Maritime salvage under contract: a comparative study of Chinese law and the International Salvage Convention

*Liang Zhao**

Chinese maritime courts had entertained few maritime salvage disputes by the time the Chinese Maritime Code came into force in 1993. Judicial practice in Chinese courts has developed since then. Nanhai Rescue Bureau of the Ministry of Transport v Archangelos Investments ENE and Another *is a recent and important case on maritime salvage under contract in China. This case has gone through five years of trials in the Guangzhou Maritime Court, the Guangdong High People's Court and the Supreme People's Court of China. This case raised the persistent issue of applicable law and the new issue of the assessment of the salvage payment in proportion under the Chinese maritime law of salvage. This article examines the issues in this case in relation to the International Convention on Salvage and the Chinese Maritime Code.*

I. INTRODUCTION

The People's Republic of China (hereafter "PRC") promulgated the Chinese Maritime Code 1992 (hereafter "CMC 1992") which came into force in 1993, and acceded to the International Convention on Salvage 1989 (hereafter "Salvage Convention 1989") in 1993. The provisions for salvage at sea in CMC 1992 were drafted on the basis of the Salvage Convention 1989.[1] Therefore, the relevant provisions in CMC 1992 are very similar to the provisions in the Salvage Convention 1989. Domestic salvage at sea in China is regulated by CMC 1992.[2] Foreign-related salvage is governed by CMC 1992 and the Salvage Convention 1989 if the latter contains provisions differing from those contained in CMC 1992,[3] unless the provisions are those on which China has announced reservations.[4] In the recent case of *Nanhai Rescue Bureau of the*

* Assistant Professor, School of Law, City University of Hong Kong, Associate Director of the Hong Kong Centre for Maritime and Transportation Law. Visiting Senior Research Fellow, Centre for Maritime Law, Faculty of Law, National University of Singapore.

1. For the Chinese maritime law of salvage in general, see Yong-Shen Huang, "The Chinese maritime law of salvage" [1995] LMCLQ 269.

2. In this article, China means mainland China and Chinese law means the law of mainland China excluding the law of Taiwan, Hong Kong and Macau.

3. CMC 1992, Art.268, para.1.

4. China acceded to the Salvage Convention 1989 but reserved the right not to apply the Salvage Convention 1989: (a) when the salvage operations take place in inland waters and all vessels involved are of inland navigation; (b) when the salvage operations take place in inland waters and no vessel is involved; and (c) when the property

Ministry of Transport v Archangelos Investments ENE and Another (hereafter "*NRB v Archangelos*"),[5] a dispute over the salvage payment arose between a Chinese salvage authority and a Greek shipowner. In this case, there was a foreign-related salvage at sea and both the CMC 1992 and the Salvage Convention 1989 could be applied. The main issue in this case was the assessment of salvage payment under a salvage contract in which the hire rate of the rescue tugs had been fixed, contracting out from the principle of "no cure, no pay". The Chinese courts applied CMC 1992 instead of the Salvage Convention 1989. However, the assessment of payment was substantially different under the Salvage Convention 1989 even though their main provisions are very similar.

II. SALVAGE CONTRACT

The Salvage Convention 1989 applies to any salvage operation save to the extent that a contract otherwise provides expressly or by implication.[6] Similarly, CMC 1992 applies to salvage operations rendered at sea or any other navigable waters adjacent thereto.[7] The salvage operation includes voluntary salvage and contractual salvage. Voluntary salvage means salvage without any pre-existing contractual or other legal duty for salvage, and contractual salvage means salvage under contract. Voluntary salvage was common in the past but rarely occurs now because of the development of communication technology and methods of salvage operation. Nowadays, a salvage operation is always rendered on the basis of a standard salvage contract, eg, Lloyd's Open Form (hereafter "LOF") which provides a regime for determining the amount of remuneration to be awarded to salvors for their services in saving property at sea and minimising or preventing damage to the environment.

Salvage contracts are usually concluded on a "no cure, no pay" basis through an LOF under which the salvors receive no salvage award where no property is salved.[8] There is no salvage payment fixed on the LOF except with the incorporation of a SCOPIC clause into the LOF.[9] Salvage payment, where the Salvage Convention 1989 applies, will be fixed according to the criteria set out in the Salvage Convention 1989, Art13.1 and will be made by all of the vessel and other property interests in proportion to their respective salved values.[10]

involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.

5. (2012) Guang Hai Fa Chu Zi 898 (Guangzhou Maritime Court, China) (first instance); (2014) Yue Gao Fa Min Si Zhong Zi 117 (Guangdong High People's Court, China) (second instance); (2016) Zui Gao Fa Min Zai 61 (Supreme People's Court, China) (retrial).

6. Salvage Convention 1989, Art.6.1.

7. CMC 1992, Art.171.

8. It is subject to the special compensation for environmental protection if the Salvage Convention 1989 or CMC 1992 applies.

9. The SCOPIC clause is supplementary to any Lloyd's Form Salvage Agreement which incorporates the provisions of the Salvage Convention 1989, Art.14. SCOPIC remuneration in respect of all personnel, tugs and other craft, and portable salvage equipment shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix A.

10. Salvage Convention 1989, Art.13.2.

In Chinese salvage practice, LOFs are not frequently used. Some Chinese local forms may be used for a salvage contract.[11] Furthermore, in most cases the salvage operations in Chinese waters are rendered by Chinese maritime authorities who are state-controlled salvors. Putting aside the status of authorities, they also act as commercial salvors to keep and maintain rescue tugs and equipment, waiting for an opportunity to provide assistance and earn a large salvage reward.[12] Salvage contracts are always concluded between those authorities and owners of salved ships with fixed salvage rates, and owners of salved ships may be responsible for the whole salvage payment, rather than payment in proportion. These special characteristics of salvage contracts in China have raised some special issues under the Salvage Convention 1989 and CMC 1992, particularly the issue of assessment of proportionate payment. This issue will be examined in the case of *NRB v Archangelos*.

