

# Salvage contracts

*John Reeder QC considers the scope and application of art 7 of the International Salvage Convention 1989*



In the past there have frequently arisen disputes as to whether a master had authority to enter into a particular salvage contract. Often the dispute centred upon whether the place of redelivery agreed was appropriate in all the circumstances. The plank for the attack was provided by the English law rules relating to agency of necessity. (See *The Choko Star* [1990] 1 Lloyd's Rep 516; *The Pa Mar* [1999] 1 Lloyd's Rep 338.) This article focuses on the extent to which art 7 of the International Salvage Convention 1989 may or may not impact on the changes brought about by art 6.2 of the Convention as regards the application of the principles of agency of necessity to salvage contracts, and, specifically, Lloyd's Open Form (LOF).

The scope of the debate can be best defined by taking a particular set of hypothetical facts and examining the application of the relevant provisions of the Convention to those facts. Suppose that a casualty is immobilised as a result of an engine breakdown. A LOF is entered into by the ship owners with salvors which provides for redelivery of the casualty at the port of destination under the bill of lading contract, which will involve a tow of several thousand miles and a route whereby the flotilla will pass a number of suitable ports of refuge. Plainly the reward will be greater than it would be if the tow were shorter and some intermediate port agreed as the place of safety. Have cargo owners, for example, any redress under art 7 of the Convention in these circumstances?

## Article 6 of the Convention

The principal provisions of the Salvage Convention are incorporated into UK law by s 224 and sch 11 of the Merchant Shipping Act 1995.

Article 6.1 provides:

*"This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication."*

The significance of this is that except in cases where there is an express or implied contracting out of the Convention, the rights and obligations of the parties are governed by the Convention. In consequence, any question of interpretation of the Convention must start with the Convention itself and reliance upon pre-Convention UK law and practice as an aid to interpretation must be very cautious, bearing in mind that (i) the Convention does not follow pre-existing UK law and practice in a number of important respects and (ii) the UK is only one of many jurisdictions, with differing pre-existing law and practice, which have adopted the Convention, so that if a strictly domestic or insular approach to construction is adopted by each of the various signatories, a Convention which is designed to create uniformity will in fact produce diversity.

Article 6.2 provides:

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

This provision protects salvors from disputes as to whether the other party to a salvage contract (usually the casualty's master or her owner) had authority to bind the owners of all the property at risk. Consequentially, it relieves them of the need to seek authority from all the salvaged interests as to the terms of the agreement. Its effect as far as English law is concerned is to reverse the decision in *The Choko Star*.

Its significance is that the requirements are not circumscribed by "reasonableness". There is no express provision that the terms of the salvage contract should be reasonable, e.g. as to the port of redelivery. Further it is not necessary to imply such a requirement, and to do so would go some way to

defeat the intention of the Convention to encourage salvage operations. The cargo owner's remedy lies under the contract of carriage.

Before examining the terms of art 7 of the Convention there is a preliminary matter that can be disposed of shortly: it has been suggested that since the cargo owners can no longer contest the authority of the master or the owners of the casualty to bind them to a contract for salvage services, Article 7 should be construed liberally because it provides them with protection against abuse. However, art 7 was not intended to redress the possibility of abuse of the authority conferred by art 6(2). Rather it is designed to provide a remedy for unfairness in the circumstances defined in the Article, which is available to salvors and the owners of all property at risk alike. Nonetheless, within the constraints of the language used in art 7, it should be construed purposively, for instance by adopting a more liberal approach to the phrase "undue influence" than would be allowed under English domestic contract law.

Article 6.3 provides:

*"Nothing in this article shall affect the application of Article 7 nor duties to prevent or minimise damage to the environment."*

The significance of this provision is that it prevents parties to a salvage contract from opting out of arts 7 and 8.1(b) and 8.2(b) of the Convention.

## Article 7 of the Convention

Article 7 provides as follows:

*"Annulment and modification of contracts  
A contract or any terms thereof may be annulled or modified if –  
(a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or*

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

### Limitations

This wording gives rise to a number of considerations as to its true construction. First, comparison of the terms of arts 7(a) and 7(b) make it clear that while art 7(b) is limited to terms concerning remuneration for salvage services, art 7(a) is not so limited. Thus a term agreeing the place of safety under a LOF salvage contract is one which is within the scope of art 7(a).

