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Conditions for obtaining salvage award

- with emphasis on the concept of danger

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Table of Contents

1. Introduction and methodology 5

1.1 Presentation of the subject 5

1.2 Legal demarcation 6

1.3 Methodology 7

1.4 Structure and approach 8

2. Conditions for obtaining salvage award 9

2.1 Introduction 9

2.2 Freedom of contract 9

2.2.1 Legal provisions are not mandatory 9

2.2.2 Salvage agreements 10

2.2.3 Implicit salvage agreements 11

2.2.4 Importance of clarifying terms of salvage agreements 12

2.3 What can be the subject of salvage? 13

2.3.1 Introduction 13

2.3.2 "Ship and other objects" 14

2.3.3 Life salvage 15

2.3.4 Prevention of environmental damage 15

2.3.5 Other financial interests 16

2.3.5.1 In general 16

2.3.5.2 Freight at risk 16

2.3.5.3 Liability salvage 17

2.4 Who can be a salvor and thus claim salvage award? 18

2.4.1 Definition of salvor 18

2.4.2 Exceptions from the "salvor´s" right to claim salvage award 19

2.4.2.1 In general 19

2.4.2.2 Misconduct of salvor 19

2.4.2.3 Right to refuse salvage services 19

2.4.2.4 “Voluntariness” 21
2.4.2.4.1 In general........ 21
2.4.2.4.2 Contractual duty........ 21
2.4.2.4.3 Public duty........ 24
2.4.2.4.4 Search and Rescue teams and other non-public authorities........ 27
2.4.2.4.5 Criticism of salvage awards to public authorities? 27
2.5 The need for a “useful result”........ 28
2.5.1 In general........ 28
2.5.2 Connection with “place of safety” 28
2.6 The condition of “*wrecked*” or “*in danger*” 29
2.6.1 Introduction........ 29
2.6.2 The condition of “*wrecked*” 29
2.6.3 Distinction between “wrecked” and “in danger” 30
2.6.4 The condition of being “in danger”........ 31
2.6.4.1 General comments on the concept of danger in salvage 31
2.6.4.2 A caveat regarding the Icelandic approach to the condition of danger 32
2.6.4.3 The type of danger 33
2.6.4.3.1 Physical danger........ 33
2.6.4.3.2 Danger to proprietary rights 34
2.6.4.3.3 Other types of danger 34
2.6.4.3.3.1 Danger of delay and loss of earnings........ 34
2.6.4.3.3.2 Danger of liability........ 35
2.6.4.4 How to assess danger?........ 36
2.6.4.4.1 Objective assessment........ 36
2.6.4.4.2 Reasonable apprehension or misapprehension of danger........ 37
2.6.4.4.3 Position of English law on “reasonable apprehension” of danger 39
2.6.4.4.4 Voluntary salvage or request salvage operations........ 40
2.6.4.5 Degree of danger........ 42
2.6.4.5.1 Minimum degree of danger 42
2.6.4.5.2 Degree of danger relevant when assessing amount........ 43
2.6.4.5.3 Degree of danger and “voluntariness”........ 43

2.6.4.5.4 Degree of danger and alternative assistance 43
2.6.4.6 Alternative assistance 44
2.6.4.7 Burden of proof regarding danger 44
2.6.4.8 Duration of danger and connection to “place of safety” 45
2.6.4.8.1 Importance of establishing when danger has surpassed 45
2.6.4.8.2 When has a “place of safety” been reached? 45
2.6.4.9 Danger not present for all property or different degrees of danger 47
2.6.4.9.1 Difference in existence or degree of danger 47
2.6.4.9.2 Different duration of danger 49

3. Conclusions 49

Bibliography 52

Table of Statutes 54

Table of Cases 55

1. Introduction and methodology

1.1 Presentation of the subject

Maritime voyages and shipping in general almost always entail some level of risk. It is simply an unavoidable element of shipping that events occur that can put the vessel, cargo or crew in harm´s way. In the vast majority of instances vessels are able to mitigate these risks and safely navigate and reach their destination intact. However, sometimes the vessel may require assistance in order to avoid damage. When that occurs, it is necessary to determine whether the assistance provided should be considered as salvage, thus enabling a claim for salvage award, or if it should be considered as assistance that does not fall under the definition of salvage. The importance of differentiating between the two is mainly due to the fact that salvage awards tend to be much higher than remuneration for services that are not considered salvage. In order to be able to claim salvage award certain conditions need to be fulfilled and it is the objective of this thesis to explore, to varying degree, these conditions and how they are interpreted.

The conditions for obtaining salvage award according to the IMO´s International Convention on Salvage from 1989[1] are quite simply that "*salvage operations which have had a useful result give right to a reward.*"[2] Salvage operations are defined as "*any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever*"[3]. When determining what may need further examination in order to assess whether salvage award can be claimed or not, the term "in danger" stands out and indeed a large part of this thesis will address the concept of danger in this regard.

This thesis is not an exhaustive account of all possible conditions that may come into consideration when assessing when salvage award can be claimed. The intention is rather to set out the main points of when salvage award can be claimed and to shed light on the basic issues in that regard, while placing main emphasis on examining the condition of danger. The other conditions for salvage award will be examined to a different extent and some will only be discussed briefly.

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[1] International Maritime Organisation. *The International Convention on Salvage.* Signed in London on 14 April 1989. Hereinafter referred to as the "Salvage Convention"
[2] Salvage Convention. Article 12.
[3] Salvage Convention. Article 1(a).

1.2 Legal demarcation

Each state regulates salvage issues within their respective legal jurisdictions and there is no international salvage law that can be applied universally. Therefore, in order for this thesis to provide any practical insight, there is need to determine under which national legal regime the topic will be addressed. Fortunately, most prominent maritime nations have harmonized their rules on salvage by agreeing on and implementing the Salvage Convention and as of January 2019 there are 71 contracting states to the convention that represent approximately 53% of the world´s tonnage[4] [5].

The Salvage Convention regulates inter alia the necessary conditions for when salvage award can be claimed. Among the contracting states are the Iceland and Norway and the U.K. and they have all implemented into their respective national laws the provisions of the Salvage Convention.[6] [7] Therefore, the rules and principles that are applicable in said countries regarding salvage issues, inter alia on the conditions for obtaining salvage award, are based on the same text of the Salvage Convention and the provisions in the respective national legislations are the same.[8]

This thesis is intended to be practical in an Icelandic context since that is the nationality and legal background of the author. Since Icelandic and Norwegian law on salvage issues go hand in hand, the legal approach in both countries will be examined. For sake of clarity, it should be highlighted that the author knows of no special considerations of Icelandic law regarding conditions for salvage award that in theory do not apply in Norway and vice versa, with the obvious caveat that case law in either country has no binding effect in the other.

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[4] International Maritime Organisation. "Status of Treaties"

[5] International Maritime Organisation. "Status of Conventions"

[6] All 3 countries´ legal systems are based on the principle that international treaties do not become part of national legislation until they have been given force of law as legislation passed by the legislator/Parliament. Cf. Brice. *Brice on Maritime Law of Salvage*. P. 20

[7] The Salvage Convention was enacted into English law as of January 1 1995 by implementing its provisions into the Merchant Shipping Act 1995. The provisions of the Salvage Convention were implemented into Icelandic law as of January 1 1999 with act no. 133/1998. In 1996 the convention was incorporated into Chapter 16 of the Norwegian Maritime Code of 24 June 1994 no. 39 (hereinafter referred to as "NMC").

[8] Comparison of the relevant provisions of the Merchant Shipping Act, NMC and IMC shows there is no significant discrepancy with respect to the conditions of salvage award. Furthermore, cf. art. 2 of the Salvage Convention entails that the contracting states are obliged to implement and enforce the provisions of the convention. Art. 30 lists four instances when a contracting state may reserve the right not to apply the provisions of the convention, but they are not relevant for the subject of this essay.

1.3 Methodology

The issues examined in this thesis have been explored in a number of ways. Obviously, by studying the legal text of the Salvage Convention and the national legislations that incorporated it, as well as the preparatory works behind it. Case law in Iceland, Norway and U.K. was explored as well as legal text books and articles in journals by scholars on the matter from all three nations. Furthermore, various articles and reports that were posted online have been explored. Due to relative scarcity of Icelandic case law and legal scholars that have addressed the topic, main emphasis will be on how the topic has been dealt with under Norwegian and English law.

The case law presented in this thesis are mentioned to illustrate certain issues that may arise when assessing the conditions for salvage. The selected case law either aims to illustrate an issue of relevance or highlight certain dilemmas where the legal text itself may not provide sufficient clarity. References to English case law or legal theory will be made when there is lack of Norwegian or Icelandic precedents to illustrate the issue at hand.

Even though the legal provisions on the conditions for salvage award in Iceland, Norway and the U.K. are more or less equivalent and based on the same text of the Salvage Convention, caution must be exercised when attempting to apply rulings, judgements and legal theories from one legal jurisdiction to another.

Furthermore, although the statutory interpretation of the Salvage Convention may be the same between these countries, aspects of other fields of law, such as contract law principles may vary. This can be of relevance, e.g. when dealing with salvage agreements and issues on duress cf. chapter 2.2.1. below, and may prevent a legal precedent from one country from being applied in another.

However, the fact remains that strong arguments are in favour of maintaining a harmonized interpretation of the Salvage Convention and the conditions for salvage award. Hence a valid and well-reasoned ruling regarding the conditions for salvage award under Norwegian or English law can be of relevance to an Icelandic court and have an impact, not least on an issue where there is no pre-existing case law in Iceland. The same applies to legal arguments

and theories provided by Norwegian or English legal scholars or industry experts. If there appears to be any discrepancy between the abovementioned legal jurisdictions on how to interpret the conditions for obtaining salvage award, that will be pointed out.

Furthermore, it should be noted that maritime law in Iceland has traditionally been heavily influenced by the maritime codes of the other Nordic countries. The current Icelandic maritime code no. 34/1985[9] (IMC) was specifically intended to further harmonize Icelandic maritime law, albeit not fully, with that of the other Nordic countries.[10] It is generally accepted, insofar as Icelandic legal provisions are based on provisions from the other Nordic countries, that corresponding Nordic case law can be of importance for the interpretation of Icelandic law[11].

1.4 Structure and approach

In the following, the conditions for obtaining salvage award will be addressed systematically, where the lion share will be afforded to the condition of danger. The first issue to discuss in chapter 2.2. is the principle of freedom of contract when dealing with potential salvage incidents. This means in effect that parties are always allowed to agree on whether or not the assistance provided shall be considered salvage and consequently effected under salvage terms or not.

In chapter 2.3. the issue of what can be subject of salvage will be addressed. E.g., is it only the successful salvage of vessels and other property at sea that can form the basis for award or can the salvage of other financial interests at risk be of relevance?

In chapter 2.4. the issue of who can be considered a salvor and thus claim salvage award will be addressed. I.e., is anyone who successfully assists a vessel in danger entitled to a salvage award or are there limitations in that regard.

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[9] The Icelandic Maritime Code ("Siglingalög"), Act no. 34/1985, hereinafter referred to as "IMC".
[10] The preparatory works to the IMC. Althingistidindi 1984. P. 1040.
[11] Sigurdsson, Bull & Falkanger. *Sjóréttur.* P. 39, 40, 461.

