Historic Wrecks As Salvable Maritime Property

MAHMUD ZUHDI MOHD NOR

ABSTRACT

The legal position regarding salvage of historic wreck, being a major form of Malaysia's underwater cultural heritage, can be examined from the perspective of Merchant Shipping laws. However, the need for cultural and historical preservation is an obvious competing interest that must be considered. Hence the question whether the law could effectively deal with this issue. This paper examines the status of historic wreck as a salvable maritime property under Malaysian law by looking at core provisions under Merchant Shipping Ordinance 1952 and some of the universally accepted salvage law principles with particular emphasis on the requirements for a successful salvage. This paper suggests that although the Ordinance is ill-suited to deal with the specific concerns of historic wrecks in terms of preservation mechanism, certain mechanism offered are still of practical use.

Keywords: *historic wrecks, underwater cultural heritage, merchant shipping, Malaysia.*

ABSTRAK

Kedudukan undang-undang mengenai salvaj kapal karam bersejarah yang merupakan sebahagian besar harta kebudayaan bawah air dapat dilihat dari sudut undang-undang perkapalan saudagar. Namun demikian, memandangkan keperluan pemuliharaannya berdasarkan faktor sejarah dan kebudayaan yang mesti diambil kira. Hal ini mengundang persoalan samada undang-undang perkapalan saudagar ini sesuai untuk menangani permasalahan kapal karam bersejarah. Kertas ini mengkaji kedudukan kapal karam bersejarah sebagai harta maritim yang boleh disalvaj di bawah undang-undang Malaysia dengan merujuk Ordinan Perkapalan Saudagar 1952 dan prinsip yang terpakai dalam undang-undang salvaj terutamanya yang melibatkan keperluan salvaj yang berjaya. Kertas ini membuat kesimpulan bahawa Ordinan tersebut tidak efektif dalam menangani isu-isu tertentu melibatkan pemuliharaan kapal karam bersejarah. Namun demikian sebahagian mekanisma yang ada masih praktikal dan berguna.

Kata kunci: *kapal karam bersejarah, harta kebudayaan bawah air, perkapalan saudagar, Malaysia.*

INTRODUCTION

The Merchant Shipping Ordinance 1952[1] defines 'salvage' as 'all expenses properly incurred by the salvor in the performance of salvage services.'[2] There are four basic requirements that the Court will consider in determining a successful salvage reward; the existence of 'maritime property', 'voluntary' act of salvage, element of 'danger' and that salvage operation itself must be 'successful'.[3] One commentator added a fifth to the requirements in that 'the salvage must occur where salvage law applies.'[4] MSO 1952 incorporates all these requirements in relation to salvage of 'wrecks' generally. This paper attempts to examine these basic requirements in relation to the salvage of 'historic wrecks' or 'underwater cultural heritage'[5] by identifying all relevant legal provisions and will look at some of the conceptual and legal difficulty in applying those requirements in relation to subject matter of discussion.

MARITIME PROPERTY AND A SHIP IN DISTRESS

The term 'property' presumes the existence of ownership. It is a cardinal principle of salvage law that only 'maritime property' may be salved. The landmark case pronouncing this principle is the *Gas Float Whitton (No. 2)* where the Court held that only 'ship, her apparel and cargo... and the wreck of these' can be salved.[6] This position excludes other marine related properties such as 'an unmanned lightship' for the purpose of salvage reward.[7] However, modern day development has also resulted in the need to extend the coverage

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[1] Hereinafter 'MSO 1952' or simply the 'Ordinance'. The term 'salvage services' is not further defined under the Ordinance. For further discussion on the meaning of 'salvage' and 'salvage activities' in connection to underwater cultural heritage; Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, Unpublished Ph.D Thesis (University of Edinburgh), 2008.

[2] S. 366 of the Merchant Shipping Ordinance 1952 (hereinafter 'MSO 1952').

[3] Generally, G. Brice, *Maritime Law of Salvage*, London, Sweet & Maxwell, 2003; W. Tetley, *International Maritime and Admiralty Law*, Canada, Yvon Blais, 2002; N. Meeson, *Admiralty Law and Practice*, 2nd Ed., 2000.

