

A Study on Legal Theory of Salvage

-International Salvage Convention and Chinese Maritime Code-

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海難救助의 法理에 關한 研究

-國際協約과 中國海商法 比較研究-

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국문요약

해난구조법은 공법과 사법의 두 부분을 포함한다. 그러나 해난구조법의 효과를 놓고 볼 때 계약구조, 임의구조 및 법정구조라는 세 가지의 기본적인 법률체도를 포함한다. 지금까지 학자들은 앞의 두 체도에 대해서는 많은 연구를 하여 왔으나, 법정구조에 대한 연구는 미비하였다.

본 논문은 “1989년 해난구조에 관한 국제협약”을 중심으로 하였고, 아울러 중국의 해난구조법과 해난구조의 입법론 및 현행의 세 가지 기본구조체도에 대한 체계적인 분석을 하고자 하였다. 연구의 주요한 내용은 다음과 같다.

1. 해난구조입법

본 장에서는 해난구조법의 역사 및 연혁, 현재의 해난구조입법의 객관적 요건, 해난구조법과 기타 관련법규와의 관계에 대하여 상세한 기술을 하였다. 이것을 바탕으로 중국의 해난구조입법의 역사적 배경, 입법기초, 표현형식 및 중국의 해상법과 해상교통안전법에 확립된 기본원칙과 제도 등 중국의 해난구조입법의 현황에 대하여 상세한 설명을 하였다.

2. 해난구조의 기본법리에 대하여

본 장은 해난구조의 정의로부터 시작하여 해난구조의 기본법리에 대한 체계적인

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기술을 하였고, 부동한 측면에서 해난구조에 내포된 의미를 분석하면서 중국해상법과 “1989년 해난구조에 관한 국제협약”상의 해난구조의 정의에 대한 차이점을 도출하였다. 또한 본 장에서는 해난구조의 법적성질, 기본원칙 및 기본제도에 대하여 기술하였고, 해난구조에 대한 분류 및 그것에 대한 구체적인 설명을 하였다.

3. 해난구조의 구성요건

본 장은 국제협약상의 관련법규를 기초로 하여 여러 가지 부동한 구조방식의 구성요건에 대하여 심도 있는 기술을 하였다. 부동한 차원에서 해난구조의 “현실적 위험”, “구조의 목적물”, “임의(구조)원칙” 및 “구조결과에 이익”등 네 개의 성립요건을 논술하고 이에 대한 사건을 피력하였다.

4. 해난구조료와 특별보상

본 장에서는 해난구조료와 특별보상의 법적성질, 배분원칙 및 특별보상제도가 확립되게 된 역사적 배경에 대하여 상세한 기술을 하였다. 이것을 바탕으로 부동한 구조방식에 따라 구조료와 특별보상을 확립하는 기본원칙을 기술하였다. 또한 중국해상법이 법정구조 상황에 대하여 실행하는 구조료와 특별보상제도를 지적하였다.

본 논문은 비교법적인 연구를 통하여 공법과 사법차원에서 중국의 해난구조제도에 대하여 기술하였고, 아울러 아래와 같은 문제점을 지적하였다.

- (1) 해난구조법의 적용범위와 국제협약과의 충돌점;
- (2) 선박충돌의 상황에서 실행된 구조에 대한 구조료와 특별보상문제에 대하여 법규정을 두고 있지 않다는 점;
- (3) 내수에서의 구조에 대하여 준거법이 혼결한 점;
- (4) 정부당국의 구조료청구권에 대한 법적 규정에 존재하는 모순점;

저자는 상술한 문제에 대한 구체적인 입법건의를 제기하였다.

본 논문의 궁극적인 목적은 해난구조의 입법론을 체계적으로 기술하고, 이것을 바탕으로 하나의 이론체계를 설립함으로써 중국의 해난구조실무에 이론적인 논리를 제공하고자 하는데 있다.

1. Introduction

The maritime law of salvage consists of three types of legal framework which regulates the legal relations arising from salvage operations. Generally

speaking, the salvage operations in the sense of modern legislation should be divided into voluntary salvage, contractual salvage and the mandatory salvage.

Since maritime law of salvage involves many important legal questions, this thesis, starting from the basic legal definitions, focus attention on a theoretical system of maritime law of salvage. Therefore, the scope of study includes maritime legislation of salvage; legal theory of maritime law of salvage; legal elements of salvage and the salvage reward and special compensation.

