Thoughts on the Salvage Convention 1989 and Turkish Law

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ABSTRACT

The International Convention on Salvage, 1989 was adopted at an international conference in London in 1989 and came into force internationally on 14 July 1996. The United Kingdom ratified the Convention in 1994 and it came into force as part of United Kingdom municipal law in January 1995 through the Merchant Shipping (Salvage and Pollution) Act 1994. Turkey acceded to the Convention in June 2014 and it will enter into force in respect of Turkey in June 2015. The provisions of the Convention became part of the Turkish municipal law before Turkey's accession, under the Turkish Commercial Code No. 6102 which entered into force in January 2012. This article attempts to provide some broad observations on the scope of application of the Convention and certain provisions of the Turkish Commercial Code with a view to determine the extent to which these provisions reflect the corresponding Convention articles.

Turkey's accession to the International Convention on Salvage, 1989 (the Convention) is long overdue after the Convention's international adoption by maritime nations.¹ In July 2004, Turkey deposited its instrument of accession for the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990 (OPRC 1990) which had entered into force internationally in 1995. This Convention had urged member states to ratify the Salvage Convention 1989 as soon as possible.² Therefore Turkey had to adopt the Salvage Convention 1989 to comply with its duty under the OPRC 1990 which came into effect in Turkey in October 2004.

The Salvage Convention 1989 grants certain rights and imposes certain duties upon states parties. The entry into force of the Convention in June 2015 shall not affect Turkey's rights as a coastal state to take measures in accordance with generally recognized principles of international law to protect its coastline from pollution following a marine incident which may result in harmful consequences, as well as its rights to give directions in relation to salvage operations.³ Moreover, in regulating

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¹ As per Article 28(2) (c), States may express to be bound by the Convention by accession.
² Conference Resolution 8, Article 1.
³ Article 9.
matters relating to salvage operations such as admittance of vessels in distress to ports in Turkey, the state shall have to ensure that the need for cooperation between salvors, public authorities and owners of properties in danger are taken into account. The purpose of this provision is to ensure that salvage operations in respect of saving life and property in danger are carried out efficiently and with utmost care for the marine environment.

I. SCOPE OF APPLICATION

For the Convention to have effect in relation to matters dealt with thereunder, a judicial or arbitral tribunal should be seized in one of the state parties, in which case its provisions apply as lex fori. At the time of expressing their consent to be bound by the Convention, state parties may however reserve the right not to apply the Convention in the following circumstances: (1) when the salvage operation takes place in inland waters and all vessels involved are of inland navigation; (2) when the salvage operations take place in inland waters and no vessel is involved; (3) when all interested parties are nationals of that State; (4) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.

At the time of its accession in June 2014, Turkey reserved the right not to apply the Convention in any of the enumerated circumstances. Accordingly, where a judicial or arbitral tribunal is seized in Turkey after the entry into force of the Convention, the Convention provisions shall apply except in so far as the dispute falls under one of the enumerated reservations. Where one of the reservations is triggered, the tribunal in Turkey should determine the law applicable to the dispute according to the rules on conflict of laws if the dispute contains a foreign element and the provisions of the Turkish Commercial Code (TCC) shall become applicable where the tribunal decides that Turkish domestic law shall govern the dispute or where no foreign element is present. It is noteworthy that under the TCC, properties which are considered as maritime cultural property of prehistoric, archaeological or historic interest situated on the sea-bed, do not constitute ‘property’ for the purposes of salvage and are accordingly not covered by

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4 Article 11.
5 Article 2.
6 Article 30(1).
7 The United Kingdom had exercised this right merely with respect to the circumstances (a), (b) and (d). For the text of Turkey's and the United Kingdom's reservations, please see <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014.pdf>, p.458, last accessed 21 November 2014.
8 i.e. 27 June 2015.
9 As per the Private International Law Act, s.1(2).
10 As provided under Article 30(1)(d).
11 TCC s 1298(3)(b).
the provisions of the TCC on salvage.