[4] N. Meeson, *Admiralty Law and Practice*, 2nd Ed., 2000, para 2-079 and 2-087; and W. Tetley, *International Maritime and Admiralty Law*, 2002, p 328 – 334.

[5] The so-called fifth element mentioned above will not be dealt with in this paper for want of space as it is not considered to be too crucial for the purpose of this paper.

[6] [1897] AC 337.

[7] S. 742 of the UK Merchant Shipping Act 1894 and now s. 313 of the UK Merchant Shipping Act 1995.

to other non-traditional maritime subject such as an aircraft. In Malaysia, this extended coverage is given effect vide section 23(1) of the Civil Aviation Act 1969,[8] which provides:

Any services rendered in assisting or in saving life from, or in saving the cargo or apparel of, an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel; and, where salvage services are rendered by an aircraft to any property or person, the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.

Next, one must also consider the term 'ship in distress'. After all we are talking about salvaging of property which is in the brink of destruction or at risk of further damage. The terms 'vessel in distress' or 'wreck', which are widely used under MSO 1952 are typically employed to cover the subject matter of salvage and for the purpose of this paper, we will use these terms interchangably although they are in no way perfect definition for one and another. The Ordinance simply defines 'wreck' to include 'jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.'[9] This definition is identical to the definition of 'wreck' employed under the UK Merchant Shipping Act 1995.[10] None of these terms (jetsam, flotsam, lagan and derelict) were given any statutory interpretation under the Ordinance but one may find some interpretation developed through case laws.[11] Of particular significance in relation to historic wrecks is the use of the term 'derelict' as a salvable property. MSO 1952 does

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[8] Similar legislation in UK is the Civil Aviation Act 1982. See in particular s. 87(1).

[9] S. 1 of the Merchant Shipping Ordinance 1952.

[10] This definition is similar to the meaning of 'wreck' under s. 510 of the UK Merchant Shipping Act 1894, which was retained in the Merchant Shipping Act 1995.

[11] *Sir Henry's Constable's Case* (1601) 5 C. Rep. 106a; *The King (in His Office of Admiralty) v Property Derelict* (1825) 3 Hag. Adm. 228; *The King (in His Office of Admiralty) v Forty-Nine Casks of Brandy* (1836) 3 Hag. Adm. 270; *R. v Two Casks of Tallow* (1837) 3 Hag. Adm. 294; *the Pauline* 2 Rob. Ad. R. 359; and *the Gas Float Whitton No. 2* [1896], p 42. See also; N. Phillips, *Merchant Shipping Act 1995*, p 182, f.n. 3. In the widely cited *Att. Gen v Sir Henry Constable* (1601) 5 Co. Rep. 106 and *Cargo ex Schiller* (1887) 2 P.D. 145, the terms 'flotsam, jetsam and lagan' were interpreted as 'Flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into sea, and afterwards, notwithstanding, the ship perish. Lagan (*vel potius* ligan) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again.'

not define this term.[12] According to Brice, 'derelict' means 'a ship which is abandoned and deserted at sea by her Master and crew without any intention on their part of returning to her but does not include a vessel which is left by her master and crew temporarily with the distinct intention of returning to it.'[13]

ABANDONED WRECKS

From the above, a constituting element of 'derelict' is the occurrence and the effect of 'abandonment' itself. For practical purposes, abandonment could be effected either expressly or constructively. Since abandonment does not have to be effected through a formal order of abandonment,[14] the test to be applied in ascertaining the existence of 'abandonment' is 'the intention and expectation of the master and crew at the time of quitting her'.[15] Thus, abandonment is not proven by showing the manner in which the physical act of 'abandonment' took place, but by examining the actual effect of that abandonment, or the *animus quo* of such abandonment in a particular case. In *Bradley v Newson*,[16] the court asked whether the ship was 'a derelict in the legal sense of the term; or, in other words, had the master and crew abandoned her without any intention of returning to her, and without hope of recovery?'[17] It is on this point that Brice spoke of the various contexts in which abandonment could take place as a necessary consideration for the determination of a successful salvage of 'derelict' as a salvable property – whether there was abandonment of 'ownership' or of 'possession' and whether that abandonment was 'temporary' or 'permanent' in nature.[18] Although MSO 1952 does not define this legal concept and the various contexts in which it could occur, it is submitted that the term 'derelict' for the

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[12] The term is also not defined in the UK Merchant Shipping Act but definition has been developed through case laws; *The Aquila* (1798) 1 C. Rob. 37; *The Sophie* (1841) 6 L. T. 370; *The Zeta* (1875) L.R. 4. Also, N. Phillips, *Merchant Shipping Act 1995*, p 182, note 4.