Chapter 2.5. will briefly address the fundamental principle of "no cure, no pay" which reflects the necessary condition of "success" or "useful result" of the salvage operation in order to obtain a salvage award.

Chapter 2.6. is the main part of this thesis, where the concept of danger will be examined thoroughly. Salvage award can only be claimed if the salved property was either wrecked or in danger at the time the salvage operation took place. As will be discussed, there are numerous issues that need to be contemplated here and not always clear lines to follow when determining if there was "danger" or not.

Finally, in chapter 3, the main conclusions of the thesis will be summarised.

2. Conditions for obtaining salvage award

2.1 Introduction

If the salvage operation, i.e. any act that has the purpose of rendering assistance to a ship or other objects that have been wrecked or are in danger, produces a useful result, then the salvor is entitled to a salvage award.[12] These are the essential conditions for obtaining salvage award but in addition there are further issues that need to be considered, beginning with the principle of freedom of contract.

2.2 Freedom of contract

2.2.1 Legal provisions are not mandatory

Before addressing the particular conditions for salvage award, it is necessary to point out that the legal provisions on salvage are not mandatory and can always be negotiated.[13] If no salvage agreement has been made then the ordinary rules of the Salvage Convention as they have been implemented in the IMC or Norwegian Maritime Code (NMC) apply, but the parties are always free to negotiate differently as they see fit. This principle of freedom of contract means that the parties involved in a salvage situation can e.g. agree on whether the

[12] Cf. IMC section 167 cf. 163(a) and the NMC section 445 cf. 441(a) and the Salvage Convention article 12 cf. 1(a).

[13] Cf. Salvage Convention article 6, the IMC section 165 and the NMC section 443. However as stated therein, no agreement can be made that limits the obligation to prevent environmental damage.

assistance provided shall be considered salvage and effected under salvage terms or commercial terms, or they could agree on what conditions need to be fulfilled in order for the salvor to receive remuneration.

Consequently, it must be considered in the following discussion that all legal provisions, case law and other potential legal arguments regarding whether the conditions for obtaining salvage award have been fulfilled only apply if parties have not made specific agreements to the contrary. However, it must also be borne in mind, that if a specific salvage agreement has been made, it can also be set aside or modified if it was concluded under undue influence or under the influence of danger (duress) and if it would be unreasonable to rely on it. The same applies if the agreed amount is not reasonably proportionate to the work that was performed.[14]

2.2.2 Salvage agreements

Even though there is no need to establish a contractual relationship between salvor and salvee since the legal regime on salvage applies unless otherwise agreed, in most cases salvage operations are performed on a contractual basis.[15] However, with respect to the situation in Iceland, it should be noted that in most salvage cases between Icelandic parties, there is usually not a formal agreement regarding the salvage services and consequently parties most often rely on the provisions of the IMC.[16]

Where salvage agreements have been made, they are usually done by standard contracts where the “Lloyds Open Form” (LOF) is the most commonly used internationally.[17] [18] [19]

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[14] Salvage Convention article 7, the IMC section 165(3) and the NMC section 443(3).
[15] Baughen. *Shipping Law.* P. 296.
[16] Sigurdsson, Bull & Falkanger. *Sjóréttur*. P. 484-485.
[17] Kennedy & Rose. *Law on Salvage*. P. 360-361.
[18] According to a questionnaire on the review of the 1989 Salvage Convention sent to maritime associations of various nations from the Comité Maritime Internationale, the LOF is the most commonly used standard form, but it is not necessarily more often used than the various national agreements or legal remedies available in each state, see further at: https://comitemaritime.org/wp-content/uploads/2018/05/Replies-of-NMLAS-to-2-nd-questionnaire.pdf
[19] The use of LOF has been on a steady decline in recent years as it has been perceived by many as too rigid and expensive for shipowners to adhere to its provisions, cf. http://www.gard.no/web/updates/content/23582625/is-the-lloyds-open-form-salvage-contract-dying

It should be noted that agreeing on standard salvage contracts might have some potential drawbacks for the salvee. For example, by agreeing to the LOF, it is at least implied if not agreed with a binding effect, that there is in fact a salvage situation at hand that warrants a salvage award.[20] The 1994 Scandinavian Salvage Contract similarly states in its preamble that the vessel is in danger ("*in distress*") and although the LOF does not include a similar express statement the effects are the same.[21] Accordingly, if such an agreement has been made but it is later proven that the casualty was not as serious as thought at the time of agreement, the salvee runs the risk of effectively being prevented from later on claiming that the services rendered were in fact not salvage services.[22] Accordingly, the salvee could potentially be better off by not signing a salvage agreement but instead letting the relevant legal provisions on salvage determine whether or not salvage award is due. However, in practise the salvor would most likely be less inclined to accept such terms thus leaving the salvee with not much of a choice other than to agree on a salvage contract, depending on the assessed level of emergency.

2.2.3 Implicit salvage agreements

It is also possible that salvage agreements can be made implicitly, i.e. no formal agreement may have been made, but the facts of the case are such that the manner in which the salvee requested assistance are equivalent to offering a salvage contract with a salvor.

For example, if the ship in distress radios for assistance on an emergency channel or otherwise requests for aid in such fashion that signals that danger is present and immediate help is required. In the Norwegian Supreme Court case *LOS 102*[23], the passenger craft Askepott towed the pilot vessel LOS 102, which had a malfunctioned rudder in a dangerous area at night time. The LOS 102 was considered in danger when it was towed by the Askepott which was accordingly awarded salvage. Although, not specifically addressed by the court in the case, it can be argued nonetheless that the salvage was *de facto* already on contractual grounds, since aid was requested on the emergency VHF channel. In addition, it

[20] Kennedy & Rose. *Law on Salvage*. P. 166-167.
[21] Rosaeg. *Misapprehension of peril in salvage.* P. 12.
[22] Kennedy & Rose. *Law on Salvage*. P 393-394. I.e. assuming the salvee cannot use the exceptions regarding undue influence or influence of danger mentioned above in 2.2.1.
[23] ND 1999:269

must have been clear to the LOS 102 that the passenger craft was operating outside of normal working hours and thus clearly not ordinary towage services as claimed by the owners of LOS 102.[24]

2.2.4 Importance of clarifying terms of salvage agreements

Further, it can be of great importance to establish whether a salvage contract with certain terms has been agreed to or whether the salvage shall take place under normal salvage terms. The importance is even greater if the salvage agreement was only made orally.

The recent Norwegian appellate court case *MV* KVITNOS[25] illustrates this important distinction. The cargo ship *Kvitnos* suffered an engine breakdown in bad weather in the Oslo fjord and a tug proceeded to assist the Kvitnos and towed it to safety. Both parties later agreed that the vessel had been "in danger" as is necessary in order to claim salvage but they disagreed on what terms should apply to assess the amount of the award. The tug claimed salvage award on salvage terms but the Kvitnos claimed that an agreement for salvage on commercial terms had been agreed. The district court (court of first instance) ruled in favour of the salvors and awarded them a salvage award of NOK 7.5 million[26], but the appellate court overturned that ruling and awarded the salvors an award of NOK 450.000 as if commercial terms had been agreed.

The dispute revolved around whether during a telephone call between the owners (insurers) of Kvitnos and the tug´s owners, while the salvage operation was underway, there had been an oral agreement for towage on commercial terms. The appellate court held that in the discussion only commercial terms were discussed and there was no mention of salvage terms or the "no cure – no pay" principle. It was also considered proven that the owners (insurers) were under the impression after the phone conversation that commercial terms had been agreed upon. The appellate court held that since commercial terms had been discussed, that if the tug owners still wished to claim salvage on salvage terms, the onus was on them to expressly reserve their right to do so with the owners (insurers) of Kvitnos. In

[24] Rösaeg. *Misapprehension of peril in salvage.* P. 36-37.
[25] LA-2017-41631. Permission was not granted to appeal the case to the Norwegian Supreme Court.
[26] The insurance value of the salved ship was NOK 180 million which leaves the originally awarded 7.5 million at 4.16% of the salved property.

light of no such reservation, the court held that commercial terms must apply to the amount awarded.[27]

This case highlights the importance of the salvor making it clear that he intends to claim salvage award under salvage terms, if it may be reasonable for the salvee to believe that commercial terms have been agreed.

2.3 What can be the subject of salvage?

2.3.1 Introduction

The definition of salvage makes it clear that “ship and other objects” can be the subjects of salvage operations in the sense that salving such property from danger merits a salvage award. Even though the rescue of human life does not in itself entail a salvage award, if done so in connection with a successful salvage operation the salvor of human life is entitled to a part of the salvage award. Furthermore, if the salvor prevents or limits environmental damage, he is entitled to a special compensation even though the salvage operation was not successful.[28] In addition, there are other issues not addressed in the legal text of the IMC or NMC that need examination.

A successful salvage operation can provide financial benefit to the owner of ship or cargo other than the preservation of the property in question. For example, the salvage of a ship may result in the shipowner being able to claim freight for the transport of cargo he may not have been able to do if the ship did not reach its destination. Further, the salvage operation could result in the shipowner having avoided potential liability claims from third parties, e.g. by virtue of having prevented the ship from damaging other property by collision or fire etc. As a consequence, the question arises if the salvor is entitled to salvage award for these sorts of financial benefits enjoyed by the owner of the salved property? These issues will be addressed briefly in the following.

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[27] Wikborg Rein. “Kvitnos-When is a commercial agreement entered into for towage assistance to a distressed vessel”.

[28] Cf. IMC section 163(1)(a), 167(2) and 170(a) and the NMC 441(a), 445(2) and 449.

2.3.2 "Ship and other objects"

From the definition of salvage in the IMC and NMC it is clear that any ship or construction capable of navigation or any other object not permanently attached to the coastline that has been wrecked or is in danger can be the subject of salvage. The terms "ship" and "other objects" have a wide meaning and case law in Norway shows that it covers all vessels, including small boats such as motor boats and sailing boats, drilling platforms and similar floating installations, floating cranes and floating dry-docks.[29]

With respect to the "other objects" that can be salved, in most cases it refers to the cargo or other valuables either on board the ship or that have fallen off it. The term also encompasses property in danger in the sea (or other waters) irrespective of where it came from, e.g. the salvage of a container found floating at sea having fallen from an unknown ship. According to the text itself the list of potential items considered "other objects" is practically limitless since the only excluding factor in the case of Icelandic and Norwegian law, other than if the object is permanently attached to the coastline, is if the object is considered a cultural heritage and thus prevented from being an object of salvage.[30] [31]

Although not explicitly stated in the legal text, it should be noted that it is generally considered necessary that the object have some maritime or shipping connection in order for it to be an subject of salvage.[32] For example, it is considered doubtful that the laws on salvage would apply if a car accidentally drove into the sea and was later pulled ashore, rather would such incidents with no real connection to shipping fall under other legal principles regarding the potential payment of award or compensation, such as the rules on "*negotorium gestio*". [33]

[29] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 572
[30] Cf. IMC section 164(4) and the NMC section 442(4).
[31] Article 30 of the Salvage Convention allows member states to make exemptions for inter alia property of cultural or archaeological interest.
[32] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 572-573 and the preparatory works to Icelandic Act no. 133/1998. Althingistidindi 1989-1990. P. 860-870
[33] Ibid.