A. Disputes and issues in *NRB v Archangelos*

The Greek oil tanker *Archangelos Gabriel* ran aground in Qiongzhou Strait, China on 12 August 2011 carrying 54,000 tons of crude oil from Hong Kong to Qinzhou, China. According to the report of Zhanjiang Maritime Authority, *Archangelos Gabriel* had tilted three degrees on its left side and seawater had entered into the peak tank through cracks. *Archangelos Gabriel* and the oil were at risk. The situation also posed a great risk to the marine environment. After the grounding, the Nanhai Rescue Bureau of the Ministry of Transport of China (hereafter "NRB"), upon the request of the owner of *Archangelos Gabriel* (hereafter the "Shipowner"), sent rescue tugs *NHJ 116*, *NHJ 101* and *NHJ 201* and a diving team to provide salvage, transport and guarding services. Before salvage operation began, the Shipowner, with the approval of the Zhanjiang Maritime Authority, decided to refloat *Archangelos Gabriel* by an off-loading operation. On 17 August, the crude oil on board was off-loaded to another oil tanker and *Archangelos Gabriel* was successfully refloated. On the following day, *Archangelos Gabriel* arrived at its destination and the crude oil was also carried to the destination by the substitute tanker.[13]

Disputes arose between the NRB and the Shipowner about the payment under the salvage contract between them. The Shipowner refused to pay for the salvage according to the salvage contract and argued that the payment under the contract was excessive for the services actually rendered by the NRB. The Shipowner asked for the tugs rate to be modified, thus reducing the payment. The Shipowner also argued that the salvage payment should be made by the owners of the salved ship and salved goods on board in proportion to their respective salved values. This case was heard by the Guangzhou Maritime Court as the court of first instance, the Guangdong High People's Court as the court of appeal and the Supreme People's Court (hereafter "SPC") as the retrial court,

11. In the Chinese market, the well-known standard salvage contract is the Standard Form of the Maritime Arbitration Commission.

12. The salvage payment is large compared with that for state-controlled salvage in other Asian countries, eg, Japan.

13. (2012) Guang Hai Fa Chu Zi 898, 7–8.

from 2012 to 2016.[14] The main issues in the proceedings were the adjustment of the salvage rate and proportionate payment in the context of CMC 1992 and the Salvage Convention 1989.

B. "Employment salvage contract"

CMC 1992 incorporates the principle of "no cure, no pay" except as otherwise provided for special compensation for environmental protection or by other laws or the salvage contract.[15] In other words, CMC 1992 allows parties to a salvage contract to contract out the principle of "no cure, no pay" for payment of salvage. In *NRB v Archangelos*, it was agreed that the Shipowner should pay the NRB for the salvage services based on agreed tug rates regardless of whether the salvage was successful.[16] Unlike the LOF, it was not a salvage contract on a "no cure, no pay" basis. The courts in *NRB v Archangelos* had different views on the interpretation of this kind of salvage operation under this salvage contract.

In the trial at first instance, the Guangzhou Maritime Court examined whether the operation of the NRB in the dispute was in fact a salvage operation under CMC 1992. It considered a number of specific points. First, the term "ship" in CMC 1992 refers to seagoing ships and other mobile units but does not include ships or craft to be used for military or public service purposes, or small ships of less than 20 tons gross tonnage.[17] The oil tanker *Archangelos Gabriel* was a ship under CMC 1992 and could be a subject of salvage under CMC 1992. Second, according to the report of Zhanjiang Maritime Authority, *Archangelos Gabriel* was in distress and the Shipowner also confirmed this situation. Third, the NRB's salvage operation was voluntary and there were no circumstances in which the NRB was not entitled to a salvage payment.[18] Fourth, *Archangelos Gabriel* refloated successfully and arrived at a safe port with the goods. This meant that the salvage operation had a useful result.[19] Therefore, it was held that the NRB's operation was a salvage operation recognised by CMC 1992 and the NRB was entitled to the salvage payment according to CMC 1992.[20]

The Guangzhou Maritime Court considered the NRB's salvage operation as voluntary salvage. However, there was a salvage contract between the NRB and the Shipowner. CMC 1992 provides that a contract for salvage operations at sea is concluded when an

14. In China, the formation of maritime adjudication system is based on the scheme of second instance finality, with three levels of courts, including the Maritime Courts, the High People's Courts and the Supreme People's Court. For Chinese maritime adjudication in general, see Liang Zhao, "Thirty years of maritime adjudication in China" (2016) 22 JIML 57.

15. CMC 1992, Art.179. See also Salvage Convention 1989, Art.12.

16. (2012) Guang Hai Fa Chu Zi 898, 9.

17. CMC 1992, Art.3.1.

18. CMC 1992, Art.186 provides that the following salvage operations shall not be entitled to payment: (1) the salvage operation is carried out as a duty to normally perform a towage contract or other service contract, though with the exception of providing special services beyond the performance of the above said duty; (2) the salvage operation is carried out in spite of the express and reasonable prohibition on the part of the master of the ship in distress, the owner of the ship in question and the owner of the other property.

19. The measure of success obtained by the salvor is one of the criteria for the salvage reward under CMC 1992. See CMC 1992, Art.180.1(3).

20. (2012) Guang Hai Fa Chu Zi 898, 18–20.

agreement has been reached between the salvor and the salved party regarding the salvage operations to be undertaken.[21] Therefore, the NRB's operation should not be considered as voluntary salvage but salvage under contract. In the appeal of this case, the Guangdong High People's Court found that the salvage contract was a legally binding contract and held that the Shipowner was liable for the salvage payment according to the salvage contract.[22]

Unlike the LOF contract, which is based on a "no cure, no pay" basis, the salvage contract in *NRB v Archangelos* was a salvage contract that did not require consideration of the effect or result of the operation. In the retrial of this case, the SPC described this kind of salvage contract as an "employment salvage contract".[23] However, there is no such named salvage contract under CMC 1992. It is understood that the term "employment" in such a contract refers to the employment of ships for salvage operations. In fact, any salvage contract, eg, the LOF, must involve salvage with the employment of ships. As such, the term "employment salvage contract" might not appropriately describe such a salvage contract. In essence, the salvage contract in *NRB v Archangelos* was a salvage contract on agreed rates without a "no cure, no pay" basis.