[13] Brice, 2003, p. 223, citing *Cossman v. West and British America Assurance Company* (1887) 30 App. Cas. 160, 180. See also *Simon v Taylor* on derelict (below, note 21). The *Oxford Companion to Law*, p 352, simply defines 'derelict' as 'a thing abandoned, particularly a ship abandoned on the high seas, if salved, it belongs to the owner, unless he has abandoned it to the underwriters, but salvage reward is payable.'

[14] Brice, 2003, p 112, citing *The Albionic* (1941) P 99, p. 112. Also, *Simon v. Taylor* (1975) 1 MLJ 236.

[15] Halsbury's, p 722, para 1092, and, *Bradley v Newson* (1919) AC 16.

[16] Cited in *Simon v Taylor* (1975) 1 MLJ 236, at p 240.

[17] Similarly one may ask, was the ship's captain and crew merely trying to save their lives?

[18] Brice, 2003, p 284.

purpose of the Ordinance has to mean physical abandonment as opposed to abandonment in view of divesting ownership. It is submitted that such position is implied from the relevant legal provision under MSO 1952 that allocates a certain period of time within which timeframe the owner of the wrecks should appear to make his claim.[19]

In the neighbouring Singapore, the High Court in *Simon v. Tailor* held that when the U 859 was torpedoed by the British submarine there was no abandonment by the commander and crew of the U 859 in order to qualify it as *res derelicta* as the Court found that the commander and crew did not form or had the intention to abandon the submarine.'[20] Here, the Court referred to Halsbury's law of England's in defining the term derelict[21] and went on to refer to the judgement of Lord Findlay LC in *Bradley v. Newson* where the Court in that case held that: 'The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control.'[22] The Lordship went on:

> The crucial question is this. Was this vessel when she was picked up by salvors a derelict in the legal sense of the term; or, in other words, had the master and crew abandoned her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene, and had driven off or sunk the submarine, they would gladly have returned

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[19] For a more detailed discussion on this point; Mahmud Zuhdi Mohd Nor, 'The Role of Receiver of Wreck in Managing Historic Wrecks under the Merchant Shipping Ordinance 1952', (2009) 3 *MUU* p 135-143.

[20] (1975) 1 MLJ 236, at p 240.

[21] At p. 722, para 1092: 'property, whether vessel or cargo abandoned at sea by those in charge of it without hope on their part of recovering or intention of returning to it. A vessel is not derelict which is only left temporarily by her master and crew with the intention of returning to her even though the management of the vessel may have passed into the hands of salvors. On the other hand, a vessel deserted by her master and crew with the intention of abandoning her does not cease to be derelict because they subsequently change their intention and try to recover her. Whenever the question arises whether a vessel is derelict or not, the test to be applied is the intention and expectation of the master and crew at the time of quitting her, and, in the absence of direct evidence, that is determined by consideration of all the circumstances of the case.'

[22] *Bradley v. Newson* (1919) AC 16; 14 *Asp Mar Law* 340, at p 343.

> to their vessel. All they intended was to save their lives by obeying the orders of the German captain ... The physical act of leaving the vessel is only one feature in such a case. Another and essential feature, in order to make it a case of derelict, is the state of mind of the captain and crew when they left. The question quo animo is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict.

