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## THE ESSENTIAL FEATURES OF VOLUNTARY SALVAGE

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The salvage service is closely related with marine insurance and general average and is an unavoidable phenomenon in the maritime commerce. The law of salvage has therefore been regarded as a special law up to the present time. The so-called "*Strandrecht*" recognized throughout the European countries in the middle ages was a very stringent and merciless custom, which has been in practice till recent times.

In early times, the wrecked ship and her cargo together with life and property were recognized as a proprietary right of the people on shore, and later of the state and finally of the feudal lords. This is what we call "*Strandregal*." Such a wicked conduct as to lead a ship to the wrong way and make it wreck by lighting a torch at night for the purpose of causing sea disaster was prevalent in those days everywhere. Heligoland was widely known as one of the most horrible islands, where such a trick had been often resorted to for a long time. Even the prohibition by law, (e.g. "*Authentica Navigia*" of Friedrich II, 1220) and the conventions among the nations at that time could do nothing with them. Thus the "*Strandrecht*" of feudal lords became an object of very hot disputes among the people and long remained as one of the most difficult problems.

In 1777, at Mecklenburg, the public prayer in church for the purpose of the so-called "*gesegneter Strand*" (blessed Stranding) was discarded for the first time. It was a victory of humanism in the modern civilized nations that we can now hardly find any such plunders of wrecked ship in time of peace since long. Thus the "*Strandrecht*" has evolved into salvage system in which a salvor may claim assistance or salvage charges and

later this was revived as a legal right for encouraging the salvage service. But the legal principles of this system much differed, so to say, from nation to nation as well as from city to city.

"*Convention pour L'Unification de Certaines Règles en Matière d'Assistance et de Sauvetage Maritimes, 1910*" in 23rd of September, was at last concluded with a view to putting an end to this disunity in the salvage law which had prevailed among nations. It may be natural that the proposed amendment concerning maritime commerce in the Commercial Law of this country is intending to revise the current provisions in reference to the "*Convention*" above mentioned.

Thus we have seen the free development of the salvage service, though gradual, since eighteenth century. There have also appeared some persons, who make it their professional occupation to save ships and cargoes from sea disaster, especially, since the appearance of steamers. These salvors wait in the proper places at sea with their expensive salvage boats and tugs specifically fitted out for it. On the other hand, the public organization is rendering service to save the wrecked ship, and the administration is organized by the state to take care of maritime affairs.

The salvage service is also provided for in the *Sea Disaster Relief Law of Japan*, and the "*Strandungsordnung vom 17. Mai, 1874 (RGBI. 73)*" and legal cases concerning salvage affairs have mainly been taken care of at Hamburg since 1913 in Germany. In England, it has also been under the rule of the Court of Admiralty since long.

## II

There are two cases of salvage service. The one is the case, in which a contract concerning salvage is made in advance between both parties, while in the second no such contract providing for any duty is made. The latter case covers the salvage service in the narrow sense and the related provision of the Commercial Law of Japan (§ 800) is for the case in this latter meaning. It is to be observed that many countries have also enacted the law with similar provisions (cf. HGB § 740, M.I.A., § 65—(1) (2))<sup>1</sup>.

<sup>1</sup> The Commercial Law of Japan § 800.

A person who without any duty to do so has salvaged the whole or a part of a ship or the cargo in cases where they are in distress at sea, may claim reasonable remuneration for the result.

M.I.A. § 65—(1) (2).

65—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for him by them for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

Salvage service usually has the following three essential requirements: (1) The object of salvage service is exposed to a danger. (2) The voluntariness of service on the part of salvors, and (3) The success is also in general a necessary condition for claiming salvage charges.<sup>2</sup>

According to the Commercial Law of Japan, "*Danger*" is a distress at sea connected with navigation and corresponds to "*Seenot*" in Commercial Law of Germany (§ 740). The danger in the salvage service must be actual, but the possibility of danger is also included in this category. Such a situation was clarified by Dr. Lushington with respect to the *Ella Constance* case in 1864. Up to the present, the judicial precedents in England and other countries appear to be that the danger necessary for salvage service, whether it arises from the condition of the vessel, or of her crew, or from her situation, must be real and sensible. Therefore, it must be neither fanciful nor vague in its possibility, while it needs not necessarily be absolute or immediate.<sup>3</sup>

With regard to the reality of danger, it is observed that the lack of geographical information on the part of those to whom the service is rendered may well constitute an element of real danger, and a ship which might be kept in safety, if handled by a more skilful master well acquainted with the locality may therefore be in peril, when her master has no such skill or knowledge. A judicial precedent in America has shown that a frightened and incompetent master was the real danger. This is the *Pendragon Castle case* (1924).<sup>4</sup>

The Court of Admiralty in England has held for a long time that those who voluntarily rescued a vessel, seeing a signal seemingly for rescue which was in fact damaged or in danger, have the right to consider the signal as reliable and are qualified for being salvors.<sup>5</sup>

The voluntariness on the part of the salvor constitutes, along with the above-mentioned reality of the danger, an indispensable element of the salvage service.