The purpose of calling the salvage contract in *NRB v Archangelos* an "employment salvage contract" was to distinguish it from salvage contracts on a "no cure, no pay" basis. In the view of the SPC, because CMC 1992 incorporates the "no cure, no pay" principle, it applies to salvage contracts on a "no cure, no pay" basis only, but not to the "employment salvage contract" which contractually excludes the "no cure, no pay" basis. Therefore, only the Contract Law of the PRC 1999 (hereafter "Contract Law 1999") should apply to the "employment salvage contract" in *NRB v Archangelos*.[24] There is no doubt that under CMC 1992 parties to a salvage contract are free to contract out of the "no cure, no pay" basis and agree to the salvage payment, whether or not the salvage is successful. However, it does not mean that CMC 1992 shall not apply to such a salvage contract. The provisions in CMC 1992 regarding salvage at sea shall apply to salvage operations regardless of how a salvage contract is concluded.[25] Therefore, CMC 1992 should apply to the salvage contract in *NRB v Archangelos* no matter what the SPC termed it. Even if parties to a salvage contract have contracted out of the "no cure, no pay" basis in CMC 1992, they do so according to CMC 1992 when CMC 1992 applies.[26] In fact, CMC 1992 applies to both voluntary salvage and salvage under contract, regardless of whether the basis of "no cure, no pay" has been contracted out. For example, parties may agree to pay on a basis other than "no cure, no pay", such as an hourly or daily basis, and such an agreement is also a salvage contract under CMC 1992.[27] The term "employment salvage contract" only confused the issue of the application of CMC 1992.

21. CMC 1992, Art.175.1.
22. (2014) Yue Gao Fa Min Si Zhong Zi 117, 28–29.
23. (2016) Zui Gao Fa Min Zai 61, 19.
24. *Ibid*.
25. CMC 1992, Art.171. The compulsory application means that parties cannot contract out duties of the parties in salvage under CMC 1992.
26. *Ibid*, Art.179.
27. Huang [1995] LMCLQ 269, 274–275.

Although CMC 1992 can, as held by the Guangdong High People's Court, apply to the so-called "employment salvage contract", the salvage contract in *NRB v Archangelos* should be governed by the Salvage Convention 1989 rather than CMC 1992. For the application of the law in relation to foreign-related matters, CMC 1992 provides that, if any international treaty concluded or acceded to by the PRC contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply unless the provisions are those on which the PRC has announced reservations.[28] Because the Shipowner in *NRB v Archangelos* was a Greek company, the disputes in this case should be considered foreign-related matters. Therefore, the Salvage Convention 1989 should apply in *NRB v Archangelos*. All the Chinese courts in *NRB v Archangelos* ignored the application of the Salvage Convention 1989. It is possible that they might have believed that the provisions of CMC 1992 regarding the salvage were the same as those of the Salvage Convention 1989. However, the truth is that there are outstanding differences between them, particularly the provisions regarding the assessment of the salvage payment and payment in proportion which are the main issues in *NRB v Archangelos*. This means that the application of the Salvage Convention 1989 in *NRB v Archangelos* might have resulted in an outcome different from that arrived at by the application of CMC 1992.

III. SALVAGE PAYMENT

A. Assessment of salvage payment

In *NRB v Archangelos*, the Shipowner accepted the rate of 3.2 Renminbi (hereafter "RMB")[29] per horsepower hour for rescue tugs *NHJ 116* and *NHJ 101* for fixing the salvage payment. One of the questions in the hearings was whether the payment based on the agreed tugs rate in the salvage contract should be fixed according to CMC 1992. CMC 1992, Art.180.1 and the Salvage Convention 1989, Art.13.1 set out the same ten criteria for fixing the salvage reward. The Guangzhou Maritime Court applied CMC 1992 for the assessment of salvage payment and considered the ten criteria set out in CMC 1992, Art.180,[30] particularly the time, expenses and losses incurred by the salvors,[31] and the risk of liability and other risks run by the salvors or their equipment.[32] The tugs' rate was fixed by the Guangzhou Maritime Court at 2.9 RMB per horsepower hour. The Guangdong High People's Court affirmed this adjustment.[33] However, one important fact had been ignored, which was that the parties in *NRB v Archangelos* had agreed to fix the payment rate. The salvage payment should not have been fixed according to the criteria in CMC 1992, Art.180. Those criteria could be considered only when there was no agreed payment in a salvage contract. If the

28. CMC 1992, Art.268.1.
29. RMB is an abbreviation of Renminbi, which is the Chinese official currency.
30. The criteria are the same to those in the Salvage Convention 1989, Art.13.1
31. CMC 1992, Art.180.1, Criterion 6.
32. CMC 1992, Art.180.1, Criterion 7.
33. (2014) Yue Gao Fa Min Si Zhong Zi 117, 30.

rate was unreasonable, it could be modified but not re-fixed according to CMC 1992. In fact, the agreed tugs rate in *NRB v Archangelos* was not fixed but modified to 2.9 RMB per horsepower hour by the Guangzhou Maritime Court. As such, the criteria considered in *NRB v Archangelos* were actually not used for the purpose of fixing the reward but for modifying the payment in contract.

The SPC accepted the payment based on the rate fixed by the Guangzhou Maritime Court under CMC 1992, although it made clear that the Contract Law 1999 should apply to the "employment salvage contract".[34] In fact, there is no provision in the Contract Law 1999 for fixing a salvage payment. The SPC actually accepted the payment fixed by contract and modified it in accordance with CMC 1992 as done by the Guangzhou Maritime Court.[35] In comparison, the Salvage Convention 1989, Art.6.1 gives parties more freedom of contract. If parties have agreed a fixed payment for salvage, it should not be fixed again according to the criteria for fixing rewards in the Salvage Convention 1989. Therefore, the criteria set out in both the Salvage Convention 1989 and CMC 1992 should not have been relied on for fixing the salvage payment in *NRB v Archangelos*.