2.3.3 Life salvage

If a vessel and all its cargo is lost or rendered worthless, i.e. the salvage operation did not produce "a useful result", the salvor cannot claim any salvage award even though he rescued the lives of people who were on board, cf. above in 2.3.1.

However, it is specifically stated in the Salvage Convention that "a person who in the course of a salvage operation has rescued human life is entitled to reasonable share of the salvage award or special compensation." As a consequence, the saving of human life does entitle a claim for salvage award insofar it is done in connection with a successful salvage operation of ship or object.[34] This means that a person who perhaps had no impact of the actual salvage of property can still claim a portion of the salvage award if he rescued human life.

2.3.4 Prevention of environmental damage

Preventing or limiting environmental damage can also be the subject of salvage in the sense that it can form the basis for a special compensation to the salvor irrespective of success.

The emergence of the special compensation in the Salvage Convention establishes that a salvor is entitled to a special compensation for his efforts in limiting or preventing environmental damage even if the salvage operation was not successful in salving the ship or other objects.[35] This is an exception to the principle of "no cure-no pay" and the payment is called a special compensation instead of "salvage award" to underline the fact it can be claimed even if no property is salved. The special compensation reflects one of the Salvage Convention´s main objectives of preventing environmental damage and encouraging salvors to undertake salvage operations even if the likelihood of successfully salving property is slim.[36]

If the ship or cargo in danger pose a risk of environmental damage then the salvor is entitled to a special compensation that should correspond to his expenses of the salvage operation, and this applies even if environmental damage was not prevented and no property salved. If

[34]Cf. IMC sections 167(2) and 168 and the NMC sections 445(2) and 446.
[35] Cf. article 14 of the Salvage Convention, the IMC section 170.a and the NMC section 449.
[36] International Maritime Organisation. "International Convention on Salvage".

the salvor was successful in preventing or limiting environmental damage then the special compensation may be increased by up to 30%, or even up to 100% in special circumstances, of the salvor´s expenses of the salvage operation, and this applies even if no property was successfully salved.

2.3.5 Other financial interests

2.3.5.1 In general

As described above, the right to claim salvage award arises when property, e.g. the ship and/or its cargo, has been salved from danger. However, what if the salvor preserves some other financial interest of the ship- or cargo owner in addition to and while also salving the property in question? Would such a financial interest be taken into account while assessing the right to claim salvage award or the amount of the award?

2.3.5.2 Freight at risk

It is stated in article 1(c) of the Salvage Convention that the meaning of the word property includes “freight at risk”. The term “freight at risk” is used to describe the right to claim freight according to the underlying contract for carriage of goods on board. The “freight at risk”, is therefore not physical property, but rather only a legal claim for payment of a certain amount of money owed to the shipowner for the transport of goods that was preserved by the salvage operation. [37]

In many cases, freight is already included in the value of the cargo onboard the ship, and in such instances the freight will not be calculated separately when assessing the value of the salved property.[38] This is the reason why it was not deemed necessary to specifically state in article 163 of the IMC where salvage is defined, that the word “object”[39] includes freight, since it is assumed included in the assessed cargo value.[40] However, this approach in the IMC (i.e. of not specifically stating that freight at risk can be an independent subject of salvage)

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[37] Brice. *Brice on Maritime Law of Salvage.* P. 398-399.

[38] Kennedy&Rose. *Law of Salvage.* P. 117-119.

[39] The IMC and NMC use the word “object” instead of “property” which is used in the Salvage Convention but it is clear from the preparatory works to section 163 of the IMC that there is no difference in meaning in this regard.

[40] Cf. the preparatory works to Icelandic Act no. 133/1998. Althingistidindi 1989-1990. P. 860-870.

can be criticized since it may cause confusion as freight is not necessarily always included in the cargo value.

“Freight at risk” can therefore only be an independent subject of salvage if the shipowner´s right to claim freight has specifically been preserved by the salvage operation and if it is not already included in the assessed value of the cargo onboard. [41] [42] In such cases, the value of the freight that was salved should be added to the value of the salved property and thus form the basis for the eventual salvage amount.[43]

2.3.5.3 Liability salvage

In some cases, a successful salvage operation will in addition to salving property also result in preventing or limiting the shipowner´s liability to third persons threatened by the vessel ultimately salved. This has been referred to as “liability salvage” and can mean preventing both contractual liability or tort liability from arising. In theory, it would not be unreasonable to argue that “liability salvage” should also be considered an independent subject of salvage since it is a clear financial benefit rendered to the shipowner he should compensate for.

For instance, if a ship without means of propulsion was at risk of colliding with another ship then that could cause the owner´s liability for the damage caused.[44] If the vessel was salved before any collision occurred then that would provide financial benefit to the owner of the salved vessel by preventing his collision liability form arising. Another example would be of a fire onboard a ship that is at risk of spreading to other ships or objects nearby, but a salvor successfully extinguishes the fire thus preventing any potential liability on behalf of the owner. The owner´s contractual liability could also be prevented if the salvage operation prevents the owner from breaching his contractual obligations to e.g. a cargo owner of delivering certain goods at an agreed time and place.

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[41] Brice. *Brice on Maritime Law of Salvage.* P. 398-399.
[42] Kennedy&Rose. *Law of Salvage.* P. 610-611
[43] Special consideration should be given to the owner´s claim for payment under charter parties with respect to whether that constitutes as “freight at risk”. Although this issue will not be discussed here it will be mentioned that a distinction appears to be made in this regard between a voyage charter party and a time charter party, where the freight under a voyage charter party is considered as “freight at risk” but not the claim for hire under a time charter party, see further: Kennedy&Rose. *Law of Salvage.* P. 118-119
[44] Cf. section 171 of the IMC and 151 and 161 of the NMC

During the preparatory works for the Salvage Convention there was discussion on whether to implement "liability salvage" as an independent subject of salvage, but no agreement was made in that regard and the issue of "liability salvage" was intentionally left out of the convention. [45]

However, with reference to Chapter 9 of the IMC and Chapter 10 of the NMC,[46] it is clear that shipowners can be held liable for environmental damage caused by their vessels. As the Salvage Convention did introduce the special compensation cf. article 14 for attempts to limit or prevent environmental damage, and that the amount should inter alia take into account the extent that environmental damage was prevented, there is d*e facto* liability salvage with respect to the prevention of environmental damage.

It is therefore safe to say that "liability salvage" is not an independent subject of salvage in Icelandic or Norwegian law, but it may arguably be a factor when assessing the amount of the salvage award.[47] [48] [49] If the salvor´s actions prevented or limited the shipowner´s liability[50] then that could lead to him receiving a higher salvage award. This argument is reasonable even though the prevention of potential liability is not specifically referenced in article 13 of the Salvage Convention[51] since the listed criteria is not exhaustive.

2.4 Who can be a salvor and thus claim salvage award?

2.4.1 Definition of salvor

The term "salvor" is not defined specifically in the Salvage Convention[52], but it can be said to mean "*a person who has rendered useful service to ship, other object, human life or the environment where one or more of them has been exposed to danger on water*"[53].

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[45] Berlingieri. *International Maritime Conventions Vol.II.* P. 72-73.
[46] The reder or shipowner is also vicariously liable for all damage caused by fault or negligence in the service of the ship, cf. section 171 of the IMC and section 151 of the NMC.
[47] Kennedy&Rose. *Law of Salvage.* P. 153.
[48] Brice. *Brice on Maritime Law of Salvage.* P. 400
[49] See e.g. *"The Gregreso"* (1971) 1 Lloyd´s Rep 220*.* The author is not aware of Nordic court rulings where "liability salvage" has specifically been mentioned as an argument in increasing the salvage award, but the arguments presented above stand nonetheless.
[50] The cargo-owner can also potentially be liable
[51] Cf. section 168 of the IMC and section 446 of the NMC.
[52] Neither is the term defined in the IMC or the NMC.
[53] Kennedy&Rose. *Law of Salvage.* P. 208.

In addition, the salvor may not be operating under any pre-existing contractual or legal obligation to assist, i.e. there must be *voluntariness* on behalf of the salvor in order to claim salvage. The line between voluntary salvage and salvage based on a legal or contractual obligation that does not merit an award can be unclear as will be discussed below.

2.4.2 Exceptions from the "salvor´s" right to claim salvage award

2.4.2.1 In general

Even though a successful salvage operation has taken place, it does not necessarily lead to the salvor being able to claim salvage award. In certain situations, the "salvor" may have no right to claim salvage depending on who the salvor is and his contractual or legal obligation to engage in the salvage operations. This issue will be addressed below in chapter 2.4.2.4.

In other situations, the misconduct of the salvor during the salvage operations or if he does not abide by an express and reasonable objection of the owner, may lead to him not being able to claim salvage award even though the operation was a success. Although these issues do not relate to the question of who can claim salvage award, they will be mentioned briefly below since they are relevant to when salvage award can be claimed.

2.4.2.2 Misconduct of salvor

Article 18 of the Salvage Convention discusses the effect of the salvor´s misconduct during a salvage operation where it is stated that the salvor may be deprived of whole or part of the salvage award or special compensation if the salvage operation has become necessary or more difficult because of fault or neglect on the salvor´s part or if the salvor has been guilty of fraud or other dishonest conduct.[54]
This issue is legally extensive and will not be discussed further here but is mentioned only since it may be relevant when determining if salvage award can be claimed.

2.4.2.3 Right to refuse salvage services

Article 19 states that services that are rendered despite the express and reasonable prohibition of the owner or master of the vessel, or the owner of any other property in

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[54] Cf. IMC section 170(b)(3) and NMC section 450(3).

danger which is not and has not been on board the vessel, shall not give rise to payment of salvage award.[55]

It is therefore not the case that vessels in danger must always accept the intervention of salvors. The master or owner of the ship in danger might be tempted to delay requesting or accepting assistance in order to avoid paying salvage award in hope of either fixing the problem themselves or negotiating assistance on favourable terms.

Whether or not the prohibition can be considered "express and reasonable" is a matter of evaluation on a case by case basis and depends on the risk to the ship, property and perhaps most importantly the environment.[56] If the objection is not deemed "reasonable" and the salvor intervenes despite the objection and concludes a successful salvage operation then he can claim salvage award. On the other hand, insofar the prohibition was "express and reasonable" the salvor has no right to claim salvage even though the operation was successful. This reflects the need to protect the shipowner from unnecessary interventions and undue interference from those who may wish to benefit financially as salvors when the situation was in fact under control.[57]

In practise it is probably not likely that a vessel in distress would reject offers of assistance. Likewise, a non-governmental salvor can hardly force a salvage operation onto an unwilling vessel that has specifically rejected offers of assistance. However, it is more relevant in case of public authorities that base their intervention on specific legal authority to protect the environment. In this regard, it should be noted that according to article 9 of the Salvage Convention the convention does not affect the right of member states to "*take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution* […] *including the right of the coastal state to give directions in relation to salvage operations*". On this basis in Icelandic law[58], the Icelandic Coastguard has full authority to intervene, give orders and potentially

[55] The same rule is stated in the IMC section 170(b)2) and in the NMC section 450(2).
[56] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 581.
[57] Brice. *Brice on Maritime Law of Salvage.* P. 32-34.
[58] See article 15 of Act no. 33/2004 on the environmental protection of oceans and beaches.

take over the control of the ship in peril, if deemed necessary to prevent environmental damage.