The requirement for 'abandonment' seems only necessary in relation to salvage of wrecks other than historic wrecks as the rights of a salvor in relation to his salvage services will only be an issue if the services were licensed by the appropriate issuing authority. The law is clear on this point and for that one must turn to National Heritage Act 2005 (hereinafter 'NHA 2005' or 'Heritage Act'), which makes it an offence to salvage underwater cultural heritage (a term which we can safely use interchangably with historic wrecks for the purpose of this paper) without securing necessary permission from Commissioner for Heritage.[23]

Coming back to salvage regime under MSO 1952, it must be noted that the terms 'flotsam, jetsam, lagan and derelict' have been employed in relation to 'wrecks' in general. In the 'generic' sence of the term, there is no distinction to be found between a historical shipwrecks and other type of wrecks. This is of no surprise since the main objective of the Ordinance, which is similar to the UK Merchant Shipping Act 1894's objective, is for 'the safe keeping and disposal of property from vessels in distressed or recently wrecked and not from vessels which had been lying on the seabed for a considerable period of time.'[24] Both the UK and Malaysian Merchant Shipping laws and common to all Merchant Shipping laws all over the world, were not designed or intended to deal with historic wrecks, and therefore all fall short in addressing issues relating to underwater cultural heritage as well. The intention of the legislator for such a general connotation of the term 'wreck' can be captured by looking at the wordings of the provisions of the Ordinance itself. Consequently, because the Ordinance applies to 'wrecks' in general, regardless of its nature or the historical significance of the wrecks concerned, all wrecks found within the jurisdiction of the Federation, or brought within the jurisdiction of the Federation, would become the subject matter of governance under the Ordinance. However, as mentioned earlier, since National Heritage 2005 also regulates underwater cultural heritage, there appears to be two different legal regimes that may concern disputes relating to underwater cultural heritage. Thus the question remains,

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[23] Art. 65 of NHA 2005.

[24] S. Dromgoole, 'Protection of historic wrecks in UK Part I', (1989) 4 Int'l J. Estuarine & Coastal L., p 27.

at least academically in the Malaysian context, whether there could seamless administration between the two sets of laws.[25] In various parts of the world such as the United States, United Kingdom, Ireland and Spain, the question is no longer academic but a real concern where courts have often time had to consider conflicts between salvage law and law dealing with heritage preservation.[26]

DANGER

Another cardinal salvage law principle is that in order to constitute a successful salvage, the salvable subject itself must be in danger, or more popularly termed as vessel in distress or a vessel threatened by marine peril. The *raison d'être* of the development of salvage law itself is the prevention of further damage or loss to the property concerned.[27] Kennedy stated that such factors relevant for the determination of requirement of danger as follows;

> ... the lesser ability of a disabled vessel to deal with emergencies such as fire or being set adrift; the danger of deterioration of ship and cargo (especially if perishable) if not removed; the facility for repairs at the place in question; the possibility of safely discharging and storing the cargo and sending it on to its destination; the possibility of expenses and the effect of delay upon both ship and cargo; and the possibility of repair at convenient ports and the time involved and safety of the operation to ship and cargo.[28]

The question that has often been asked is whether a historic wreck is a vessel in danger for the purpose of salvage reward. The element of danger must be necessarily demonstrated so that the presiding Judge in considering salvage reward is clear of the necessity of saving a ship in distress as an equitable principle justifying the often enermous salvage reward. One side of the argument is that historic wrecks have sunk to the bottom of the ocean for so many years and that the element of danger had ceased to exist. On the other hand, the danger could be said to continue to survive in a different context – that the 'danger' of the wreck being a navigational hazard especially when the wrecks are located

[25] The author realises that this is a tantalising proposition but one that needs further consideration elsewhere.

[26] Generally; Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 202-254.

[27] *The Cythera* [1965] 2 Llyod's Rep. 454, *The Glaucus* [1948] 81 Ll. L. Rep. 262, *The Troilus* [1951] 1 Lloyd's Rep. 467, *The Goring* [1986] 1 Llyod's Rep. 127 which was later affirmed by the House of Lords [1988] 1 Llyod's Rep. 397, *The Aldora* [1975] QB 748, *The Geertje K* [1971] 1 Lloyd's Rep. 285.