B. Modification of payment under CMC 1992

In *NRB v Archangelos*, because of the change of salvage operation, the NRB's tugs did not tow *Archangelos Gabriel* as agreed in the contract but did provide a guidance service. The Shipowner applied for the modification of the tugs rate according to CMC 1992, Art.176. This application was the second circumstance under this Article in which the payment under the contract was considered excessive for the services actually rendered. The Guangzhou Maritime Court pointed out that the actual cost, technique requirements and risks were much lower in the guidance service than those in the salvage operation. Therefore, the Guangzhou Maritime Court granted the Shipowner's application and adjusted the agreed tugs rate according to criteria 6 and 7 in CMC 1992, Art.180.1.[36]

It was appropriate to modify the tugs rate in *NRB v Archangelos* but not appropriate to modify the rate according to the criteria set for fixing the salvage rate under CMC 1992. As discussed above, the criteria are considered for fixing the reward when there is no fixed payment agreed in contract. Of course, these criteria may be the same criteria for modification of a payment fixed in contract. However, they should not be legal authority for modification of payment. In considering the adjustment of the tugs rate in the first instance, the Guangdong High People's Court decided not to adjust it again, although the Shipowner appealed for readjustment of the tugs rate because it believed the adjusted rate was not reasonable.[37] This issue should have been clarified but was actually ignored because the parties then moved on to focus on the issue of proportionate payment, which will be discussed below.

34. (2016) Zui Gao Fa Min Zai 61, 19.
35. Modification of payment is the following issue in *NRB v Archangelos*.
36. (2012) Guang Hai Fa Chu Zi 898, 22–23.
37. (2014) Yue Gao Fa Min Si Zhong Zi 117, 30.

In the retrial of this case, the SPC reaffirmed the adjustment at first instance because the NRB did not raise the issue of adjustment in the application for retrial.[38] The decision of the SPC to keep the adjusted rate unchanged raised an unsolved problem regarding the adjustment of payment under a salvage contract. As held by the SPC, CMC 1992 should not apply to the "employment salvage contract", thus the tugs rate should not be adjusted according to CMC 1992. Therefore, the adjustment of the tugs rate by the Guangzhou Maritime Court was a wrongful application of the law. The SPC should not have affirmed or accepted it without changing the applicable law. Since CMC 1992 did not apply and the Contract Law 1999 applied to the "employment salvage contract", the tugs rate in *NRB v Archangelos* should have been adjusted according to the Contract Law 1999. Otherwise, it may be inferred that CMC 1992 applies to the modification of the "employment salvage contract" in *NRB v Archangelos*. This inference obviously contradicts the SPC's opinion. More importantly, the SPC did not clarify on what legal basis the tugs rate in the "employment salvage contract" could be adjusted if CMC 1992 did not apply for the adjustment.

C. Modification of payment under the Chinese Contract Law

If, as held by the SPC in *NRB v Archangelos*, CMC 1992 does not apply for the modification of a salvage contract, then contract law shall apply for this purpose. Under the Contract Law 1999, a contract may be modified if the contract is concluded under substantial misunderstanding or the conclusion of the contract lacks fairness. A contract may also be modified if the contract is concluded against the parties' intention by means of deceit, coercion or taking advantage of its difficulties.[39] However, it is difficult to rely on the Contract Law 1999 for the modification of a salvage contract. For example, the parties in *NRB v Archangelos* concluded the "employment salvage contract" after sufficient negotiation with a clear understanding of the dangerous situation of the ship in distress. Therefore, there was no substantial misunderstanding and the contract did not lack fairness when it was concluded. However, the salvage payment became unfair after conclusion of the contract when the salvage operation was changed from towage to guidance. Contract law cannot easily solve the problem of unfairness. Conversely, this is the circumstance in which the salvage contract could be modified according to CMC 1992.[40] Although the principle of good faith in the Contract Law 1999 may be relied on for the modification of a salvage contract,[41] this principle is too general and there may be difficulty in the application of this principle in judicial practice. Whether the tugs rate in *NRB v Archangelos* could be modified on the basis of good faith depends on the judicial interpretation of good faith within the discretion of Chinese judges. It may cause uncertainty in the application of the Contract Law 1999 for the modification of salvage contracts.

38. (2016) Zui Gao Fa Min Zai 61, 20.
39. Contract Law 1999, Art.54.1 and 2.
40. CMC 1992, Art.176 (2).
41. The Contract Law 1999, Art.6 provides that the parties shall exercise their rights and perform their obligations in good faith.

The Shipowner in *NRB v Archangelos* also relied on duress and change of situation for the modification of payment. First, the Shipowner argued that the tugs rate was accepted under duress because *Archangelos Gabriel* was in danger. According to the Contract Law 1999, where a party makes the other party enter into a contract against its true will by means of deceit, coercion or taking advantage of its difficulties, the injured party has the right to request a court or an arbitration institution to modify or rescind the contract.[42] The Guangzhou Maritime Court rejected this argument and pointed out that there was no evidence to prove duress when the Shipowner accepted the tug rates.[43] In fact, the Shipowner asked for renegotiation of the tug rates three days after his acceptance because his insurer suggested that he do so. In the appeal of this case, it was found that the NRB offered rescue tug rates similar to those of other parties for the same towing operations as those of *Archangelos Gabriel*. Therefore, the Guangdong High People's Court held that there was no evidence of duress or any circumstance in which NRB took advantage of the difficulties of the Shipowner.[44]

From the judgments of the Guangzhou Maritime Court and the Guangdong High People's Court, it can be seen that the Shipowner had the burden of proving the existence of duress when the contract was concluded. The salved ship is always in danger in a salvage operation and that is the reason for salvage. However, the danger itself is not evidence of duress. When a shipowner has other choices for salvage, he has sufficient bargaining power in the market and duress cannot be relied on by the shipowner. In *NRB v Archangelos*, the Shipowner might consider other professional salvors, eg, the Guangzhou Salvage Bureau of the Ministry of Transport located in Guangzhou. If the Shipowner could prove that he had no other choice in the urgent circumstance, eg, there were no rescue tugs available from the Guangzhou Salvage Bureau and he had to accept an unreasonable rate for rescue tugs from the NRB, his burden of proof might be discharged. However, the NRB's offer to others at a similar rate might not be a reasonable defence against the argument of duress. Even if a similar rate had been accepted by others, it does not mean that there was no duress in the contract between the NRB and others. At the least, it could not be considered evidence of non-existence of duress even though the Shipowner had not shifted the burden of proof of duress to the NRB.

