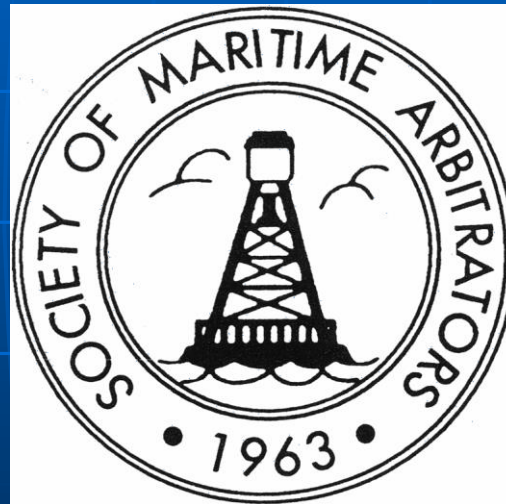


Salvage Arbitrations Under SMA Rules

Maritime Law Association Fall Meeting

October 19, 2018

Captain Jim Shirley & Captain Tom Fox



Society of Maritime Arbitrators, Inc.

SOCIETY OF MARITIME ARBITRATORS
WWW.SMANY.ORG

Introduction to Salvage Arbitration

History of Salvage Law in the United States

Principles and criteria have roots in **Rhodian Law** dating to 900 B.C.

More recently evolved from **English Common law** developments from the early 19th Century with relatively little change until the 20th Century

- *The Sabine (1879)*: Marine Peril, Voluntary Act, Success
- *The Blackwall (1869)*: Six Salvage Award Criteria
- **1910 Salvage Convention**
- Salvage in the Public Interest, e.g. Environmental Protection
- Salvage of Treasure and Artifacts/Underwater Cultural Heritage
- Small Vessel Salvage

U. S. Salvage Law in the in the 21st Century

1989 Salvage Convention (Strong Environmental Regime)

Most 20th Century Salvage Law continues to apply, perhaps updated

Parties' responsibilities to each other defined: Article 8 of the 1989 Convention

Conditions Precedent Remain: Marine Peril, Voluntary Service, Success

Award Criteria: *The Blackwall* factors updated and extended through Articles 13 and 14 of the 1989 Convention

1910 Convention may still apply in some cases

History of Salvage Dispute Resolution Processes

- Federal Admiralty Court (State Court Option?)
- Arbitration
- Mediation

Maritime Lawyer's Perspective on Salvage Arbitration

- New York/USA v. London
- Time and Cost Considerations
- Possible Settlement Advantage with/without Mediation

SMA Rules Incorporate Many Advantages for Both Parties Over Other Available Fora

- SMA Rules are Strong and Comprehensive
- Most SMA Awards are Published and Digested for Ease of Research
- Reasoned Awards on record provide guidance to the parties and their counsel
- The Parties Control the Costs of Proceedings
- No Procedural Costs or Assessments
- Legal Counsel not required – at the option of each party
- The Parties Control the timing of Hearings and Submissions
- Arbitration may be handled on Submissions alone
- The Parties Choose the Arbitrator(s) they want to decide the Matters in Dispute

Maritime Arbitration Rules of the SMA

SMA Model Arbitration Clause

“Should any dispute arise out of this Charter, the Matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. This Charter shall be governed by the Federal Maritime Law of the United States. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc. The Arbitrators shall be members of the Society of Maritime Arbitrators, Inc.”

Society of Maritime Arbitrators, Inc.
SALVAGE ARBITRATION RULES
Codename: SMASALV
Supplement to the Arbitration Clause

"Any dispute arising out of this Agreement shall be referred to arbitration in New York City under the then current Salvage Arbitration Rules of the Society of Maritime Arbitrators, Inc. (SMA). The arbitrator(s) shall be appointed by the parties as provided for by these rules. The arbitrator(s) decision shall be final, and for the purpose of enforcement may be entered for judgment in any Court of competent jurisdiction."

RULES FOR SALVAGE ARBITRATION

I. Appointment of Arbitrator(s)

When making a demand for arbitration, the claimant shall give the other party written notice of its nomination of an arbitrator pursuant to Section I of these rules. If the parties are unable to agree upon a sole arbitrator within 15 days following the demand for arbitration, each party is then to submit the names of three SMA members to the President of the SMA, who shall promptly select by random process one of the six names so submitted.

