation pay-outs according to Section 449 is based on the out of pocket expenses incurred by a salvor during a salvage operation, and not on the value of what is salvaged or prevented.

By changing the way special compensation is calculated, the remuneration could reflect a salvors operation in a more correct way. This change in calculation would remunerate a salvor with

higher amounts than today, and would thus become a special award instead of a special compensation.

Changing an already existing Section will however not be a straightforward case. By speaking to Wikborg Rein, it was made clear that a change in Section 449 of the NMC a Special Award could end up having a countervailing effect. By adding an additional award to an already expensive contract for the shipowner would have a negative effect on the use of the Lloyd's Open Form. As shipowners already are in favour of other commercial salvage contracts, the possibility for agreeing on a Lloyd's Open Form with an award for environmental protection would be even smaller⁹⁸.

The process of renewing Section 449 is also very unlikely to happen according to several insurance companies which has contributed to this thesis. The process of determining the value of a salvors effort would also be a challenge for the involved parties. As a new award would dramatically increase the expenses for shipowners and his insurers it would be more logical to highlight an already existing criterion in today's Lloyds Open Form. The environment is extremely important to protect, and by encouraging salvors to protect the environment the possibility of hindering large environmental incidents would be greater than it is today.

An additional award instead of a special compensation would mean higher costs for shipowners and could lead to shipowners prefer wreck-removal contracts instead of LOF by waiting until the ship sinks before contacting wreck removers. Thus, would the environment suffer even more as a ship is more likely to pollute when sunk and provides an even bigger threat to the marine environment.

P&I-clubs are understandingly not interested in an environmental award as they would be liable for the costs this would bring if it were to be considered the same way as a special compensation. According to Gard they believe that salvors already are being fairly rewarded and thus there should not be an additional environmental award available. As environmental protection is covered under Section 446 letter c), an additional remuneration would be an excess award.

⁹⁸ Personal conversation with Hermann Steen, Partner at Wikborg Rein. November 20th, 2019.

P&I clubs are today liable for the costs connected to special compensation through SCOPIC and Section 449. By creating a new award for the salvor, which will remunerate him greater than he already is today will mean an increased cost for the P&I clubs. As the special compensation today is outside of the scope of the responsibility for H&M insurers are P&I clubs not to welcoming for a greater reward available to the salvor through special compensation.

However, a special award can also be an advantage for both the salvor and the P&I-clubs. P&I-insurers are liable for costs connected to the clean-up of oil-spills at sea⁹⁹. The costs connected to clean-up operations can be enormous, as seen for example with the bulk carrier *MV Solomon Trader* who ran aground in the Rennell Islands, a part of the Solomon Islands, earlier this year (2019). Experts have stated that the costs connected to the clean-up of the oil spill will be in the range of USD 30 million and USD 50 million¹⁰⁰.

P&I-clubs will have a high interest in avoiding oil spills and environmental incidents. The way a P&I-club can benefit from a special award is if the salvor is guaranteed a remuneration if he is able to prevent oil from escaping the ship or limit the damages if oil has already escaped the ship. By include an environmental award in today's legislation would the salvor be encouraged to prevent environmental damage and limit oil spills which would eventually limit the costs for the P&I-clubs. The way costs could be limited for a P&I-insurer, is by them being liable for a special reward, instead of the costs for a clean-up for oil spill.

A special award would ensure the salvors an award for protecting the environment even if the ship is not being salvaged. The encouragement factor, which is the essence of the salvage award, would also be included in the operation of protecting the environment. If the salvor were to be awarded more generously for these types of operation than today, there would be a larger possibility for salvors to actively hindering oil spills. This would eventually entitle the salvor to greater awards, and simultaneously save the P&I-clubs by making them liable to pay a reasonable special award instead of the costs connected to oil-spill clean-up.

⁹⁹ Falkanger (2016) p. 580

¹⁰⁰ Martin (2019)

It is important to point out that P&I clubs are not against awarding salvors for their effort in preventing environmental damage, but they have the perception that salvors already are being awarded accordingly to their effort. By adding an environmental award to the total salvage award would make the salving a ship unnecessary expensive for insurers¹⁰¹.