In view of the fact that the legal question involved in the maritime law of salvage is influenced not only by the international convention but also by internal legal system, thus the study is made on the basis of analysis of the legal theory in different aspects. Moreover, the comparison has been made between the Chinese maritime law of salvage and international conventions in order to find the common points of and differences between the law and conventions.

2. Maritime Legislation of Salvage

2.1 Evolution of Maritime Legislation of Salvage

The origins of maritime law of salvage is of great antiquity. In the sense of academic research, the international maritime legislation of salvage can be divided into four stages which can be listed as ancient times, middle ages, modern times and contemporary ages.

There is a evidence that almost three thousand years ago, under the Rhodian Sea Law (Rhodian Maritime Code) which was applied in ancient Greece and Mediterranean, volunteer salvors were held entitled to be rewarded for their salvage services.

In the middle ages, along with the development of navigation and international trade, many laws and judicial practices were compiled by some lawyers, finally, three eminent Codes which are known as the *Rolle Olayron*, *Lex Consolato* and *Wisby Town Law* were adopted. It has been recognized

that the Maritime Codes mentioned above have the far reaching influence to the international legislation of salvage.

In the modern times, great change were taken place to the maritime legislation of Europe. In order to fit the requirements of the international trade and navigation, most of marine countries adopted their own maritime codes in which the regulations of salvage were included. Such maritime codes were made on the basis of customary laws which are popular in some districts of Europe, the typical one is the *Marine Ordinances* which was issued by Louis XIV in 1681. The *Marine Ordinances* was described as systematical Code.

In the contemporary ages, since there are many contradictions in the law of every country, the unification of maritime laws of salvage became an important question which led to the conclusion of the Brussels Convention on Salvage of 1910 in which some basic principles of the salvage was established. Nevertheless owing to the fact that during a long period of time the international situation has been changed in many aspects, some provisions in the Convention could not fit the new circumstances. Therefore, the Convention should be modified.

In view of the above, the London Salvage Convention of 1989 which is fit for the new circumstance has finally been adopted.

2.2 Chinese Maritime Legislation of Salvage

China is a developing country as well as a big shipping country, but owing to the limitation of political condition, the legal legislation has been disturbed for a long time. Since the reformation and opening of China, the Chinese Maritime Code was issued in 1992. one of the Principles for legislation is that the Maritime Code should be kept in line with the development of international maritime legislation.

Since China is a signatory to the 1989 Convention, the main system established in the Maritime Code is essentially same with that of the Convention with a little exceptions. Therefore, in the thesis, the basic systems of the Chinese maritime

law of salvage is deeply demonstrated with the 1989 Convention as a conference, as a result, some contradictions have been found out.

In Korea, there is a Water Disaster Salvage Act which is in the nature of public law, but in China there is no such Act. Under Chinese law system, the administrative regulations of salvage are mainly embodied in the Maritime Traffic Safety Law and other regulations issued by the Ministry of Communication.

The Maritime Traffic Safety Law of China, as a component part of maritime public law, provided for some basic principles and systems concerning the salvage from the angle of administration. In the thesis, the following systems have been deeply researched.

- (1) System of calling for help
- (2) Self-rescue by the ship in distress
- (3) Life salvage
- (4) The right of salvaged party for selection of salvor
- (5) Duty of ships involved in a collision
- (6) A rescue operation organized by the competent authorities
- (7) Search and rescue of vessel or people performed by foreign country

On the other hand, a study has been made on basic system established in the "Regulation Concerning the Management of Dispatch and Command of Salving Vessels" which is issued by the Ministry of Communication of China in 1992. Therefore, the following systems have been summarized:

- (1) Disposition of salving vessels
- (2) Management of salving vessels
- (3) Principles of management
- (4) Legal liability for a breach of the Regulation

3. Legal Theory of Salvage

3.1 Concept of Salvage

Though the 1989 Convention did not give the definition directly for

"salvage", Article 1 (a) of the Convention defines "salvage operation" 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

The Chinese Maritime Code has not given the exact definition directly for salvage at sea, it is implied that the definition of salvage has been established indirectly in Article 171 of the Maritime Code which provides for that the "the provisions of this chapter shall apply to salvage operations rendered at sea or any other navigable waters adjacent thereto ships and any other property in distress".