Notwithstanding the foregoing, the parties may agree upon a tripartite panel of arbitrators. In such case each shall appoint an arbitrator, and the two so chosen shall agree upon a third arbitrator who shall also chair the panel for administrative and procedural purposes. In the event they cannot agree on a third arbitrator within 15 days, the two party-appointed arbitrators shall request the President of the SMA to appoint the third arbitrator from the SMA roster.

II. Failure to Respond

Should the Respondent fail to respond within 15 days from receipt of the demand for arbitration, the arbitrator named by the claimant shall serve as the sole arbitrator, with the same force and authority as if agreed between the parties.

III. Submission of Evidence

a) Within 15 days from the date of appointment, or completion of the panel, the arbitrator(s) shall establish a schedule for the submission of documentary evidence. The submissions should include documentary evidence to support their positions (such as but not limited to salvage reports, valuations, insurance certificates, photographs, survey reports, repair estimates and receipts, etc.), and such sworn testimony by affidavit as is relevant to the issues.

b) At the sole discretion of the arbitrator(s), each side may be permitted one postponement, the duration of which shall be determined by the arbitrator(s).

c) Within 15 days after completion of submission of documents/evidence by all parties, the parties may submit a short written summary of their respective positions, following which the proceedings shall be closed.

d) The arbitrator(s) shall at all times have the sole discretion to modify the procedures set forth in this section. If the nature of the dispute warrants a hearing, or multiple submissions beyond those set forth in III a) and c) above, the arbitrator(s) shall permit same, but in such case the limitation on arbitrators(s') fees set forth at Section V shall not apply.

IV. Award

- a) The arbitrator(s) shall issue a written award within 30 days following the date of closing of the proceedings. The award shall set forth the arbitrator(s)' findings of fact and decisions clearly and concisely.
- b) In a tripartite proceeding, the decision of any two arbitrators shall be final. In such case, the award will include the dissenting arbitrator's opinion.
- c) The arbitrator(s) shall have the discretion to assess costs, including attorneys' fees and the fees and expenses of the arbitrator(s), in whole or in part against either party.
- d) Once the arbitrator(s) has reached a decision and an award is issued, it is final. The arbitrator(s) may by their own authority, however, correct apparent clerical or arithmetical errors.

V. Arbitrator(s) Fee(s) and Expenses

(a) A sole arbitrator's fee shall not exceed \$2,000. In a tripartite proceeding, the fee of each arbitrator shall not exceed \$1500, except that the chairman shall be entitled to an additional compensation of \$500. These fees are based upon submissions made pursuant to Section III a) and c) and no hearings. In addition, the arbitrator(s) shall be entitled to reimbursement for the expenses of the arbitration, including telephone and facsimile charges, photocopying, postage, etc. at cost. Alternatively, the arbitrator(s) may charge \$100 in lieu of an accounting of such expenses.

VI. Security for Arbitrator(s) Fee(s) and Expenses

At any time prior to issuance of the award the arbitrator(s) may require each party to post security for 100% of the estimated arbitrator(s) fee(s) and expenses. Upon such demand, each party shall promptly post the required amount in the Escrow Account of the SMA, or in any other manner acceptable to the arbitrator(s). It is understood and agreed that the amounts requested for security are not to be considered as reflective of the ultimate fees and expenses of the arbitrator(s) or the allocation of the fees.

VII. Application of Rules

Notwithstanding anything provided above, the Rules will not apply to any claims in excess of USD100,000. Claims in excess of \$100,000 shall be subject to the Maritime Arbitration Rules of the SMA in effect at the time the salvage agreement was executed. The above Salvage Arbitration Rules are effective as of (the date of approval of the amendment).

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Revised 1997, 2010, 2017

SOCIETY OF MARITIME ARBITRATORS, INC.

