UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

School of Law

Salvage and the Environment:

Is the South African law of salvage fit for encouraging and remunerating salvors for environmental protection services in shipping incidents?

by

Durand M Cupido

Thesis for the degree of Doctor of Philosophy

May 2017

ABSTRACT

SALVAGE AND THE ENVIRONMENT

Is the South African law of salvage fit for encouraging and remunerating salvors for environmental protection services in shipping incidents?

by Durand M Cupido

While the need for environmental protection in certain salvage operations is apparent, arguments about the remuneration of salvors for environmental services tend to involve the assumption that the law of salvage should be the basis for such remuneration. This thesis explores the viability of this assumption and proposes the alternative view that the South African law of salvage should not be the basis upon which salvors are remunerated for environmental services incidental to salvage operations.

Changes to the law of salvage to provide remuneration for environmental services, understandably driven by the values attached to environmental protection, are at odds with the legal theoretical underpinnings of salvage. Salvage law developed on the basis of services rendered to property in danger at sea in furtherance of policies relating to the encouragement of shipping and trade at sea and the notion that the recipients of benefits (the rescue of maritime property) must pay for such benefits. This resulted in a system that would always be challenged by demands for services that involve interests and benefits conferred beyond those traditionally recognised in salvage.

The 1989 Salvage Convention is ostensibly directed at environmental protection outcomes but it has maintained the traditional view of salvage operations with remuneration for environmental services in the form of special compensation arguably premised upon the narrow property based private relationship between salvor and the owners of salved property. Provisions reflective of environmental protection values are both superimposed on and limited by the traditional property bias of salvage maintained in the Convention. In this regard the Convention appears to have gone as far as it possibly can without introducing fundamental changes that may render the law of salvage uncertain.

While the ‘South African Wreck and Salvage Act’ represents an attempt at improving the Salvage Convention, it has similarly maintained the status quo in relation to the legal theoretical essence of salvage. Once again, the Act has probably taken salvage law and the convention as far it can go without a fundamental change to the law. Despite the utility value of salvage operations in the prevention of marine pollution, developments in the law have not truly been aligned with value driven environmental protection concerns.

This thesis proposes a novel regime for the remuneration of salvor’s environmental services based on a view of salvage operations as a functional component in a network of measures, legal and non-legal, public and private, directed at environmental protection. This regime entails the eventual removal of remuneration for environmental services from the South African law of salvage, instead providing for a direct contractual link between salvors and the State as a beneficiary of environmental services outside of the traditional salvage matrix. To achieve this, the thesis proposes certain amendments to the Wreck and Salvage Act that will provide for such a direct contractual relationship where the State intervenes in salvage operations involving environmental risks.

TABLE OF CONTENTS

ABSTRACT ..... **i**
CASES ..... **ix**
LEGISLATION ..... **xi**
ABBREVIATIONS ..... **xv**
Acknowledgements and dedication ..... **xix**
Introduction **1**
Hypothesis 5
Aim and methodology 6
Structure of the study 7
Contribution to knowledge 10
Chapter I Environmental Values, Norms and Law **11**
1.1 Introduction 11
1.2 Values and law distinguished 12
1.3 Informal and formal norms (law) 14
1.4 The values-social norms-law continuum. 16
1.4.1 The importance of a norm and policy formulation. 17
1.4.2 The function of law and the interaction between law, informal norms and values. 22
1.5 Conclusions 26
Chapter II A history of Salvage **29**
2.1 Introduction 29
2.2 Early Maritime law and Codes 32
2.2.1 The Rhodian Law of the Sea 33
2.2.2 The Laws of Oleron 39
2.3 English Admiralty law and salvage 44
2.3.1 The High Court of Admiralty 45
2.3.2 The impact of legislation on Admiralty Jurisdiction 49
2.3.3 English salvage law 51
2.3.3.1 Early English Admiralty Jurisdiction pertaining to salvage 51
2.4 The South African Court of Admiralty and Salvage 56
2.5 Modern developments in the law of Salvage 60
2.6 Environmental pressures 63
2.7 Conclusions 64
Chapter III The legal theoretical nature of Salvage **67**
3.1 Introduction 67