2.4.2.4 *"Voluntariness"*

2.4.2.4.1 In general

It has traditionally been considered that the right to claim salvage award will be lost if the salvor did not act as a "volunteer", i.e. where the salvor rendered assistance to the salvee pursuant to an obligation towards the owner, either contractual or legal, that was already at hand when danger arose.[59] [60]Accordingly, parties to salvage agreements are still considered "volunteers" in this regard since such agreements are made only after danger was present.

As it pertains to the Salvage Convention, the conditions on "voluntariness" are reflected in articles 4, 5 and 17.[61] The potential prior duty of the salvor to render assistance may either be based on contract or some sort of public duty.

The Salvage Convention and accordingly the IMC and NMC, are quite clear on the consequences of the salvor having a pre-existing contractual obligation towards the salvee, namely that the salvor cannot claim salvage award in such instances unless the services rendered exceed what can be reasonably demanded according to the contract. However, the Convention is not conclusive regarding the situation when the salvor has a public legal duty to render assistance, instead leaving it to the member states to regulate that aspect as they see fit.

2.4.2.4.2 Contractual duty

Article 17 of the Salvage Convention states that "[*n*]*o payment is due* […] *unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.*"[62] It can be challenging to determine precisely the point where services start to exceed what can be considered due performance of a contract.

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[59] Baughen. *Shipping Law.* P. 288.
[60] Kennedy&Rose. *Law of Salvage.* P. 237.
[61] Cf. IMC section 164(2)&(3), 170(b) and NMC section 442(2)&(3), 450(1),
[62] Cf. IMC section 170(b) and NMC section 450(1),

This clause is relevant when the salvor has a pre-existing contractual relationship with the salvee, e.g. as an employee, crew member, pilot or tug. The general rule is that if these individuals assist in the preservation of the vessel when it is in danger simply by doing what they were hired or contracted to do, then they have no claim for salvage award.
For example, if a crew member puts out a fire on board the vessel he will normally not be entitled to salvage award, unless his actions were so extraordinary they did not fall under the scope of his employment contract.

However, even though one may have the contractual obligation to render assistance to a vessel it does not necessarily mean that has to be done at any risk.[63] Actions that exceed what can reasonably be expected of an employee or contractor should entail a salvage claim, but the bar is probably set quite high when making that assessment.

With respect to crew members it can be of importance whether or not the order to abandon ship has been given when they assist in its participation. If the crew has validly abandoned ship[64] it may be argued they have been discharged by their prior duties and thus availing them of the right to claim salvage award if they later assist in its preservation.[65] [66] One interesting Norwegian court case shall be mentioned in this regard, the *Heidi Anita*[67]:

> The vessel Heidi Anita ran ashore and was later abandoned by the crew. One crew member later returned with another ship and assisted in fixing a tow between the vessels and otherwise assisted in bringing the Heidi Anita to safety. Said crew member claimed salvage award but the owner of the vessel and his employer rejected the claim by referring to that the crew member´s actions fell under his contractual obligations. However, the Court disagreed and awarded the crew member salvage award. Special reference was made to the fact that at the time the

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[63] Sigurdsson, Bull & Falkanger. *Sjóréttur.* P. 491.
[64] I.e. the crew members did not violate their employment contract or obligations to the shipowner by abandoning ship, e.g. after being given such an order from the captain.
[65] *Brice on Maritime Law of Salvage*. P. 85-87 and Baughen. *Shipping Law.* P. 289
[66]Cf. *The San Demetrio*, (1941) 69 Lloyd´s Rep 5 at 12. In short, the San Demetrio caught fire at sea and was abandoned. Some crew members later re-boarded the vessel, put out the fire and brought it to safety and where awarded salvage for its rescue.
[67] ND 1981:293 ("NCC HEIDI ANITA"). Norwegian court of first instance.

crew member had no contractual obligation to undertake the actions and that they clearly exceeded his contractual duty towards the shipowner, and also that his actions were instrumental in the salvage of the vessel and that he put himself at great risk in order to do so.

Regarding pilots and tugs it is possible that a contractual service can turn into a salvage operation, if the services exceed what they were originally contracted to do. The following two cases provide examples of salvage claims of that nature:

In the Norwegian case *Bergen CLIO*[68] a pilot demanded salvage award for providing advice on how to best navigate the vessel through the dangerous conditions that were at hand claiming his advice exceeded the standard piloting services he was hired to undertake. His claim was rejected by the Court by referencing that his actions fell under the scope of his contractual obligation.

In the English case *The Aldora*[69] tugs had been contracted to tow a ship into harbour, but the ship ran aground and was as a consequence in danger.[70] The tugs refloated the ship and claimed salvage award for those services. The Court agreed and awarded salvage for the refloating services since they exceeded the obligations of their original towage contract.

When determining whether the services rendered can justify salvage award, the decisive factor is not the existence of the contractual relationship, but rather whether the actions undertaken have a sound footing in the relevant contract or not. In that respect, focus should be on the nature of the services provided and the circumstances at hand, notably the level of risk and danger the salvor is exposed to.

[68] ND 1961:339 ("Bergen CLIO")
[69] "*The Aldora*"(1975) 1 Lloyd´s Rep 617.
[70] The grounding was not considered the fault of the tugs so that had no effect on their salvage claim. However, if that would have been the case, then the salvor´s misconduct could lead to the salvage claim being reduced or rejected altogether, cf. IMC section 170(b)(3) and the NMC section 450(3).

2.4.2.4.3 Public duty

According to articles 4 and 5 of the Salvage Convention, the salvage rules only apply towards state-owned vessels if so decided by the relevant state. In the case of Iceland and Norway, it is specifically stated in the IMC and NMC respectively[71] that the rules on salvage apply even if the salvage is performed by a state-owned ship.[72] Accordingly, it is clear that state-owned ships can demand salvage award insofar as other necessary conditions are fulfilled.

Article 5 of the Salvage Convention states that it is left to the discretion of the contracting state to determine the extent to which the salvage rules apply to the public authorities that have a duty to perform salvage operations. Accordingly, it may vary between countries, to what extent public authorities with a duty to undertake salvage operations can claim salvage award. In the case of Iceland, it is stated in section 164(3) of the IMC that even though salvage operations are undertaken by public authorities or take place under their supervision, the salvors who have taken part in such operations are entitled to salvage award or special compensation. [73]

Although the general rule in Iceland and Norway is that public authorities can claim salvage award even though they have a legal duty to undertake salvage operations, there are limits to how far that rules goes. In some cases, it is not an easy task to determine when those with a public duty to assist can claim salvage.
It appears that in order for public authorities to be able to claim salvage award, that they need to have provided services that exceed the limits of their general scope of public duty and may amount to being extraordinary. [74] [75] In this way the same principle applies as when contractual duties exist.

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[71] IMC section 164(2) and NMC section 442(2).

[72] Even though the word “ship” is used, it also applies to salvage performed by other means, cf. the definition of salvage operation is not unique to ships, but an also be done from land, or potentially from air.

[73] A similar rule is in the NMC although it is additionally stated in section 442(3), in accordance with article 5(1) of the Salvage Convention, that the rules of Chapter 16 (i.e. the rules on salvage) “*have no limiting effect on the rules that otherwise apply to salvage operations carried out by or under the supervision of pubic authorities. Salvors who have taken part in such salvage operations are entitled to salvage reward or special compensation according to the provisions of this chapter.*”

[74] Baughen. *Shipping Law.* P. 289.

[75] Sigurdsson, Bull & Falkanger. *Sjóréttur.* P 490-491.

An interesting case of this approach is *The Gregerso*[76], where the harbour authority was denied salvage award for removing a vessel that had stranded in the entrance to the Boston harbour since it was considered to fall under its public duty of action. In a similar case of *The Mbashi*[77], port authorities were however found to have a rightful claim for salvage award since the stranding occurred outside the harbour and they had no pre-existing duty to assist there unless access to the harbour was restricted which it was not.[78]

The issue of when public authorities are entitled to salvage award is not clear cut and it could even appear to be inconsistent with the wording of the legal text itself in the IMC and NMC that does not differentiate specifically between extraordinary actions of public authorities salvor and ordinary ones. With respect to Icelandic law specifically, the preparatory works to the legal act incorporating the Salvage Convention[79] provide insight into the complexity of this issue. There it is first stated that the general rule is that public authorities are in principle entitled to salvage award. However, secondly, it must also be the case, that the salvage services exceed what is considered a standard task of their public duty. The example is taken of a fire brigade that extinguishes fire on-board a ship is generally not entitled to claim salvage but if the actions taken in extinguishing the fire were extraordinary then the right to salvage can be at hand. Then thirdly, it is stated that even a service of a public authority that falls under its normal scope of duty, can in some cases justify a salvage claim, for example if more dedication or skill is applied than can be expected.[80]

If the individual performing the salvage operations on behalf of a public authority has done so in a manner that justifies a claim for salvage award, then it is the public authority in question but not the individual per se that is entitled to claim salvage award. [81] [82] However,

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[76] "The Gregreso" (1971) 1 Lloyd´s Rep 220
[77] "The Mbashi" (2002) 2 Lloyd´s Rep 502
[78] Baughen. *Shipping Law.* P. 289.
[79] Preparatory works to Act no. 133/1998. Althingistidindi 1989-1990. P. 860-870
[80]Ibid.
[81] Public authorities and others that may have a duty to assist may potentially be subject to special legislation or internal rules/policies that prevent them from claiming salvage award and also regarding the internal apportionment of any salvage award.
[82] Similar issues regarding the individual´s right to claim salvage even if their employer may not can be found e.g. in the BIMCO time charter party "Supplytime 2017", article 18(c), where it is stated that although the

the individual in question may have a claim for a stake in the salvage award cf. article 15 of the Salvage Convention. Each state shall determine how the salvage award shall be apportioned between the salvors and their employers. The IMC and NMC have identical rules in this regard where it is specifically stated how the salvage award shall be apportioned when the salvage operation is performed from a ship owned by a reder.[83] If that is not the case, as may be when salvage operations are carried out by public authorities such as the fire brigade, then the apportionment between the salvor and his employer shall be in accordance with the laws and regulations that govern their relationship, cf. IMC section 170(C)(8) [84] and article 15(2) of the Salvage Convention. Hence, the relevant laws and regulations that govern the public authority in question can be decisive when establishing the individual´s (employee´s) right to claim salvage award.