The Society of Maritime Arbitrators, Inc.
U.S. OPEN FORM SALVAGE AGREEMENT
Codename -- MARSALV©

This SALVAGE AGREEMENT ("Agreement"), between _____, Master and/or Owner, Agent and/or Underwriter of the Vessel _____ ("Vessel") and _____ ("Salvor", mutually "Parties"), is for salvage services rendered or to be rendered to the Vessel, her cargo and other property currently lying at or near _____, under the following terms and conditions:

FIRST: The Salvor shall use its best endeavors, to avoid or minimize damage to the environment, to save the Vessel, her cargo and other property and deliver same safely afloat, at or near _____, at which place and time the Salvor's services will terminate unless otherwise mutually agreed.

SECOND: The Master and crew of the Vessel agree to lend their aid and assistance to the Salvor, who shall be entitled, free of expense, to the reasonable use of the Vessel's equipment, and any property on board.

THIRD: The Salvor's services are to be performed on the following basis (check and initial):

- No Cure-No Pay: (Compensation to be conditioned upon successful salvage of the Vessel and/or her cargo and/or other property. In such case, the Salvor's compensation shall be pursuant to the International Convention on Salvage 1989, and any revisions in force at the time of signing this Agreement.

No Cure-No Pay, Fixed Fee: \$ _____

- Time and Materials (per attached schedule)

Other: _____

FOURTH: The Salvor shall have a lien upon the Vessel, its cargo and/or other property for services rendered pursuant to Paragraph THIRD, and his statement for services rendered shall be submitted as promptly as possible after completion or termination of such services. In lieu of arrest or attachment of the Vessel the Salvor may demand reasonable security for such services from the Vessel and cargo interests at any time, unless otherwise provided for.

FIFTH: This Agreement shall be governed by and construed in accordance with the Federal Maritime Law of the United States. Any dispute arising out of this Agreement shall be referred to arbitration in the United States in accordance with the applicable Arbitration Rules of The Society of Maritime Arbitrators, Inc. Any award made hereunder may include interest, attorney's fees and costs, and shall be final and binding. For the purpose of enforcement the Award may be entered for judgment in any court of competent jurisdiction.

Dated this ____ day of _____, 20__

For: SALVOR
and/or UNDERWRITER

For: MASTER and/or OWNER

(Auth. sign. – SALVOR)

(Auth. sign. – MASTER,
OWNER, AGENT and/or
UNDER.)

(Print name and title)

(Print name and title)

Rev. 10/2017

US Open Form Salvage Agreement - MARSALV (Contd.)

1. Obligations: Parties agree that by entering into this Agreement they will each make their best efforts to cooperate in all ways necessary to save the vessel, cargo and property.
2. International Convention on Salvage 1989: In the event that the “No Cure – No Pay” option is selected, all sections of the International Salvage Convention 1989 are applicable.
3. Preliminary Efforts: It is understood that by entering into this Agreement the Parties incorporate all services rendered in advance of execution of this Agreement.
4. Termination: If this Agreement is entered into on a “No Cure – No Pay” basis, and if after all reasonable efforts a successful salvage is not possible, the Salvor may with prior reasonable written notice terminate this agreement, without further obligation beyond the terms agreed.

5. Arbitration Rules: All disputes arising out of this Agreement are subject to the applicable rules of the Society of Maritime Arbitrators, Inc., with the understanding that claims in excess of US\$100,000 shall be subject to the main Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc. All disputes of USD\$100,000 or less will be subject to the Society of Maritime Arbitrators Salvage Arbitration Rules, unless the Parties specifically agree in writing otherwise.

6. Awards: All awards will be in writing and published, unless agreed to the contrary between the Parties.

7. Property Salved: "Vessel, her cargo and other property" as referenced at Paragraph First includes, but is not limited to the Vessel, freight, bunkers, cargo, stores, and any other property on board or due at the time of complete execution of this "Agreement".

Rev. 10/2017

Sociedad de Árbitros Marítimos, Inc.
REGLAS DE ARBITRAJE DE SALVAMENTO
Codename: SMASALV
Suplemento a la Cláusula de Arbitraje

"Cualquier disputa que surja de este Acuerdo será sometida a arbitraje en la Ciudad de Nueva York bajo el entonces actual Reglamento de Arbitraje de Salvamento de la Sociedad de Árbitros Marítimos, Inc. (SMA) El árbitro será nombrado por las partes según lo dispuesto. La decisión del árbitro será definitiva y, a los efectos de su ejecución, podrá ser presentada para que sea juzgada en cualquier tribunal de jurisdicción competente ".