3.2 A basic definition of salvage 68
3.3 The legal theoretical basis of salvage 73
3.3.1 The position in English law 73
3.3.1.1 The equitable nature of salvage 73
3.3.1.1.1 Benefits conferred as the basis for salvage 74
3.3.1.1.2 Public Policy 75
3.3.1.2 A contractual basis for salvage 80
3.3.2 South African law of Salvage. 82
3.3.2.1 Negotiorum Gestio 84
3.3.2.2 Quasi Negotiorum Gestio (the extended enrichment action) 99
3.4 Roman-Dutch law as an alternative to the English law 110
3.5 Conclusion 112
Chapter IV The 1989 Salvage Convention, Wreck and Salvage Act and Salvors' environmental services. 115
4.1 Introduction 115
4.2 The 1910 Salvage Convention 116
4.3 Environmental Protection and the 1989 Salvage Convention (the Convention). 116
4.3.1 Substantive provisions relating to environmental protection 118
4.3.1.1 Encouragement and financial incentives (Articles 13 and 14 of the Convention). 119
4.3.1.2 Penalties and environmental protection 130
4.3.1.3 Duties and environmental protection 137
4.3.1.4 Further provisions expressive of environmental values. 143
4.3.1.4.1 Article 5. 146
4.3.1.4.2 Article 6. 148
4.3.1.4.3 Article 11. 150
4.3.1.5 The Convention and Environmental Protection? 152
4.4 The South African Wreck and Salvage Act 94 of 1996 (WSA) 155
4.4.1 Subjects of salvage 156
4.4.2 Damage to the environment 158
4.4.3 The Calculation of Special Compensation 160
4.4.4 Maritime Lien for environmental services 161
4.4.5 Do the changes brought about by the WSA address the perceived shortcomings of the Convention? 162
4.5 Conclusions 163
Chapter V. Salvage Contracts (LOF), SCOPIC and Environmental Protection 165
5.1 Introduction 165

5.2 Lloyd's Open Form Salvage Agreements (LOF) and the Special Compensation P&I Clause (SCOPIC) 166
5.2.1 LOF 2011 166
5.2.1.1 Parties to the LOF 2011 167
5.2.1.2 Environmental Clauses in LOF 2011. 167
5.2.2 SCOPIC 169
5.2.2.1 SCOPIC and LOF 170
5.2.2.2 SCOPIC remuneration 175
5.2.2.3 Special Casualty Representatives and other Special Representatives 176
5.2.2.4 Provisions directly addressing environmental protection 177
5.2.2.4.1 Clause 10 177
5.2.2.4.2 Clause 14 180
5.3 The Stipulatio Alteri (Contract in favour of a party) and the State's interest in environmental protection. 181
5.3.1 The central features and requirements for the *stipulatio alteri* 182
5.3.2 The *Stipulatio Alteri* and SCOPIC 185
5.3 Conclusions 186
Chapter VI Environmental Law and Salvage 189
6.1 Introduction 189
6.2 What is environmental law? 190
6.3 What is the environment to be protected? 194
6.4 Distinct Principles of Environmental law 196
6.4.1 Sustainable development 197
6.4.2 Duty of care to avoid harm to the environment, (principle of prevention) 199
6.4.3 Precautionary Principle 199
6.4.4 Polluter pays principle 200
6.4.5 Environmental principles in the law of salvage 201
6.5 Norms contained in other distinct areas of law as environmental law 203
6.5.1 Categorising legal rules as environmental law 203
6.5.2 The 1989 Salvage Convention on the environmental law spectrum 211
6.4.2.1. Level seven (Legislation with no environmental relevance) 212
6.4.2.2 Level one (exclusive environmental legislation) 213
6.4.2.3 Level six (legislation regulating environmental exploitation) 213
6.4.2.4 Levels five and four (legislation not aimed at environmental management but with potential environmental relevance and direct environmental relevance) 214
6.4.2.5 Levels three and Two (Legislation incidentally containing environmentally specific norms and that predominantly contain environmentally specific norms) 215