It can be of significant financial interest for the salvor whether he is considered part of a public authority or whether he is deemed to be operating as an independent salvor. This issue may e.g. be relevant if the salvor is a public servant but off-duty while conducting the salvage services. If he is considered operating independently then his salvage claim could presumably not be rejected on the basis that the services are an act of ordinary public duty. In this regard, the Norwegian arbitration case *Tom Strömer*[85] is of interest:

> The chief of the fire brigade, firefighters and a port official all participated in preventing the ship *Tom Strömer* from sinking while at port. They all demanded salvage award as independent salvors and claimed they had been operating independently and not as officials from the public authorities that employed them. The court did not agree and ruled they had to be considered as public officials on behalf of their respective employers. However, the Court did confirm that the public authorities in question, i.e. the fire brigade and port authorities, should be considered salvors in this instance and were awarded salvage award.

"owners" waive their right to claim salvage award for salvage services provided by the chartered ship, then that waiver is without prejudice to the crew members right to claim salvage.

[83] Cf. IMC section 170(c) and the NMC section 451.

[84] Cf. article 15(2) of the Salvage Convention.

[85] ND 1970:323 (*NA TOM STRÖMER).* Norwegian Arbitration.

As is apparent from the above, it is not always clear where the line is drawn between services rendered by public authorities that allow for a salvage claim and those that do not. Furthermore, the legal text itself does not make any difference between the various types of public authorities that may claim salvage award, so in theory the same should apply to all public authorities in that regard, whether it is the Coastguard, the fire brigade, the police, harbour/port authorities, any public rescue services or other authorities.

2.4.2.4.4 Search and Rescue teams and other non-public authorities

It is possible that that the salvor may have a duty to render assistance and participate in salvage operations without being a formal public authority. This is the case for instance regarding the Icelandic search and rescue teams that are operated around the country. Even though these teams consist for the most part of volunteers, they operate in Iceland under legal authority where it is inter alia stated that they have the duty to provide salvage services if so requested by authorities.[86]

Salvors from search and rescue teams, or other organisations that are not public authorities should not have their right to claim salvage limited even though their services are considered ordinary operations on their behalf, in contrast to what normally applies to public authorities as discussed above. They should instead be treated as any other voluntary salvor and thus maintain their right to claim salvage, as is in fact specifically stated in the IMC and NMC, even if the salvage services are of simple nature or are normal and within the scope of their normal operations.

2.4.2.4.5 Criticism of salvage awards to public authorities?

Allowing public authorities to claim salvage award can also justify some criticism.
It can be argued that it may potentially undermine one of the Salvage Convention´s main objectives of preventing environmental damage and other types of loss. A shipowner or master may be less inclined to request or accept assistance from public authorities such as the Coastguard if he must later pay a handsome salvage award.

[86] Act no. 43/2003 on Search and Rescue Teams, section 4(1).

Furthermore, with respect to public authorities with a legal obligation to assist and prevent environmental damage, it is clear that there is not the same need for encouraging salvage operations as is when the prospect of salvage depends solely on the voluntariness of other ships nearby when danger arises. With no need to encourage, or at least to a less extent, it may be controversial to generously award public officials for simply doing their job. On the other hand the objective of preventing environmental damage is of such importance that it can be argued that any fairness issues in this regard must be secondary.

2.5 The need for a "useful result"

2.5.1 In general

The salvage operation must "produce a useful result" for the salvor to claim salvage award.[87] This has been called the rule of "*no cure- no pay*". In effect, the rule entails that no salvage award shall be paid unless the ship or property in question has been salved, i.e. property of financial value must have been preserved, either in part or full.[88] The meaning of the word "salved" can warrant a lengthy discussion[89], but ultimately it depends on when the ship or property is no longer in danger and has reached a "place of safety", a topic that will be discussed more specifically in the next chapter 2.5.2. and 2.6.4.8.

As already discussed[90], the salvage of human life does not entitle salvage award unless it is done in the course of a successful salvage operation. Hence, if no financial valuables were saved, then the salvage operation will not be considered to have produced a "useful result" even if the salvors were successful in saving lives. [91]

2.5.2 Connection with "place of safety"

In order to determine whether "a useful result has been produced", it is necessary to evaluate each case on its merits, depending on what happened to the ship (or cargo) that placed it in danger to begin with and whether it has been brought out of danger to a place of safety. Normally that is not a challenging issue, but complications may arise. For example, a

[87] Cf. art. 12 of the Salvage Convention, IMC section 167 and the NMC section 445.
[88] Brice. *Brice on Maritime Law of Salvage.* P. 105.
[89] Brice. *Brice on Maritime Law of Salvage.* P. 102-112.
[90] Cf. chapter 2.3.3.
[91] Cf. IMC section 167(2) and NMC section 445(2) and article 16 of the Salvage Convention.

disabled ship that is drifting towards shore and in risk of grounding that is only towed out of immediate danger would probably not be at a "place of safety" until it has been brought to port. Furthermore, in order for it to be considered salved, it is possible that the disabled ship would have to be taken to a port where it can be repaired, i.e. not just any port where it may lay safely but ultimately still be dependent on further towage to reach its destination.[92]

In this respect, the Norwegian appellate court case *NARVIK*[93] is of interest, where a ship had grounded and was later towed to port nearby were necessary repairs could not take place. The court held that the ship had not been fully salved until it had been brought to the repair yard. This approach is in line with the English case *The Troilus*[94] which will be discussed in chapter 2.6.4.8.[95]

2.6 The condition of "*wrecked*" or "*in danger*"

2.6.1 Introduction

For salvage award to be applicable, the ship or other object ultimately salved either needs to have been "in danger" or "wrecked". These two conditions will now be examined further.

2.6.2 The condition of "*wrecked*"

The concept of "wrecked" is not found in the Salvage Convention where the definition of salvage operation only refers to the assistance of ships or other objects that are in danger. However, the IMC and the NMC, have added that assistance also classifies as a salvage operation if the ship or other object has been wrecked. It is specifically stated in the preparatory works to the IMC that this addition is not contrary to any provisions of the Salvage Convention.[96]

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[92] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 579.
[93] ND 1994:327. Norwegian Court of Appeal. Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 579.
[94] *The Troilus*" (1951) 1 Lloyd´s Rep. 467.
[95] Regarding the term "salved" under Icelandic law, with respect to whether the disabled ship would have to be brought to port were repairs could take place or if any port where it may lay safely suffices. It should be noted that there is no case law to suggest that the Icelandic approach would differ from the Norwegian one as per the *Narvik* case. However, in his book *Sjóréttur,* which is largely based on the book *Scandinavian Maritime Law* that specifically references the Narvik case, professor Gudmundur Sigurdsson, when discussing this issue does not refer to the *Narvik* principle, so it is left unsaid whether he believes it to apply under Icelandic law.
[96] Preparatory works to Act no. 133/1998. Althingistidindi 1989-1990. P. 863.

The term “wrecked” would entail a ship or other object that has sunken or broken up[97] following some kind of serious accident or incident[98]. Since only property of financial value can justify a salvage award, the ship or object cannot be wrecked in the sense that is has been rendered worthless.

2.6.3 Distinction between “wrecked” and “in danger”

In many cases, a ship or object that has been wrecked would also be considered in danger. In those instances, there is no need with respect to salvage award to determine which term is more appropriate since they are alternative to each other.

However, the distinction is important if the ship or object cannot be considered in danger any more with respect to further damage. For example, a sunken ship that lays on the seabed will be considered to have been wrecked but not “in danger” if it is not at risk at suffering further danger than has already occurred.

But what about property that may be difficult to classify as “wrecked” under the normal understanding of that word, i.e. where it has not suffered any physical damage or been exposed to any risk thereof? For example, if a ship carrying a cargo of valuable metals sunk but due to its nature the cargo was not at risk of suffering damage, would the retrieval of those metals not warrant salvage award?

It must be considered in such instances that if the valuables cannot reasonably be defined as “wrecked” then they would be considered “in danger” even if it is not necessarily danger of suffering physical damage, rather danger of being lost to its owner. Even though there might not be danger of significant deterioration to the valuables, it can be convincingly argued that all property not under the control of its owner or lawful possessor is considered subject to danger, whether it be minimal or gradual deterioration, possibility of theft or becoming lost.

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[97] Oxford English online dictionary. Cf. definition of “shipwreck”.
[98] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 578.

As long as the object in question sunk or is lost as a consequence of having been in danger to begin with, the retrieval of said object would be considered salvage.[99] [100]

2.6.4 The condition of being "in danger"

2.6.4.1 General comments on the concept of danger in salvage

In order for the salvor to be entitled to salvage award, the ship or other object must be in danger at the time salvage took place, assuming it was not wrecked. Danger is therefore an essential element of salvage services and the foundation of the claim for salvage award. The danger at hand must exceed the level of risk that is inherent to shipping, i.e. the "ordinary perils of the sea" cannot give rise to salvage award. If the salvor is not able to establish that the property in question was in danger, then his claim for payment cannot be based on salvage terms, which are generally much higher than ordinary market or commercial terms of remuneration otherwise applicable for the services provided.

Once the existence of danger has been established, there is a salvage situation at hand and the degree of danger, i.e. whether the danger is severe or slight, does not matter with respect to the salvor´s right in principle to claim salvage award. However, the degree and nature of the danger is of great importance when determining the amount of the salvage award and is one of the main criteria in that regard.

If the "salved" property was not in danger, then the "salvor" has no claim for salvage award even if he himself may have been in danger during the operation. However, if the salvor was exposed to risks during an otherwise legitimate salvage operation (i.e. the salved property was in danger) then that should be to his benefit when assessing the amount of the salvage award.[101]

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[99] Kennedy&Rose. *Law of Salvage*. P. 184.

[100] Furthermore, the Icelandic text of "*farist hefur*" should be translated as "lost" rather than "wrecked" as is the term used in the NMC. In order for property to be consider "lost" at sea, there is most likely no need for physical damage as may be argued regarding the term "wrecked".

[101] Cf. article 13(1)(g) of the Salvage Convention, the IMC section 168(1)(h) and the NMC section 446(1)(h).

2.6.4.2 A caveat regarding the Icelandic approach to the condition of danger

As with other salvage issues, the provisions of the IMC are more or less the same as the NMC. It should be noted however, that the Icelandic legislator did not introduce the present condition of danger until 1985 even though the other Nordic countries had done so approximately 20 years earlier.[102] Until the legislative change in 1985,[103] in order for a salvor to claim salvage award under Icelandic law, the salved property needed to be in a "emergency"[104], but since then the necessary degree of distress to warrant salvage has been lowered to "danger". This is mentioned to underline the fact that there is a clear meaningful and legal distinction between these two concepts.

More importantly however, with respect to the concept of danger, there is one distinction between the IMC and the Salvage Convention and the maritime codes of the other Nordic countries, worth mentioning.[105] It is stated in section 168(2) of the IMC that if the salved ship was not in "imminent" danger[106] but was unable to reach port by its own propulsion, then importance shall be attached to letters b-j of paragraph 1, in effect stating that the value of the salved ship should not ordinarily be a factor when assessing the amount of the salvage award in these situations.