In the retrial of the case, the Shipowner argued that the tugs rate should be adjusted because of the change of situation, namely the change of salvage operation from towing to guiding. There is no rule regarding change of situation in the Contract Law 1999. However, the SPC created a new rule for modification of contract because of the change of situation in a judicial interpretation on the Contract Law 1999.[45] The judicial interpretation provides that:[46]

"Where, after the conclusion of the contract, the objective situation undergoes significant changes that were unforeseeable by the concerned parties at the time of conclusion of the contract, and such changes are not caused by force majeure and do not constitute commercial risks, and to

42. Contract Law 1999, Art.54.2.
43. (2012) Guang Hai Fa Chu Zi 898, 18.
44. (2014) Yue Gao Fa Min Si Zhong Zi 117, 28.
45. Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (II) 2009, Fa Shi [2009] No. 5.
46. *Ibid*, Art.26.

continue with the performance of the contract will be obviously unfair to one concerned party or will not realise the purpose for which such contract was concluded, the court shall, upon the request for modifying or terminating the contract by a concerned party, determine whether to modify or terminate the contract on the basis of the principles of fairness and by considering the actual situation prevalent in the case."

The SPC in *NRB v Archangelos* pointed out that the situation of the danger had not changed and only the salvage operation had changed. The change of salvage operation was not based on any change in the actual situation but on the negotiation of the relevant parties. Therefore, there was no change of situation in this dispute and the Shipowner was not allowed to apply for the adjustment of the tug rate based on change of situation in contract.[47] The argument of change of situation might be accepted if a dangerous circumstance had changed—for example, if the grounded ship had refloated by herself on a high tide and the salvage had become unnecessary.

In short, a contract may be modified under general contract law. However, the conditions for such modification are general and strict. This causes difficulty in modifying a salvage contract when the modification becomes necessary. In fact, unlike ordinary contracts, the maritime law of salvage can reopen salvage contracts, even in the absence of economic duress, change of situation etc. Both the Salvage Convention 1989 and CMC 1992 provide two circumstances in which a maritime salvage contract may be modified: if it has been entered into under undue influence or the influence of danger and its terms are inequitable; or if the payment under the contract is, to an excessive degree, too large or too small for the services actually rendered.[48] General contract law cannot satisfy the demand for the modification of salvage contracts. Therefore, the Salvage Convention 1989 or CMC 1992, rather than general contract law, should apply for the purposes of modifying a salvage contract.

D. Reasonableness of payment

In *NRB v Archangelos*, the Shipowner, after the conclusion of the salvage contract, requested the NRB to reduce the tug rate to 2.9 per horsepower hour and the NRB replied that the payment arising from the salvage by the two tugs would be discussed later. The Guangzhou Maritime Court decided to modify the tug rate according to CMC 1992 but the three judges had two different views on how to adjust the rate in the salvage operation according to the salvage contract. Two judges took the view that the tug rate should be adjusted from 3.2 RMB per horsepower hour to 2.9 RMB per horsepower hour as this was the intention of the parties. It was a fact that the Shipowner asked for renegotiation of the tug rate and hoped to reduce it to 2.9 RMB per horsepower. The two judges believed that the 2.9 RMB rate was what the Shipowner intended and the NRB may well have accepted it later. Considering the purpose of salvage under CMC 1992, the two judges held that the 2.9 RMB rate was a reasonable tug rate for the salvage operation in *NRB v Archangelos*.[49]

47. (2016) Zui Gao Fa Min Zai 61, 20.
48. Salvage Convention 1989, Art.7 and CMC 1992, Art.176.
49. (2012) Guang Hai Fa Chu Zi 898, 23.

However, the 2.9 RMB rate was not the agreed rate in the salvage contract. It was the 3.2 RMB rate that had been accepted by the Shipowner. The request for a 2.9 RMB rate was not an offer for the salvage contract but a new offer for modification of the contract. Even if the 2.9 RMB rate was the intention as a new offer, this new offer was not actually accepted by the NRB. The NRB agreed to discuss the salvage payment later but it did not agree to accept the 2.9 RMB rate. At the least, agreement to discuss the payment was not the same as an acceptance of modification of the original tug rate. Only the rate based on the mutual intention of both parties was the real intention of the parties. In fact, the NRB had never agreed to the 2.9 RMB rate even in the proceedings of the courts. Therefore, the 2.9 RMB rate was not a newly agreed rate based on the intention of the parties and it should not be a reasonable rate as held by the majority of the Guangzhou Maritime Court in *NRB v Archangelos*.

The third first instance judge in *NRB v Archangelos* did not consider the Shipowner's request of the 2.9 RMB rate but found a reference from the third rescue tug *NHJ 201*, which was 1.5 RMB per horsepower hour for transport of crews and experts during the salvage operation.[50] However, although the 2.9 RMB rate should not have been seen as a reasonable rate, it is difficult to conclude that the 1.5 RMB rate was reasonable. In any case, the rescue tugs *NHJ 116* and *NHJ 101*, based on the 3.2 RMB rate, provided a guidance service but the rescue tug *NHJ 201* provided a transport service. The 1.5 RMB rate may not be a good reference for different tugs with different functions and for different purposes. The third judge did not explain why the 1.5 RMB rate was a reasonable rate for the rescue tugs *NHJ 116* and *NHJ 101*. Because of the difference in the two tug rates, the case was submitted to the Judicial Committee of the Guangzhou Maritime Court.[51] The Judicial Committee agreed with the view of the majority and the rate was reduced to 2.9 RMB per horsepower hour according to the majority rule adopted in Chinese courts.[52]

Although the adjustment of the tug rate by the Guangzhou Maritime Court was accepted by the SPC, this does not mean that 2.9 RMB rate was an agreed rate or a reasonable rate for assessment of salvage payment in *NRB v Archangelos*. Although the 1.5 RMB rate might not be reasonable, it indicated that a reasonable rate should be adopted for the assessment of salvage payment. In Chinese judicial practice, where there is no agreed rate in a salvage contract, the salvage payment should be assessed according to a reasonable rate; the reasonable rate could be a local market rate at the time of salvage.[53] For the same reason, if the salvage rate has been agreed, it may be adjusted to a reasonable rate according to CMC 1992 or, where CMC 1992 does not apply, the Contract Law 1999. Reasonableness is a question of fact and it is at the discretion of Chinese courts to decide a reasonable rate with reference to the local salvage market. It might not have been necessary for the SPC in *NRB v Archangelos* to

50. *Ibid*, 23–24.