As is provided for in the Article 800 of our Commercial Law by a phrase "A person who without any duty to do so salvaged.....", the said Law is well imbued with this principle. The salvage of property has hitherto been described as an act spontaneously rendered by voluntary adventurers in order to keep for the benefit of owners of the property from loss or damage at sea with the responsibility of making restitution as well as

<sup>2</sup> Success is usually recognized as one of the essential requirements of the salvage service but Kennedy adds some qualifications for it (cf. *A treatise on the law of civil salvage* p. 20), HGB. § 741, "*Convention*." § 2, Commercial Law of Japan. § 800, Lord Chorley & O.C. Giles, Shipping Law. p. 249.

<sup>3</sup> Kennedy, *ibid.* p. 24. Burchard, *Bergung u. Hilfsleistung in Seenot*. S. 32.

<sup>4</sup> Kennedy, *ibid.* p. 27.

<sup>5</sup> The *Mary* (1842); The *Dossitei* (1846); The *Hedwig* (1853); The *Little Joe* (1860); The *Racer* (1874); The *Aglai* (1888). See Kennedy, *ibid.* p. 28.

with a lien for their reward.

“What is a salvor?” said Lord Stowell in the *Neptune*. “A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship.” It is to be observed that the requirement of voluntariness in the salvor is sufficient in case of absence of any contractual or official obligation therein. There is a moral obligation in general when the human life or property is in danger, to render every possible assistance for its preservation. This is based on the idea that deviation from the predetermined voyage for the purpose of saving human life, does not make any effect on the contract of insurance and the shipowner is not protected in case of the deviation be made only to save property.<sup>6</sup> The same principle also holds with respect to carriage by sea. According to the Carriage of Goods by Sea Act, 1924 (§ 4. Rights and immunities. 4), any deviation or its attempt for the purpose of saving life or property at sea, or any reasonable deviation is not the violation or breach of these rules or of the contract of carriage. The carrier is therefore not liable for any loss damage resulting therefrom. So we can say that the essence of the Act is originating from our moral sentiments.<sup>7</sup>

By the contractual or official obligation, we mean a duty to the owner of the property salvaged. The test of voluntariness is only applicable as between the salvor and salvaged, and in case the service be voluntary in relation to the salvaged, i.e., not rendered by reason of any obligation towards him, it is quite immaterial whether or not the salvor was ordered by somebody in control of him about his behavior. Two cases in England, i.e., the *Sarpen* (1916) and *Carrie* (1917) cases made this point clear.

In compliance with this principle of rewarding volunteers as salvors, neither the crew nor the pilot leading a ship, nor the owner nor the crew of a tug under a contract of towage, nor the ship's agent, are generally held entitled to obtain any salvage reward for the services rendered by them for the preservation of the ship herself or of the lives or of the cargoes which she was carrying. For all of these concerned are under an obligation to render service in their respective way for the benefit of life or property at risk. On the other hand, government officials are also not entitled to claim their salvage rewards, however meritorious their assistance may be, so far as they have done only their official duties. The passengers who happened to be on board the ship in distress is not commonly qualified, for the above-mentioned reasons as creditors. They are not under any legal or official obligation to do any work for the safety of

<sup>6</sup> Kennedy, *ibid.* pp. 173-175.

<sup>7</sup> Scrutton, *On Charter Parties*. 15th ed. London, 1955. p. 488.

a ship or her cargo. In fact they exert themselves only for their own safety, therefore not qualified for receiving rewards for labours they have rendered for their own interest, though the services thus rendered might happen to be at the same time profitable to the interest of other persons. Moreover, the passengers clearly have a strong moral duty to do their best for preserving a ship in distress, although they are by no means so bound by any legal obligation. For it is incumbent upon all those on board to render every possible assistance, whenever a ship is confronting with a common peril.

The successful execution of the salvage, successful at least in the sense that the said salvage contributed to the ultimate safety of the property in danger, is as a rule one of the conditions necessary for claiming rewards. Formerly, Dr. Lushington, in the *Zephyrus* (1842) case said; "I apprehend that upon general principles a mere attempt to save the vessel and cargo, however meritorious that attempt may have been, or whatever degree of risk or danger may have been incurred, if unsuccessful, cannot be considered in the Court of Admiralty as furnishing any title to salvage reward. The reason is obvious, namely, that salvage reward is for benefits actually conferred, not for a service attempted to be rendered." In England there are many cases which were taken care of from the same viewpoint.<sup>8</sup>

The provision "....., may claim reasonable remuneration for the result." in our Commercial Law is also based on almost the same principle as above-mentioned. (cf. § 800, *Convention*. Art. II) So, the salvage service in the form of "no cure no pay", which has been in operation by Lloyd's from long ago, is nothing but the result of the emphasize on the necessity of "success". In other words, the Lloyd's Standard Form of Salvage Agreement is almost the same as the general law of salvage involving all essential conditions already stated. The difference of these two systems rests on point that the salvage reward is fixed in advance in the former, but not in the latter.