The Convention leaves certain matters to be determined by municipal law, such as the apportionment of the award between the owner, master and other persons in the service of each salving vessel\(^\text{12}\) and the measures necessary to enforce the duty of the master to render assistance to any person in danger of being lost at sea.\(^\text{13}\) The TCC contains specific provisions in respect of the former matter,\(^\text{14}\) yet it is less clear so far as the duty of the master to render assistance is concerned.\(^\text{15}\) The Convention provides that every master is bound to render assistance to any person in danger of being lost at sea without causing serious danger to his vessel and persons thereon\(^\text{16}\) and requires states parties to adopt the measures necessary to enforce the said duty\(^\text{17}\) which would include sanctions that could be imposed in the event of the breach of the duty.\(^\text{18}\) The provisions of the TCC are contented with incorporating the existence of the duty without further providing necessary measures for its enforcement.\(^\text{19}\) Following the entry into force of the Convention, Turkey will be bound to comply with this requirement.

II. Thoughts on certain domestic provisions of Turkish Law on salvage with comparison to corresponding Convention articles

The provisions of the TCC on salvage (sections 1298 to 1319) reflect the diligent work

\(^{12}\) Article 15(2).

\(^{13}\) Article 10.

\(^{14}\) TCC s 1310.

\(^{15}\) TCC s 1317.

\(^{16}\) Article 10(1).

\(^{17}\) Article 10(2).

\(^{18}\) Under the Merchant Shipping Act 1995, s 224, Sched. 11, Pt II, para. 3(1), the United Kingdom has accordingly provided that the master of a vessel who fails to comply with the duty imposed by Article 10 commits an offence and shall be liable (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

Article 10 as a whole corresponds to Articles 11 and 12 of the 1910 Brussels Convention on Salvage, as also provided in Comité Maritime Internationale, ‘The Travaux Préparatoires of the Convention on Salvage 1989’, [CMI Report to IMO Document LEG 52/4-Annex 2], 271. In particular, Article 10(2) corresponds to Article 12(1) of the 1910 Brussels Convention on Salvage which provides that States whose legislation does not forbid infringements of the duty shall take or propose to their respective legislatures the measures necessary for the prevention of such infringements. Articles 11 and 12 were incorporated into US law under 46 U.S Code para. 2304; and para. 2304 (b) provides; ‘A master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both’. This subsection survived the entry into force of the Salvage Convention 1989 in the United States in 1996 and is another example of a measure taken to enforce the duty to render assistance.

\(^{19}\) Explanatory notes to TCC s 1317 provide that Article 10 corresponds to Article 11 of the 1910 Brussels Convention on Salvage and as per the rule set out in Article 10(2), Article 10(1) and 10(3) were reproduced in the TCC s 1317(1) and (2). However it is to be observed that first of all, Article 10 is the correspondent article of both articles 11 and 12 of the 1910 Brussels Convention (see previous footnote). Secondly, the rule in Article 10(2) does not arguably require states parties to reproduce Article 10(1) and 10(3), yet to implement measures necessary to enforce the duty provided under Article 10(1).
of drafters towards the careful reproduction of the Convention articles into domestic law. Nonetheless, the TCC departs from an enactment verbatim in relation to two articles of the Convention: Article 19 on prohibition of salvage operations by the owners of the vessel or property in danger, and Article 17 on services rendered under existing contracts. Below are some tentative observations with respect to the relevant provisions of the Convention and of the TCC with a view to determine whether the differences in wording could perhaps result in unforeseen or unintended consequences.

a) Prohibition of Salvage Operations

Under the Convention, salvage operation is 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’ and salvage operations which have had a useful result give right to an award. This denotes that any act to salve a vessel or property in danger can be considered as a salvage operation even though it does not eventually have a useful result; yet only operations whereby a vessel or property in danger are successfully (wholly or partly) salved give rise to such award. In other words, ‘useful result’ is a pre-requisite to a claim of salvage award under the Convention, however it shall not affect whether or not an operation is considered a salvage operation within the meaning of Article 1(a) of the Convention.