At least from an Icelandic perspective, this clause has relevance with respect to the concept of danger. In the preparatory works behind the provision[107], it is stated that it is "*mainly intended to cover instances such as where ships have been immobilized due to engine failure or fishing gear in the propeller, and as a consequence cannot on its own reach port but are not in imminent danger, i.e. weather and conditions are such that there is no danger of grounding, collision or striking within the period of time alternative assistance would easily*

[102] Sigurdsson, Bull & Falkanger. *Sjóréttur*. P. 470.
[103] I.e. when the IMC was implemented with act. no. 34/1985.
[104] Cf. article 199(1) of Act no. 66/1963 which is no longer in effect.
[105] Even though this provision is not found in the Salvage Convention, comments in the preparatory works to Act. no. 133/1998 show that the Icelandic legislator does not believe it to be a violation of it either, pointing out that salvage award is always subject to evaluation based on the merits of each case ranging from 0-100% of the value of the salved property. Cf. *Althingistidindi 1998-1999*. P. 869-870.
[106] The author´s translation of the Icelandic term "yfirvofandi", since there is no official translation available of the provision.
[107] Preparatory works to the IMC. Althingistidindi 1984. P. 1044.

be available. A precondition for this is that salvors did not have to put themselves at risk during the salvage."[108]

Relatively simple salvage operations of this nature are under Icelandic law not deemed to justify the value of the salved property to be taken into account when assessing the award, not least since such criteria could lead to substantially different amounts being awarded for similar salvage operations where the only difference was the value of the salved vessel. Ultimately, the salvage award in these instances would reflect a fair remuneration for the time and effort the salvage operation took, but the amount would have to exceed standard commercial rates for such an undertaking, at least slightly, in order to provide sufficient incentive to potential salvors.

But the provision also shows that vessels in situations described above should generally be considered "in danger" even though there is no risk of grounding, striking or collision, within the time that alternative assistance could easily have arrived. This points to a relatively low threshold when considering if the property was "in danger" but is at the same time clearly stated that such instances do not merit a generous salvage award.[109]

Next, the necessary type of danger will be addressed, i.e. whether there must be a danger of physical damage or if some other kind of danger may suffice in order to claim salvage award.

2.6.4.3 The type of danger

2.6.4.3.1 Physical danger

In general, the danger must be of physical nature of either damage or destruction to the property.[110] Although not necessary that the property face risk of destruction, there must be a reasonable risk of the property sustaining "fairly extensive" physical damage. [111] Accordingly, not all risk of physical damage can be considered "danger" in this regard, and damage that is a consequence of the "ordinary perils of the sea" or normal "wear and tear"

[108] Author´s translation since no official English version available.
[109] It should be noted, that the provision only applies to "ships that cannot reach port by their own propulsion" and not other objects or ships unable to reach port for other reasons. Sigurdsson, Bull & Falkanger. *Sjórettur*. P. 508-509.
[110] Baughen. *Shipping Law.* P. 286.
[111] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575.

would not suffice nor would any potential damage that poses no or very little risk to the safety of the vessel.

It may be possible that a vessel could still be considered "in danger" even though it is no longer at risk of suffering physical damage. E.g. if a vessel has been in danger of suffering physical damage following engine failure but was later towed to port where it lies safely moored. In such cases there may be no further risk of physical damage but the ship may nevertheless not be considered salved until it has reached a port where repairs may take place. This will be discussed further in chapter 2.6.4.8. regarding the duration of danger and the so-called place of safety.

2.6.4.3.2 Danger to proprietary rights

As previously mentioned, it is possible that retrieval of property may warrant salvage award even if there is no danger of extensive physical damage or destruction.[112] Furthermore, at least in English law, the danger to proprietary rights can justify a salvage award, such as when a vessel has been stolen by pirates or bandits, or lost at sea unmanned, but later retrieved and returned to its owner.[113] In such cases there is not necessarily risk of physical damage to the vessel but it may however be in great risk of being lost forever from its owner. Due to lack of case law in Iceland or Norway, it is uncertain whether the same would apply as under English law, but sound arguments point to that being reasonable, such as the need to encourage such undertakings as they may entail risk and expenses for the salvors.

2.6.4.3.3 Other types of danger

2.6.4.3.3.1 Danger of delay and loss of earnings

As discussed under chapter 2.3.5.2. above, the "freight at risk" that is salved, i.e. the owner´s claim for freight that is preserved by the salvage operation is an independent subject of salvage, in the sense that its salvage entails a salvage award to the salvor.

[112] Cf. the example in chapter 2.6.3. of sunken valuable metals that are not at risk of physical damage.
[113] Brice. *Brice on Maritime Law of Salvage*. P. 52.

However, this applies only if there is danger of physical damage to the vessel. If there is no danger of the ship suffering physical damage, then there can be no claim for salving the “freight at risk” or for preventing financial loss of other kind.

This issue may be of relevance, if the vessel is prohibited or unable to move, thus resulting in the risk of delay, loss of earnings or similar financial damage. If the vessel was not exposed to any risk of physical damage, then no salvage award can be claimed for the assistance that resulted in the ship avoiding delay and loss of earnings. For example, if a ship is in danger of being frozen in port and delayed, but not in danger of suffering damage, then any assistance rendered to said vessel that prevented the delay from occurring, e.g. from an icebreaker that clears the way from port, does not warrant a salvage award.

However, where there is simultaneously risk of both physical and financial damage, then the prevention of financial damage may potentially be taken into consideration when assessing the salvage amount[114], although such criteria is not specifically mentioned under article 13 of the Salvage Convention. In this respect, reference is made to chapter 2.3.5. above regarding the preservation of financial interests of the shipowner leading to a higher salvage award.

2.6.4.3.3.2 Danger of liability

The same is considered to apply to so-called “liability salvage”, i.e. where the “salvor” prevents or minimizes the owner´s liability towards third parties. Averting such liability has not been considered an independent subject of salvage cf. chapter 2.3.5.3. above.

Hence, if the owner is in danger of becoming liable without the ship or object being in danger of suffering physical damage, then the “salvor´s” actions that prevent such liability from arising do not entail a salvage award. If the previous example is used of a ship that is frozen in port, undamaged but at risk of delay, then the assistance rendered to that ship that enables it to avoid delay and continue its voyage may result in the shipowner avoiding

[114] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575.

liability claims for e.g. failure to duly perform a contract of carriage. Such danger of liability would not suffice to entail a salvage claim.

However, when the actions of the salvor in addition to salving the vessel from physical damage also prevent the owner from becoming liable to a third party, then such "liability salvage" could be considered a valid factor when assessing the amount of the salvage award.[115] [116] Reference is made to chapter 2.3.5.3. for examples of either tort or contractual liability salvage that can impact the salvage award amount in this regard.

2.6.4.4 How to assess danger?

2.6.4.4.1 Objective assessment

When a salvage situation arises, it may be clear that the property in question was indeed in danger when the salvor intervened, thus justifying a salvage award. However, it is also possible that following such a situation it may later be evident that the situation was not as serious as originally perceived and that the property never was actually in danger. Would the "salvor" in such a case warrant a salvage award?

The questions of how to properly assess danger and what the consequences are of misapprehension of danger, are not answered in the Salvage Convention nor in the provisions of the IMC or NMC. Accordingly, it is left to case law and legal precedent of each country to regulate these issues more specifically, which results in potentially varying approaches from one country to another.

With respect to Icelandic and Norwegian law, it seems clear that the position is the same. The danger must be a real one and the ship must be objectively in danger. In effect the determination on the existence of danger is made in hindsight based on all the information that ultimately becomes available.[117] Accordingly, the evaluation of the captain and crew of the overall situation is relevant but not decisive when making that determination.

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[115] Brice. *Brice on Maritime Law of Salvage.* P. 172 and 638.
[116] Kennedy&Rose. *Law of Salvage*. P. 171.
[117] Sigurdsson, Bull & Falkanger. *Sjóréttur*. P. 476.

When assessing whether the danger is real the competence and skill of the captain and crew onboard will be of importance, as well as their overall evaluation of the situation.[118] As a consequence, it may be possible to reach two different conclusions regarding whether there is danger or not depending on the background and capabilities of those on board, even if the conditions of the situation at hand are otherwise exactly the same. A vessel with a skilful and capable master and crew are less likely to be considered in danger and thus less likely to be faced with a salvage claim.

2.6.4.4.2 Reasonable apprehension or misapprehension of danger

Generally, it has been considered a valid test as to whether the vessel is in danger, if it would be reasonable or safe to refuse an offer of assistance.[119] However, this test can be problematic with respect to the objective approach described above that provides for only real and present danger to be relevant.

If the test regarding the condition of danger is truly whether it would have been safe or reasonable to refuse an offer of assistance at the time it took place, then that must allow for potential and reasonable future risks to be taken into account, even though those risks ultimately did not materialize. A primary example of such “reasonable apprehensions” of danger would be when a vessel was assisted in a position that would have become dangerous if the weather had deteriorated, but it ultimately did not.[120]

The issue of whether a “reasonable apprehension” of danger is sufficient for the vessel to be considered in danger, is not clear cut but appears to be inconsistent with the main rule of only objective and present danger if the rule is applied in strict terms.

However, both approaches may potentially be harmonized so that allowing for valid and reasonable apprehensions of danger would not necessarily contrast with the principle of an objective assessment.

In order to do so, it is necessary to differentiate clearly between “reasonable apprehensions” of danger that ultimately do not materialize and “misapprehensions” of

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[118] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575
[119] Rösaeg. *Misapprehension of peril in salvage.* P. 19-22
[120] Ibid. P. 4.

danger in the sense that there was in fact never any possibility of danger occurring due to a misunderstanding, lack of knowledge or some sort of negligence that lead to the danger being "misapprehended". [121]

For example, the reasonable fear or anticipation of bad weather worsening is not a "misapprehension" if the weather ultimately developed favourably, in the same sense as a mistaken belief of the exact location of the vessel where it was wrongly thought to be closer to shore than it was in reality. The salvor only needs to prove that the risk is real and that it is present, e.g. the possibility of bad weather worsening, he does not have to prove that it necessarily would have materialized and led to damage had he not intervened. A real peril may also exist if there is a weakness in the ship or engine that can lead to an emergency or if the crew is in experienced or lacks certain qualifications.[122]

These situations would therefore not be considered "misapprehensions" of perils as they inherently provide for a dangerous situation. As Erik Rösaeg has stated in this respect; "*Even a peril that does not materialize is a peril to the vessel that can form basis for a salvage claim, and the fact that it does not materialize is no indication that it is based on a misapprehension.*"[123]

However valid this argument may appear, it must be reiterated that it seems at least to some extent contrary to the main rule discussed above, i.e. of assessing objectively, with the benefit of hindsight, whether the vessel was in fact in danger. In this respect, reference can be made to the following Norwegian Supreme Court cases that underline that the vessel must objectively be in danger: ND 1996:238 *LORAN*, ND 1999:269 *LOS 102* and ND 2004:383 *Norsk Viking*.

Due to lack of case law in Norway and Iceland it is difficult to determine to what extent, if any, "reasonable apprehensions" of danger could lead to a salvage award when proven that the risks ultimately did not materialize. However, some legal scholars in Norway and Iceland seem to reserve some criticism towards a strict application of the "objective" approach since it may undermine the basic objective to encourage salvage attempts and can lead to difficult

[121] Ibid. P. 19-22.
[122] Rösaeg. *Misapprehension of peril in salvage.* P. 19-22.
[123] Ibid. P. 19-20.

evaluations and potentially unfair results. [124] [125] [126] Therefore, in future court rulings more consideration may potentially be given to reasonable apprehensions of danger and thus the principle of objective assessment will perhaps be given a more nuanced application.

