An Overview of Salvage Law – Avoiding Salvor Exposure

Larry DeMarcay, Partner
Fowler Rodriguez Valdes-Fauli
(504) 523-2600
ldemarcay@frvf-law.com

July 1, 2011

By the Implementation of a Salvage Plan

For those of you who are in the salvage business, you probably know and understand salvage law like the back of your hand. For the rest of us who operate in the marine environment, United States-based salvage laws can be confusing. Add a crisis to the mix and you have a recipe for potential problems down the road. As such, it may be helpful to gain an understanding about the various types of salvage, when a salvage claim exists and plan how to respond to a potential salvage situation prior to an unfortunate event occurring.

Salvage is the process of rescuing a vessel, its cargo, or other property from peril. Salvage under the general maritime law is a legal concept that tries to be fair to both the distressed property owners and the salvors (the persons rendering aid). The law provides an inducement for mariners to save property that is in distress because it provides for a salvage award to the salvor.

Pure Salvage

There are two types of salvage. “Pure salvage” occurs when the salvor is a volunteer. “Contract salvage” occurs when the salvor and the distressed vessel enter into an agreement concerning the salvage effort.

For a salvor to bring a pure salvage claim under the general maritime law, three elements must be satisfied. One, there must be a marine peril placing the property at risk of loss, destruction or deterioration. A marine peril occurs when there is a reasonable apprehension that the property is in a situation that might expose it to loss or destruction.
Two, the salvage service must be voluntarily rendered and not required by an existing duty or by contract. A contract or other obligation between the salvor and the distressed vessel precludes voluntariness. Additionally, the salvor must have the express or implied consent of the vessel in distress before it renders aid. Consent is present if a reasonably prudent person would have requested or accepted the salvage services under the circumstances. A vessel that is abandoned by her master and crew does not require consent.

Three, the salvage efforts must be successful. This element is called the “no cure, no pay” rule. A salvage team could work for days, but if unsuccessful, the team would receive nothing for its efforts.

The exception to the “no cure, no pay” rule involves potential environmental damage. The 1989 International Convention on Salvage gave salvors the incentive to minimize environmental damage even if they cannot save the property. For example, if salvors are not successful in saving a vessel but still manage to prevent a major oil spill, they can obtain compensation from the owner of the vessel to reimburse them for their salvage expenses.

When a salvor meets all three requirements, they can receive an award based upon the value of the rescued property. Judges or arbitrators base the award upon a variety of factors, including the value of the vessel. Traditionally, only “maritime property” such as vessels, cargo, freight, bunkers, etc. can be the object of an act of salvage.

A salvor can bring a pure salvage claim in rem against the property saved or in personam against its owner. Salvors have a lien upon the property saved, which enables them to maintain a suit in rem against the ship or cargo. A suit for pure salvage needs to commence within two years of the date the salvage service.

There are no rigid categories of salvors. Salvors can be any volunteer who renders salvage services such as an individual, corporation or a government. Essentially, any person that performs an act of salvage, as long as he is not under a pre-existing duty to perform the act in question, may bring a claim for pure salvage.
As a rule, the vessel’s master and crew are not entitled to bring a claim for pure salvage because they already have a duty to preserve the ship and cargo. However, the vessel crew can become individual salvors if their employment contract terminates before the salvage service commenced. Several ways to terminate the crew’s employment includes the authorized abandonment of the ship under the master’s authority, the master’s discharge of the crew concerned, or the capture of the vessel in a hostile encounter.

In determining how much a judge or arbitrator should award for pure salvage, several factors are considered. These factors include:

(a) the value of the vessel (The value of the vessel prior to the incident less the cost of repairing any damage that occurred prior to and during the salvage);
(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
(c) the measure of success obtained by the salver;
(d) the nature and degree of danger;
(e) the skill and efforts of the salvors used in salvaging the vessel;
(f) the time, expenses and losses incurred by the salvors;
(g) the risks encountered by the salvors or their equipment;
(h) the promptness of services rendered;
(i) the availability and use of vessels or other equipment intended for salvage operations;
(j) the state of readiness and efficiency of the salver’s equipment and the value thereof.

The judge or arbitrator has significant discretion in considering these factors. Salvage awards vary based on the facts of each claim. The award, however, cannot exceed the total value of the property saved.

**Contract Salvage**

Parties often make an agreement for contract salvage via a wireless conversation between the master of the salvage vessel and the master of the distressed vessel. The performance of the salvage service is for a fixed price, often without regard to success. If a contract is entered into while the vessel was in an *in extremis* situation, the courts will give it close scrutiny and may set it aside if the compensation is grossly exorbitant, if the salver took unfair advantage or was guilty of fraud. However, if the parties fairly negotiated the agreement and the parties consented, the terms are enforceable.
Contract salvage is highly preferable to pure salvage. If the salvage effort is pure salvage, the potential award will be considerably higher because it is determined by the court based upon several factors. On the other hand, parties negotiate contract salvage for fixed terms for services rendered.

Just because a ship owner requests salvage services and the salvors in response furnish it, standing alone, does not create an implied contract. The salvors can still argue that they are entitled to a pure salvage award. The distressed vessel should make sure to negotiate the terms for the salvor’s work to ensure that the salvor is not proceeding on a pure salvage basis.

Vessel owners and charterers should also be aware of the Lloyd’s Open Form (LOF), which is the most popular standard salvage contract. Many towage vessels have blank LOF’s in their wheelhouse and often push for the distressed vessel to sign the LOF. However, the distressed vessel should negotiate a rate for the salvage services rather than signing the LOF. Although the LOF is a contract, salvage services performed pursuant to the LOF are considered to be pure salvage, not contract salvage, because the LOF provides that the contract salvor is engaged on a “no cure, no pay” basis, and it leaves the reward amount open in the event of success. Accordingly, ship owners and charterers should avoid signing an LOF unless they are in a catastrophic situation and have no time to negotiate a fixed compensation contractual agreement.

The LOF also contains a choice of law provision for English law and an arbitration provision in London for contract disputes. However, United States courts have declined to enforce the arbitration provision when the salvage occurred in United States waters between United States citizens.

Unfortunately, incidents that place vessels in distress happen from time to time. It is important that each vessel operator have a plan in place to deal with these unplanned events. As vessel operators crave certainty and prefer to avoid litigation, they should try to avoid a pure salvage situation, where the salvage award is beyond the company’s control, at all costs. The negotiation of contractual terms prior to the salvage operation beginning will save the company, and its underwriters, a potential headache in the end.