



The legal status of the “employment salvage contract” in the Chinese maritime salvage law: A challenge to the principle of ‘no cure, no pay’

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ABSTRACT

The legal nature and law application of the employment salvage contract, which is not very clear in the relevant Chinese legislation, has drawn significant attention from the Chinese salvage and maritime law academia. The case of *NRB vs. Archangelos* fully demonstrates various issues that exist in the judicial practice, and its final judgment by the SPC shows an authoritative judicial position on such issues. Through a comprehensive analysis of the *NRB vs. Archangelos* and a comparative evaluation of the current academic views, this article argues that, although the employment salvage contract has indeed excluded the principle of ‘no cure, no pay’ and challenged the current Chinese salvage law system, it does not alter its legal nature as a salvage contract and the application of law to the legal policy of promoting the salvage at sea. However, this article also cautions that employment salvage reward should be paid and apportioned only when something has been actually saved.

1. Introduction

The law of maritime salvage is a unique and important part of maritime law in China as well as in other countries [1].¹ It has a considerably long history and can be dated back to some relevant rules of ancient Rhodian Law, which, nine hundred years before the Christian era, recognised the principle of offering a reward for the saving of imperilled maritime property [1].² As for the salvage service, there are salvage under contract and pure salvage that has been the main form for a very long time. Nevertheless, whatever the salvage service is, a right to salvage reward arises when a person (natural or legal), acting as a volunteer (i.e. without any pre-existing contractual and legal duty to do so) preserves or contributes to preserving any vessel, cargo, freight, or other recognised subject from danger at sea [2]. By the late 19th century, contract salvage was more popular and common than pure salvage, especially Lloyd’s Standard Form of salvage agreement, first came into being and was soon to be superseded and improved during the 20th century [2]. The policy of encouraging efforts to save property in peril and discourage embezzlement by salvors, which is the core of the law of

salvage, distinguishes the salvage service from other maritime services [3].

The fundamental rule of salvage law relates to the amount, payment, and proportion of salvage reward, which are also the most important issues in judicial practice. For these issues, the principle of ‘no cure, no pay’ has always held an important position, whether in the past period of pure salvage or in the current situation of contract salvages prevailing. In a literal sense, this principle means that the salvor is entitled to a reward only when salvage operation has achieved any practical result. In the meantime, the salvor should be paid as long as the salvage operation achieves any practical result, even if it is not completely successful. As the reward is directly and only related to the salvage results, the principle of ‘no cure, no pay’ stipulates an incentive for the salvor to try their best to save the property in peril. The rationality in determining and calculating the salvage reward results in it being accepted and promoted by several major international conventions and domestic salvage law.

The two main international conventions on maritime salvage, namely the Brussels Convention on Salvage 1910 (hereinafter, the Salvage Convention 1910)³ and the International Convention on Salvage

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¹ The maritime law, for the purpose of public policy, and for the advantage of trade, impose a liability on the thing saved—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing was saved under great stress and exceptional circumstance.

² Basically, this principle of reward for voluntary services rendered is the back-stone of the liberal modern day law of maritime salvage.

³ Available at: <http://www.admiraltylawguide.com/conven/salvage1910.html>. (visited 9April 2020).

1989 (hereinafter, the Salvage Convention 1989).⁴ The 1989 Salvage Convention is more detailed in content, especially in its augment regarding special compensation for the salvor's effort on the marine environment protection, which reflects the legislators' special concern about marine environmental safety. However, the principle of 'no cure, no pay' has always played an important role in the recognition and calculation of salvage reward. It can be said that this principle has been incorporated and developed by the Salvage Convention 1989 after its first confirmation as a fundamental principle on salvage reward by the Salvage Convention 1910, and it still holds a very important position in the field of international salvage today.

On 7 November 1992, the Standing Committee of the National People's Congress promulgated the Maritime Law of the People's Republic of China (hereinafter, the Maritime Law 1992),⁵ which came into effect on July 1, 1993. The law provides a special chapter (Chapter IX), which covers 22 articles (Articles 171–192) for the maritime salvage. Less than a year later, the Chinese government acceded the Salvage Convention 1989, which entered into force for China on July 14, 1996. A comparison between Chapter IX of Maritime Law 1992 and the Salvage Convention 1989 shows that the contents of the two laws are basically the same, except for Article 30(a), (b), and (d) of the convention on which the Chinese government declares reservations. This means that although the Chinese government acceded and approved the Salvage Convention 1989 several years later than the promulgation of its domestic law, the Chinese lawmakers have paid much attention to the legal spirit and legislative experience of the Salvage Convention 1989. Chapter IX of Maritime Law 1992 also confirms that the principle of 'no cure, no pay' plays an important role in determining and calculating the salvage reward through Article 179.⁶

However, in recent years, a special salvage contract, which fixes the rate or amount of the salvage reward whether or not the salvage service is successful, has challenged the principle of 'no cure, no pay' in China. Chinese scholars call such salvage contracts without the 'no cure, no pay' as 'employment salvage contracts' or 'fixed-rate salvage contracts'. The exclusion of the principle of 'no cure no pay' in the contract has resulted in serious discussion and controversy in both theory and practice [4–8]. The most important issue is whether the employment salvage contract enjoys the legal nature of maritime salvage contract or whether Chapter IX of Maritime Law 1992 and the Salvage Convention 1989 should govern the employment salvage contract. One prevailing position in theory is that the employment salvage contract without a 'no cure, no pay' basis is no longer a salvage contract but a contract of maritime service, which is not applicable in Chapter IX of Maritime Law 1992 or international salvage conventions. Since there is no relevant provision in Maritime Law 1992, nor corresponding international rules for this special contract, the Contract Law shall apply [5,7,9]. This position implies that employed salvage service is not maritime salvage and the salvage law shall apply to a salvage contract on a 'no cure, no pay' basis only.

On July 7, 2016, the Supreme People's Court (SPC) of China heard the case of 'Nanhai Rescue Bureau (NRB) of the Ministry of Transport vs. Archangelos Investments ENE and Another' (*NRB vs. Archangelos*), which focused on the legal nature of the employment salvage contract and the payment of a salvage reward. Nearly five years after the accident occurred in 2011 to the retrial, which was concluded in 2016, this case was tried by three Chinese courts, namely the Guangzhou Maritime

Court as the court of first instance (hereinafter, trial court), the Guangdong High People's Court as the court of appeal, and the SPC as the retrial court. This case demonstrates the judicial attitude of Chinese courts at all levels on issues related to the application of a salvage contract.⁷ Therefore, the *NRB vs. Archangelos* case caused great concern in both the Chinese judicial community and academia and once again triggered a heated discussion in the theoretical and practical circles regarding the nature of an employment salvage contract and its relationship with other maritime law systems [10–12]. The SPC determined that a *salvage contract fixing the rate of salvage reward and excluding the principle of 'no cure, no pay' is not a salvage contract on a 'no cure, no pay' basis but an employment salvage contract. Although an employment salvage contract is still a salvage contract under Chapter IX of Maritime Law, the Contract Law 1999(contract law 1999) governs the issues of reward payment and apportionment for such a contract.*⁸

The above academic position and judicial practice show that an employment salvage contract, based on its own particularity, does challenge the principle of 'no cure, no pay' and the current salvage law system. The divergence of the legal nature and law application of the employment salvage contract between Chinese academia and the judicial circles is obvious. Therefore, by analysing the judgements of *NRB vs. Archangelos* and evaluating the current academic views, this article probes into the legal nature and law application of the employment salvage contract. Based on this, the article will be divided into seven parts. Section 2 briefly describes the case facts and makes a detailed comparative analysis on the decision of the three courts regarding the vital issues. Section 3 analyses the debate on the nature of the employment salvage contract – a maritime service contract or a maritime salvage contract. From a comparative law perspective, this section discusses the logical flow of the prevailing academic position on the nature and the application of law in employment salvage contracts and that the principle of 'no cure, no pay' was and is still an important rule for the salvage reward but not a requirement in determining the nature of maritime salvage services and contracts. Section 4 provides a supplementary discussion of the SPC's holding and points out the inadequacy of the Contract Law to govern such a contract. This section attempts to prove that applying the law of salvage seems to be a better choice due to its underlying policy of encouraging the efforts of saving property in peril and of protecting the marine environment. Section 5 cautions that regarding the apportionment of an employment salvage reward, it is more reasonable for the courts to make judgements in line with the corresponding facts of individual cases for 'individual justice'. Section 6 illustrates the latest development in the revision of Chinese Maritime Law, in which the new chapter of the maritime salvage is an important part. The new draft reflects the intention of the drafters to harmonise the provisions of the Chinese law of salvage with those of the Salvage Convention 1989, and the new draft should not be interpreted as precluding its application of the salvage law to the employment salvage contract, except for the relevant rules on salvage reward.

2. Facts and decisions on the '*NRB vs. Archangelos*'

On August 12, 2011, *Archangelos Gabriel*, a Greek oil tanker owned

⁴ Available at: <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx>. (visited 9 April 2020).