In the judgement of a case in 1925, Lord Phillimore summarized these principles from various judicial precedents as follows: "Success is necessary for a salvage reward. Contributions to that success or, as it is sometimes expressed, meritorious contributions to that success, give a title to salvage reward. Service, however meritorious which do not contribute to the ultimate success, do not give a title to salvage reward. Service which rescues a vessel from one danger but ends by leaving her in a position of as great or nearly as great danger, though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward."<sup>9</sup>

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<sup>8</sup> E.U., (1853); *The Lockwoods*, (1845); *The Zetah*, (1868); *The Camellia*, (1883); *The City of Chester*, (1884); *The Dart*, (1899); *The Tarbert*, (1921); *The Melanie*, (*Owners*) v. *The San Onofre (Owners)*, (1925) etc. See Kennedy, *ibid.* p. 33.

<sup>9</sup> *The Melanie (Owners) v. The San Onofre (Owners)* (1925).

Thus success means, in short, to save the whole or a part of a ship or the cargo (§ 800). The foreign laws regarding this point provide similar stipulations. For instance, as we are well aware from various cases, the preservation of some part at least of the *res* is essential to any salvage claim in England.<sup>10</sup> Consequently, there must be something saved other than life, from which funds will be raised for paying the salvage reward. In other words, for the saving of life alone without the saving of ship, cargo, or freight, salvage is not recoverable in the Admiralty Court. The *Renpor* (1883) in England is the most suitable case for elucidating this fact.<sup>11</sup>

### III

So far, we have briefly described three factors as essential features of the salvage service. From what has been mentioned above, we can understand that the salvage service does not aim at saving life, but *res*, and the life saving does not therefore belong to the legal salvage. The Commercial Law of Japan, for instance, has for that purpose the following provision, "A person who without any duty to do so has salvaged the whole or a part of a ship or the cargo....." (§ 800). In Commercial Law of Germany, it is similarly provided for as follows: "When in case of distress a ship or its cargo, being no longer....." (HGB. § 740). The judicial precedents, the *Cargo ex Sarpedon* (1877) and the *Medina* (1876) in England, for instance, were also based on the principle that the saving life alone can not be recoverable in Court. On the contrary, in case several persons jointly contributed to the salvage, any persons who rendered the salvage service in saving life may claim a share of salvage remuneration § 804 (2). This fact is made clear by the afore-said *Medina* case (1876) in England in which a ship was wrecked, while passengers and crew were taken off by a salvaging steamer and brought to the port of destination. The passage money was thereby earned by the owner of the wreck. It was then held that this earned freight constituted a fund out of which the life salvors might be paid. In modern times, however, the harshness of doctrine has been gradually softened by the principle that if lives were saved together with property a salvage award may be claimed. The provision of the Commercial Law of Japan (§ 804) is in the same direction. Question such as, what is the position if there were two groups of salvors, one saving lives, the other property, was really raised in England. Suppose in a case like the one just stated, that passengers and crew were taken off by certain boats, while the substantial part of the cargo was saved by another group of salvors as in the afore-said case of *Medina*. It

<sup>10</sup> See per Bruce, J., *The Hestia* (1895).

<sup>11</sup> See Kennedy, *ibid.* pp. 52-53.

was again held that a fund should be created from the property saved so that the life salvors may be remunerated from it. The *Cargo ex Schiller* case in 1877 referred to above is a precedent which has proved this point. The situation was clarified by Bagally, L. J., who declare, "The liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, ..... and that such liability is not general personal liability to be enforced in any circumstances whether the ship and cargo are lost or not, but is a liability limited to the value of the property saved from destruction..... as regards the right of life salvors to claim a reasonable amount of salvage, it is immaterial whether the property saved from destruction has been saved by salvors, as the expression is ordinarily understood, or by other means."