51. According to the Organic Law of the People's Courts of the People's Republic of China 2006, Art.10.1, the functions of judicial committees in Chinese courts are to sum up judicial experience and to discuss important or difficult cases and other issues relating to the judicial work.

52. (2012) Guang Hai Fa Chu Zi 898, 24.

53. *Shantou Maritime Authority v Sinopec Ltd Guangdong Co* (2005) Guang Hai Fa Chu Zi 182 (Guangzhou Maritime Court, China).

find out a reasonable salvage rate since it was not raised by the NRB in its application for retrial. However, it may not be appropriate simply to accept the adjustment of the tugs rate from the first instance. It should be the SPC's function and duty to clarify the question of law for when a reasonable rate should be adopted for the assessment of salvage payment under the "employment salvage contract".

IV. PROPORTIONATE PAYMENT

A. Salvage Convention 1989 and CMC 1992

According to CMC 1992, Art.183, a salvage reward shall be paid by the owners of the salved ship and other property in accordance with the respective proportions which the salved values of the ship and other property bear to the total salved value. It is similar but not identical to the corresponding provisions in the Salvage Convention 1989. Article 13.2 of the 1989 Convention provides that "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 salved values".[54] The material difference between them is how the payment is fixed for liability of payment in proportion. Under Art.13 of the Convention, a proportionate payment under para.2 must be the payment fixed according to the criteria in para.1. They are cross-referenced provisions under the Salvage Convention 1989 and cannot be applied separately.[55] In other words, if the reward is fixed in contract, not according to criteria in Art.13.1 of the Convention, the parties are free to agree the payment, whether in proportion or not. In *NRB v Archangelos*, there was no agreement of proportionate payment between the Shipowner and other owners of salved goods; this implied that the parties had contracted out the payment in proportion. Therefore, if the Salvage Convention 1989 applied to *NRB v Archangelos*,[56] the payment fixed in contract would not be made on a proportionate basis.

The Salvage Convention 1989, Art.6.1 provides: "This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication."[57] This provision leaves the salvor and shipowner with plenary contractual freedom.[58] Of course, this freedom is subject to annulment and modification of contracts and duties to prevent or minimise damage to the environment.[59] Conversely, CMC 1992 does not provide such contract freedom. The relevant provisions in CMC 1992 shall apply to salvage operations and only the "no cure, no pay" principle can be contracted out of.[60] Therefore, when CMC 1992 applied to *NRB v Archangelos*, the provision for proportionate

54. Emphasis added.
55. For the same understanding of liability to pay salvage in proportion under the Salvage Convention 1989 from the perspective of common law, see FD Rose, *Kennedy & Rose Law of Salvage*, 9th edn (Sweet & Maxwell 2017), [17.017]. Thus, if a salvor of both ship and cargo brings an action *in rem* against the ship alone, he will only get judgment for such an amount of reward as the court finds to be due in respect of the value of that property which is before the court: *The Pyrennée* (1863) Br. & L. 189.
56. In fact, it should apply to *NRB v Archangelos*.
57. Salvage Convention 1989, Art.6.1.
58. Comité Maritime International, *The Travaux Préparatoires of the Convention on Salvage 1989*, 183.
59. Salvage Convention 1989, Art.6.3.
60. CMC 1992, Arts 171 and 179.

payment should apply compulsorily and payment should be made proportionately. This compulsory requirement also corresponds to the master or the shipowner's authority to conclude a salvage contract on behalf of the owner of the property on board the ship under CMC 1992.[61]

B. Chinese judicial practice

Furthermore, the Salvage Convention 1989 provides that a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares.[62] However, CMC 1992 does not provide rules for recourse action between the owners of salved properties. In Chinese judicial practice, the salvor is entitled to sue the owners of the salved ship and the owners of the salved goods on board the salved ship for the salvage payment. In *Ningbo Zhenhai Manxiang Shipping Co Ltd v Jin Yun Shipping Co Ltd and Taizhou Dachuang Metal Co Ltd*,[63] the salvor claimed a salvage payment against both the Shipowner of the salved ship and the owner of the salved goods on board. It was held that the owners of the salved ship and salved goods should be liable for the salvage payment in accordance with the respective proportions which the salved values of the ship and goods bore to the total salved value.[64]

However, CMC 1992 does not clarify whether the shipowner of the salved ship is responsible for salvage payment only on a proportionate basis when the salvor claims only against the shipowner and not the owner of other salved property. In *Guangzhou Salvage Bureau v Fuzhou Shengxiong Shipping Trade Co Ltd*,[65] the salvor claimed only against the Shipowner of the salved ship for the salvage payment. It was held that the owner of the salved goods on board the salved ship should be liable for the payment in proportion according to CMC 1992, Art.183. Although the owner of the salved goods was not a party to the salvage contract, it was held that the owner of the salved goods was bound by the salvage contract. CMC 1992 provides that 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.[66] However, the owner of the salved goods was not the defendant in the salvor's claim, so it may not be reasonable for the owner of the salved goods to be liable for the payment.