6.6 Conclusion 220

Chapter VII Salvage operations within coastal state marine environmental protection measures and mechanisms outside of salvage for the remuneration of salvors' environmental services. 223

7.1 Introduction 223

7.2 Salvage within government responses to marine pollution from ships. 224

7.2.1 The United Kingdom 224

7.2.2 The United States of America 232

7.2.3 South Africa 235

7.3 Salvors' claims for environmental services under international instruments outside of the law of salvage. 243

7.3.1 The 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1992 Fund Convention. 244

7.3.2 The CLC 1992 245

7.3.3 The International Oil Pollution Compensation (IOPC) Funds 245

7.3.4 Salvors under the CLC and Fund Conventions 246

7.3.5 Difficulties created by the Salvage Convention for claims under the CLC 247

7.3.5.1 The purpose of preventative measures and salvage 247

7.3.5.2 The assessment of costs that a salvor may recover 254

7.4 The position of commercial salvors outside of retainer agreements 255

7.5 Conclusions 257

Chapter VIII Conclusions and Recommendations – Does the law of salvage provide the appropriate basis for the remuneration of salvors' environmental services? 261

8.1 Summary of the issues 261

8.1.1 Environmental values and the law 261

8.1.2 Historical overview of salvage 262

8.1.3 The Law of Salvage: The facilitation and remuneration of salvors' environmental services. 262

8.1.4 Contractual responses to the perceived difficulties under the Salvage Convention 265

8.1.5 Salvors' environmental services and Environmental law 267

8.1.6 The integration of salvage capabilities into pollution response measures and the operation of other instruments directed at environmental protection 268

8.2 The way forward: Reconciling the Wreck and Salvage Act 96 of 1994 with wider environmental law and environmental Instruments aimed at the prevention of pollution. 269

8.2.1 An award for environmental salvage? 271

8.2.2 A contractual basis for salvors' environmental services 272

8.2.2.1 Where there is a threat to the environment and no contract in place? 273

8.2.2.2 Amending the Wreck and Salvage Act 273
BIBLIOGRAPHY 277
Appendix I 289
Appendix II 315
Appendix III 319

CASES

South African Cases

Associated Boating Co v Baardsen: in re The "Lief " (1895) 12 SC 330

Crooks & Co v Agricultural Co-operative Union Ltd 1922 AD 423

Goldfoot v. Meyerson 1926 T.P.D. 242

Hauman v Nortje 1914 AD 293

Hyams v. Wolf & Simpson 1908 T.S. 78

In re the Ship Myvanwy (1883) 4 NLR 43

Laden on Board (163/10) [2011] ZASCA 12 (11 March 2011)

Malelane Suikerkorporasie (Edms) Bpk v Streak [1970] 1 All SA 41 (T)

Maytom v The Master "Harry Escombe" 1920 AD 187

McCullogh v Fernwood Estate Ltd 1920 AD 204

Melanie, The (Owners) v The San Onofre (Owners) [1925] A.C. 246.

Mpakathi v Kghotso Development CC 1993 (3) SA 429 (W)

Mutual Insurance Co. v. Hotz, 1911 A.D. 556

MV Mbashi, The [2002] 2 Lloyd's Rep 602; 2002 (3) SA 217 (D)

Nel v Toron Screen corporation (Pty) Ltd and Mutual and Federal Insurance (Pty) Ltd

Ras v Vermeulen 1937 OPD 5

Rubin v Botha 1911 AD 568

Spencer v Gostelow 1920 AD 617

Standard Bank Financial Services Ltd v Taylam (Pty) Ltd [1979] 4 All SA 1 (C).

Table Bay Harbour Board v New Zealand Steamship Co (The "Papanui") (1901) 18 SC 34

Transnet Limited t/a National Ports Authority v The MV Cleopatra Dream and The Cargo

Wavedancer, The (600/94) [1996] ZASCA 80 (23 August 1996).