REGLAS PARA ARBITRAJE DE SALVAMENTO

I. Nombramiento del (de los) Árbitro (s)

Al presentar una demanda de arbitraje, el reclamante deberá notificar por escrito a la otra parte su nombramiento de un árbitro de acuerdo con la Sección I de estas reglas. Si las partes no pueden llegar a un acuerdo sobre un árbitro único dentro de los 15 días siguientes a la solicitud de arbitraje, cada parte deberá entonces someter los nombres de tres miembros de la SMA al Presidente de la SMA, quien seleccionará puntualmente uno de los seis nombres así enviados.

Sin perjuicio de lo anterior, las partes podrán acordar un panel tripartito de árbitros. En tal caso, cada uno nombrará un árbitro y los dos así elegidos acordarán un tercer árbitro que también presidirá el panel con fines administrativos y de procedimiento. En el caso de que no puedan acordar un tercer árbitro en un plazo de 15 días, los dos árbitros nombrados por las partes solicitarán al Presidente de la SMA que designe al tercer árbitro de la lista de miembros de la SMA.

II. Falta de Respuesta

Si el Demandado no responde en un plazo de 15 días a partir de la recepción de la solicitud de arbitraje, el árbitro designado por el demandante actuará como árbitro único, con la misma fuerza y autoridad que así se hubiera acordado entre las partes.

III. Presentación de Pruebas

a) En el plazo de 15 días a partir de la fecha del nombramiento o de la finalización del panel, el árbitro establecerá un programa para la presentación de pruebas documentales. Las presentaciones deben incluir evidencia documental que respalde sus posiciones (tales como, pero no limitado a, informes de salvamento, valoraciones, certificados de seguro, fotografías, reportes de encuestas, estimaciones de reparación y recibos, etc.) y tal testimonio jurado por declaración jurada como es pertinente a las cuestiones.

- b) A discreción del árbitro o árbitros, se permitirá a cada parte un aplazamiento, cuya duración será determinada por el (los) árbitro (s).
- c) Dentro de los 15 días siguientes a la finalización de la presentación de documentos o pruebas por todas las partes, las partes podrán presentar un breve resumen por escrito de sus respectivas posiciones, tras lo cual se cerrará el procedimiento.
- d) El árbitro (s) tendrá en todo momento la discreción única para modificar los procedimientos establecidos en esta sección. Si la naturaleza de la controversia amerita una audiencia o presentaciones múltiples más allá de las expuestas en los incisos III (a) y (c) anteriores, el árbitro o árbitros lo permitirán, pero en tal caso la limitación de los honorarios de los árbitros establecida en la Sección V no se aplicará.

IV. Laudo

- a) El (los) árbitro (s) emitirá un laudo escrito dentro de los 30 días siguientes a la fecha de cierre del procedimiento. El laudo establecerá las conclusiones de hecho y decisiones del árbitro (s) de manera clara y concisa.
- b) En un procedimiento tripartito, la decisión de dos árbitros será definitiva. En tal caso, el laudo incluirá la opinión del árbitro disidente.
- c) El árbitro o los árbitros tendrán la discreción de evaluar los costos, incluidos los honorarios de abogados y los honorarios y gastos del árbitro, total o parcialmente, contra cualquiera de las partes.
- d) Una vez que el (los) árbitro (s) ha llegado a una decisión y se emite un laudo, es definitivo. Sin embargo, el árbitro puede, por su propia autoridad, corregir errores escritos o aritméticos aparentes.