[28] Kennedy, *Law of Salvage*, 15th Ed., London, Stevens, 1985, p 339.

within shipping route. In terms of protecting underwater cultural heritage, historic wrecks need to be saved from the elements and ultimately from the danger of being plundered by treasure hunters. Unfortunately, it is not within the purview of the Merchant Shipping Ordinance and definitely not within the remit of the traditional salvage law principles to deal with this sort of issues. For the purist underwater archaeologists, the only peril that is likely to occur is when the salvors remove objects from the wrecks site and fail to adequately conserve them by following universally accepted archaeological standard such as those under the ICOMOS Charter and the Annex Rules of the 2001 UNESCO Convention. In part, this issue has been addressed by the National Heritage Act 2005 by making it an offence for anyone to carry any salvage work without licence subject to the conditions specified by the Heritage Commissioner but the law remains vulnerable as far as MSO 1952 is concerned.

VOLUNTARINESS OF THE ACT

Although the performance of salvage services must be based on voluntary act on the part of the salvor, it does not follow that a salvor is precluded from performing such service out of contract. In shipping practice, one talks about the Lloyd's Standard Form of Salvage Agreement. However, if there is already 'a duty to render the service wholly and completely' on the part of the claimant and 'that duty was owed to the owners of he property saved', the claim for salvage must fail, unless the claimant can prove that 'the services rendered are outside or beyond the scope and bounds of their duties under contract'.[29] The prevailing scenario in Malaysia is that it is up to a prospective salvor to propose a certain project to the government through the Heritage Commissioner, who will then forward the application to the National Committee of the Management of Historic Wrecks to consider the viability of the project. The act of salvage on the part of salvor is still voluntary in nature but it is also up to the appropriate licensing authority to consider the proposal and to proceed from there. Alternatively, it is the government who will, in many cases, commission commercial salvage

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[29] C. Hill, *Maritime Law*, 6th Ed., 2003, LLP, p 337, also citing *The Sandefjord* [1953] 2 Llyod's Rep. 557 where the Court held that the services rendered by the Pilot as 'salvage' services because 'not only did the Pilot take a personal risk' thus risking his own 'personal reputation... but also he relieved the ship's owners of the almost certain alternative of a vast salvage award for tug assistance' and that 'the underlying reason for salvage awards is to encourage seafaring people to take reasonable risks for the purpose of saving maritime property in danger'. See also; *The San Demetrio* (1941) 69 Ll. L. Rep. 5, *The Warrior* (1862) Lush 476, *The Beaver* (1800) 3 Ch Rob 92, *The Albionic* (1941) 70 Ll. L. Rep. 257.

company to carry out a salvage project under special agreement. Examples are numerous and these would include Diana (Malaysia), HMS Sussex (UK), RMS Titanic (USA, UK, France) and many others.[30]

SUCCESSFUL SALVAGE

Salvage operation too must be successful, at least partially, before a salvage claim can be made. The reason is that salvage law has always been associated with the principle of 'no cure, no pay'.[31] In layman terms, if one salvages nothing, there is nothing to reward. Certainly, this principle finds its way incorporated into Salvage contracts between the government of Malaysia and private companies intending to carry out salvage of historic wrecks.[32] Proposed projects involving the recovery of underwater cultural heritage often contain elements of risk, and it is precisely on this reason that many projects which have been approved by the government did not proceed further.

The term 'salvor' is nowhere defined in the Merchant Shipping Ordinance 1952 but from the meaning of the term 'salvage' it can be safely concluded that a salvor is the person who voluntarily performed a successful salvage services.[33] Anyone can become a salvor except those who are already contractually bound to perform his duties. In Malaysia, the performance of salvage can also come from salvors from a state owned vessel.[34] Sec. 173(1) of the Armed Forces Act

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[30] Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 202-254.

[31] *The Rene* [1955] 1 Llyod's Rep. 101.

[32] According to the then approving body, the Department of Museums and Antiquity, reference to such principle is also found in Salvage Guidelines relating to government contracts involving private salvage companies. Mahmud Zuhdi Mohd Nor, Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 202-254.

[33] S. 255 of the UK Merchant Shipping Act 1995 defines 'salvor' as 'in the case of salvage services rendered by the officers or crew or part of the crew of any ship belonging to Her Majesty, the person in command of the ship'.