By comparison of the definitions of the salvage defined by the Convention and the Maritime Code, there are two differences which are as follows:

(1) Difference about emphasis of definition

For the definition defined in the convention, the emphasis has been laid on the subject-matter of salvage rather than the salvage operation, but, In the Chinese Maritime Code, the emphasis of the definition is put on the act of salvage operation rather than the ship or property in danger.

For this reason, some activities may be regarded as a salvage operation under the convention, but it will not be within the scope of salvage in the sense of Maritime Code.

(2) Difference about condition precedent of salvage at sea

Under the convention, the recognized subject-matter of salvage should be "in danger", while in the sense of Maritime Code, the ship or property should be "in distress". In this sense, the difference between two expressions is about the degree of sea perils.

3.2 Legal Nature of Salvage and Basic Principles

There are four doctrines with regard to the legal nature of salvage which can be listed as the doctrines about management of general affairs; para-contract; mandatory act and the illegal profits. In the thesis, it is deemed that the doctrine about general affairs would represent the true meaning of the

salvage.

The main reason for recognition of salvage reward is that the special risks of the sea has been considered, therefore, the payment of salvage reward should be made. Such policy is established on the basis of the principle of equity and the principle of encouragement for salvage.

3.3 Classifications of Salvage

(1) Voluntary Salvage

There are two essential features for voluntary salvage:

- a) there are no any pre-contractual relationship between salvor and the salvaged party
- b) the principle of no cure no pay shall also apply to the salvage.

(2) Mandatory Salvage

By analysing the provisions in respect of mandatory salvage provided for in the Convention, it can be found that the mandatory salvage can be divided into two categories: one is the service rendered by public authority with their own vessel; another one is the service rendered by a salvor who is under the control of public authority. Though the salvage service mentioned above is mandatory one, the salvor shall be entitled to avail themselves of the rights and remedies provided for in the Maritime Code.

(3) Contractual Salvage

The contractual salvage is the act of salvage of the ship or property in peril in the light of contract which is concluded under the principle of no cure no pay.

In the thesis, the salvage operations have been studied under the guidance of the 1989 Convention.

3.4 Relationship Between the Law of Salvage and other Laws

- (1) Relationship between maritime law of salvage and law of Carriage of

Goods by Sea

It seems that there are no any connection between the law of salvage and the law of carriage of goods by sea, but in fact, the act of salvage is usually connected with that of deviation which is an important legal question in the carriage of goods by sea.

The deviation can be divided into two types: reasonable deviation and unreasonable deviation. It is provided in the Hague Rules that any deviation for saving or attempting to save life or property... can not be regarded as a breach of the Rules or the contract. Therefore, in the sense of Hague Rules, the salvage operations which are connected with deviation can be divided into two types:

1) Actual salvage

The so called actual salvage means that, after deviation, the carrier actually rendered salvage operation to the life or property.

2) Attempting to render the salvage service

Attempting to salve means that the master, when he decided to deviate the ship, was for the purpose of rendering the salvage operation irrespective of that whether he has actually rendered the service or not.

(2) Relationship between the Law of Salvage and the Law of Ship's Collision

Although the salvage at sea should be regulated by maritime law of salvage, the mutual obligation for salvage is imposed on the ships which have come into collision irrespective of that who will be liable for the accidents of collision.

The performance of the reciprocal obligation of salvage shall not prejudice the right of the salvor for claim of the salvage reward from the other side unless he is wholly liable for the accidents of collision.

(3) Relationship between the Law of Salvage and That of General Average

The maritime law of salvage has a close relation with that of general average. In the meaning of essence, both the act of salvage and general average are for the purpose of saving the property from total loss. However, there are some differences between them.

Firstly, in a case of salvage, the salvors to be rewarded are those of volunteers by reason that they have no any official obligations or contractual obligations. While in the circumstances of general average, it is the duty of the persons on board the ship to render the service for the common safety of the ship and property. Therefore, there is no rewards for them.

Secondly, In the circumstance of salvage, the salvor has a maritime lien on the property salvaged, which attaches on the property salvaged at the time and place where the salvage services terminate. As regards to the general average, the shipowner's remedy is in the legal nature of a possessory lien which he cannot exercise until the termination of the adventure.

Thirdly, in a case of salvage, the evaluation of the values of the property is to assist the tribunal for assessment of the salvage reward and to determine how much each interest will pay. In the circumstance of general average, the purpose of the carrier for assessment of the values of the property is only to assess the values on which each interest will contribute.

Fourthly, the values in a salvage case are assessed at the time and place where the salvage service terminate. Whereas for general average, the values are assessed when the common maritime adventure ends.