V. Árbitro (s) Honorarios y Gastos

(a) El honorario de un árbitro único no excederá de \$2,000. En un procedimiento tripartito, la cuota de cada árbitro no excederá de \$1500, excepto que el presidente tendrá derecho a una compensación adicional de \$500. Estos honorarios se basan en las presentaciones hechas conforme a la Sección III (a) y (c) y sin audiencias. Además, los árbitros tendrán derecho al reembolso de los gastos del arbitraje, incluidos los cargos de teléfono y facsímil, fotocopia, gastos de envío, etc., al costo. Alternativamente, el árbitro (s) puede cobrar \$100 en lugar de una contabilidad de tales gastos.

VI. Seguridad para el Árbitro (s) Honorarios y Gastos

En cualquier momento previo a la emisión del laudo, el árbitro podrá exigir a cada parte que deposite la garantía por el 100% de los honorarios y gastos estimados de los árbitros. En tal demanda, cada parte pondrá inmediatamente la cantidad requerida en la cuenta de fideicomiso de la SMA, o de cualquier otra manera aceptable para el árbitro (s). Se entiende y acuerda que las cantidades solicitadas por garantía no se considerarán como reflejo de los honorarios y gastos finales del (de los) árbitro (s) o la asignación de los honorarios.

VII. Aplicación de las Reglas

Sin perjuicio de lo dispuesto anteriormente, las Reglas no se aplicarán a reclamaciones de más de USD100,000. Las reclamaciones por más de \$100,000 estarán sujetas a las Reglas de Arbitraje Marítimo de la SMA vigentes en el momento en que se ejecutó el acuerdo de salvamento. Las anteriores Reglas de Arbitraje de Salvamento son efectivas a partir de (la fecha de aprobación de la enmienda).

El texto en español es una traducción del texto original en inglés de las Reglas de Arbitraje de Salvamento. En caso de conflicto o discrepancia entre esta traducción y el texto original en inglés, se regirá el texto en inglés.

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PICO 4, SMA #4277, April 29, 2016, - Burke, Shirley & Fox

The dispute arose under a WRECKHIRE 2010 form (Contract) between Mammoet Salvage Americas, Inc. (Salvor) and Pico Mexico Servicios Petroleros S de RL. de CV (Owner), covering the retrieval of three legs of a lift boat PICO 4 that had suffered a "punch-through" in November, 2011 while it was maneuvering next to an oil production platform in the Gulf of Campeche in Mexican waters.

The Contract provided for the Salvor to be paid at daily rates covering the salvage vessel and associated equipment and personnel.

Payments to the Salvor were earned daily and were non-refundable.

The lift boat was a three legged self-propelled jack-up oil field service platform that was in the process of "preloading" its legs in preparation for jacking near the production platform.

The forward starboard leg "punched through" the sea floor, causing the hull to take on a 15 degree list. The three legs were freed from the lift boat and were later cut to provide navigational clearance.

The sea bottom was described in the WRECKHIRE as "mud" and the Salvor planned its retrieval of the legs on that basis, using an anchor windlass type chain puller arrangement through the "moon pool" of a dynamic positioning salvage vessel.

However, the seabed was in fact "clay" and required more extraction force than mud, as the legs and their pads were more deeply embedded in the sea floor than as described in the Contract.

After six days of attempting to extract one of the legs, the chain pullers failed and further work was suspended until the Parties subsequently entered an Addendum reflecting the new extraction requirements.

Nonetheless, the total extraction time exceeded the estimated time specified in the Addendum.

The Contract was terminated by the Owner in September 2012.

The Salvor subsequently claimed for about \$18,000,000 as the balance of unpaid hire and interest at the contracted rate of 1.5% per month, asserting that the Owner failed to exercise "best endeavors" under the Contract.

The Owner counterclaimed for a refund of hire of about \$10,000,000 for sums paid but not earned, asserting that the Salvor failed to use "due care" under the Contract.

Twenty hearings were held in which testimony was heard from the parties' fact and expert witnesses and the parties subsequently exchanged main and reply briefs.

After determining that the Salvor had failed to use "due care" with respect to time lost due to the chain puller failures, the Panel discounted the Salvor's claim by the time and expenses lost for that failure and also dismissed the Owner's counterclaim in total.

The panel unanimously awarded the Salvor an adjusted amount of about \$28,000,000, including about \$11,000,000 in interest and about \$1,300,000 in attorney's fees and costs, as well as arbitrator's fees.