⁵ Available at: http://www.npc.gov.cn/wxzl/gongbao/1992-11/07/content_1479260.htm (visited 9 April 2020).

⁶ Maritime Law 1992, Article 179: Where the salvage operations rendered to the distressed ship and other property have had a useful result, the salvor shall be entitled to a reward. Except as otherwise provided for by Article 182 of this law or by other laws or the salvage contract, the salvor shall not be entitled to the payment if the salvage operations have had no useful result.

⁷ The full name of the case is 'Nanhai Rescue Bureau of the Ministry of Transport vs. Archangelos Investments ENE and Another'. It will be hereinafter referred to as *NRB vs. Archangelos*, (2012) Guang Hai Fa Chu Zi 898 (first instance); (2014) Yue Gao Fa Min Si Zhong Zi 117 (second instance); (2016) Zui Gao Fa Min Zai 61 (retrial). The English version of the judgment of retrial is available at: <https://maritimeintelligence.informa.com/searchlisting?searchText=Archangelos%20Gabriel%e3%80%81> (visited 18 Mar 2020).

⁸ See, *NRB vs. Archangelos*, (2016) Zui Gao Fa Min Zai 61.

by Archangelos Investments E.N.E, ran aground in the North Waterway of the Qiongzhou Channel, China.⁹ After the accident, the shipowner immediately authorised its representative office in Shanghai to draft a contract with the Nanhai Rescue Bureau of the Ministry of Transport (NRB) for providing salvage services. The shipowner and the NRB signed a salvage agreement through e-mail, which clearly stipulated the ‘salvage reward rate (RMB 3.2/horsepower hours) no matter whether the NRB can successfully assist the Gabriel refloat or not’ (the salvage reward clause). Nevertheless, because of the change in the rescue plan from towing to off-loading, the salvage tugs did not perform the operation based on the salvage agreement (pushing and towing) but only kept on guarding and on standby.¹⁰ Therefore, disputes regarding the salvage contract and reward arose between the NRB and the shipowner. The major issues of the *NRB vs. Archangelos* case were: A. the nature and applicable law of the contract; and B. the amount and apportionment of the salvage reward.

2.1. Decisions for issue A

2.1.1. The trial court

The classification of the involved contract by the trial court is based on the nature of salvage service. The court held that the involved service provided by NRB, in this case, had met all the legal requirements of a maritime salvage service.¹¹ Thus, the contract signed for this service was, naturally, a maritime salvage contract, which shall be governed by the Maritime Law 1992.

2.1.2. The court of appeal

In the trial of the second instance, the NRB argued that the involved contract was an employment salvage contract for its special reward clause altering the nature of the contract. However, the court of appeal rejected this claim on the ground that according to Article 172 (3)¹² of the Maritime Law 1992, salvage payment refers to any reward, remuneration, and compensation for salvage operation paid by the salvaged party to the salvor. Accordingly, contractual remuneration without a ‘no cure, no pay’ basis is also a maritime salvage payment. Moreover, according to Article 179 of the Maritime Law 1992, parties have the right to contract a salvage reward outside the principle of ‘no cure, no pay’ and the special clause on the salvage reward does not change the nature of the salvage contract. Thus, the involved contract is still a maritime salvage contract, which, shall be governed by the Maritime Law 1992.

2.1.3. The SPC

The SPC again classified *NRB vs. Archangelos* as a dispute related to a maritime salvage contract. However, different from the holding of the court of appeal, the SPC held that the special reward clause, which fixes the rate or amount of the salvage reward and excludes the principle of ‘no cure, no pay’, indeed, attributes the agreement to a salvage employment contract which is no longer a salvage contract on a ‘no cure, no pay’ basis.¹³ In addition, the provisions of the Maritime Law 1992 on salvage reward calculation and apportionment were applicable only to salvage reward on a ‘no cure, no pay’ basis. Therefore, issues of the

⁹ The ship and the cargo (crude oil) were both in dangerous, which seriously threatened the marine environmental safety. See, *NRB vs. Archangelos*, (2016) Zui Gao Fa Min Zai 61.

¹⁰ Before the salvage operation began, the shipowner decided to refloat ‘Archangelos Gabriel’ by an off-loading operation at the request of Zhanjiang Maritime Safety Administration.

¹¹ The requirements were: the matters saved have been recognised by law; there was a marine peril placing the property at risk; the salvage service was voluntarily rendered by NRB; the salvage service was effective.

¹² The Maritime Law 1992, Art. 172 (3): ‘Payment’ means any reward, remuneration or compensation for salvage operations to be paid by the salvaged party to the salvor pursuant to the provisions of this Chapter.

¹³ See, *NRB vs. Archangelos*, (2016) Zui Gao Fa Min Zai 61.

reward calculation and apportionment of such employment salvage contract were ultimately governed by the rules of the Contract Law 1999.

2.2. Issue B in the trial of three levels

2.2.1. Validity of the salvage reward clause

2.2.1.1. The trial court. The trial court held that the special reward clause stipulated in the contract was valid. Moreover, the reward fixed by this clause is still a reward on a ‘no cure, no pay’ basis. This is because, from the perspective of the whole salvage service, the vessel, cargo, and crew on board finally re-floated safely. Therefore, the salvage service is effective and successful. Although the tugs did not perform the operation as originally agreed, it remained on standby at the request of the shipowner until the vessel was successfully rescued, which is a sign of the completion of the salvage.¹⁴ Accordingly, the NRB shall be entitled to a salvage reward as agreed upon in the contract.

2.2.1.2. The court of appeal and the SPC. The court of appeal also confirmed the validity of the special reward clause; however, what is different from the holding of the trial court is that the reward fixed by the contract clause was not a reward on a ‘no cure, no pay’ basis. It is, in fact, a legal and contractual exception to the principle of ‘no cure, no pay’ according to Article 179 of the Maritime Law 1992.¹⁵ This means that the special reward clause was not only valid but also had the legal effect of changing the nature of the salvage reward. As the salvage reward without a ‘no cure, no pay’ basis is allowed by the Maritime Law 1992, the NRB is entitled to claim a salvage reward regardless of its actual operation.

Similar but further than the holding of the court of appeal, the SPC held that the special reward clause, which fixes the rate or amount of the salvage reward and excludes the principle of ‘no cure, no pay’, did not only have the effect of changing the nature of the reward but also altering the nature of the contract.

2.2.2. The amount of the salvage reward

Although the legal nature of the salvage reward fixed by contract has triggered a heated debate in courts, the amount of the salvage reward determined by the trial court was accepted by the parties and upheld by the higher courts.

The trial court emphasised that the salvage reward was an incentive of encouragement of salvage service; therefore, when determining the amount, all the case facts should be considered, according to Article 180 of the Maritime Law 1992. The reward fixed by contract was set for the salvage operation of towage. However, the actual salvage operation was safeguarding and on standby. The cost, technical requirements, and risks of the actual operation were much less than those of an operation agreed on by contract. Therefore, the trial court, considering the parties’ negotiation,¹⁶ adjusted the rate of reward from 3.2 yuan/horsepower hour to 2.9 yuan/horsepower hour in accordance with Article 176(2) of the Maritime Law 1992. The Article stipulates that ‘the salvage contract may be modified by a judgement of the court under the circumstance that the payment under the contract is in an excessive degree too large or too small for the services actually rendered’.

2.2.3. The apportionment of the salvage reward

The apportionment of salvage reward is the main issue in the trial of

¹⁴ See, *NRB vs. Archangelos*, (2012) Guang Hai Fa Chu Zi 898.

¹⁵ See, *NRB vs. Archangelos*, (2014) Yue Gao Fa Min Si Zhong Zi 117.

¹⁶ The rate of 2.9 yuan/horsepower hour was proposed by the investment company in the mail after the change of the salvage plan. And the NRB did not explicitly reject it in its reply. See, *NRB vs. Archangelos*, (2012) Guang Hai Fa Chu Zi 898.

second instance and retrial. The shipowner appealed to the court of appeal to allocate the reward with the amount determined by the trial court in proportion to the value of the ship and cargo. The claim was upheld by the court because the master of a ship in distress has the right to make a salvage contract on behalf of the owner of the ship as well as the owner of the cargo on board in accordance with Article 175 of the Maritime Law 1992. In addition, the salvage reward shall be paid by the owners of the vessel and cargo in proportion to the value of the vessel and cargo, respectively, in accordance with Article 183 of the Maritime Law 1992. It has been found that the ship accounts for 38.85% of the value of all saved property; therefore, the shipowner could only pay 38.85% of the total amount to the NRB.¹⁷

The NRB, not satisfied with the decision of the court of appeal, appealed to SPC for a full amount (determined by the trial court) of the salvage reward on the basis of the special reward clause turning the agreement into an employment salvage contract and that the shipowner shall pay the whole sum of the reward as per the clause in the agreement. The SPC upheld NRB's claim because the provisions on salvage reward apportionment in the Maritime Law 1992 and the Salvage Convention 1989 were applicable to a salvage contract on a 'no cure, no pay' basis only. The involved contract is an employment salvage contract, which excludes the principle of 'no cure, no pay', and the fixing of the reward for such contracts shall not be governed by the provisions (Article 183) in the Maritime Law 1992 and the Salvage Convention 1989. As the SPC chose the Contract Law 1999 for issues on employment salvage reward and there is no such rule on reward apportionment, the NRB received the entire sum (as determined by the trial court) of the payment.