By involving an additional remuneration for environment protection, the costs would be a highly discussed topic. GARD have already had cases where it took over a decade to estimate the values of an environmental accident which had occurred. By using a severe amount of time on estimating costs for an accident which already has happened, the time used would be considerable higher when assessing the costs in a case where an environmental incident could have happened. When processes regarding salvage awards goes over a longer period of time it would be taking up too much time for the parts involved and the big winners would be the lawyers and other involved experts due to their wages.

A potential additional award for environmental protection may be difficult to establish. The process of establishing guidelines for the value of what a salvor has prevented would be a challenge. However, as salvors today are only awarded for their skill and effort and not for the result they have provided there is something missing in the way salvors are remunerated. An establishing of a special award which could be invoked when a salvors has, through exceptional work, prevented environmental protection will ensure that salvors are encouraged to put in the necessary work to get this done. As salvors today are not guaranteed a 100 percent compensation for their effort, would a salvor be ensured that the expenses he will incur trough a salvage operation will also be awarded in connection with environmental protection.

By setting out clear guidelines and specific demands connected to a maritime incident, the way of remunerating salvors for their environmental effort could be changed. Eventually, this would lead to a salvor having clearer ideas of what to do and what should be focused on when the aim is to protect the environment. Since SCOPIC has taken over the use of Section 449 since its introduction, there could be taken measures which would give Section 449 a stronger position and awarding salvors for their environmental engagement.

¹⁰¹ Gard (2012)

The establishing of an additional award would not necessarily have the effect which the insurance companies fear. A special award would not replace the salvage award, nor create an unnecessarily high cost for insurers. The aim of introducing a special award is to recognize the salvors actions and the risk they are putting themselves into. A special award would be relevant when a salvor has either prevented an environmental incident or minimized a damage to the environment is the incident already has occurred. Much has changed since the introduction of the Salvage Convention from 1989, and changes will have to be made to the legislation which governs the salvage industry today.

By strengthen the position of Section 449 and make it a *special award* instead of a *special compensation*, a salvor could be more encouraged to protect the environment and will simultaneously be remunerated for his effort. The encouragement factor is as mentioned earlier one of the main aspects of salvage and should also apply to the environmental part of salvage. As the invoking of the SCOPIC clause can lead to the salvor losing a certain percentage of his salvage award if it is invoked without being needed, a standard clause in the contract would ensure the salvor of being adequately rewarded for his services. Also, by not being guaranteed a full compensation for their work in protecting the environment proves that the effort put in by a salvor is not reflected enough in the compensation they are able to claim.

In other words are salvors today not sufficient awarded for protecting the environment according to nor Section 449 or SCOPIC, they are just compensated for their out-of-pocket expenses with an additional rate for their service. The award they are receiving from Section 446 is just based on their skill and effort of protecting the environment and not the actual value of their services and their prevention of environmental damage. This creates an imbalance in the correspondence between priority and award. A salvor should be able to claim some sort of award for protecting one of the main concerns in the world today; the environment.

Therefore, an introduction of a *special award* for environmental protection would be a pretext for a salvor to use his best endeavours to prevent or limit danger to the environment in cases where he may not be able to save the ship itself. Thus, would an award like this would work in the same way as SCOPIC and Section 449 today are not sufficiently doing; by rewarding the

salvor if he has not been sufficiently rewarded by the award from Section 446 for the value of their work performed in correlation with environmental protection.

As salvors involved in environmental threatening situations performs an operation for preserving the environment and preventing damage to it, there should be a possibility for a salvor to be remunerated for his services in a different way than it is today. The compensation for expenses occurred which Section 449 is based on does not reflect the effort and skills put into a situation by the salvor. By changing the Section 449 regarding special compensation, a salvor would be adequality rewarded for his efforts in connection with environmental salvage without the risk of not getting paid due to the principle of “no cure no pay.

By establishing a form of “values” (for bunkers, oil-spill etc.) for certain elements in an environmental award, the fixing of the award would be a less time-consuming process. Then the involved parties would have the possibility to look at pre-arranged values or suggested rates which should be taken into consideration when deciding an environmental award. With this type of system, a salvor would be ensured to receive the award as he is entitled to and additionally within a reasonable amount of time.