Carrying out salvage operations which have had a useful result may still not produce payment. The Convention further provides that a salvor is not entitled to receive payment for the services rendered notwithstanding the express and reasonable prohibition of the owner or master of the salved vessel or the owner of the salved property. The natural meaning of ‘payment’ would cover both the payment of a salvage award where salvage services have a useful result and of a special compensation for preventing or minimising pollution damage. Therefore, a salvor who provides services despite an express and reasonable prohibition may not be entitled to either payment. Nevertheless, it is to be observed that in so far as the services rendered are within the definition of ‘salvage operation’, neither consent to nor reasonable prohibition of salvage services would affect the existence of a salvage operation within the meaning of Article 1(a) if the salvor renders the services eventually; they would merely determine the entitlement of the salvor to payment. It is noteworthy that there may be several occasions where the

20 See K. Atamer, 1989 Londra Sözleşmesinde ve Türk Ticaret Kanunu Tasarısında Kurtarma, (Prof. Dr. Hüseyin Ülgen'e Armağan, Vol 1, 2007) 807, for a detailed analysis of Turkish law provisions on salvage and their preparation process.

21 Article 1(a).

22 Article 12(1).

23 Article 19: This article contains many similarities to Article 3 of the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea.

24 Article 14.

25 The title of Article 19 is ‘prohibition of salvage operations’ which may give rise to the argument that as a result of the prohibition of salvage services by the vessel in danger no salvage operation shall be deemed to have been conducted. However, the article itself is clear and does not pertain to whether salvage operations are in existence, yet to whether remuneration is payable as a result of these operations.
prohibition may be expressed: in practice, the master may prohibit altogether a salvage operation volunteered by the salvor if he thinks the vessel is capable of averting the danger by her own exertions. Otherwise, the services may also be initially accepted and consequently dismissed by the would-be-salvees before the operations could ever begin or after the commencement of operations.

The TCC introduces a slightly different reproduction of Article 19 of the Convention to the effect that prohibited services do not constitute ‘salvage operation’. The justification provided in this regard is that acts not giving rise to ‘salvage award’ could not be considered as salvage operation in the first place and that therefore it would not be reasonable to initially consider them within the definition of salvage operation and insert a specific provision to the effect that no payment for salvage award could be claimed for these acts. This may give rise to the question of whether acts giving rise to special compensation (yet not to salvage award) could nevertheless be termed ‘salvage operation’ for the purposes of the salvor’s entitlement to special compensation. The answer is likely lie in that special compensation is not an additional reward and that there ought to be a prima facie entitlement to salvage award, which is not the case as far as prohibited operations are concerned.

In a dispute where the provisions of the TCC apply, the court will assess whether the prohibition was reasonable and express and if affirmative, the court will decide that there will be no right to remuneration on the ground that there was no salvage

In *Fisher v The Oceanic Grandeur* [1972] 2 Lloyd’s Rep. 396, where the dispute had not arisen under the Salvage Convention 1989, it was said by the High Court of Australia that the consent of salvee is a consent to the acts performed and not to their legal characterisation and consequences. It was accordingly for the Court to determine whether the acts constituted salvage services and the salvor would be entitled to an award where there is consent. The wording of Article 19 of the Convention seems to be in line with this approach.

26 TCC s 1298(4)(a). The Explanatory Notes of the section enunciate that the sub-section is the equivalent of Article 19 of the Convention.

27 The definition of ‘salvage operation’ is provided under TCC s 1298(1) and is an exact translation of Article 1(a) of the Convention.

28 The provisions relating to salvage award are found in TCC ss 1304 to 1311.

29 See the explanatory notes of TCC s 1298(4).


31 What is ‘reasonable’ is a question of fact and is to be assessed in each case. A prohibition based upon purely economic reasons where the owner prefers not to make salvage expenditures whereas danger is imminent would likely to be unreasonable. Where, however the prohibition is due to a reason which is nautically justifiable and the decision would be what a prudent master would take, it may be considered as ‘reasonable’ (see David J. Bederman & Brian D. Spielman, *6 Loyola Mar.L.J* 31, (2008), 36 for the position under American law). In most of the circumstances, decisions on acceptance of salvage services will be given upon consultation of the hull insurer of the vessel in danger who provides cover for the vessel’s proportion of salvage, see International Hull Clauses, cl. 8.1, a decision to prohibit services purely on the ground that payment may not be made by insurers for these services would arguably not be ‘reasonable’, if the services are nautically required.
operation in the first place; whereas Article 19 can only apply where there is a prima facie entitlement to a salvage award, meaning that all the normal preconditions for salvage award must have been satisfied, including the existence of a salvage operation. In practical terms, this difference between the Convention and TCC will not affect whether the salvor has a right to payment.