[34] S. 173(1) of the Armed Forces Act 1972 provides that 'where salvage services are rendered by or with the aid of a ship or aircraft belonging to the Yang Di-Pertuan Agong and used in the armed forces, the Federal government may claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship or aircraft would have belonged to him' S. 173(2) further provides that 'no claim for salvage services by the commander or any of the officers... of a ship or aircraft belonging to... the Yang di-Pertuan Agong... shall ne finally adjudicated upon, unless the consent of the Minister to the prosecution of the claim is proved...'

1972[35] provides that 'where salvage services are rendered by or with the aid of a ship or aircraft belonging to the Yang Di-Pertuan Agong and used in the armed forces, the Federal government may claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship or aircraft would have belonged to him'. In the case of *Hans L Simon v Geoffrey John Taylor & Ors* (1975),[36] in determining whether the Defendants i.e. the four divers in the case are in fact salvors for the purpose of salvage rewards, the Court considered the term 'salvage' by referring to Halsbury's Laws of England.[37] Relevant part of the Halsbury's laws text defining the term salvage reads:

> ...either the service rendered by a salvor or the reward payable to him for his service. Salvage service in the present sense is that service which saves or contributes to the safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons belonging to a vessel when in danger at sea, or in tidal waters, or on the shore of the sea or tidal waters, provided that the service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self-preservation. The person who renders the service, that is the salvor, becomes entitled to remuneration termed 'salvage reward.'[38]

Based on this definition, the Court held that the 'the essence of a salvage service is that it is a service rendered to property or life in danger and the burden of proving the presence of danger rests upon those who claim as salvors.'[39] In this case, some mercury were recovered from a German submarine U859 which sank during World War II in 1944 25 miles of the Island of Penang, Malaysia, and was brought into Singapore. In 1969, an agreement was entered into between the company Associated Salvage Sendirian Berhad (ASSB) and the Government of Malaysia whereby ASSB 'purchased' the interest of the Government of Malaysia in this sunken submarine. At this point of time, the identity of the vessel could not be identified but when its identity was later ascertained, the Federal Republic of Germany claimed the sunken vessel.

The question was whether the Defendants in that case were to be regarded as 'salvors' for the purpose of salvage services. In this case the Court held that the Defendants were not salvors since what their actions were not motivated 'by any intention to salve for the benefit of the owners of the submarine and the cargo but solely for their own benefit and in other words, they cannot be said

[35] Act No. 77.
[36] (1975) 1 MLJ 236, at p 240.
[37] Vol. 35 at p 731, para 1109.
[38] Vol. 35 at p 731, para 1109.
[39] Halsbury's p 738 para 1119.

to have rendered 'any service in the nature of salvage services.'[40] In rejecting the Defendants claim that the 'raising of a sunken vessel or cargo' as a salvage service, the Court decided that the attitude of the four divers were such that 'they thought they had every right to take the cargo from the submarine because the submarine was in International waters and that anyone finding it could take it.'[41] This position clearly rejects the notion 'finders keepers' as far as State vessels are concerned. As discussed earlier, as far as State vessels are concerned, there is no abandonment unless expressly done so.

DETERMINATION OF SALVAGE DISPUTE

Subject to all above, distribution of salvage can be determined. However, dispute over salvage amount should be distinguished from disputes over the actual amount payable to the Receiver for all expenses incurred by him, which includes Receiver fees.[42] If the latter case is the essence of the dispute, the dispute shall be determined by the Minister[43] and his decision shall be considered final.[44] The High Court shall have jurisdiction to decide upon claims relating to salvage, which may include 'services in respect of which salvage is claimed were performed on the high seas or within the Federation, or partly on the high seas and partly within the Federation, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land or partly on the sea and partly on the land.'[45] Now one might inquire as to the validity of such extensive jurisdiction but this is quite normal elsewhere in the world. Where jurisdiction is asserted within one's own territory, it is territorial jurisdiction. However, it is perfectly possible that a wreck is found deep on the seabed of the high seas brought back into one's jurisdiction, as seen in the many American cases such as those involving the Titanic, subject to other rules relating to abandonment, immunity of state vessels and other rules prescribed under 1982 United Nations Convention on the Law of the Sea and 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage where applicable.[46] Additionally,

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[40] *Simon & Taylor* (1975), p 240.