Therefore, if an additional award for environmental protection should be a reality, it would be important to establish a system equally to Section 446 where several criterions in the end establishes an award. To calculate the size of the environmental award, it must be possible to determine the expected scope and the severity of the potential environmental damage. By this calculation the possible liability claims could be calculated. As in salvage awards fixed under Section 446, there would be a discretionary evaluation to each incident considering the environmental aspects.

The introduction of a new Section rewarding salvors for the value of their actual prevention of environmental damage instead of just their skill and effort would lead to an award which would reflect the work they have performed. It is important to point out that a potential environmental award would not be in the same range as the size as a salvage award. A salvage award would still be the dominating remuneration, but by being able to claim an additional award would ensure that the incentives for a salvor in connection with environmental protection were maintained.

Environmental focus is the main focus in most parts of the world, and new measures are made every day to prevent and limit pollution. By introducing a special award, the modern increase the chances of limiting the pollution from one of the largest industries on the earth by adequately rewarding salvors for their actions.

3.5. Life salvage

Salvage is defined in Section 441 letter a) of the Norwegian Maritime Code as *any act the purpose of which is to render assistance to a ship or other object which has been wrecked or is in danger in any waters*. While salvage is mainly focused on the salvaging of ships and other objects does letter b) of Section 446 state that the effort put down by a salvor in salvaging human lives should be taken into account when fixing the salvage award.

Salvaging of human life is a salvors most important task and his highest priority at sea. However, the salvage law is constructed in a way where salvage of human life is only rewarded when certain demands are met. This means that while there has always been a wish to protect human life in the historical development of salvage law there has never been any direct remuneration for these actions. Today, a salvor is just rewarded for the skill and effort he puts in according to Section 446 letter b).

When salvors has to respond to an emergency situation, they are taking a huge risk. High waves, unstable ships and a large number of persons makes the salvors tasks challenging. Salvors has to execute the operation to perfection while trying to save persons, the ship and its cargo and protecting the environment.

The Norwegian Maritime Code is clear on its view regarding salvage of human lives. According to Section 445 2nd paragraph the rescue of human does not as such entitle a salvage award. However, if a person has rescued a human life in the course of a salvage operation, the salvor is entitled to a reasonable share of the salvage award or special compensation for his efforts. To be entitled to a part of a salvage award, the salvage operation itself has to be considered a success. This means that if the operation is not considered successful, there is no salvage award, and thus no award available for the salvor to claim, even if one or more human lives has been salvaged.

Accordingly, the current Salvage Convention does not directly remunerate salvaging of human life unless the salvage operation is successful. Even if the operation is successful, the salvor is not rewarded for the actual human lives he salvages, but the effort and skill he puts into the operation.

Under Chapter 6 of the NMC, it is not mentioned that the master has a duty to render assistance to other ships in the same way he is obliged to save humans. Section 135 1st paragraph states

that *as far as possible without serious risk to the ship or to those on board, the master is duty bound to give all possible and necessary assistance to any person in distress at sea or threatened by danger at sea.*

By looking at the Section of the NMC, the master has a duty to save humans at sea, but not a duty to save ships and its cargo. Thus, is the saving of human lives not considered a salvage operation as it is not voluntary, but a duty for the master according to the legislation.

It is important to remember that a salvor is always a voluntary ship, unless he is under a contract with a shipowner. Since engaging in salvage operations are voluntary, a master can decide whether he will perform a salvage operation or not. In most cases it is expected from a ship and its crew to engage in salvage operations as it is considered good seamanship to help a vessel in distress, but sometimes other interests can come in the way and a master can decide to not engage in a salvage operation.

The principal for a salvage award is to encourage people to save ships in distress. By being fairly rewarded a salvor can be remunerated in a good manner for his effort and the equipment he has used in connection with the operation. Thus, since there is no reward for saving a human life, this could affect the motivation for a salvor to engage in such situations as he may not be willing to put his crew, ship and equipment in risk if this will not be rewarded.

Using the Norwegian vessel, *The Tampa*, as an example it is clear to see that the situation around life salvage is difficult. The master of the Ro/Ro ship *The Tampa* picked up 433 asylum seekers in 2001 which was trying to reach Australia. The refugees had been travelling with an Indonesian ferry which had sent out an emergency signal. Master Arne Rinnan picked up the people and wanted to transport them to shore.