2.6.4.4.3 Position of English law on "reasonable apprehension" of danger

The position of English law appears to be for the most part based on the same objective approach as in Norway and Iceland, although it seems quite clear that a "reasonable apprehension" of danger based on a factual foundation would suffice to deem the condition of danger to fulfilled.

In *Kennedy&Rose Law of Salvage* the following is stated:

> "*The test of whether there is sufficient danger to found a claim for salvage is essentially an objective one. The danger* […] *has been described as a real and sensible danger* […] *it must not be fanciful or only vaguely possible or have passed by the time the service is rendered. On the other hand it is not necessary that distress should be actual or immediate or that the danger should be imminent: it will be sufficient if at the time at which assistance is rendered, the subject matter has encountered any misfortune or likelihood of misfortune which might possible expose it to loss or damage if the service were not rendered* […] *there must be danger or apprehension of danger.*[…]*Therefore, in order to warrant a salvage service, there must be such a reasonable, present apprehension of danger that, in order to escape or avoid the danger, no reasonably prudent and skilful person in charge of the venture would refuse a salvor´s help if it were offered to him upon the condition of his paying a salvage reward.*" [127]

Similar arguments are offered in *Brice Maritime Law of Salvage*, where it is also stated:

[124] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575
[125]Sigurdsson, Bull & Falkanger. *Sjóréttur*. P. 478.
[126] Rösaeg. *Misapprehension of peril in salvage.* P. 35-41
[127] Kennedy&Rose. *Law of Salvage*. P. 162-163.

> "[s]*uch an apprehension must be based on some foundation of fact so that if the vessel is in fact in safety or the risks to her are merely fanciful there is no ground for awarding salvage* […]"[128]

According to the above, under English law, a reasonable apprehension based on some foundation of fact, would suffice to claim the vessel or property was in danger, even if the danger did not materialize. So there appears to be a slight difference between the Nordic approach and the English one in this respect. The English approach takes more consideration of the need to encourage salvors to undertake salvage operations and puts significance on whether a "reasonably prudent and skilful person in charge" would refuse acceptance or not.

The Nordic approach is less considerate from the salvor´s point of view since he in effect bears the risk of any reasonable danger not materializing. While it is true that if the ship with the benefit of hindsight was never was in actual danger then no property was in fact salved, and as a consequence no salvage award should be claimed. The Nordic approach is logical in that aspect. It may also provide incentive to the master of the ship in potential danger to call for assistance if he will not have to pay a salvage award if it is later proven that the risk never materialized. That would likely benefit environmental protection since it increases the likelihood that the vessel in distress will request assistance. On the other hand, that positive aspect is countered by the deterrence that the "Nordic approach" may have on potential salvors that may not be willing to spend time, money and effort on potentially risky salvage operations if there is any doubt with respect to the presence of danger.

2.6.4.4.4 Voluntary salvage or request salvage operations

As stated above in 2.6.4.4.1, the law seems to be settled with respect to the consequences of misapprehension of danger; if the vessel would not have been damaged even though the "salvor" would not have assisted the vessel then it was not "in danger" and no salvage award can be claimed.

[128] Brice. *Brice on Maritime Law of Salvage.* P. 46.

However, as explained above, due to the lack of case law there is perhaps room for a more nuanced approach, especially by applying viewpoints of risk allocation based on whether the salvage operation took place following a request for assistance or if it was the voluntary decision of the salvor without a formal request.

This issue has been addressed by Erik Rösaeg[129] and his findings were, inter alia, the following.

- Where a special request had been made for assistance it would often be followed up by the conclusion of a salvage agreement, thus potentially estopping the owner of the salved vessel from later claiming that there was in fact no danger or that salvage award cannot be claimed, cf. chapter x above.

- In cases where no specific agreement was made following a request for help, then strong legal arguments are in favour of a rule stating that salvage award should be claimed, even though the danger was misapprehended and there was in fact no danger to the vessel, but only insofar as the salvor was in good faith regarding the perceived danger at hand. In such cases, general rules on risk allocation lead to it being unfair that the salvor should bear the risk of the vessel in distress having misjudged the gravity of the situation. The salvor is hardly in a good position to verify the information and description of the situation relayed by the assisted vessel, e.g. regarding perceived engine trouble or other issues on-board causing the perilous situation. Furthermore, such a rule would enhance the encourage aspect of salvage operations.[130]

- A different viewpoint would apply to voluntary salvage, i.e. salvage operations that took place without any specific request from vessel in distress. In such cases the voluntary salvor should carry the risk the danger perceived to be at hand was based on a misapprehension, and there was in fact no danger at all.

[129] Rösaeg. *Misapprehension of peril in salvage.* P. 1-43.
[130] Ibid. P. 16, 17, 24-26.

> Although the encouragement aspect would still be a valid point in favour of the salvor and his claim for salvage award, the fact that the salvor is not responding to a request but rather independently deciding to salve the vessel in hope of financial reward, alters how the risk should be allocated with respect to the appearance of danger. In such cases, the "salvor" would not be acting on information from the owner of the salved vessel, rather would the misapprehension be based on the salvor´s on misconception of the situation. Further, owner´s might need protection from officious interventions, thus making it reasonable to demand that in order for the salvor to claim salvage award, he must at his own risk ensure that the necessary conditions are met.[131]

Although the author finds the arguments above compelling, it must be reiterated that they are not reflected in the recent case law, specifically the Norwegian Supreme Court cases *The LORAN*[132] and *Norsk Viking*[133]. In both cases, salvage operations were performed at the request of the vessel in distress, but salvage award was denied due to a misapprehension of danger on the part of the salved vessel. So as matters stand, it appears to be irrelevant, or at least not decisive, whether the salvage was voluntary or upon request with respect to the consequences of misapprehension of danger or if potential dangers do not materialize. In those instances, the "salvor" must bear that risk and accordingly cannot claim salvage award.

2.6.4.5 Degree of danger

2.6.4.5.1 Minimum degree of danger

When assessing the condition of danger, it is necessary to determine what the likelihood for damage needs to be in order for a salvage situation to be at hand. This can be referred to as the minimum degree of danger. Here there are no clear lines other than the danger must be more than posed by the ordinary perils of the sea.[134] In this respect, it is likely that the

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[131] Rösaeg. *Misapprehension of peril in salvage.* P. 17, 18, 19.
[132] ND 1996:238.
[133] ND 2004:383
[134] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575.

threshold is fairly low[135] with reference to the important objective of encouraging salvage operations and if there is any doubt that the salvor should get the benefit of it.[136]

2.6.4.5.2 Degree of danger relevant when assessing amount

The level or degree of danger above the minimum threshold is not relevant when establishing the right to claim salvage award but is on the other hand a very important factor when assessing the salvage award amount cf. article 13(d) of the Salvage Convention.[137]

2.6.4.5.3 Degree of danger and "voluntariness"

The degree of danger can be of special importance when determining whether the actions of salvors that had a pre-existing contractual or public duty to assist the vessel in distress enables them to claim salvage award. If there is a high degree of danger to the vessel that also coincides with the degree of danger the salvors are exposed to during the salvage operation, that could point to the salvors having exceeded their contractual or legal obligations to assist. For example, if a crew member puts his life at risk to extinguish a fire on-board in extraordinary fashion, then he would rather be entitled to a salvage award as opposed to if he puts out the fire without exposing himself to any risk.

2.6.4.5.4 Degree of danger and alternative assistance

Furthermore, the degree of danger could also be affected by any alternative assistance that may be available to the vessel in distress. For example, if a salvor comes to the aid of a vessel with no means of propulsion and in danger of grounding, and tows it to safety, the degree of danger would be reduced, and as a consequence the salvage amount, if the distressed vessel had alternative and potentially cheaper ways of being saved.[138]

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[135] Cf. discussion in chapter 2.6.4.2.

[136] When there is not a salvage situation at hand due to lack of danger, the assisting party is due a "fair compensation" instead of a salvage award, the amount of which is at the discretion of the court and should be more reflective of ordinary commercial terms than the criteria mentioned under article 13 of the Salvage Convention.

[137] Cf. IMC section168(e) and NMC 446(e).

[138] Kennedy&Rose. *Law of Salvage*. P. 163.

2.6.4.6 Alternative assistance

As mentioned above, the possibility of assistance from others than the actual salvor may impact the degree of danger considered at hand for the ship in distress. The owners of the salved ship may even be tempted to argue that there was in fact no danger at hand since there was time to receive assistance from others, potentially on cheaper terms, before any damage could occur to the ship. I.e., that the availability of alternative assistance may be relevant to the existence of danger in itself, and especially when assistance on commercial terms would have been available.[139]

However, it is generally accepted that the availability of alternative assistance is only relevant to the degree of danger (and thus affecting the amount of the salvage award), but does not impact the assessment on whether the ship was in fact in danger to begin with.[140] [141] Hence, the salvor cannot be denied salvage award on the basis that the ship in distress could have been assisted by others before any damage materialized, if the ship was initially in danger. However, as already discussed in chapter 2.4.2.3. above, if the owner of the salved ship expressly and reasonably prohibits the salvor from salving the ship, then no salvage award can be claimed.[142] One factor in the "reasonableness" of such a prohibition would be whether alternative assistance was available. So even though the availability of alternative assistance cannot on its own absolve the owner from paying salvage award, it can justify his prohibition to the salvor of performing the salvage services.

2.6.4.7 Burden of proof regarding danger

Danger can be evidenced in various forms and ways and each case must be judged by looking at the set of circumstances as a whole. What could be a dangerous situation for one ship is not necessarily the case for another. There must be sufficient evidence to prove that the ship or property in question was in objective and real danger and to that effect numerous factors can play a part in establishing the existence and severity of danger.

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[139] Brice. *Brice on Maritime Law of Salvage*. P. 56. This argument was made in *The St John* (1999) 1 Lloyd´s Rep. 88 - but it was not addressed directly by the court in that case.
[140] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 575.
[141] Brice. *Brice on Maritime Law of Salvage*. P. 57.

In general, with respect to burden of proof, it can be said that the onus is on the claimant to prove the merits of his claim. The same applies with respect to salvage awards, i.e. the salvor has the burden of proving that all conditions for salvage award are met, including the existence of danger.[143] The same would apply to the salvors allegations regarding the degree of danger at hand.

It may also be important to prove when the danger ceased to exist, since salvage award can only be claimed for actions while the property is in danger. When it has already been established that the property has been in danger, it is the salvee, not the salvor, that has the burden of proving when the danger has ceased to exist. That is logical since in those situations it is the salvee that must argue and prove when the property is out of danger in order to end the salvage situation and thus limit the salvage award. This issue regarding the duration of danger and place of safety will now be discussed further.

2.6.4.8 Duration of danger and connection to "place of safety"

2.6.4.8.1 Importance of establishing when danger has surpassed

It is important to determine when the danger has surpassed since services that are rendered in the absence of danger will only entitle a fair or agreed amount of compensation and do not justify salvage award.