As a solution to this problem, parties to the salvage contract may apply to add the owner of the salved goods on board to the court proceedings between them. This was what occurred in the first instance of *NRB v Archangelos*. However, this application was rejected by the Guangzhou Maritime Court because of the wrongful basis of the application. The Shipowner understood that the salvage payment should be a general average liability which should be contributed to by both the owners of the salved ship and the salved properties, and thus applied to add the third party. The Guangzhou Maritime Court pointed out that salvage payment and general average were different

61. *Ibid*, Art.175.
62. The Salvage Convention 1989, Art.13.2.
63. (2009) Yong Hai Fa Shang Chu Zi 423 (Ningbo Maritime Court, China).
64. The salvage payment in this case was assessed on the basis of "no cure, on pay".
65. (2000) Hai Shang Chu Zi 558 (Haikou Maritime Court, China).
66. CMC 1992, Art.175.2.

legal issues and the Shipowner's application should be denied because it was for a general average purpose rather than for a salvage payment.[67] It seems appropriate to deny the application on the basis of a different issue. However, it is not known whether the application to add the third party can be granted if such an application is on the basis of the salvage payment. In theory, an application to add a third party should be granted if it is on the basis of a salvage payment. In judicial practice, it is at the discretion of the judges in Chinese courts.

In the appeal of *NRB v Archangelos*, the Shipowner stated that, regardless of whether the owner of the salved goods acted as the third party in proceedings, he should be liable for the salvage payment in proportion according to CMC 1992, Art.183. The Guangdong High People's Court reasoned that CMC 1992 did not make any distinction between different types of salvage operations and thus Art.183 should apply to all kinds of salvage including salvage under contract.[68] Therefore, the Guangdong High People's Court held that the Shipowner should be liable for the salvage payment in proportion to the salved value of the ship.[69] The NRB applied for a retrial. The SPC held that the Guangdong High People's Court wrongfully applied CMC 1992 and the decision of the appeal was reversed.[70] As understood by the SPC, both the Salvage Convention 1989 and CMC 1992 applied only to voluntary salvage or the salvage contract on the basis of "no cure, no pay" but did not apply to the "employment salvage contract" in this dispute. Therefore, the SPC in the retrial held that CMC 1992, Art.183 should not apply to this case and that the NRB was entitled to the full salvage payment according to the "employment salvage contract".[71]

In essence, whether the Shipowner in *NRB v Archangelos* was entitled to limit his payment in proportion depends on the issue of the application of CMC 1992, Art.183. First, as discussed above, the "employment salvage contract" which contracted out the basis of "no cure, no pay" did not exclude the application of CMC 1992. Second, the SPC's proposition that "both the Salvage Convention 1989 and CMC 1992 allow parties to reach a salvage contract different from the provisions of the Salvage Convention 1989 and CMC 1992"[72] is an ambiguous statement. In fact, only CMC 1992, Art.179 allows parties to contract out the application on a "no cure, no pay" basis for salvage payment; Art.183 does not allow parties to contract out its application for salvage payment in proportion. Therefore, Art.183 should apply to the salvage contract, including the so-called "employment salvage contract", even if it contracted out the basis of "no cure, no pay". If this conclusion is correct, and where Chinese law applies to a salvage contract, it is suggested that the salvor claim against both the owner of the salved ship and the owner of the salved property on board the ship for full payment of salvage. Otherwise, the salvor cannot claim full payment from the owner of the salved ship.[73] Of course, this is something that needs to be tested in future judicial practice in China.

67. (2012) Guang Hai Fa Chu Zi 898, 18.
68. (2014) Yue Gao Fa Min Si Zhong Zi 117, 30–31.
69. *Ibid*, 33.
70. (2016) Zui Gao Fa Min Zai 61, 20.
71. *Ibid*, 18–19.
72. *Ibid*, 18.
73. See also Huang [1995] LMCLQ 269, 288. It was suggested that "claiming for salvage remuneration should be made against all the salved parties, not just the owner of the salved ship, but special compensation can only be claimed from the shipowner".

C. Remedies for salvors under CMC 1992

Although salvage payment in proportion is a mandatory provision in CMC 1992, it does not mean that salvors have insufficient remedies if the owner of the salved ship is liable for payment only in proportion. Security provided by a person who is liable for payment is an important remedy for the salvor. In practice, one reason for the popularity of the LOF among salvors is that it provides arbitration before experienced arbitrators, backed by a tried and reasonably quick method of obtaining security and payment.[74] Under the Salvage Convention 1989, the salvor is entitled to request a person liable for salvage payment to provide satisfactory security for the claim, including interest and costs of the salvor. Furthermore, without the consent of the salvor, the salved vessel and other property cannot be removed from the port or place at which they first arrived after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.[75] China incorporated this provision into CMC 1992.[76] Besides the security, the salvor under CMC 1992 may apply to the court for an order on forced sale by auction if a person liable for salvage payment has neither made the payment nor provided satisfactory security for the ship and other property salved after 90 days of the salvage. The proceeds of the sale shall, after deduction of the expenses incurred for the storage and sale, be used for the payment.[77] The salvors are also entitled to maritime lien for salvage payment under CMC 1992.[78] Therefore, CMC 1992 provides sufficient remedies for the salvor's payment. If the salvor waives his remedies, it is not reasonable to request the full payment from the owner of the salved ship who is actually only liable in proportion according to CMC 1992.