The Australian government removed their granted permission the master had received to offload the refugees. After a while the master took a decision and travelled into Australian territorial seas and issuing a distress signal as he was concerned about the medical situation on board. After a weeklong standoff, the refugees were transferred to shore by Australian naval ships. The costs *The Tampa* had incurred during this week was enormous, but they had no right to claim a salvage

reward even though they had saved 433 people¹⁰². They were nevertheless granted the Nansen Award for their efforts, which is a refugee award, not a salvage award¹⁰³.

The example of *The Tampa* highlights the issue regarding the salvaging of human life at sea. When salvaging a ship, the master of the salvor stops his operation to do anything in his power to save a ship. When salvaging human lives, the master does exactly the same. But only one of these situations are rewarded with a salvage award.

The reasoning of why this is the case is not clearly explained in the Salvage Conventions. It can be difficult to see why salvaging something that can be repaired or reproduced can be rewarded, but a human life which never can be replaced is not. The question of awards for life salvage is also a very much discussed topic in relation with the later years flow of migrants in the Mediterranean Sea, where there are situations similar as to the described situation regarding *The Tampa*

It is important to clarify that the motivation for saving a human life should under no circumstances depend on whether the salvor is able to claim a salvage award or not. To save a person's life is a human instinct, and one should never be in doubt to engage in a salvage operation to rescue a human at sea or anywhere else, even though if there is a possibility of the salvage operation of the vessel not being a success. Therefore, it can be justified as a duty and not a voluntary act to save a person without necessary being able to claim a salvage award.

In the Norwegian Maritime Code, Letter b) of Section 446 does already include the effort of salvaging human life, but this criterion is not weighted enough when fixing an award. The possibility of incorporating a new Section in the Nordic Maritime Code for a Special Award in relation with life salvage could be a peripheral thought and hard to implement as it would be an additional cost for the shipowner and his insurers. Therefore, the opportunity for making life salvage more rewarded would be to make letter b) of Section 446 more topical.

In situation where the value of what was salvaged is considered low, or the degree of danger is low the salvor would still get fairly paid if he were to engage in a salvage operation. This could be

¹⁰² Omenga (2017)

¹⁰³ Cue (2012)

relevant to the situations involving refugees at sea. In situations involving immigrants are the value of ships low and the degree of danger which the ship itself is in may be considered low, but the danger which the humans onboard are in is considered very high. By being able to claim an award for his effort in connection with saving human lives, a salvor would not hesitate in engaging in these operations as he would be awarded for his efforts even though the material values involved are not high.

By making letter b) influence the award more than it is today, the salvage of human life would be both more encouraged and rewarded. Although it is a human instinct and a master's duty to help other persons in danger, this can in rare situations be overlooked in order to acquire a high amount of award. By awarding salvage of human life, this would ensure a salvor being rewarded for his efforts and in addition would a shipowner be more confident that a salvor would give his best endeavours in salving of his crew or passengers. The aim of this proposal is not to apply larger costs to shipowners or insurers, but to reward salvors for the most important job they can perform; saving human lives at sea.

If salvage of human life were to be more influential regarding the salvage award, it would not necessarily increase the award. This situation is similar to the one regarding environmental protection described in chapter 3.4 above. The impact sideletters have on the fixing of a salvage award according to Section 446 would hinder an amendment from having an impact. If the salvage of human life made up more of the final salvage award this would only make a difference in the case of a clean Lloyd's Open Form, as sideletters would cap the award available for the salvor. Therefore would another, and more likely, solution be to look in the same direction as the one mentioned in chapter 3.4 above.

The salvage of human lives at sea does today not have a dedicated Section in the Norwegian Maritime Code. In order to remunerate salvors in a more correct manner, these types of operation should be put equally with the preventing and limiting of environmental damage. Therefore, to make salvage of human life a remunerated operation, it should be included in Section 449 regarding special compensation.

As discussed above are the salvage industry encouraged by salvage awards and the lack of awards can have consequences. For example, by not prioritizing awards in connection with life salvage will a salvor not be willing to upgrade equipment and invest a capital in equipment meant for salvaging of human life. By not upgrading this equipment a salvor will not be able to perform a human life salvage as effectively as it could have been which may lead to some humans not being salvaged and thus lives will be lost.