To make it easier for the readers to understand each debate of that section, a summary table of issues and decision points by each court has been provided as Table 1.

3. Summary

The above overview of the judgements show that the judicial logic and reasoning of the three courts are very different from each other and reflect the different understanding and interpretation of the principle of 'no cure, no pay' by the courts.

The trial court identified *NRB vs. Archangelos* as an ordinary maritime salvage contract case. The court emphasised the fact that the change of salvage operation was not the fault of the salvor who kept safeguarding and on standby at the request of the shipowner and the salvor. Moreover, the ship and property aboard were finally saved, thus, the salvage service was successful. This means that the trial court did not take the special reward clause as an exclusion of the principle of 'no cure, no pay'. Meanwhile, the court adjusted the reward rate commensurate with the actual salvage operation as the salvage law allowed. Obviously, the court ignored the particular case because the salvor's operation may not actually 'cure' the property in peril. In other words, the trial court emphasised the final salvage result rather than the causal link between the salvor's operation and the result, which, however, is more important for the meaning of 'no cure, no pay'. The policy or purpose of the principle of 'no cure, no pay' is to associate the salvage result with the salvage reward. In other words, a successful service earns a corresponding reward. However, the principle implies a causal link between the salvage result and the actual operation by the salvor, which is more important for the reward calculation. The question is, if the ship and property in peril are saved mainly or totally by the operation of others instead of the operation of the salvor in a suit, could the salvor get a reward on a 'no cure, no pay' basis? In *NRB vs. Archangelos*, it seems that the actual operation of NRB made very little contribution to the

Table 1

A Summary of dockets on issues in the '*NRB vs. Archangelos*' case.

The issues The decision of each court	The Trial Court	The Court of Appeal	The SPC
Nature of the contract	Salvage contract on a 'no cure, no pay' basis	Salvage contract without a 'no cure, no pay' basis	Salvage contract without a 'no cure, no pay' basis (Employment salvage contract)
Law Application	Chapter IX of the Maritime Law 1992 governed all the issues	Chapter IX of the Maritime Law 1992 governed all the issues	Contract Law 1999 governed issues of the reward calculation and apportionment
Validity of the reward	Valid, and it is a salvage reward on a 'no cure, no pay' basis	Valid, but it is a salvage reward without a 'no cure, no pay' basis	Valid, but it is a salvage reward without a 'no cure, no pay' basis (Employed Salvage Reward)
Amount of the reward	adjusted the rate of reward from 3.2 yuan/horsepower hour to 2.9 yuan/horsepower hour	Upheld	Upheld
Apportionment of the reward	–	The reward shall be apportioned and paid in proportion to the value of vessel and cargo salvaged respectively	The reward shall be paid on the whole (as determined by the trial court), because the provision of salvage reward apportionment in the Maritime Law 1992 shall applied only to the salvage reward on a 'no cure, no pay' basis
Application of the principle of 'no cure, no pay'	Generally applying the principle of 'no cure, no pay' to the reward	The special reward clause contracting out of the principle of 'no cure, no pay'	The special reward clause contracting out of the principle of 'no cure, no pay'

Source: Created by this research

successful result. Moreover, the contract indeed provided that a reward would be paid in this regard.¹⁸ Therefore, if the trial court awarded a reward on a 'no cure, no pay' basis, more evidence of the causal link between the salvor's operation and the result should have been added to convict the parties.

Generally, the court of appeal agreed with the trial court in terms of the classification of the case and the contract involved and concluded that the special reward clause in the contract did not alter the nature of the contract as a salvage contract. Nevertheless, contrary to the trial court's judicial logic of generally applying the principle of 'no cure, no pay', the court of appeal realised that the case facts (the special reward clause and the change of salvage operation from towing to being on standby) made the involved salvage contract and reward special. This means that, although the case was about the contract salvage, the contract and the reward fixed by the contract are, in fact, no longer a salvage contract and reward on a 'no cure, no pay' basis. In dealing with this issue, the court of appeal held that the salvage law stipulated the principle of 'no cure, no pay' with exceptions that allowed the parties to contract out of it. By such holding, the court implied that Chapter IX of the Maritime Law 1992 was applicable to a salvage reward on a 'no cure,

¹⁷ *ibid.*

¹⁸ The special reward clause stipulated that 'salvage reward rate (RMB 3.2/horsepower hours) no matter whether the NRB can successfully assist the Gabriel refloat or not'.

no pay' basis, as well as to other forms of reward, such as a salvage reward fixed by contract in *NRB vs. Archangelos*. Therefore, from the perspective of the court of appeal, the special reward clause with an effect of precluding the principle of 'no cure, no pay' has established a salvage reward not based on the 'no cure, no pay' principle, which, however, shall be governed by Chapter IX of the Maritime Law 1992.

However, the SPC held that the special reward clause precluding the principle of 'no cure, no pay' has not only established a new type of salvage reward but has also altered the salvage contract. The salvage contract with such a clause is an employment salvage contract other than the salvage contract on a 'no cure, no pay' basis. This holding is a conceptual innovation and a judicial confirmation as there is no such legislative conception of the employment salvage contract that has been discussed in literature for a long time. The judicial confirmation of the employment salvage contract by SPC will significantly influence the judicial practice of the lower court in similar future cases and contracts.¹⁹ At least, it is in total contrast with the holding of the trial court. The understanding and interpretation of the salvage law of the court of appeal are similar to those of SPC, but the latter went further, particularly, in terms of establishing a new concept. However, the former, as a lower court, is understandably cautious on this point. Moreover, the SPC argued that the employment salvage contract is still a maritime salvage contract to which the provisions on salvage reward calculation and apportionment in salvage law were not applicable. This holding shows that the SPC not only proposed the concept of the employment salvage contract but also confirmed its legal status as a maritime salvage contract. Meanwhile, the SPC interpreted the scope of the provisions on the apportionment of a salvage reward and held that such provisions applied only to a salvage reward that is fixed on the basis of the principle of 'no cure, no pay' rather than a salvage reward fixed by agreement.

Overall, the judgements of *NRB vs. Archangelos* show that the judicial position on the employment salvage contract is that it is still a salvage contract, though without a 'no cure, no pay' basis.

4. Nature of the employment salvage contract: maritime salvage contract or maritime service contract

It is worth noting that the current judicial position on the legal nature of the employment salvage contract is very different from the current academic position. The latter suggests that the employment salvage contract is no longer a maritime salvage contract but a maritime service contract. Scholars following this position mainly argue that the

¹⁹ Prior to the *NRB vs. Archangelos*, there was no judgment clearly identifying the employment salvage contract in judicial practice. Even if facing a contract with the special reward clause similar to the contract in the *NRB vs. Archangelos*, the court just regarded it as a general salvage contract based on the similar classification and rationale by the trial court or the court of appeal of the *NRB vs. Archangelos*. However, since the *NRB vs. Archangelos*, the concept of employment salvage contract has been widely followed by lower courts. For example, both in the cases of Zhejiang Manyang Shipping Engineering Co., Ltd. vs. S & P Marine Co., (2017) Zhe72 Min Chu Zi 373 and Zhejiang Manyang Shipping Engineering Co., Ltd. vs. Ningbo Hongxun Shipping Co., Ltd., etc., (2017) Zhe 72 Min Chu Zi 686 (Case One), Ningbo Maritime Court determined similar types of contracts in such two cases as employment salvage contracts based on the SPC's judgment. The decision on this issue had been confirmed by the Zhengjiang High People's Court in subsequent related proceedings.

employed salvage [13,14],²⁰ as the behavioural basis of the employment salvage contract, is more likely to be a commercial maritime service. This is because the amount of an employed salvage reward is agreed on in the contract and the results and effects of the salvage operation are not necessarily considered when determining the salvage reward [15].²¹ Therefore, compared to the ordinary contract salvage on a 'no cure, no pay' basis, the most striking feature of the employed salvage is that it excludes the principle of 'no cure, no pay'. Similarly, the employment salvage contract with a special reward clause enjoys the same feature.

It seems that the academic position is based on a rebuttable precondition that applying the principle of 'no cure, no pay' to calculate the reward is a requirement for a maritime salvage, which, however, lacks theoretical support. By collecting and comparing views on what is and what constitutes a maritime salvage from several authoritative textbooks, it is perceived that the study on the conception and requirement of maritime salvage is broadly similar. The maritime salvage refers to the operation voluntarily performed by others on navigable (or any) waters to save ships and properties in peril [9,16,17]. Therefore, the essential characteristics of a formal maritime salvage claim are mainly in four aspects. First, there must be a marine peril placing the property at risk of loss, destruction, or deterioration. Second, the salvage service must be rendered voluntarily and not required by an existing duty or by special contract. Third, the matters saved must be recognised by law. Fourth, for a reward on a 'no cure, no pay' basis, the salvage must be successful, in whole or in part [9,16,17].