Another consequence of the wording of the TCC provision may arise with respect to the services rendered by public authorities under a duty to perform salvage operations. The Convention provides that the extent to which these authorities may avail themselves of the rights and remedies provided for in the Convention shall be determined by the law of the state where the authority is situated. The TCC contains a rule to the effect that its provisions on salvage also apply where the salvor has a statutory duty to conduct salvage. Thus, even if the public authority conducts salvage operations as per their statutory duty and notwithstanding an express and reasonable prohibition, the services conducted will not be considered as salvage operation for the purposes of the TCC and consequently not give right to claim an award; although, having actually conducted salvage operations, the public authority will have performed its statutory duty.

In addition to the foregoing, another question may arise as to whether there may be a divergence between the application of the Convention and the TCC in respect of services rendered despite the express and reasonable prohibition. Although these services would not give rise to payment under both the Convention and the TCC, it may be argued that salvors may nonetheless owe a duty to the owner of the vessel or property in danger to carry out salvage operations with due care and to exercise the same to prevent or minimize damage to the environment under the Convention. This suggestion presumes that the application of Article 8 merely rests upon the existence of a salvage operation within the meaning of Article 1(a) and whether or not consent is given to the operations would not affect the existence of the duty. A counter-argument may perhaps be raised with reference to Article 8(2)(a), whereby the owner or master of the vessel in danger shall owe a duty to the salvor to co-operate fully with him during the course of the salvage operations. It can be contended that such a duty could not be exercised unless the operations are consented to and accordingly that Article 8 would only apply where there are salvage operations which can give rise to payment under the Convention and not to prohibited services. However this argument would merely relate to the salvee’s duties and would arguably not affect the salvor’s duties.

Should the former argument be favoured, applying the relevant provision of the

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33 Article 5(3).
34 TCC s 1299(1)(a).
35 TCC s 1298(4)(a).
36 Article 8(1)(a).
37 Article 8(1)(b).
38 And not prohibited within the meaning of Article 19.
TCC\textsuperscript{39} may produce the result that where the prohibition is express and reasonable, any services rendered following the prohibition could not be considered as ‘salvage operation’ and accordingly could not give rise to the duty on the part of the salvor to carry out the operations with due care\textsuperscript{40} or to exercise due care to prevent or minimize damage to the environment.\textsuperscript{41} Nevertheless, this discussion may be theoretical because even where the duty exists and is not complied with, the only remedies or sanctions available would be the deprivation of the whole or part of payment,\textsuperscript{42} i.e. payment to which the salvor of a prohibited salvage operation would not be entitled in the first place both under the Convention and the TCC.

\section*{b) Services Rendered Under Existing Contracts}

It is provided in the explanatory notes of TCC s 1298(4)(c) that it is a reproduction of Article 17 of the Salvage Convention which provides that no payment is due under the Convention unless the services rendered exceed what can reasonably be considered as due performance of a contract entered into before the danger arose. The TCC states a shorter and a slightly different version of the Article in that services rendered or which shall be rendered for the purpose of performing under a contract entered into before the danger arose shall not be considered a salvage operation.

The Convention Article pertains to all contracts entered into before the danger arose which may reflect the recognition of the use of devices other than tugs for salvage operations;\textsuperscript{43} however most of the examples to illustrate this article rest upon towage contracts.\textsuperscript{44} Where, for instance, a towage contract is entered into before the danger arose and the performance under the contract is the towage of the vessel from point A to point B, the performance of the same after the danger arose would not give rise to a salvage award although the act can be considered as ‘salvage operation’ within the meaning of Article 1(a). Applying the relevant provision of the TCC would in turn result in the finding that no salvage operation would exist in the first place, with the same consequence that no salvage award would accordingly be available.