[41] *Simon & Taylor* (1975), p 240.

[42] S. 404(1) of MSO 1952. Also 'fees' as enumerated in the Ninth Schedule of MSO 1952. For a more detailed account on the role of Receiver of Wrecks in relation to dealings over wrecks; Mahmud Zuhdi Mohd Nor, 'The Role of Receiver of Wreck in Managing Historic Wrecks under the Merchant Shipping Ordinance 1952', (2009) 3 *MUU* p 135-143.

[43] Minister means minister in charge of merchant shipping – S. 2(a) of MSO 1952.

[44] S. 404(3) of MSO 1952.

[45] S. 403 of MSO 1952.

[46] Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 202-254.

there is of course room and possibility for dispute resolution through other dispute resolving mechanism such as mutual agreement between the parties concerned or arbitration. Alternatively, if not settled by agreement, arbitration or otherwise, salvage may be determined summarily by a Sessions Court.[47]

The determination of dispute over the salvage of historic wreck contract awarded to a salvage company will also depend on the specific terms under the special contract, which does not necessarily follow dispute resolution provided under the Merchant Shipping Ordinance. The only dispute between the Government of Malaysia and the Salvage company on the apportionment of the *Diana* wreck artefacts was agreed in the agreement to be arbitrated at the Kuala Lumpur Regional Centre for Arbitration. However, the decision of the arbitration over the dispute between the government and the private company over the alleged distribution of artefacts could not be studied for the purpose of this paper since both parties objected to a study of the arbitration award.

FACTORS CONSIDERED FOR THE DISTRIBUTION OF SALVAGE

According to the *Blackwall* rules,[48] there are six factors to be taken into account for the determination of salvage amount; 'the labor expended by the salvors in rendering the salvage service', 'promenitude, skill, and energy displayed in rendering the service and saving the property', 'the value of the property employed by the salvors in rendering the service', 'the danger to which such property was exposed', 'the risk incurred by the salvors in securing the property from the impending peril', 'the value of the property saved' and 'the degree of danger from which the property was rescued'. These criteria have become standard and found their way into the Merchant Shipping Ordinance. The Ordinance provides that in determining the amount payable to the Salvor for successful salvage under section 389 or section 390 of the Merchant Shipping Ordinance 1952, or in the case where there is more than one Salvors, the

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[47] S. 393 MSO 1952 provides for that mechanism subject to the following: (a) the parties to the dispute consent; or (b) the value of the property saved does not exceed five thousand dollars; or (c) the amount claimed does not exceed one thousand dollars. Further sub-sec. (2) and (3) of the same provision provides: 'disputes as to salvage shall be determined by the High Court, but if the claimant does not recover in the High Court more than one thousand dollars, he shall not be entitled to recover any costs, charges or expenses incurred by him in the prosecution of his claim unless such Court certifies that the case is a fit one to be tried by the High Court' and 'disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved or of their respective agents.'

[48] *The Blackwall* 77 U.S 1 (1869) cited in Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (2003) Harv. Int'l L. J. 251, at fn 13.

proportion in which the remuneration is to be distributed among the salvors, the following are the criteria that shall be taken into consideration by the Court[49]:

(a) the measure of success obtained;
(b) the effects and deserts of the salvors;
(c) the danger run by the salved vessel, by her passengers, crew, and cargo;
(d) the danger run by the salving vessel and the salvors;
(e) the time expended, the expenses incurred, the losses suffered, and the risks of liability and other risks run by the salvors and the value of the property exposed to such risks, due regard being had to the special appropriation (if any) of the salvors' vessel for salvage purposes;
(f) the value of the property salved.