For such requirements, the first three actually determine the nature of the salvage service, while the last one determines only the type of salvage reward. This means that a maritime service rendered, which meets the first three requirements, will fall within the scope of the maritime salvage service. Assessing and calculating the salvage reward is not necessary to determine the nature of the salvage service, which, however, determines whether the salvage reward and contract are on a 'no cure, no pay' basis.

Moreover, the above conclusion can also be established from the perspective of comparative law. There is no such claim that a maritime salvage must be on a 'no cure, no pay' basis in the salvage law of other countries. For example, the English scholars recognised that although most salvage agreements are on 'no cure, no pay' terms, an agreement providing for some payment in the event of no success may still be properly called a salvage agreement [2]. In the English salvage law, when the salvor finishes the engaged operation, which does not save the vessel and property in distress, the salvor can also be rewarded if the vessel and property in distress are finally saved by others. Such kind of maritime salvage was acknowledged as engaged service, which is considered as the practical basis of the employed salvage by most Chinese scholars [5]. In the American salvage law, the essential characteristics of a maritime salvage service are that it should be performed on

²⁰ The employed salvage itself has been identified and characterized as early as in the 1980s. It, also known as fixed-fee salvage, refers to the behaviour that the salvor performed the salvage service at the request of the salvee, and gets reward according to the agreed rate or amount regardless of the result of the salvage service. Besides, in the Chinese Waterways Technical Dictionary published in 1982, the term of 'employed salvage' was defined as that 'a salvage in which the salvor was awarded according to its labour, time and equipment expended.' The term is contained in the chapter of 'salvage at sea' and is distinguished from the contract salvage on a 'no cure, no pay' basis.

²¹ In fact, such claim has been argued in 1960s, even many years before the emergence of concept of employed salvage in 1980s.

navigable waters and that it should be rendered voluntarily.²² Contract salvage includes the salvage service entered into between the salvor and the owner of the imperilled property (or by their respective representatives) pursuant to an agreement, written or oral, fixing the amount of compensation to be paid, whether successful or not in the enterprise [1]. Therefore, in the common law system, the contract with a special reward clause 'does not alter the nature of the service as a salvage service, but only fixes the rule, by which the court is to be governed in awarding the compensation'.²³ Besides, the rules of maritime salvage of civil law countries are usually provided in the separate law of maritime or the commercial code. Particularly, after 1994, the legislative style and main contents of the maritime law in the Nordic countries tend to merge, and the rules relating to the conception of maritime salvage are highly similar to each other [18]. Actually, such rules do not restrict the salvage service with a 'no cure, no pay' basis, nor limit the masters' authority to contract outside the principle of 'no cure, no pay'.²⁴ Besides, the rules of other civil law countries, such as Germany, on these issues are also similar to those in the Chinese law of salvage, which have no strict restrictions on the conditions for determining a salvage service or contract.²⁵

Therefore, the purpose and the behavioural basis of a maritime salvage contract and maritime service contract determine the nature of such services and contracts. There are certain similarities on the external behavioural patterns between an employed salvage service and a commercial maritime service; however, the intrinsic purpose of rescuing property in peril or of providing safety service constitutes a fundamental difference between them.²⁶ Specifically, the maritime service means that one party provides a maritime service to another party and the serviced party pays the provider according to their service contract. The payment depends on the market price of the service, the difficulty faced by the service provider, the skill of the service provider, and the actual completion of this service. Thus, the operation and payment of employed salvage and maritime service may be similar. However, in the context of maritime service, the situation of all parties is relatively safe, which is contrary to employed salvage. The purpose of the employed salvage service is to help the party to get rid of the distress and save the property in peril. This means that at least one party is facing real danger when the same operation is performed in salvage service; thus, salvage service has a certain practical urgency. The urgency comes from the risk of damage or loss of the ship and cargo on board, on the one hand, and from the potential risk of pollution to the marine environment, on the other hand. These risks do not exist in an ordinary maritime service and, if it occurs, an ordinary maritime service may turn into a salvage service [2,8]. Take the towing, which is a common operation in both the salvage

service and the towage service, as an example. The purpose of a ship engaging a tug for a towing service is to expedite her process or to pull or push her in such a way that she is not exposed to danger unnecessarily. However, a ship engaging a tug for a salvage service is to save her property in distress. This means that the urgency of time and the risk of property loss faced by the performers of towing in salvage operations are not available in the same operation of the ordinary sea service. This also means that the policy of the law applicable to the towage contracts is to protect the enforcement of commercial contracts, while the policy of the salvage law is to encourage salvage behaviour. Therefore, from the perspective of the behavioural purpose, the employed salvage still belongs to the scope of maritime salvage.

It is worth noting that the principle of 'no cure, no pay' was and is an important rule for salvage reward calculation and its advantages in salvage reward determination should not be ignored. The policy and reason for this is that the law of maritime salvage was developed in response to important social policies, to encourage efforts to save property from destruction, and to discourage embezzlement by salvors. The fundamental aims underlying the provision of salvage awards are to recompense for exemplary conduct and to foster economic efficiency [3]. Meanwhile, there is little evidence of a practice of making formal salvage agreements in the literature or in textbooks until the nineteenth century [2].²⁷ Therefore, under the traditional approach, a prerequisite for a valid reward claim is that at least some of the property must be saved. In addition, the efforts of the salvor must contribute to the success. However, the employed salvage, as a special contract salvage where the service is performed for a fixed compensation without regarding the successful or beneficial result, enjoys a 'no cure, but pay' feature. Such a feature not only distinguishes it from the contract salvage on a 'no cure, no pay' basis but also leads to problems when applying certain rules of salvage law and maritime law to the employment salvage contract.

5. Law applicable to employment salvage contract

Contrary to the above academic position, the SPC held that the employment salvage contract, though different from the salvage contract on a 'no cure, no pay' basis, was still a maritime salvage contract under the salvage law. The laws of salvage are generally applicable to such contracts, except for the provisions on salvage calculation and apportionment, because of the contracts' particularity in the reward calculation and the 'no cure, but pay' feature. However, the reason for such a significant conclusion was only that 'both the Salvage Convention 1989 and Chapter IX of Maritime Law 1992 allow the parties to enter into salvage contracts without a 'no cure, no pay' basis. The reasoning is inadequate and further discussion over this issue is required.

5.1. Employment salvage contract in chapter IX of the maritime law 1992 and in salvage convention 1989

5.1.1. Chapter IX of the maritime law 1992

Article 171 of the Maritime Law 1992 stipulates the application scope of Chapter IX, which provides that 'the provisions of this Chapter shall apply to salvage operations rendered at sea or any other navigable waters adjacent thereto to ships and other property in distress'. This Article also implies the legislators' definition of maritime salvage. The lawmakers further restricted the definition of 'ships and property' in this Chapter. 'Ship' means sea-going ships and other mobile units, but

²² Justice Story, in the case of *Emulous*, defined the salvage service very clear that 'wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances, which establish, that the parties have voluntarily entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt*.' 1 Sumn. 207, 8 F.Cas. 704, No. 4480.

²³ *ibid.* In the case of *Mount Isa Mines Ltd. v The Ship 'Thor Commander'*, [2018] FCA 1326., the federal court of Australia emphasised the essential elements for determining a maritime salvage service are a real marine peril and a voluntary service. And, according to the Art. 13(1) of the Salvage Convention 1989, the policy of encouraging the salvage shall be taken into account when determining the rewards.

²⁴ The Norwegian Maritime Code 1994 (including Act of No. 2 of August 2, 1996): Arts. 441, 442, 443.

²⁵ The Germany Commercial Code 2009, Chapter 8: Arts. 740, 742, 744, 750.

²⁶ The SPC held, in a recent case, that 'to determine whether a operation at sea is salvage service or antifouling, the actual purpose of the operation, the risks faced by the ship, and the actual operation content are necessary to be considered.' See, *Rescue and Salvage Bureau of Ministry of Transport of PRC vs. Provence Shipowner 2008-1 Ltd., etc.*, 2018 Zui Gao Fa Min Zai 368.

²⁷ On the one hand, the professional salvors first came into existence in about 1875 and by about the turn of the century were using the standard form salvage agreement; The courts recognised the serious possibility of unfairness due to the inequity of bargaining power arising from the circumstances in which such agreements might be made and retained a general equitable power to set them aside, on the other hand.

excluding ships or craft to be used for military or public service purposes, or small ships of less than 20 tonnes gross tonnage. (Article 3, Article 172(1)). ‘Property’ means any property not permanently and intentionally attached to the shoreline and includes freight at risk (Article 172(2)). In addition, the lawmakers ruled out specific potential recipients, providing that ‘the provisions of this Chapter shall not apply to fixed or floating platforms or mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources’ (Article 173). Thus, the maritime salvage stipulated in Chapter IX of the Maritime Law 1992 has three main features: (1) the salvage object is the specific ship and property; (2) there is real danger for such specific ship and property; (3) and salvage operation is rendered at a specific site. However, the way of calculating the salvage reward is not a vital factor for the operation being maritime salvage. Therefore, the above relevant provisions do not show the legislators’ intent that the rules of this Chapter apply only to the salvage contract on a ‘no cure, no pay’ basis.

