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Wreck removal: choosing the right contract

Sam Kendall-Marsden, syndicate director at The Standard Club, highlights the main differences between the principal wreck removal contracts and flags issues to consider in contract selection – experience gained through managing a number of recent major wreck removals, including *Costa Concordia* and *Amadeo I*

► *Sam Kendall-Marsden, syndicate director, The Standard P&I Club*

It is prudent in any wreck removal operation to hope for the best but plan for the worst – a precautionary principle that extends beyond operational matters to the contract under which salvors are engaged. This is because if things do not go to plan, the contract will be the ship owner's last line of defence. The first decision to make is which of the available contracts to select, based on a sound working knowledge of their key features, applied to the known facts.

During the initial phase of casualty response there will often be a need to act swiftly and decisively to ensure the necessary resources are in place to address the situation on the ground. Salvors will often offer a Lloyd's Open Form (LOF) contract which is well-known, well-used, has an elegant simplicity in its terms and is consequently suited to emergency-type situations.

However, it will not be possible to accurately forecast the remuneration the salvors will receive, which will be assessed in accordance with the principles embodied in Article 13 of the 1989 Salvage Convention (the Convention), including the skill and efforts of the salvors and the value of property salved. The ship owner does enjoy the advantage, though, that all of those whose property has been salved – including cargo interests – will be required to contribute to the salvage award in proportion to the relative values of their property salved. He will not, therefore, initially be left to bear the financial burden on his own.

◄ **Amadeo I**, *a recent casualty that The Standard P&I Club is currently handling*

LOF is a 'no cure, no pay' contract, which – in broad terms – means that the salvors are not entitled to be remunerated if the operation is unsuccessful. However, there is an exception to this principle through the inclusion of the Special Compensation P&I Clause (SCOPIC) in the contract. If SCOPIC is invoked by the salvors, they will be remunerated in accordance with tariff rates for their craft, personnel and equipment, plus a 25 per cent bonus.

This applies irrespective of success, although if SCOPIC remuneration does not exceed compensation assessed under Article 13 of the Convention, the salvors suffer a penalty of 25 per cent of the difference (and do not receive any remuneration assessed under SCOPIC). It is also worth bearing in mind that Clause 9 of SCOPIC prevents termination if the relevant authorities do not allow salvors to demobilise. This could be an important consideration in cases where the authorities are heavily involved and it has, in fact, resulted in considerable escalation of costs in recent wreck removals.

The main alternatives to LOF are the BIMCO Wreckhire, Wreckstage and Wreckfixed contracts, the 2010 versions of which being the most recent. They are standard contracts which can be used without amendment to their boilerplate terms, although variations are commonly agreed in practice.

While BIMCO's stated aim is to "represent fairly the interests of both parties", Wreckhire is the most salvor-friendly of the contracts, and Wreckfixed the most ship owner-friendly, with Wreckstage sitting somewhere in the middle. A key differentiator relates to payment: Wreckhire is a 'time and materials' contract, with salvors paid agreed daily rates for craft, personnel and equipment, and third-party expenses usually charged at cost plus an uplift.

At the other end of the spectrum, Wreckfixed is (like LOF) a 'no cure, no pay' contract, with salvors receiving a pre-agreed lump sum upon successful completion of the operation. Wreckstage is also a lump-sum contract, with payments broken down into stages, but payment does not depend on overall success – each stage payment is irrevocably earned once its payment trigger has been satisfied.

Importantly, under Wreckhire and Wreckstage salvors are entitled to additional compensation at agreed rates for delays caused by factors beyond their control, a provision absent from Wreckfixed.

The wreck removal contract, though, is more than a document that defines the scope of work salvors agree to perform in order to receive payment: it is also a legal mechanism that allows for the allocation and transfer of risk. At its most basic level, the contract determines which of the parties bears the risk of non-completion of what might be a risky operation with uncertain prospects of success.

The risk is entirely on salvors under Wreckfixed, although with an assumption of increased risk comes an expectation for enhanced reward, which will influence the overall contract price. Ship owners bear the risk of non-completion under Wreckstage and Wreckhire, more so in the case of the latter, where they will be required to pay the salvors until the conclusion of services rendered (plus demobilisation). With Wreckhire, the risk of time and consequent cost overruns is also on the ship owner who – barring actionable fault – will pay the salvors at the agreed rates for the duration of the operation.

At the other end of the spectrum, Wreckfixed provides the certainty of almost complete risk transfer with defined cost. Wreckstage is a compromise between the two positions – a lump sum but without the overall contingency of success. 'Extra costs' – such as port expenses and local taxes – are to be met by the ship owner under Wreckhire but by the salvors under Wreckfixed. Under Wreckstage, these liabilities are to be agreed by the contracting parties.

The position is similar with regard to obtaining permits and permissions to do the work – the onus is on the salvors under Wreckfixed and Wreckstage, and on the ship owner under Wreckhire.

In practice, what can be achieved will be a factor of the relative strengths of the parties' bargaining positions. It is also worth bearing in mind that the form of contract selected is only the beginning. With the overall legal framework in place, the parties will then need to consider what variations to the standard contractual wordings might be necessary to reflect the precise circumstances of the case.