V. STATE CONTROLLED SALVAGE

State-controlled salvage is very common in China. In the retrial of *NRB v Archangelos*, the Shipowner contended that the NRB, as a stated-owned and controlled salvage authority, should provide salvage in the public interest and should charge only for the real cost and not claim for salvage payment for profit.[79] This is a common argument made in Chinese judicial practice on the subject of maritime salvage in China. In stated-controlled salvage, the authorities are frequently challenged as to their entitlement to a salvage payment under CMC 1992. Although Chinese maritime authorities have been held to be entitled to salvage payment in judicial practice,[80] it is still an uncertain issue in the Chinese maritime law of salvage. Under CMC 1992, for salvage operations performed or controlled by the relevant competent authorities of China, the salvors shall

74. Nicholas Gaskell, "The 1989 Salvage Convention and the Lloyd's Open Form of Salvage Agreement" (1991) 16 Tulane Mar LJ 1, 12.
75. Salvage Convention 1989, Art.21.
76. CMC 1992, Art.188.
77. *Ibid*, Art.190.
78. *Ibid*, Art.22.
79. (2016) Zui Gao Fa Min Zai 61, 17.
80. *Shantou Maritime Authority v Hsin Ying Shipping Co Ltd and Ever Success (HK) Shipping Co Ltd* (2007) Guang Hai Fa Chu Zi 352 (Guangzhou Maritime Court, China).

be entitled to avail themselves of the rights and compensations provided for in CMC 1992.[81] Under the Salvage Convention 1989, such salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.[82] Unlike "remedies" in the Salvage Convention 1989, Chinese authorities as salvors are entitled to "compensation" for a salvage operation under CMC 1992. In other words, Chinese authorities may be reimbursed for the cost of salvage operations but not entitled to a salvage reward or remuneration under CMC 1992. Unfortunately, this reasoning has not been accepted in Chinese judicial practice.

In China, the relevant competent authorities for maritime salvage include the Maritime Safety Administration (hereafter "MSA") with its local branches, and China Rescue and Salvage Bureau, with three Rescue Bureaus and three Salvage Bureaux of the Ministry of Transport of the PRC. The Rescue Bureaux include the Beihai Rescue Bureau, the Donghai Rescue Bureau and the Nanhai Rescue Bureau. The Salvage Bureaux include the Yantai Salvage Bureau, the Shanghai Salvage Bureau and the Guangzhou Salvage Bureau. The Nanhai Rescue Bureau was the party in the dispute in *NRB v Archangelos*. The MSA and its local branches and China Rescue and Salvage Bureaux are administrative authorities. However, the Salvage Bureaux and Rescue Bureaux are not administrative authorities but public institutions under the control and management of China Rescue and Salvage of the Ministry of Transport of China. Public institutions are special organisations in Chinese government system. They may undertake administrative functions, engage in production and business operations, and engage in public welfare services.[83] In theory, the Rescue Bureaux and the Salvage Bureaux undertake administrative functions and engage in public welfare services. In practice, however, they also engage in business operations. For example, the NRB engaged in a salvage operation with the Shipowner of *Archangelos Gabriel* for salvage payment in *NRB v Archangelos*. For a business operation, they may use another name. For example, the Guangzhou Salvage Bureau is also known in business as the China Ocean Engineering Guangzhou Company.

The existence of public institutions as authorities in salvage operations in China makes judicial practice complicated. In *Shantou Maritime Authority v Sinopec Ltd Guangdong Co*,[84] the Shanghai Salvage Bureau provided salvage services and claimed salvage payment. The owner of the salved property contended that the Shanghai Salvage Bureau performed administrative duties and should be compensated but not be entitled to salvage reward. The Guangzhou Maritime Court pointed out that the Shanghai Salvage Bureau was not only an authority for salvage but also an enterprise named China Ocean Engineering Shanghai Company. Therefore, the Shanghai Salvage Bureau was entitled to the salvage reward according to CMC 1992, Art.192, which has recognised the entitlement to a salvage payment by such an authority. This judgment reflects the confusion in the application of CMC 1992, Art.192. If the Shanghai Salvage Bureau claimed for the salvage payment with the title of China Ocean Engineering Shanghai

81. CMC 1992, Art.192.
82. Salvage Convention 1989, Art.5.2.
83. Guiding Opinions of the CPC Central Committee and the State Council on Advancing the Reform of Public Institutions in a Classified Manner, Zhong Fa [2011] No.5, Art.8.
84. (2005) Guang Hai Fa Chu Zi 182 (Guangzhou Maritime Court, China).

Company, it should be a commercial salvage operation under contract and CMC 1992, Art.192 should not apply. If the Shanghai Salvage Bureau was granted the salvage payment as a salvage authority, its business status should not be discussed for salvage payment purposes. Chinese courts may want to prove that Chinese authorities are entitled to salvage payment not only as commercial units but also as authorities under CMC 1992. However, this has caused uncertainty in Chinese judicial practice.

Last but not least, Chinese salvage authorities may rely on state immunity to exclude their liabilities in salvage operations. In the Hong Kong case *The Hua Tian Long*,[85] the Guangzhou Salvage Bureau (hereafter "GSB") chartered *Hua Tian Long*, a crane-barge owned by the GSB to a Malaysian company which applied for arrest of *Hua Tian Long* in Hong Kong waters because GSB had breached the charter. The GSB raised a defence in the Hong Kong courts claiming to be entitled to immunity from suits on the ground that it was controlled by, and was an organ of, the Chinese Government. The Hong Kong courts found that the Chinese Government had sufficient control over the GSB and the GSB was part of the Ministry of Communications of China and not a separate legal entity. Therefore, the GSB was prima facie entitled to plead state immunity in the Hong Kong courts. In fact, however, the GSB is a separate legal entity, namely a public institution or China Ocean Engineering Guangzhou Company. Under the Chinese maritime law of salvage, those Chinese maritime authorities as salvors are entitled to salvage payment but should not be immune from liabilities that occur during salvage operations on the basis of state immunity.

VI. CONCLUSION

A salvage contract that excludes the "no cure, no pay" basis for salvage payment can be considered a standard salvage contract, although it is not common compared with the popular LOF. Regardless of whether such a contract is called an "employment salvage contract", CMC 1992, rather than general contract law, applies to such a salvage contract if Chinese law applies to the salvage contract. If a salvage contract involves foreign-related matters, the Salvage Convention 1989 shall apply when Chinese law is the applicable law of the contract. In Chinese judicial practice, the application of the Salvage Convention 1989 should not be replaced by the application of CMC 1992 because of some outstanding differences between them although both of them incorporate the principle of "no cure, no pay". The Salvage Convention 1989 is a successful international treaty which has been widely adopted as national law or used as the basis of national legislation. This should be followed by Chinese judicial practice for foreign-related salvage operations in China, and it keeps China in line with the common practice of salvage under the Salvage Convention 1989.

85. *Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel Hua Tian Long* [2010] 3 HKLRD 611.