The relevant provision of the Convention would not extend to circumstances where the performances before and after the danger arose are obviously different, for example where a crane discharging the cargo on board a vessel under an existing

\begin{footnotes}
\item[]\textsuperscript{39} TCC s 1298(4)(a).
\item[]\textsuperscript{40} See TCC s 1303(1)(a) for the duty.
\item[]\textsuperscript{41} See TCC s 1303(1)(b) for the duty.
\item[]\textsuperscript{42} Article 18, for the corresponding TCC provision, see s 1311. See, Gaskell, The 1989 Salvage Convention, 40 for the view that the breach of salvor’s duties under Article 8 would result in the reduction or withholding of payment.
\item[]\textsuperscript{44} This is partly due to the fact that Article 17 is a broader restatement of Art. 4 of the 1910 Convention which provides, ‘A tug has no right to remuneration for assistance to or salvage of the vessel she is towing or of the vessel’s cargo, except where she has rendered exceptional services which cannot be considered as rendered in fulfilment of the contract of towage.’
\end{footnotes}
contract commences salvage operations after the vessel begins to sink.\textsuperscript{45} However, there may exist some borderline cases where the performances before and after the danger arose are not entirely distinct yet the contractual performance becomes more onerous given the danger. Where for instance a towage contract requires the tug to tow a vessel from point A to point B within a certain time frame, the question would arise as to whether performing the same act with extra exertion so as to complete the towage as soon as possible to prevent damage to the vessel in danger could qualify as performance of the existing contract or an act exceeding what can reasonably be considered as due performance under that contract.\textsuperscript{46} Whether or not this performance would constitute salvage or the performance under the existing contract will mostly depend on whether it could reasonably be expected to have been performed under the contract. It will be observed that if the services rendered are for the purpose of performing under a previous contract, no salvage operation shall be deemed to exist under the TCC\textsuperscript{47} and that accordingly the salvor shall not be entitled to any remuneration.

**III. CONCLUSION**

Both the accession of Turkey to the Salvage Convention 1989 and the reproduction of its articles under the Turkish domestic law give full effect to the Convention which is now applicable in more than sixty contracting states. Despite the fact that Turkey reserved the right not to apply the Convention in any of the circumstances enumerated thereunder, it is likely that this shall not have a substantial effect on resolution of disputes on salvage where the Turkish domestic provisions apply.

The slight differences of drafting between the TCC and Convention provisions on prohibited services and previously made contracts may initially seem alarming. Nevertheless these differences rather give rise principally to theoretical discussions as to whether the existence of a salvage operation merely rests upon the fulfilment of the criteria mentioned in the Convention, i.e. acts undertaken to assist a vessel or property in danger and in navigable waters; or upon whether the act is an act prohibited by the vessel in danger or an act undertaken for the purpose of performing under an existing contract. In practical terms and for the purposes of entitlement to payment of a salvor, the application of both the Convention and TCC provisions would provide the same result.

\textsuperscript{45} Please see Atamer, \textit{Türk Ticaret Kanunu Tasarısında Kurtarma}, 850, fn.171 with reference to Enrico Vincenzini, \textquote{International Salvage Law}(LLP, 1992), para. 43.

\textsuperscript{46} The common law illustrations on whether a tug could be entitled to a salvage payment are numerous. The leading authorities are: \textit{The Homewood} (1928),31, Ll.L.Rep,336; \textit{The Minnehaha} (1861) Lush. 335 P.C.; \textit{The Annapolis} (1861) Lush. 355 and \textit{The Liverpool} [1893] P. 154. According to Hill J in his decision in \textit{The Homewood}, 339, two elements are necessary to constitute salvage service by a tug: 1) \textquote{That the tow is in danger by reason of circumstances not reasonably contemplated by the parties, and 2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract.}'

\textsuperscript{47} TCC s 1298(4)(c).