Besides, the authors believe that the legislators have actually reserved applicable space for the employment salvage contract in Chapter IX of the Maritime Law 1992, which is mainly reflected in Article 179 on the principle of ‘no cure, no pay’ and its exceptions. This provision actually has two implications: (1) salvors shall be entitled to reward if their operation has any useful effect. Where the operation is not effective, the salvor shall not be entitled to any salvage reward. However, (2) if the operation meets the requirements of Article 182 of Maritime Law 1992; or meets the provisions of other laws; or provided by the salvage contract, the salvors will be awarded even though their operation has not achieved any effect. The former is exactly the principle of ‘no cure, no pay’, and the latter provides three exceptions to the former. Exception 1: if the salvage operation did not save the ship and property in peril but successfully protected the marine environment, the salvor shall obtain a special compensation according to Article 182. Exception 2: if the salvage operation did not save the ship and property in peril but complies with the special provisions of other laws, the salvor will be rewarded as well. Exception 3: if the salvage operation did not save the ship and property in peril but the salvage contract provides otherwise, the salvor will be rewarded as well. In terms of structure and expression, the difference between Article 179(2) and Article 12(2) of the Salvage Convention 1989 is obvious. Some scholars have argued that it is reasonable to believe that, through Exception three provided by Article 179(2), the Chinese lawmakers allow the parties to contract out of the principle of ‘no cure, no pay’. In *NRB vs. Archangelos*, the courts also interpreted the clause as the applicable space of Chapter IX left by the lawmakers for the employment salvage contract.

Therefore, according to the above provisions, it seems that Chapter IX of Maritime Law 1992 is not only applicable to contract salvage on a ‘no cure, no pay’ basis, but also that the legislators have left application space for the employment salvage contract as an exception to the salvage contract on a ‘no cure, no pay’ basis.

5.1.2. The Salvage Convention 1989

Highly similar to Chapter IX of the Maritime Law 1992, it is difficult to conclude that the Salvage Convention only applies to contract salvage on a ‘no cure, no pay’ basis according to the relevant provisions on the application scope of the Salvage Convention 1989.²⁸ In fact, considering that the convention may apply to multiple types of contracts, there was a heated discussion on this issue among the delegates. This could be proved by the drafting reports of the Salvage Convention 1989.²⁹ The drafters of the convention attempted to harmonise the convention and various types of salvage contracts through Article 6. First, Paragraph 1 of

Article 6 empowers the parties to contract out of the convention.³⁰ However, it should be noted that the intention of excluding the application of the convention should be explicitly expressed by parties in their salvage contract. This means that, if the contract only stipulates a fixed rate of the salvage reward and/or a clause, providing that reward has nothing to do with the result of the salvage, it only means that the parties intended to exclude the principle of ‘no cure, no pay’. Therefore, the non-application of the whole convention and the non-application of the principle of ‘no cure, no pay’ are two completely different situations. Second, Paragraph 2 of Article 6 empowers the master to contract on behalf of the shipowner and even the owner of the cargo; it stipulates that ‘the master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel’. Generally, Article 6 is an innovation of the Salvage Convention 1989 to the Salvage Convention 1910. The purpose of this article is to promote the completion of salvage and realise the purpose of encouraging the timely and effective salvage of the convention.³¹ Nevertheless, during the drafting process, some delegations³² queried that Article 6 gives the masters unrestricted authority so that they may conclude the salvage contract for a fixed amount of reward and, even with the exclusion of the principle of ‘no cure, no pay’, it seems that there is some danger to the interest of the shipowners. Therefore, they proposed that the masters’ authority should be restricted to sign a salvage contract on a ‘no cure, no pay’ basis on behalf of the shipowners. However, the delegations³³ opposed this proposal, arguing that it might result in the master’s failure to conclude salvage contracts in another form, even when the shipowners wish to do so. Moreover, it is practically impossible to restrict the masters in distress from negotiating a contract that is appropriate in the circumstances. As for the fear of causing any repercussions to the innocent parties, the convention, in its wisdom, does provide for an equitable result (under Article 7).³⁴ In the end, the proposal was withdrawn because of opposition from most delegations. Article 6 of the Convention gives the master the right to sign any contract on behalf of the owner of the ship and cargo. The above drafting process shows that the contract salvage without a ‘no cure, no pay’ basis is not unique to China; different countries may express it in different terms. The disputes arising from salvage contracts without a ‘no cure, no pay’ basis have not only caught the attention of the drafters of the Salvage Convention 1989, but have also been discussed and evaluated fully in the process of convention drafting, and it is not unreasonable to apply the Salvage Convention 1989 to such salvage contracts. The importance of the provisions on the masters’ authority is that there should not be any uncertainty about the master concluding contracts. A delay due to such uncertainty hampers the speedy actions of the salvors, which is the whole purpose of this convention.³⁵

Meanwhile, Article 12 of the Salvage Convention 1989 clearly stipulates the principle of ‘no cure, no pay’ and its exception. However, unlike Article 179 of Chinese salvage law, which explicitly lists various exceptions, Article 12 refers to all exceptions only as ‘except as otherwise provided’. Considering that the Salvage Convention 1989, as an

³⁰ During the drafting process, the delegations had a heated discussion on whether the Convention was mandatory or not. And the majority decided that the Convention was not mandatory. *ibid.*, pp.180–188.

³¹ *Ibid.*, p.189.

³² They are delegations of Poland and Germany. *Ibid.*, pp. 203–206.

³³ They are delegations of Japan, Ireland, Netherlands, United Kingdom, France, Italy and Democratic Yemen. *ibid.*

³⁴ Salvage Convention 1989, Art.7 Annulment and modification of contracts: A contract or any terms thereof may be annulled or modified if: (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

³⁵ The Travaux Préparatoires of the Convention on Salvage 1989, p.189.

²⁸ The Salvage Convention 1898, Art.1 (a)(b)(c), Art.2, Art. 3 and Art 4(1).

²⁹ The Travaux Préparatoires of the Convention on Salvage 1989. Available at: <https://comitemaritime.org/publications-documents/travaux-preparatoires/> (visited 9 April 2020).

international law, naturally and necessarily has a certain degree of generality, this expression is appropriate for the judges to make a flexible interpretation in individual cases. Although there are still some disputes about the exceptions to Article 12, it is generally considered as the special compensation or marine environment protection provided by Article 14 of the Salvage Convention 1989 and/or provisions in other international laws [19–21]. However, some Chinese scholars have argued that the Convention does not have the clause for salvage reward without a ‘no cure, no pay’ basis, which may mean that the Convention only applies to salvage contracts on a ‘no cure, no pay’ basis [5]. The authors of this paper only agree with the first half of this view, namely that some specific provisions in the Convention are only applicable to the salvage reward on a ‘no cure, no pay’ basis. However, this does not mean that the Convention as a whole excludes salvage contracts without a ‘no cure, no pay’ basis. As mentioned above, Article 6(2) of the Convention and its drafting report has shown that the Convention allows masters to enter into other types of contracts. Therefore, a more appropriate interpretation may be that the Convention also applies to contracts without a ‘no cure, no pay’ basis, except for the provisions on the calculation and apportionment of salvage reward. Such provisions are set to provide references for the domestic salvage law on how to calculate the reward on a ‘no cure, no pay’ basis, which is uncertain and would be determined based on the actual effect, which is also a very vague concept. On the contrary, with regard to the salvage contract with a fixed reward rate or amount, there is no need for the convention to stipulate, since the amount has already been agreed by the parties. Moreover, Article 7 of the Convention also provides a ‘safety valve’ in case the terms are inequitable, for example, if the payment under the contract is in an excessive degree too large or too small for the services actually rendered, for which the contract or any terms thereof may be annulled or modified.

Therefore, as the holding of the SPC, the laws of salvage, both domestic and international, allow the masters to sign salvage contracts without a ‘no cure, no pay’ basis, and it seems that employment salvage contracts, the same as salvage contracts with a ‘no cure, no pay’ basis, are still salvage contracts in the salvage law.

5.2. Insufficiency of the contract law 1999 for governing the employment salvage contract

As a supplement to the holding of SPC, the authors believe that there seems to be no better choice than applying the law of salvage to the employment salvage contracts. Those who believe that employment salvage ceases to be maritime salvage argue that the Contract Law 1999 shall apply to such contracts since there is no relevant rule for it in the Maritime Law 1992 or in corresponding international conventions. However, the insufficiency of the Contract Law 1999 for governing the employment salvage contract caught our attention. Generally, there is no such employment salvage contract in the Contract Law 1999, which, however, stipulates fifteen types of named contracts. Thus, if applied, the employment salvage contract has to be governed by the general rules of the Contract Law 1999. However, the Contract Law 1999 maybe insufficient, considering the particularity and complexity of such contracts in several aspects. Discussed below are three of them.