Apart from these criteria, one criteria should be added in relation to historic wrecks and the underwater cultural heritage – that there should be due consideration on the special need for scientific endeavours for preserving the collective integrity of historic wrecks, its associated artefacts and environment. In the United States, the Court in *Colombus-America Discovery Group v Atlantic Mutual Insurance Company*[50] recognised the amount of time and money expended through salvor's scientific research in the project in addition to other normal criteria in fixing salvage reward. On this issue, it is also crucial to note that under the existing system under MSO 1952, there is no incentive for a salvor to protect the environment when they undertake a salvage operation since their reward comes from saving the ship, crew and its cargo. It is worth considering the need to compensate salvors for the steps taken to minimise damage to the associated environment.[51]

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[49] S. 396(1) of MSO 1952. Compare with, A. 13(1) of the Salvage Convention 1989 which provides for an elaborate criteria for fixing salvage reward: '(a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of the danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.'

[50] (1995) AMC 1985 (US Court of Appeals, 4th Circuit) but on this point; (1992) AMC 2705.

[51] In some countries such as Ireland, owners of vessels are required by law to compensate salvors who have taken steps to minimise damage to the environment, even in cases where the salvage operation itself has been unsuccessful.

The determination of the value of a particular wreck is assessed according to its own special circumstances, either 'as a going concern', which includes 'the consideration of pending profitable engagements' or its value to the owners in its 'damaged condition'.[52] This assessment is solely on the ship. The assessment of the value of the cargo is however a separate concern. Shipping practice and regulation in Malaysia requires that 'where any dispute as to salvage arises, the receiver of the district where the property is in respect of which the salvage claim is made may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties.'[53] Apportionment of salvage in relation to projects undertaken between the government and private salvage company, however, may on the other hand adhere to special formula agreed upon between the government and the company. [54] In the event of a dispute, both parties may also choose arbitration instead of a court procedure as method of dispute settlement as seen in the dispute involving Diana wreck between the government of Malaysia and private salvage company.[55]

CONCLUSION

While salvaging historic wrecks may constitute 'salvage' for the purpose of salvage reward under MSO 1952, salvage principles under the Ordinace were designed for 'wrecks' in general without considering the special needs of historic wrecks or underwater cultural heritage. It is through the implementation of National Heritage Act 2005 that a license for salvage activities may be secured. Although this relatively new Act contains some provisions regulating the management of underwater cultural heritage, it does not expressly exclude the application of the Ordinance. Therefore, the relationship between the Ordinance and the National Heritage Act 2005 in providing the necessary control mechanism over activities affecting the salvage of historic wrecks is a matter of considerable significance.

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[52] C. Hill, *Maritime Law*, 6th Edition, 2003, LLP, London, p. 368. Recent English case law on this point is the *Yolaine* [1995] 2 Lloyd's Rep. 7, but see also; *The Queen Elizabeth* [1949] 82 Ll.L.Rep. 803.

[53] Section 398(1). 398(2) provides that a copy 'of the valuation purporting to be signed by the valuer, and to be certified as a true copy by the receiver, shall be admissible as evidence in any subsequent proceeding.' See also sec. 402, MSO 1952 on the apportionment of salvage by the High Court.

[54] Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 229-233.

[55] Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 229-233.

It is important that there must be clear demarcation of scope between the two laws or one may argue this is simply a matter of seamless integration between the two laws. For this paper, 'salvage' of historic wrecks is still a concern that derives significance from MSO 1952. After all, the mechanism provided under National Heritage Act 2005 is rather similar to MSO 1952 and the only major changes are in respect of the custodian of the wreck and the power to approve salvage activities.[56] However, until further regulations are made in implementing the Act, one is clueless as to whether the application of salvage principles under MSO 1952 is any different from NHA 2005. Of particular signifinace is that, as discussed above, MSO 1952 is only concerned with 'successful salvage' not on the successful preservation of salvaged items.

Dr. Mahmud Zuhdi Mohd Nor
Senior Lecturer
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi
Selangor

Email: zuhdi@ukm.my

[56] It is not the objective of this paper to elaborate upon the extensive mechanism offered under National Heritage Act 2005 for want of space but for lengthy discussion on this issue; Mahmud Zuhdi Mohd Nor, Law and Underwater Cultural Heritage: A Malaysian Perspective, p 144-254.