By looking at the priority a salvor has to make and the following fixing of an award, it can be seen as an imbalance between the priority and the reward. A human life cannot be put a price on, but a container can. The worst-case scenario is a situation where a salvor prioritises the container ship in distress over the cruise ship just to gain a large salvage reward. The prioritizing following the Convention makes the salvor liable to save a human life before property.

However, out in the open seas it could be hard to monitor a salvor and his actions. An ethical question will thus arise. What should the salvor start to save when he arrives at an accident? If salvaging a life does not give the salvor any considerable amount of remuneration, will the bar be set lower to rather engage in salvaging the container ship with highly valuable property on board? By placing the salvage of life above salvaging property it would be thought by saving a life a salvor would be fairly rewarded, but this is not the case.

By using the encouragement of salvaging human life, the refugee situation in today's world are very relevant. The refugees are often using ships which is in a remarkably bad shape and the number of person onboard are much higher than what the ship is designed to hold. As the ships of refugees often are in a bad condition, they are often exposed to engine failure and similar malfunctions. So, when these ships are in danger, there is a high number of lives which needs to be rescued.

According to Section 135 3rd paragraph of the Norwegian Maritime Code, the master is obliged to provide all possible and necessary assistance to a human being in distress or danger at sea, which includes refugees. All persons brought onboard a ship has to be treated with dignity and care according to the same Section of the Norwegian Maritime Code. The master does not have any choice and is bound by the Norwegian Maritime Code Chapter 16 to prioritize rescuing

humans before the environment and ships, and does also have a duty to rescue everyone, no matter who they are, and treat them the best way possible.

As mentioned earlier is the encouragement factor the main powertrain of the salvage industry. If a salvor is to be fairly remunerated for his efforts connected to saving lives at sea, he will be higher motivated to engage in operations where the award available from Section 446 is considered low. This motivational encouragement would increase the chances for passengers and crew to be salvaged at sea, which would increase the possibility to be rescued at sea if an accident is to happen.

Therefore, there should be a new regulation where the shipowner could be put in the position where he is responsible for a special award payable to the salvors when they have executed an operation where crew and passengers are salvaged from a dangerous situation at sea.

If salvage of human life were to be an award on its own it could lead to extremely high costs for insurers if both ship and humans were salvaged. Like a separate award for environmental protection, this could have a countervailing effect making shipowners be more careful of entering into LOF as it would inflict them with huge costs.

The meaning of a special award is to reward the salvor in a greater way than it is today to acknowledge their services. A special award would be higher than the existing special compensation, but not at the level of a salvage award fixed after Section 446. The parts involved should be in a situation where the contract should be considered fair so the salvor is fairly rewarded without the shipowner and insurers suffer huge economic losses.

The topic of life salvage has not been the main subject of discussion in the last years but could potentially be in the near future due to the increasing traffic at sea. In 2009 there were approximately 17.8 million cruise passengers worldwide. The projected number of passengers in 2018 was approximately 27,2 million passengers. This means that in the last nine years, there has been an increase of over 50% in cruise passengers¹⁰⁴.

¹⁰⁴ The Florida-Caribbean Cruise Association (2018)

With this increase of passengers, there is also an equivalent increase in cruise ships and the size of those. According to Cruise Market Watch, the average cruise ship today carries 11 674 passengers¹⁰⁵. A cruise ship is not necessary a ship which holds property of great value, if passengers are not included in the calculation. And it is here one of the large problems of salvage needs to be discussed, what is most important for a salvor; salvage awards or saving lives? If there should be an incident involving a cruise ship and a container ship, the salvor can be put in a situation where the ethical factor will be proven.

After the 1989 Convention was incorporated into LOF, the safety of life shall be the highest priority of the salvor. Number two is the environmental protection and the last one is saving of property. According to this, the salvor in our situation has to save passengers and crew from the cruise ship before engaging in salvaging the highly valued cargo ship.

In a situation like this, the first salvor at the scene of the incident can risk losing a severe salvage award as he has to save the cruise ship while the second salvor at the scene of the incident can engage in salvaging the container ship which in the end will provide the second salvor with a considerable salvage award. The salvor of the cruise ship will receive an award, but the second salvor can be looking at a greater reward, even though he was the second salvor at the scene as he is salvaging a vessel with a greater value.