5.2.1. The masters’ authority

There is no such provision on the special authority for the masters to conclude contracts on behalf of other parties in the Contract Law 1999. Therefore, if it were to be applied based on the privity of contract, the salvage contract would be only valid for the shipowner and the salvor. The importance and the advantages of such a special authority in salvage service have been illustrated above. As a direct consequence, the reward will be paid wholly by the shipowner. The case of *NRB vs. Archangelos* witnessed such consequence and its controversy. It is unfavourable and unfair for the shipowner whose master may conclude an appropriate salvage contract under the particular circumstance. Meanwhile, such a

consequence is not fully beneficial to the salvor because the privity of contract also restricts the salvor to claim compensation from the shipowner only. Since it cuts off the multiple sources of salvage reward, it is actually not conducive for salvors to claim and realise their right to the salvage reward, especially in certain circumstances, such as when the owner of the saved cargo is richer than the shipowner.

5.2.2. Security for salvage reward

The second insufficiency of the Contract Law 1999 in an employment salvage contract is its lack of security for the salvage reward. Both the Salvage Convention 1989 and Chapter IX of Maritime Law 1992 provide special and even biased regimes to protect salvors based on the policy of encouraging salvage. For example, there are corresponding provisions in the above two laws stipulating that the person liable to the salvage payment has a duty to provide satisfactory security or interim payment at the request of the salvors.³⁶ In addition, if the party salvaged has neither made the payment nor provided satisfactory security after 90 days of the salvage, the salvor may apply to the court for an order of forced sale by auction.³⁷ However, there is no such institutional protection for the salvors in the Contract Law 1999.

5.2.3. Special compensation for the marine environmental protection

The third insufficiency of the Contract Law 1999 with regard to employment salvage contracts is its lack of special compensation for the marine environmental protection, which is a feature and innovation of the Salvage Convention 1989, compared to the Salvage Convention 1910. The special compensation, which is also a statutory exception to the principle of ‘no cure, no pay’, entitles the salvor, who eliminates the environmental damage caused by the vessel or cargo, to a remuneration equivalent to the salvor’s actual expense if more than the reward on a ‘no cure, no pay’ basis. Obviously, the underlying policy of the special compensation is to encourage the salvor to eliminate the marine environmental damage when saving vessels and properties in peril, as the cases of oil tankers being in distress and seriously polluting the marine environment abound. However, once the Contract Law 1999 is applied to an employment salvage contract, the above institutional protection for the marine environment will be absent.

Thus, the essential insufficiency of the Contract Law 1999 is that the rules of contract law are not enough to deal with the speciality and particularity of the employment salvage contract, which is caused by its lack of the special policy aspect. Unlike the law of salvage, there is no special concern for coordinating the complex relationships among salvors, shipowners, and owners of cargo or for the marine environment protection in the underlying policy of the contract law, which mainly focuses on the civil or commercial relationship between the equal parties. However, both the salvage service and contract involve the legal relationship between the salvors and the parties (shipowners and cargo owners) in distress, which may not be equal, as the actual peril puts the rescued party at a disadvantage. Meanwhile, to encourage and promote rescue and, more importantly, in consideration of the marine environment protection, the legal policies and rules of the salvage law need to provide certain policy incentives for the salvors. Therefore, it is critical and indispensable for the salvage law to make a prudential balance among multiple interests and complicate declarations, which the general rules of contract law maybe incompetent.

6. The apportionment of the employed salvage reward

Even if identifying the employed salvage as maritime salvage and applying relevant rules of salvage law to the employment salvage contract, the nature of employed salvage itself cannot be ignored. In fact,

³⁶ The Salvage Convention 1989, Arts. 21, 22; the Maritime Law 1992, Arts. 188, 189.

³⁷ The Maritime Law 1992, Art. 190.

the feature of 'no cure, but pay' of employed salvage makes it difficult for the law of salvage to coordinate the relationship and interest among the salvor, the shipowner, and the owner of the cargo, which may be reflected, especially, by the salvage reward apportionment. The SPC, as the judgement of *NRB vs. Archangelos* shows, held that the employed salvage reward would not be proportionate to the value of the vessel and cargo, as the relevant provisions in the Salvage Convention 1989 and Chapter IX of the Maritime Law 1992 are applicable to the salvage reward only on a 'no cure, no pay' basis. However, this holding should have been supported by more reasoning. It is undeniable that Article 13 of the Salvage Convention 1989 does explicitly provide that a reward fixed by the principle of 'no cure, no pay' shall be proportionate. This shows that even if the drafters of the convention allow the parties to sign contracts with other forms, the provisions on salvage reward are not applicable to salvage contracts on a 'no cure, no pay' basis.³⁸ However, based on the wording of Article 183 of the Maritime Law 1992 alone, it cannot be concluded that the provision on the salvage reward apportionment is only applicable to salvage contracts on a 'no cure, no pay' basis [22].³⁹

Then, should the employment salvage reward be apportioned under Chinese law? The answer to this question depends on the nature of the employed salvage. In fact, the main difference between the employed salvage and the contract salvage on a 'no cure, no pay' basis is not in the way of reward calculation, but the feature of 'no cure, but pay', which makes it difficult to apply the rule of reward apportionment. Once such a rule is applied, both the shipowner and owner of cargo will have to pay for a salvage service of nothing saved. Compared to the shipowner whose master signed and accepted the contract, it is extremely unfair for the owner of the cargo who is innocent and has no option to determine the form of the salvage contract but to pay for a total loss. Perhaps, this was also the reason the delegates restricted the master's authority during the drafting of the convention. Moreover, the 'no cure, but pay' feature will cause a problem, as no such proportion of value is saved to apportion the reward when the whole salvage service has fails. Therefore, the Salvage Convention 1989 restricting its rule of reward apportionment to the reward on a 'no cure, no pay' basis is an equitable and wise result. With regard to the *NRB vs. Archangelos* case, the SPC, perhaps in consideration of protecting the interests of the owner of the cargo, applied Contract Law 1999 to the issue of salvage reward apportionment. However, it is believed that this holding, while understandable, is not convincing and more reasoning is indispensable. After all, this holding has actually set an application scope of Article 183 of the Maritime Law 1992, which, however, is so broad and general that it would govern any salvage reward literally. Moreover, although China is not a common law country, the judgement of the SPC will influence the

subsequent cases with similar facts, to a large extent.⁴⁰

However, in terms of the apportionment of the employment salvage reward, it is more reasonable for the courts to make judgements in line with the corresponding facts of individual cases for 'individual justice'. In fact, as mentioned above, the basic obstacle to applying the regime of salvage reward apportionment to the employed salvage reward is the fact that the salvor could be awarded even when nothing valuable was saved. Only in this circumstance, it seems completely unreasonable for salvage reward apportionment because there is no proportion standard, on the one hand, and it is unfair to the owner of the cargo, on the other hand. However, for cases with similar acts as in the *NRB vs. Archangelos* case, where the salvor's operation has little contribution to a successful result, it is not entirely unreasonable, though controversial, for the court to decide that the reward shall be paid by the shipowner and cargo owner in proportion to the value of the property saved. On the contrary, if the salvage service fails completely (nothing valuable saved), then, no reward should be awarded (not to mention the share apportionment) [2].⁴¹ This is because a salvage reward is not merely a question of work and labour or merely a calculation of hours, although time is undoubtedly an important factor. As Lord Stowell held in the '*William Beckford*' case, various factors, such as the general interest of the navigation and commerce of the country, the fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, and the skill and dexterity acquire through the exercise of that spirit should all be taken into consideration.⁴² Such factors should be assessed when there is a successful result. Moreover, it is not only unfair for the reward paid when nothing is saved to be proportionate, but also unreasonable for the reward paid for nothing to enjoy maritime lien. Both the Salvage Convention 1989 and the Maritime Law 1992 endow the salvor a maritime lien, which is a *jus in rem* or a proprietary interest on a ship or other maritime item, for the salvor's salvage reward. However, if a salvor performed the salvage service but nothing was saved, the salvor has actually lost the material basis on which to claim such a right.⁴³ Therefore, this article cautions that the employment salvage reward should be paid and apportioned only when something has been actually

³⁸ Salvage Convention 1989: Art.13 (2) 'Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values

³⁹ Maritime Law 1992: Art.183 'The salvage reward shall be paid by the owners of the salvaged ship and other property in accordance with the respective proportions which the salvaged values of the ship and other property bear to the total salvaged value.' Thus, different to Article 13 of the convention, Article 183 does not explicitly limit its application. Therefore, Some Chinese scholars argued that the Article 183, which is a significant and substantial departure to the relevant Articles in the Salvage Convention 1989, applied to salvage reward of any form.