(4) Relationship between the Law of Salvage and the Law of Maritime lien

There are no any exceptions in the law of every country that a salvor who rendered beneficial services to a ship and associated property will enjoy a maritime lien on the salvaged property. While the legal basis of maritime lien is the law rather than the agreement. It is independent of personal obligation on the part of the res owner; it is directly or indirectly restricted by the delivery of the goods. Moreover, the salvage maritime lien is not subject to any right of limitation.

4. Legal Elements of Salvage

4.1 Legal Elements of Traditional Salvage

In the light of traditional theory, the salvage should satisfy following

elements:

(1) Existence of Physical Danger

The physical danger in the sense of maritime law of salvage means the substantial danger under which the property has come into a position of danger necessitating a salvage service to preserve it from loss or damage. With regard to this issue, the attention should be paid to the essential factors of physical danger, the types of physical danger, the difference between the "danger" in the sense of salvage and that of general average, and the burden of proof about physical danger.

(2) Recognized Subject of Salvage

Either under the international convention or under the maritime law, the salvage should only be rewarded for the service to property which is recognized as a subject of salvage. The subject of salvage includes a vessel, property and freight at risk. All of the items mentioned herein have been deeply demonstrated with modern theory.

(3) Voluntariness of Action by the Salvor

Voluntariness, as a common element of traditional salvage, means the person who rendered a salvage service without any pre-obligation to the owner of salvaged property. While the obligation includes the legal obligation, moral obligation, official obligation and contractual obligation.

Among the above obligations, the legal obligation and moral obligation shall not affect the salvor's right of claim for reward.

(4) Useful Result

With regard to the useful result, the classification can be made as Direct result, indirect result and invisible result.

Though the "useful result" has been established as a general rule for award of salvage, there are two important exceptions—Exception provided by law and Exception agreed by Contract.

4.2 Legal Elements of Mandatory Salvage

- (1) The ship or property must be in peril which is threatening the Maritime traffic safety or human lives
- (2) Salvage operation must be in connected with the act of government
- (3) There are no any pre-salvage contracts
- (4) There must be some useful result

5. Salvage Reward and Special Compensation

5.1 Salvage Reward

Under a guidance of international convention and the Maritime Code, the criteria for establishment of the salvage reward have been demonstrated. In the mean time, the international judicial practice or cases have been made as reference.

In the thesis, it is deemed that the apportionment should not be deviated from the criteria listed in the convention, all of the criteria should systematically be taken into account rather than isolation.

As regards to the applicable law of apportionment, it can be traced from the 1910 Convention. It has been evolved as the Article 15 of the 1989 Convention. Therefore, the law of the flag of the vessel is recognized as applicable law.

5.2 Special Compensation

The special compensation, as a new legal system established in the 1989 Convention, is an exception to the traditional principle of "no cure-no pay", the system of special compensation is established for the salvage in respect of vessel or its cargo threatened damage to the environment.

The establishment of special compensation shall be performed under the

following principles:

- (1) The special compensation shall be paid only for the salvage of ship or cargo threatened damage to the environment
- (2) The special compensation can be increased for the salvage operation which has prevented or minimized damage to the environment
- (3) In determining the special compensation, the ability of the salvor shall be taken into account
- (4) The special compensation shall be paid to the extent that it is greater than reward recoverable by the salvor
- (5) The negligent salvor who has failed to prevent or minimize damage to the environment shall wholly or partially be deprived of the special compensation

The Salvage reward for mandatory salvage is left to be settled by internal laws. By virtue of this provision, the salvor in the circumstance of mandatory salvage has been recognized by the Maritime Code as in same position of the salvor in traditional salvage.

6. Conclusion

On the basis of a study on legal theory of salvage, some problems have been found in Chinese Maritime Law of Salvage

- (1) Applicable scope of law is in contradiction with that of convention;
- (2) There are no any provisions of salvage reward for reciprocal salvage;
- (3) There are no special regulations for salvage in inland waters;

In view of the problems of the above, the legislative suggestions are put forward as follows:

- a) A special regulation should be issued in order to close the loophole in the law;
- b) The applicable scope of maritime law of salvage should be adjusted so that it can be in conformity with the convention;
- c) A supplementary provision with regard to the salvage reward for

reciprocal salvage should be adopted in order to protect the lawful interests of the salvor.

- d) The public service ship should be differentiated from the salving vessel which is owned by the public authority.

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