Section 446 letter a) concern the value of what is salvaged. The market value of a container ship and its cargo is seen as higher than a cruise ship and its passengers and therefore more highly rewarded in a salvage situation. Letter b) of the same Section also includes the skill and effort put into salvaging human lives, but this is not rewarded as much as letter a). As mentioned above, the most important factors when fixing the award is letter a) concerning *the value of what was salvaged* and letter e) concerning *the nature and degree of danger*.

One of the main reasons that salvaging of human life is not remunerated is the two difficult question of (1) who is going to pay the salvor for the salvaging of human life and (2) how it is possible to put a value to a human life. As Section 447 of the Norwegian Maritime Code states, *the salvage award is payable by the shipowner and the owners of other objects in proportion to*

¹⁰⁵ Cruise market watch (2018)

the values salvaged from each of them. The cargo and a ship have its respectful owners which can be put responsible for their property, but a human does not have anyone who can be considered an owner. So, who shall be held responsible for the cost of the award?

If there should be an award for salvaging a human life, there would have to be a certain amount a salvor could be entitled to. This amount would create a question which is impossible to answer; what is the value of a human life? It is important that if there should be established a standard amount for salvaging a human life, this is not an estimate of the value of a human life but a sum which reflects the importance of a salvors actions.

Section 445 2nd paragraph is entitling salvors to a reasonable share of the salvage award if a human life is rescued in the course of a salvage operation. Accordingly, there is established a certain amount which would reflect the value of saving human life. If a salvor were to be awarded in similarity to Section 446 where the value of what is salvaged is taken into consideration, a new Section 449 would not be realistic. A human life is worth more than anything else in this world and can in the end not be put a value on. Therefore, would an eventual special award be a symbolic sum reflecting the actions of the salvors, and not the value of a human life.

The second paragraph of Section 445 limits the remuneration available for a salvor. Described as a *reasonable share* of the salvage award, will mean that the amount a salvor will receive in connection with salvage of human life is considerably lower than a salvage award. By removing this phrasing from Section 445 and implement it under Section 449 with some adjustment would reflect the value of the service rendered in a more precise way.

When refugees are saved at sea, they are traveling in boats which are not necessarily capable of transporting as many persons at it is. This can lead to a breakdown of the ship and thus a dangerous situation for both ship and persons onboard. If a salvor were to claim a salvage award for rescuing refugees, there would be a lot of questions to ask. If only looking at the salvage part of the incident the main question would be who the salvor should address to claim the salvage award. Refugees comes from poor conditions and the ships they are using are often not belonging to any company or shipowner. The refugees themselves would almost exclusively not

be able to provide near the amount of money a salvor are asking, and with to company to claim award from it is hard to see how a salvor could be rewarded for salving refugees at sea.

A person which is salvaged may not have the possibility to pay a sum in the proximity of what could be claimed and thus would there again be a problem. On the other side will the owner in most cases have the opportunity to pay the sum, but he may not be interested in this as the employee does not have any determined value or is at the moment liable for paying any extra sum to the salvor as he is only entitled to a part of the salvage award.

Therefore, the question will arise if the shipowner is responsible for the passengers or not. If a shipowner is to be considered to be responsible for the passengers and crew onboard of a ship, it can be justified that he shall be liable for paying salvors an additional award for their services. The award a salvor would be entitled would not be in the same range as the salvage award calculated from Section 446 but should be a reasonable award to reward salvors for their efforts in addition to salvaging the ship itself.

To make life salvage an operation which provides a special award will mean that a fundamental change has to be made to the legislation concerning salvage. The way the award is fixed has to be updated as there will be new factors which will decide the size of the pay-out. The P&I clubs will be more involved in the process of negotiating the terms for which the contracts are going to be based on as they will become more liable in cases which is affected by salvage of human life and environmental protection.

An increasing traffic and number of cruise ships can mean that there is a greater chance of a serious incident with a cruise ship, and if this happens there is going to be a lot of human lives involved. In March this year (2019) the cruise ship *Viking Sky* suffered an engine breakdown outside of Molde, Norway. With 1373 persons onboard were the vessel just hundred meters from the risk of grounding. The anchor stopped this ship from grounding, and salvors went out to the ship immediately after it sent out distress signals. Salvor put in a severe risk trying to evacuate person and the waves surrounding the ship were reported to be around eight meters high¹⁰⁶.