⁴⁰ After the *NRB vs. Archangelos*, the lower courts have followed the SPC's position on the issue of apportionment to employed salvage reward. For example, in *Ningbo Hongxun Shipping Co., Ltd., etc. vs. Qinhuangdao Jinmaoyuan Paper Co., Ltd., etc.*, (2019) *Zhe Min Zhong Zi 54*, which is a relevant case to Case One in supra note 20. The plaintiff in the original trial was one of the owners of cargo on the ship in distress. Prior to the judgment of Case one being made, the plaintiff had already redeemed his cargo from the rescuer. Then, the owner sued the shipowners and the rescuer for the restitution of unjust enrichment on the basis that the judgment of Case one classified the involved contract as the employment salvage contract and the employed salvage reward should be paid only by the shipowner in line with the *NRB vs. Archangelos*. Zhengjiang High People's Court, as the court of appeal, upheld the plaintiff's partial claim on the nature and apportionment of the employed salvage reward based on the *NRB vs. Archangelos*. However, the court emphasised that the salvor enjoy the maritime lien on the ship and cargo for the unpaid employed salvage reward. And The plaintiff's payment for the redemption of the goods was actually an advance payment for the unpaid employed salvage reward in lieu of the shipowner. Therefore, the plaintiff should recover from the shipowner not the salvor.

⁴¹ A similar conception of engaged service in the English salvage law, the salvor shall be rewarded only if the vessel and property in distress are finally saved by others, if the salvors' operation does not save the vessel and property in distress. Comparing to such engaged service, the employed salvage seems to go further.

⁴² (1801) 3 c. Rob. 355 at 355–356. A successful marine salvage reward claim under the general American Maritime Law still requires proof of three elements: (1) marine peril, (2) service voluntarily rendered, not required by duty or contract, and (3) success in whole or in part, with the services rendered having contributed to such success. *Dorothy J v. City of New York*, 749 F.Supp.2d 50 (E.D.N.Y. 2010).

⁴³ Moreover, it would be unfair to secure the salvors' claim on remuneration in the event that the salvage service has totally failed.

saved. Otherwise, the employment salvage contract and reward will constitute not only a challenge but also a fundamental conflict and deviation to the principle of 'no cure, no pay', which should actually be avoided as much as possible.

In addition to the successful results, which are the most significant parameter, at least the following two functional parameters should also be considered for judges to make decisions on reward apportionment. The first one is a format concern. If the facts show that the master has promptly informed the cargo owners of signing the employment salvage contract and there is no explicit objection from the cargo owner, then, in the case of saving the cargo successfully, a decision for reward apportionment is reasonable. The second one is a substantial or value concern. If the value of the cargo accounts for a large proportion of the total value rescued, then, this is also an important factor for a reasonable decision for reward apportionment. In short, the judges shall consider various factors to determine the apportionment to the employment salvage reward in individual cases.

7. The 2018 draft of maritime law in China and the employment salvage contract

7.1. The background and the purpose of the 2018 draft

The debate and theoretical discussion on the revision of Maritime Law in China has lasted for several years, and on November 5, 2018, the Chinese Ministry of Transport issued the Draft for Comments on the Revision of the Maritime Law of the People's Republic of China (The 2018 Draft).⁴⁴ Until then, the Maritime Law 1992 had been officially in force for more than 25 years since July 1, 1993, during which the huge and profound promotions have taken place in China's economy, trade, and shipping industry structure, and the international and domestic legal environment has also changed significantly. On the one hand, by 2017, the total value of imports and exports of foreign trade reached 27.79 trillion yuan, which was 30.5 times that of 1992, and more than 90% of the goods are transported by sea.⁴⁵ At the same time, the size of the Chinese fleet and the net load of ships have also increased significantly.

On the other hand, the Maritime Law 1992 was drafted in reference to international legislation that had extensive influence at the time. However, in the past 25 years, not only have these legislations experienced a series of revisions but also many new international legislations that greatly enriched the international maritime law system and reflected the latest legal developments have emerged.⁴⁶ Besides, this

⁴⁴ Available at: http://www.mot.gov.cn/yijianzhengji/201811/t20181107_3125036.html (visited 9 April 2020).

⁴⁵ Only in 2016, the total water freight volume was 6.38 billion tons, which was 6.9 times of that in 1992; The foreign trade throughput of major coastal ports was 3.39 billion tons, which was 92.3 times of that in 1992; the international container throughput of major ports was 194 million TEUs, which was 89 times of that in 1992.

⁴⁶ For example, after the promulgation of the Maritime Law 1992, the York-Antwerp Rules, 1974 experienced three revisions in 1994, 2004, and 2016; while the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 and the Convention on Limitation of Liability for Maritime Claims, 1976 were revised in 2002 and 1996, respectively. In the 21st century, the international legislation on shipping safety and prevention of oil pollution has been established one after another, such as the International Rules for the Ship Safety Management and Pollution Prevention, 2000 and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. However, the Maritime Law 1992 was blank on this side.

period has also witnessed the vigorous development of China's domestic legal system, which has caused problems for the Maritime Law 1992 to coordinate with other civil and commercial rules.⁴⁷ Moreover, the Belt and Road Initiative proposed by President Xi Jinping in 2013 profoundly affects China's maritime trade and economy, and also sets higher demands for China's maritime law system.

Therefore, all the changes and developments have revealed the deficiencies of the Maritime law 1992 in various aspects and the necessity of modification. Thus, the main purpose of the 2018 Draft is to make maritime law more adaptable to the latest developments in China's shipping and economy and to harmonise the Chinese maritime law and the international/domestic laws.

7.2. The 2018 draft and the chapter of maritime salvage

In fact, the 2018 Draft (both the content and the structure) reflects the drafters' determination to achieve the above goals. Specifically, in terms of the change of the structure, two new chapters were added on the basis of the original structure of the Maritime Law 1992. These are Chapter V, 'Contracts for the carriage of goods by domestic waterways',⁴⁸ and Chapter XIII, 'Liability for Ship Pollution Damage'.⁴⁹ With regard to the changes in the content, the revision involves almost all the 15 original chapters, and the revision of the Chapter of Maritime Salvage is an important part of the 2018 Draft.⁵⁰ The revisions of the Articles discussed in this paper are shown in Table 2.

The purpose of the revision of the chapter on maritime salvage in the 2018 Draft was to disentangle the relationship between the Chinese law of salvage and the Salvage Convention 1989. From the content of this new chapter, 'disentangle' means to make the two laws as consistent as possible, which also reflects one of the overall purposes of the 2018 Draft, namely to integrate the Chinese maritime law with the corresponding international law. The revisions of the provisions discussed in this article were as follow:

First, compared with the original Article 175, Article 10.5 clarifies that the parties can exclude the application of the chapter of maritime

⁴⁷ For the China's civil law system, when the Maritime Law 1992 was enacted, only the General Principles of the Civil Law of PRC, 1986 had been promulgated and implemented. But since then, the important civil legislation such as the Contract Law 1999, the Property Law 2007, and the Tort Law 2009 have came into effect successively. In 2017, General Provisions of the Civil Law of PRC was promulgated and implemented, which means that the China's civil law system has began its transition from the law departments to a civil code.

⁴⁸ This chapter specifies the rights and obligations of the parties under the contracts for the carriage of goods by domestic waterways due to the importance of such kind of contracts in practice and the lack of rules for the contracts after the repealing, in 2016, of the Regulation on Contracts for the carriage of goods by domestic waterways, 2000.

⁴⁹ This chapter systematically improves the existing legal systems for ship pollution damages, such as the issues of ship oil pollution, fuel oil pollution, toxic and hazardous substances, and oil pollution damage compensation funds.

⁵⁰ The highlights of the revision for other important chapters in the Draft 2018 are listed as follows: Chapter I (General Principles) expands the concepts of 'ships' and 'maritime transport' and broadening the scope of application of maritime law as a whole; Chapter II perfects the rules for the ship property rights; Chapter III improves the rules for the rights and duties of the crew; Chapter IV perfects the rules for the international contracts for the carriage of goods by sea; Chapter XII improves the rules for the Limitation of liability for maritime claims; Chapter XIV supplements the obligation of guarantee and notification; Chapter XV improves the statute of limitations for maritime claims; and Chapter XVI perfects the rules for the application of laws in foreign-related matters. In fact, the purpose of improving the Chapters II, XV, and XVI is to make them more compatible with the Chinese domestic law of the Property Law 2007, General Provisions of Civil Law 2017, and the Law on Choice of Law for Foreign-related Civil Relationships 2010; and the revision to Chapters III, IV, XII and XIV is mainly to promote the convergence of Chinese maritime law with the corresponding international law.

salvage by agreement. Meanwhile, the third paragraph of Article 10.5, as a new clause, stipulates that the exclusion to the application of this chapter does not detract from the discretion of the courts or arbitration agencies to modify or annul a contract that is obviously unfair, or the terms on the salvage reward, which is obviously unreasonable, nor does it exempt the parties from the duty of protecting the marine environment. Overall, Article 10.5 is almost identical in content and structure to Article 6 of the Salvage Convention 1989. Similarly, Article 10.6 expands the judicial or arbitral discretion by allowing the courts or arbitration agencies to annul the unreasonable contracts or terms, which has also brought Article 10.6 in agreement with Article 7 of the Salvage Convention 1989.