### Jurisdiction

Secondly, art 7(a) confers a jurisdiction to annul or modify a salvage contract if, but only, if the specified conditions are met. The first is that the contract has been entered into under undue influence or the influence of danger. Usually influence of danger alone is relied upon to impugn the offending provision. The second is that the term (or the entire contract) which the applicant for relief seeks to have annulled or modified is inequitable. These two requirements are linked by the conjunction "and".

Does the fact that a salvage contract is not entered into unless the vessel is in danger automatically cause the first requirement to be fulfilled or is some peculiarly exigent danger required? If the mere presence of a salvage danger were sufficient then all that would be required is the fulfilment of the second condition. As far as danger is concerned, there is no need to draw a distinction between different levels of danger. In the case of both undue influence and danger, the threshold for the jurisdiction is proof that the applicant's bargaining power was vitiated by one or other of these matters.

Accordingly, in cases where the applicant relies upon danger in order to found jurisdiction to annul or modify a particular term, he must demonstrate that his power to negotiate was removed altogether or significantly eroded by reason of the actual or reasonably apprehended danger faced by the property at risk at the time the bargain was struck. Of course, the greater and more immediate the danger, the more likely it will be that he will be able to discharge his burden of proof on this point and vice versa.

It is not surprising that the jurisdiction conferred by arts 7(a) and (b) should be formulated in the way that they are. As

far as terms relating to remuneration are concerned, the mischief to be addressed is the agreement to an amount which in the event proves to be excessively too high or too low for the services actually rendered. The English court has long been willing to modify such bargains, even where there has been no undue influence or particularly exigent danger.

As far as other terms are concerned, the Convention strictly circumscribes the circumstances in which the tribunal is given jurisdiction to re-write the salvage contract. The reason for this is that in general courts are slow to interfere with private bargains and will only intervene to re-write them in circumstances where they are manifestly unfair and unjust.

In *Akerblom v Price, Potter, Walker & Co* (1881) 7 QBD 129 at p 133, Brett LJ was dealing with an appeal from a trial in which the jury had decided that services by pilots who had gone out to a vessel in grave danger which was flying a pilot flag were not salvage services. In rejecting the defendants' contention that it was a rule of law that the vessel had to be damaged before a pilot could claim salvage, he said:

*"The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just between the parties...If the parties have made an agreement, the Court will enforce it unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances... It follows that there can be no such rigid rule or law or interpretation of*

*facts, as is suggested on behalf of the defendants."* (Emphasis added.)

It may be thought that this decision is authority for the proposition that the court could interfere in any case where the contract (or a term of a contract) was manifestly unfair and unjust. It is doubtful if the decision goes this far by reason of the reference to unequal bargaining position earlier in the passage quoted, suggestive of one party's choice being overborne by the situation of danger. However that may be, where a claim for modification of a term of a salvage contract is brought, the scope of the jurisdiction is that provided by art 7(a) itself. If the jurisdiction formulated by Brett LJ is wider than the Convention it is inconsistent with it, and any such wider jurisdiction cannot survive the introduction of the Convention into UK law.

### Influence

Thirdly, there is no nexus between arts 7(a) and 7(b). There is nothing surprising about the fact that art 7(b) is not subject to a requirement of undue influence or influence of danger. This is because the approach in the two sub-paragraphs is very different. Thus, art 7(a) requires the court to consider the circumstances at the time when the agreement was made while art 7(b) requires to the court to evaluate the fairness of the agreed remuneration in the light of hindsight: art 7(a) applies only if one party's contractual will has been vitiated, art 7(b) is unconcerned with that consideration.

Fourthly, it is implicit in the wording used in art 7(a) that the party seeking relief must show a causal relationship between the undue influence or the influence of danger and the inequity of the term. In other words that party must show that he, or the person acting on his behalf, agreed the inequitable term because of the undue influence or the influence of danger.

### Burden of proof

Fifthly, the question of whether the burden of proof under art 7(a) has been discharged by the party seeking relief must be determined in light of the facts which were or ought to have been known at the time the contract was entered into.

### Comment

It will readily be appreciated that in a simple case of immobilisation, there will

be considerable difficulty confronting the owners of cargo in overcoming the first hurdle, namely, that the ship representative's mind or choice was overborne by the danger confronting the casualty. As regards the second limb, it is a question of fact in each case as to whether the particular term, i.e. the place of redelivery in the example under consideration, may be regarded as inequitable.

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