¹⁰⁶ Lohne et al. (2019)

In the aftermath of the accident involving *Viking Sky*, some of the passengers have issued lawsuit against the company operating the ship. Accordingly, can the company be liable to pay compensation to the passengers which were onboard this route on the day of the accident. The shipowner would then be liable for the compensation payable to the passengers. A shipowner is ascertained for the passengers and for the compensation payable if the lawsuits are successful.

If a shipowner could be held responsible for compensating lawsuits, it should also be possible to hold him liable for paying salvors a special award when they are salvaging human lives.

Shipowners have the responsibility for keeping the passengers and crew safe when they are on board a vessel no matter if it is a cruise ship or a tanker.

The injury, illness and death to passengers and crew are covered by the shipowners P&I insurers. Similar to costs connected to oil spills, are costs paid in connection to damage and death and injury to crew-members high. Therefore, the P&I insurers will benefit from salvors arriving at the scene of the accident in order to save the humans on board before a passenger or crew member is seriously damaged, or even killed¹⁰⁷.

Shipowners will also benefit from a change in the regulations regarding injury and death to crew and passengers. Salvors will be more fairly rewarded from situations which they may hesitate to engage in today, but the costs will be lower for a shipowner as there will be a special reward payable instead of compensation for injury or death, and the safety of crew and passengers will increase as they are more likely to receive emergency assistance.

In similarity to the concern of rewards connected to environmental damage, the salvage of human life would be more fairly awarded if it were to be included in Section 449. The salvage of human life is not sufficient rewarded today, and needs to be incorporated in a Section which applies to situations where the salvage operation itself is not considered a success. By including these two operations in the one and same Section, the prioritization of a salvor would be more sufficient reflected than it is today. A new Section 449 would create a Section enabling salvors to claim a special award based on criteria and values which needs to be established.

¹⁰⁷ Gard (u.d.)

With a new phrasing which would entitle a salvor to a *reasonable award* instead *reasonable share of the salvage award* the salvor would be fairly rewarded for the operation of salvaging human lives in addition to ship and other objects. This would be under the category of a special award, which would replace the existing Section 449 of the NMC, which is rarely used.

By changing an outdated Section 449 with a more topical Section, would reflect the modern world of salvage in a more reasonable way than it is today. By entitling salvors to a special award instead of compensating them with lower amounts there would be a situation which would profit all parties involved. The special award would be estimated in a way that it is to be viewed as a reasonable award and is not a suggestion which should replace the normal salvage award fixed according to Section 446.

Section 449 would be used in the same way it is intended to do today with the salvors being able to claim an additional remuneration if they are not fairly rewarded in Section 449. The main difference would be that a salvor would be entitled to a larger sum which is based on the value of what he has salvaged or prevented, and not just a compensation for the expenses he already has experienced.

A Special award would guarantee the salvor a significant award if he is able to save human life or protect the environment and is not adequately rewarded from the Section 449. This would ensure a shipowner and other parties involved that a salvor would always strive to perform his best endeavours in order to protect the most important value there is; the human life.

Sum up of Environment and Human salvage

The protection of the environment and salvage of human life is as mentioned the two highest prioritised tasks for a salvor during a salvage operation. Both these aspects are covered under Section 446 of the Norwegian Maritime Code, letter b) and c). Nonetheless are these two letters not the two most influential ones when fixing the salvage award. By discussing the potential impact a change of approach towards these topics would have on an award, the conclusion would not be absolute but provide some suggestion of what could be changed regarding salvage of human life and protection of the environment.

The problem surrounding the rewarding of a salvors actions connected to these two subjects are quite similar. In the modern salvage industry today, the salvors are not awarded in a proper manner. Human life is not even a part of the Section regarding special compensation in today's regulations, and this needs to change. By creating a Section 449 regarding *special award* the legislation would reflect the modern maritime salvage industry.

The proposal for a new special award not necessary going to be an additional expense for P&I insurers. If the special award can contribute to influence the encouragement factor to both preventing and limiting environmental damage and salvage of human life as explained above, it can be cost reducing for P&I clubs if salvors are willing to engage in such situations with the assurance of a special award.

There has to be established rates which reflects the actions performed by the salvor. These rates could be based on the potential pollution a tanker could have caused, or how much danger the passengers and crew were in when their vessel was salvaged.