Second, compared to the Maritime Law 1992, the provision on the principle of ‘no cure, no pay’ has been modified significantly in the 2018 Draft, in which the exception to the principle could only be ‘as otherwise provided for by this chapter’. The drafters intentionally deleted the following two other exceptions as provided by Article 179(2) of Maritime Law 1992: ‘as otherwise provided by other laws or by the salvage contract’. Therefore, the only exception provided by Article 10.9 of the 2018 Draft seems to be the special compensation for marine environmental protection as provided in Article 10.12 of this chapter. Although this revision is intended to integrate corresponding rules in the Chinese salvage law and the Salvage Convention 1989, Article 10.9 is more conservative and restrictive than Article 12 of the Salvage Convention 1989, which left more room for judicial interpretation with the expression, ‘Except as otherwise provided’. However, due to the limitation of the phrase, ‘by this chapter’, it is difficult for the judge to make flexible interpretations about the exceptions in individual cases.

Finally, but more interestingly, the original provision on salvage reward apportionment has been reserved in the 2018 Draft, which means that there is still a difference between the 2018 Draft and the Salvage Convention 1989 on the issue about the rule of salvage reward apportionment being applied only to salvage reward on a ‘no cure, no pay’ basis (position of the Salvage Convention 1989) or not (position of the Chinese salvage law).

8. Summary

In general, the new chapter on maritime salvage in the 2018 Draft is almost identical to the one in the Salvage Convention 1989. Such revision is appropriate, considering the issue and the debate on the law application of the maritime salvage cases involving foreign elements. According to Article 268 of the Maritime Law 1992 (or Article 16.1 of the 2018 Draft), if the provisions of the international treaty concluded or acceded to by Chinese government conflict with those in the Chinese Maritime Law, the provisions of the relevant international treaty shall apply preferentially, unless the provisions are those on which the government has announced a reservation. Therefore, any legal conflicts between the Chinese Maritime Law and the Salvage Convention 1989 will result in serious problems and debates and will greatly limit that the application scope of the Chinese Maritime Law in practice. Different rules may also bring judicial uncertainty, as the *NRB vs. Archangelos* case has shown. Considering the international evaluation on the Salvage Convention 1989 since its entry into force, the Convention would not be modified in a long time [20]. Thus, legal conflicts can only be reduced by modifying the domestic law. However, this consistency should not be over-interpreted as compliance. In fact, without causing a fundamental

Table 2

Comparison between chapter 9 in maritime law 1992 and the draft 2018.

The Maritime Law 1992	The Draft 2018
<p>Art. 175 A contract for salvage operations at sea is concluded when an agreement has been reached between the salvor and the salvaged party regarding the salvage operations to be undertaken. The Master of the ship in distress shall have the authority to conclude a contract for salvage operations on behalf of the shipowner. The Master of the ship in distress or its owner shall have the authority to conclude a contract for salvage operations on behalf of the owner of the property on board.</p>	<p>Art.10.5 This chapter shall apply to any salvage operations save to the extent that a contract provides otherwise. The Master of the ship in distress shall have the authority to conclude a contract for salvage operations on behalf of the shipowner. The Master of the ship in distress or its owner shall have the authority to conclude a contract for salvage operations on behalf of the owner of the property on board. Nothing in this article shall affect the application of neither Article 10.6 nor duties to prevent or minimise damage to the environment.</p>
<p>Art. 176 The salvage contract may be modified by a judgment of the court to which has entertained the suit brought by either party, or modified by an award of the arbitration organization to which the dispute has been submitted for arbitration upon the agreement of the parties, under any of the following circumstances: (1) The contract has been entered into under undue influence or the influence of danger and its terms are obviously inequitable; (2) The payment under the contract is in an excessive degree too large or too small for the services actually rendered.</p>	<p>Art. 10.6 The salvage contract may be modified or annulled by a judgment of the court to which has entertained the suit brought by either party, or by an award of the arbitration organization to which the dispute has been submitted for arbitration upon the agreement of the parties, under any of the following circumstances: (1) The contract has been entered into under undue influence or the influence of danger and its terms are obviously inequitable; (2) The payment under the contract is in an excessive degree too large or too small for the services actually rendered.</p>
<p>Art. 179 Where the salvage operations rendered to the distressed ship and other property have had a useful result, the salvor shall be entitled to a reward. Except as otherwise provided for by Article 182 of this Law or by other laws or the salvage contract, the salvor shall not be entitled to the payment if the salvage operations have had no useful result.</p>	<p>Art.10.9 Where the salvage operations rendered to the distressed ship and other property have had a useful result, the salvor shall be entitled to a reward. Except as otherwise provided for by this chapter, the salvor shall not be entitled to the payment if the salvage operations have had no useful result.</p>
<p>Art.183 The salvage reward shall be paid by the owners of the salvaged ship and other property in accordance with the respective proportions which the salvaged values of the ship and other property bear to the total salvaged value.</p>	<p>Art. 10.13 Retention of the original provision.</p>

Source: Created by this research

conflict, the revision should also avoid disputes and deficiencies regarding the Salvage Convention 1989.⁵¹

However, it is worth noting that Article 10.9 of the 2018 Draft should not be interpreted as limiting the parties’ freedom to contract out of the principle of ‘no cure, no pay’. This is because, as mentioned above, Article 6(2) of the Salvage Convention 1989 and its drafting report have shown that the contract without a ‘no cure, no pay’ basis is allowed. Therefore, if Article 10.5 of the 2018 Draft is considered consistent with

⁵¹ For example, through the famous case of ‘The Nagasaki Spirit’ which is also the first case for the English court to apply the rule of special compensation (Art. 14(3)) of the Salvage Convention 1989, the English courts established the famous ‘Nagasaki Rule’ which refined the Art.14(3) by clarifying the meaning of ‘fair fate’ and the period a salvor entitled to special compensation. *Semco Salvage & Marine Pte Ltd vs Lancer Navigation Co Ltd*, [1997] C.L.C. 507, [1997] A.C. 455.

Article 6 in terms of legislative logic, then Article 6(2) could also be reasonably interpreted as allowing the master to contract out of the principle of ‘no cure, no pay’. Otherwise, the judge should also preferentially apply the provision of the Salvage Convention 1989 in individual cases.

Therefore, it is clear that the Salvage Convention 1989, the Maritime Law 1992, and the 2018 Draft do not completely preclude the employment salvage contracts. Moreover, except for the provisions on the salvage reward, other provisions of the above laws are able to regulate such contracts and balance the interests of the different parties involved. Therefore, from the perspective of law application, there is no obstacle to determine such contracts as maritime salvage contracts. However, the 2018 Draft, like the Salvage Convention 1989, does not explicitly limit its provision on salvage reward apportionment to the salvage reward on a ‘no cure, no pay’ basis. Therefore, there may still be some disputes over law application on this issue, even when the 2018 Draft comes into force in the future. Overall, although the 2018 Draft is not the final revision to the Maritime Law 1992, it seems to be a legislative response to some issues for the employment salvage contract in the current judicial practice.

9. Conclusion

The employed salvage, which is very different from the contract salvage on a ‘no cure, no pay’ basis, has drawn more and more attention from the Chinese salvage and the maritime law academia. The case of *NRB vs. Archangelos* fully demonstrates the various issues that exist in the practice of employed salvage, and the retrial of this case by the SPC has given rise to intense responses in the shipping industry and the Chinese judicial circle. The judgement of the *NRB vs. Archangelos* case shows the SPC’s attitude towards the legal nature of the employed salvage and employment salvage contract, which is not very clear in the relevant legislation. The SPC recognises that employed salvage, which excludes the principle of ‘no cure, no pay’, is still maritime salvage. More specifically, it is a type of contract salvage without a ‘no cure, no pay’ basis, rather than a maritime service, as some scholars argue. This classification makes it possible to discuss the connection between the employed salvage contract or reward and other maritime law regimes. It is suggested that the principle of ‘no cure, no pay’ is not a necessity for maritime salvage, the purpose of saving vessels and properties in peril distinguish the employed salvage from maritime service and the insufficiency of the civil law for governing the employment salvage contract. In fact, it is not a question of ‘yes or no’ regarding the nature of the employment salvage contract and it is difficult to answer that ‘it should be A or B’ in terms of the issue of the application of law in such contracts. Regardless of the category into which the employment salvage contract falls, its own feature will raise complex issues of law application. However, from the perspective of encouraging maritime salvage, applying the law of salvage is, perhaps, a better choice because encouraging and promoting successful maritime salvage is an important and unique policy concern. According to the statistics of the Rescue and Salvage Bureau of Ministry of Transport of PRC, from 2013 to 2018, the proportion of salvage operations with contracts on the ‘no cure, no pay’ basis was less than 20% [20]. Thus, if other contracts were all classified as maritime service contracts, the purpose of the contracts would be ignored. Therefore, the laws of salvage should provide policy protection for more salvors and salvage operations, as such a list, which encompasses all the elements of the salvage services, has never existed and salvors are entitled to a salvage reward as long as the essential conditions of a salvage claim are met [2]. However, providing that its feature

of the employment salvage contract that the salver will be paid when the operation has not been actually helpful in saving, and even if the salvage service has failed completely, the judges need to exercise discretion on special issues based on the case facts to ensure individual justice.

Declaration of competing interest

This is a short statement to confirm that there is no conflict of interest for this piece of work. All authors agree with the terms and the name order that places in the paper.

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