Though the right of life salvors claiming a salvage charges was gradually expanded, as well as mitigated, the situation has not yet been satisfactorily settled. For this reason, it has been provided that if salvage services are rendered to a British ship anywhere or to a foreign ship in British waters, and no or almost no property is saved, the Ministry of Transport may in its discretion award a sum out of the Mercantile Marine Fund.<sup>12</sup>

Thus the right of claiming salvage charge of life is in the tendency of approaching the like standing of salvage of cargo as days go by. The classical idea regarding the right of life salvors is based on the ethical sentiments of human being, which can not be estimated in terms of money. Burchard, in his work "*Bergung und Hilfsleistung in Seenot*" (S. 66), explained it with the term "*Humanitätsrücksichten*" (humanity considerations), while it was called it "*ethisch*" (ethical) by Wüstendörfer. It has hitherto been considered inappropriate by the legal circles to make the salved pay for their rescue or to make the shipowner or her mother country, to which the wrecked ship belongs, responsible for the rescue of her passengers. For instance, "*Deutsches Seerechtsausschuss*" (The Commission of German Maritime Law) does not approve from moral sentiments the salvage charges for saving life.

It is because in the first place we are all requested be willing to sacrifice ourselves at the risk of others and secondly it is practically impossible to claim the compensation against the mother country. In short, the salvage of life at sea is a kind of virtue originating from the mutual love or brotherhood and is in the tendency of being compensated among each other in the long run.<sup>13</sup>

It is provided for in "*Convention pour L'Unification*", "Il n'est du accume rémunération par les personnes sauvées, sans que, cepedant, il soit

<sup>12</sup> See Merchant Shipping Act, 1894. s. 544; Merchant Shipping (Mercantile Marine Fund) Act, 1898. s. 1 (1) (b).

<sup>13</sup> H. Wüstendörfer, a.a.O.S. 419.

porté atteinte aux prescriptions des lois nationales cet egard." (Art. IX (1)). The provision stands on the basis of the like spirit, but another part of the provision of the same article, "les sauveteurs de vies humaines qui sont intervenus à l'occasion de l'accident, ayant donné lieu au sauvetage ou à l'assistance, ont droit à une équitable part de la rémunération accordée aux sauveteurs du navire, de la cargaison, et de leurs accosoires" (Art. IX (2)) is based on the almost same idea as that of our Commercial Law (cf. § 804). The Commercial Law of Germany was amended in accordance with the "International Convention" effective as of the 7th of January, 1913. This is also, needless to say, founded on the like basis.

Now we are confronted with two alternatives in this connection according to one of which the saving of a ship in disaster should be left to the ethical sentiments bestowed upon men by God on the part of the would-be salvor, while the other alternative considers it desirous to legally stipulate the rescue of human life. Judging from the recent tendency, many countries are now coming to legally impose the liability to save human life on the ship master. The Maritime Conventions Act, 1911, provides that the ship master is liable for the rescue of any person in danger at sea, and this was agreed upon in the international convention by the major countries in maritime commerce. In England, the life salvage has become, by this Act, a statutory obligation the violation of which is punished as a criminal conduct. A legal obligation to render assistance is, furthermore, imposed on any ship receiving a wireless distress signal.<sup>14</sup>

It sometimes happens that the salvor threatens a ship in danger by sending a signal to the effect of "No pay no rope" in order to bid up the pay for the rescue. In fact, it is very unlikely that the agreement on salvage is fair to both parties concerned. The agreement is therefore scrutinized by the Court, which allots revises the agreement, if it is obviously unfair. There have been in fact many cases in England, which were taken care of along the above-stated line.<sup>15</sup> Probably such cases will gradually decrease in number, because the refusal to help without pay would now constitute a misdemeanour.<sup>16</sup> As was already stated, the Mercantile Marine Fund is now in existence in England for facilitating the payment for the saving of life.

The legal nature of reward for the saving of life is different from that of charges for the salvaged property. In fact, the salvage charges are paid in the latter case for the benefit, which a ship or the cargoes actually raised, while the salvage charges are in the former case encouraged by

<sup>14</sup> Merchant Shipping (Safety Convention) Act, 1949. S. 22.

<sup>15</sup> *The Altair*, (1897); *The Rialto*, (1891); *The Port Caledonia* and *The Anna*, (1903). *Akerblom v. Price, Potter, Waller & Co.*, (1881); *The Medina*, (1876).

<sup>16</sup> See Lord Chorley & Giles, *ibid.* p. 267.



the policy of the law to the same effect. Dr. Lushington has already clarified this difference in the *Fusilier* case (1864), and stated as follows: "Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to the benefit received, combined with a just regard, also, to the general interests and commerce. It is a political as well as a mercantile transaction,—so says Lord Stowell, so says Mr. Justice Story—as, for instance, when a larger reward is given because of the greater value of the property saved." (see Carver's *Carriage of Goods by Sea*. p. 555.)

The idea involved in the judgement given by Dr. Lushington as above-mentioned has gradually borne fruits and finally developed into a system of the Mercantile Fund, or succeeded in bringing about a law, which makes it obligatory for any ship to render assistance in case of emergency to save life. Here we see again the realization of the material progress of humanism and the economic life of mankind.

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