Firstly, a salvor is today only rewarded for the skill and effort he is putting into salvaging human life and protecting the environment through Section 446 of the NMC. The value of what he has salvaged or prevented is not taken into consideration when fixing an award. This would have to be a topic for discussion where a salvage award would reflect the value of what was salvaged, either through Section 446 regarding fixing of the salvage award, or through Section 449 regarding special compensation.

Secondly, the salvage of human life is not a part of Section 449. This means that if a salvor is not sufficiently rewarded according to Section 446, he has no possibility of being compensated for his expenses connected to salvage of human lives. It is worth mentioning that a salvor is entitled to a part of the award if human lives are salvaged, but this would not necessarily cover his expenses. Therefore, should the salvaging of human lives also be included in Section 449, providing the salvor with a security of being compensated for his effort in rescuing human beings at sea. It is after all the highest priority for a salvor.

Accordingly, the salvage of human life should be included in a new Section 449 of the Norwegian Maritime Code regarding special award in connection with salvage operations.

Today, a salvor is entitled to a fair share of the award according to Section 445 2nd paragraph, but this might not be enough to cover his expenses connected with the salvaging of a person. Therefore, there should be created a new Section 449, which deals with special awards instead of today's special compensation. Instead of being entitled a reasonable share of a salvage award, a salvor which saves human life or prevents damage to the environment would be entitled a reasonable special salvage award.

For a long time, it has been clear that Section 449 of the Norwegian Maritime Code is outdated and, in most cases, replaced with the use of SCOPIC. Both protection and minimizing of environmental damage and salvage of human life is today not sufficiently rewarded for a salvor.

Therefore, by amending Section 449 and making it more topical would the change in the regulation entitle salvors to a higher remuneration in these types of operations. A special award would replace the special compensation and entitle the salvor involved in a salvage operation to a reasonable award in connection with their two most important focuses during a salvage operation; saving human life and preventing and minimizing damage to the environment.

4.0. Conclusion

The improved standard of technology in the maritime industry have simplified the way of communicating, effectively removing or reducing several marine perils. As a result, the shipowner is able to communicate directly with other interests for advice and council as he has a more detailed overview of the situation, thus avoiding entering into unnecessary expensive contracts compared to the actual danger the ship is facing.

In light of this, the shipowner is able to avoid entering into expensive contractual relations based on hasty conclusions taken due to lack of or unclear information. The shipowner is thus in a better position to amend the Lloyd's Open Form with sideletters and discuss the terms of the contract with several salvors when the situation allows it. The use of sideletters reflects the principle of contractual freedom practiced by the shipowner. The sideletters reflects the shipowner's opinion of Lloyd's Open Form excessively remunerating the salvors.

Due to the decrease of issued Lloyd's Open Forms combined with the increase of capping the salvage awards with sideletters, the industry has discussed an alternative standard emergency contract based on the same principles as the original Lloyd's Open Form. Although the alternative contract contains standardized clauses for the salvor, the salvors prefer the original Lloyd's Open Form as it may entitle higher salvage awards. Even though the H&M-insurers isn't against the alternative contract, they prefer the current solution. The P&I-insurers on the other hand are strongly against the LOF Light as they will, to a greater extent, be involved in the remuneration of the salvage award. The LOF Light therefore does not seem to have sufficient support in the industry.

By making environmental protection a more influential part of the remuneration connected to special compensation, salvors will be more fairly rewarded for their actions. By establishing a new Section 449, regarding special award, and create clearer guidelines reflecting the value of a salvor's measures to protect the environment and not only his efforts and skills, the special award will recognize the prevented damage.

A new Section 449 should also include the salving of human life. Salvors would be entitled to a reasonable special award in connection with the salving of people at sea to reflect the acts of the salvor. Thereby, both environmental protection and salvage of human life will be more fairly rewarded than today.

4.1. Further research

A more in-depth comparison between the Lloyd's Open Form 2011 and another commercial contract could be another interesting angle on the topic. Being able to retrieve an example of a sideletter or a template of the Lloyd's Open Form Light could also be interesting. Should there also come a new edition of the Lloyd's Open Form, one could evaluate the new additions compared to the Lloyd's Open Form 2011.

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