The moment of time that salvage operations are over will also be relevant with respect to calculating the value of the salved property, which shall only be done once the property has reached a place of safety.

Furthermore, the exact time the salvage operations are concluded, i.e. when danger has surpassed, is also important since all damage that later occurs to the salved property will not affect the salvor´s claim.

2.6.4.8.2 When has a "place of safety" been reached?

As already mentioned in chapter 2.5.2., the "useful result" necessary to claim salvage award goes hand in hand with reaching "a place of safety", i.e. where danger no longer exists to the

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[143] Kennedy&Rose. *Law of Salvage*. P. 166.

salved property.[144] However, it may be possible that some parts of the salved property may have different "places of safety", i.e. that danger may last longer for some part of the salved property than others[145], cf. example in chapter 2.6.4.9.2. below.

There may be numerous considerations regarding whether the ship has reached a "place of safety", i.e. whether danger still exists or not. These issues may be especially relevant when the salvage operation takes place in stages and potentially more than one salvor takes part.

These issues are illustrated in the English case of *The Troilus*,[146] where a steamship laden with cargo lost its propeller in the Indian Ocean but was otherwise unimpaired. The ship was towed to port in Aden and it was agreed that the towage was a salvage service. However, the ship could not be repaired in Aden nor could the cargo be discharged and stored or forwarded, but the ship could lay there in port safely. From Aden, the Troilus was towed again by another ship to the U.K. for repairs, and that ship also claimed salvage award but the owners rejected the claim on the basis that the ship was not in danger in Aden when the towage began, since it lay there safely and never was in danger during the towage to the U.K.

The court ruled that the burden was on the owners to show that danger had surpassed when the second towage began.[147] The court furthermore reached the conclusion that the owners had not succeeded in proving that danger had surpassed and that it was not sufficient to simply point out that the ship lay safely anchored. It was pointed out that there is no general rule that states that an immobilized ship without propulsion or its cargo are automatically in danger until the ship has been repaired. The conclusion whether or not danger had surpassed would have to be concluded based upon the facts of each case. In that respect, it matters if there is reduced ability to react to emergencies such as fire or being adrift, if there is any danger of the ship or cargo further deteriorating, what the facilities are for repair at place in question, what the possibilities are for safe discharge, storage and

[144] Cf. article 12 of the Salvage Convention, IMC section 167 and NMC section 445.
[145] Kennedy&Rose. *Law of Salvage*. P. 180-181.
[146] *The Troilus*". (1951) 1 Lloyd´s Rep. 467. House of Lords.

[147] Cf. chapter 2.6.4.7 regarding the burden of proving when danger has ceased to exist.

shipment of cargo and whether there are potential delays and expenses at the place in question?[148] [149]

Further, with respect to this issue, in the similar case of *The Glaucus*[150] the court held that "*quite apart from physical danger,* […] *until somebody got her* [i.e. the ship] *to a place where the necessary repairs could be executed she was completely immobilized. It is no use saying that this valuable property* […] *is safe, if it is safe in circumstances where nobody can use it. For practical purposes, it might just as well be at the bottom of the sea*"

The arguments above could be summarized by stating that a ship and cargo may be considered in danger simply by being immobilized, even if the ship lays safely, if repairs cannot take place or the cargo discharged and stored. In order to properly make this determination, there must be a case by case evaluation, inter alia on the basis of the criteria laid out above from *The Troilus.*

These arguments are logical and could also apply equally under Icelandic and Norwegian law, as the *NARVIK* decision points to cf. chapter 2.5.2. above where it was in effect held that even though the ship had been towed to a nearby port following its grounding it had not reached a place of safety until it had reached the repair yard.

2.6.4.9 Danger not present for all property or different degrees of danger

2.6.4.9.1 Difference in existence or degree of danger

In most salvage operations, both the ship and cargo will be subject to the danger causing the salvage situation, i.e. if the ship is in danger then the same applies to the cargo onboard.

However, there are possible scenarios when that is not necessarily the case and the vessel may be in danger of suffering damage but not the cargo, or similarly if some cargo is exposed to danger but not all cargo, e.g. if some cargo is in secured containers or storages and are not at risk of suffering damage. In such cases, is the owner of goods that were not in danger also liable to pay salvage award? It is also possible that different parts of the salved

[148] Brice. *Brice on Maritime Law of Salvage.* P. 50-51
[149] Kennedy&Rose. *Law of Salvage*. P. 182-183.
[150] "*The Glaucus*"(1948) 81 Lloyd´s Rep. 262 at 266.

property in salvage operations may have been exposed to different degrees of danger and as a consequence the question may rise if that should result in higher salvage award from owners of property exposed to greater danger than others.

These issues are regulated by article 13(2) of the Salvage Convention, cf. section 169 of the IMC and section 447 of the NMC. There it is stated that the salvage award is payable by the shipowner and the owners of other objects in proportion to the values salvaged for each of them. Under English law at least, this means that "*if one part of the property making up the common adventure is in peril then the whole adventure is treated as being in peril and pays the salvage remuneration rateably to the salved values*".[151] Accordingly, even though it may be argued that a part of the cargo was not in danger, but the vessel which it was onboard indeed was, then that cargo owner is still liable for his portion of the salvage award. The same applies with respect to different degrees of danger the salved property was exposed to. Difference in the degree of danger from which a part of the property was salved from does not give rise to a different proportional rate when assessing the salvage award amount.[152] [153]

The author has not found any case law or legal theory to suggest the same position is not applied under Icelandic and Norwegian law, so it is therefore submitted that that is the case. It must be pointed out however, that the wording of article 13(2) as implemented in the IMC and NMC is not obvious in this regard. The owner of the part of the property that was not in danger may attempt to argue that he should not pay any salvage award since he suffered no benefit of the salvage operation. However, in practise it would be very difficult to prove that his cargo was not in danger if agreed that the ship carrying it indeed was. In addition, such an owner would enjoy a practical benefit of a successful salvage operation for which he should be liable to pay for.

Further, it would be extremely difficult to independently assess the level of risk each property interest was exposed to and properly distinguish between degrees of danger

[151] Brice. *Brice on Maritime Law of Salvage*. P. 53.
[152] Kennedy&Rose. *Law of Salvage.* P. 680.
[153] Brice. *Brice on Maritime Law of Salvage*. P. 406 - 412.

threating one part of the cargo from the next. It is therefore clearly the most practical solution to apply the same level of risk to all salved property.

2.6.4.9.2 Different duration of danger

It should be noted that it may be possible for the existence of danger to last longer towards one part of the salved property than another. Salvage services are considered to last until the property has reached a place of safety, i.e. when there no longer is any danger to the property. Accordingly, it is possible that one part of the salved property may still be considered in danger while another part is not. However, this is only relevant when calculating the salvage fund, i.e. the value of the salved property that the salvage award shall be calculated from. The value of the salved property is meant to be assessed when the salvage operation is completed.[154]

If we take an example of a laden oil tanker that suffered damage and is salved and towed to a repair yard. The danger to the vessel might be considered to be at hand until the ship has reached the repair yard, but if the oil cargo on board had been transhipped to another ship sooner, the danger towards the oil cargo may have already surpassed by the time the ship reached port. When calculating the value of the cargo, it would probably be more appropriate to do so according to its value when the cargo was salved, but the value of the vessel would be calculated when it had reached safety at the repair yard, perhaps even weeks later.[155] In this respect, it may be of relevance how long danger lasts towards each part of the salved property as market value can obviously fluctuate.

3. Conclusions

Although the statutory text on the conditions for salvage award seems fairly straight forward, there are still numerous issues that may require special consideration when assessing if salvage award can be claimed.

Importantly, parties involved in a salvage situation often apply the principle of contractual freedom and commit to a formal agreement that may state there is a salvage situation at

[154] Falkanger, Bull & Brautaset. *Scandinavian Maritime Law.* P. 583.
[155] Brice. *Brice on Maritime Law of Salvage.* P. 412.

hand and stipulate independently when an award can be claimed. In such cases the agreement itself replaces an independent assessment of whether the conditions for salvage award have been met. When salvage agreements are in writing there should not be much room for dispute regarding the conditions for and terms of the potential salvage award. But where oral agreements are concerned it may be especially important to clarify the terms of any salvage award and the salvor may have an obligation to expressly reserve his rights in that regard, as illustrated by the case of *MV Kvitnos*.[156]

The only exception to the “no cure – no pay” principle is the special compensation that the salvor can claim when the vessel or its cargo threatened to damage the environment. Otherwise, the preservation of physical property is always necessary to claim salvage award, but if other financial interests of the salvee are also preserved by the salvor, e.g. by so-called “liability salvage” or otherwise, then that could arguably increase the amount of the award.

An interesting aspect of salvage is when the salvor may claim an award despite having either a prior contractual or legal obligation to assist. In both cases it is possible that the salvor´s actions may exceed his scope of duty towards the salvee and avail him of the right to claim an award, especially where the salvor is exposed to a high degree of danger or otherwise acts in an extraordinary fashion. With respect to public authorities with a duty to assist, it is clear that they can in principle claim salvage award, but in practise that right is limited. It is not clear where the line is in this regard and the statutory text does not differentiate between extraordinary actions of salvors that merit salvage award and ordinary ones that do not. It is far from ideal that this issue is unclear. The case law in this regard is not conclusive so there is need for further guidance, either from the national courts or the legislator.

The condition of being “in danger” has warranted most attention in this thesis. The term is vital in order to establish a salvage situation so the need to clarify what it entails is obvious. Danger can theoretically be of many sorts, but only the danger of physical damage can lead to salvage award, although danger to proprietary rights could also suffice.

[156] LA-2017-41631, cf. chapter 2.2.4.

The legal text itself does not provide any guidance on how to properly assess the existence of danger. However, it can be deduced from case law that the assessment must effectively be made in hindsight by applying all relevant information about the situation, even if it was not available at the time to the parties involved. This objective assessment entails that under Icelandic and Norwegian law, it is doubtful that reasonable apprehensions of danger that did not materialize will suffice to establish danger, in contrast to the situation under English law. There may be valid arguments to amend the apparent current approach regarding reasonable apprehensions of danger, as it can be argued to be unfair to the salvor and not in accordance with the objective to encourage salvage attempts. Based on views of risk allocation it may be reasonable to make a distinction in this regard between salvage operations that were requested by the salvor and operations based on a unilateral decision by the salvor to assist. Such a distinction is however not reflected in recent case law and can therefore not be considered valid as *lex lata.*

With respect to the duration of danger, various issues may come into consideration when assessing if the danger has surpassed thus ending the salvage situation, not least if the salvage operation takes part in stages. It may be difficult to specifically legislate those matters further since such an evaluation would often have to be made on a case by case basis. Accordingly, it may be best left to the courts and future case law to develop the issue further.

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Overall, the relevant provisions of the IMC and NMC that implemented the Salvage Convention regulate quite clearly when salvage award can be claimed. However, as indicated above there may be room for more clarity and potential modifications for certain aspects, such as regarding the status of public authorities, reasonable apprehensions of danger and the duration of danger. Such modifications could either be left to the respective national courts or legislators to implement or they could be adopted by the IMO which could in turn lead to a more harmonized approach between the member states.

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