Williams 'Estate v Molenschoot and Schep (Pty) Limited 1939 CPD 360

English Cases

Calypso, The (1828) 2 Hagg 209

Cargo Ex Port Victor, The [1901] P. 243 (confirmed on appeal)

Cargo ex Port Victor, The 9 Asp. Mar. Law Cas 163.

Envoy Shipp. Gaz. W.s. February 28, 1888

Falcke v Scottish Imperial Insurance Co (1886) 34 CH.D 234.

Five Steel Barges [1890] 15 P.D. 142

Fusilier, The (1865) Lush 341

Glengyle, The [1898] A.C. 519 (H.L). 8 Asp Mar Law Cas 436

Goring, The [1987] Lloyd's Rep. 15

Governer Raffles, *The* (1815) 2 Dods. 14

Hong Kong Fir Co. Ltd. V Kawasaki Kisen Kaisha Ltd. [1962] 2 QB. 26.

Juliana, The (1822) 2 Dods. 504

Liffey, The (1887) 6 Asp. M.L.C at 256

Makedonia, The [1958] 1 Q.B. 365.

Meandros, The [1925] P. 61.

Rosa Luxemburg, The (1934) 49 Ll.L. Rep 292

Semco Salvage & Marine Pte Ltd v Lancer Navigaton Co Ltd (The Nagasaki Spirit) [1997] 1 Lloyd's Rep. 323 [HL]

Sir Henry Constable (1601) 5 Co. Rep. 106a

Te Hu, The (1970) P. 106

Toju Maru, The [1972] A.C 242, 292.

Velox, The [1906] P. 263

William Beckford, The 3 C. Rob. 355.

<u>*United States Cases*</u>

The Henry Ewbank (1883) 11 Fed Cas 116

LEGISLATION

South African Legislation

Admiralty Jurisdiction Regulation Act 108 of 1983

Atmospheric Pollution Prevention Act 45 of 1965

Conservation of Agricultural Resources Act 44 of 1983

Constitution of the Republic of South Africa Act 108 of 1996

Dumping at Sea Control Act 73 of 1980

Environmental Conservation Act 73 of 1989

Forest Act 122 of 1984

Hazardous Substance Act 15 of 1973

International Convention for the Prevention of Pollution from Ships Act 2 of 1986

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties Act 64 of 1987

Lake Areas Act 39 of 1975

Marine Living Resources Act 18 of 1998

Merchant Shipping (Civil Liability Convention) Act 25 of 2013

Merchant Shipping (Salvage and Pollution) Act 1994

Mountain Catchment Areas Act 63 of 1970

National Environmental Management Act 107 of 1998

National Parks Act 57 of 1976

Physical Planning Act 125 of 1991

Prevention and Combating of Pollution of the Seas by Oil Act 6 of 1981

Wreck and Salvage Act 94 of 1996

English Legislation

12 Anne c. 18 (1713)

13 Richard II. St. 1 c. 5 (1389)

15 Richard II. C. 3 (1391)

17 & 18 Vict c 104 (1854)

2 Henry IV. C. ii (1400)

24 Vict c 10 (1861)

26 Geo. 2 c. 19 (1753).

27 Edw. III c. 13 (1353)

3 & 4 Vict. C65 (1840)

31 & 32 Vict c 71 (1861).

32 Henry VIII. C. 14 (1540)

4 Geo. 1 c.12 (1717)

9 & 10 Vict c 99 (1846)

Environmental Protection Act 1990

Frauds by Boatmen Act

Marine Insurance Act 1906

Merchant Shipping Act 1854

Merchant Shipping Act 1995

Municipal Corporations Act of 1835

Statute of Westminster I (1275). 3 Edw. 1 c 4

Third Parties (Rights against Insurers) Act 1930

International Conventions

Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910 *(http://www.admiraltylawguide.com/conven/salvage1910.html)*

Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 *(http://www.admiraltylawguide.com/conven/oilpolfund1971.html)*

IMO Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 Nov 1969
(http://www.admiraltylawguide.com/conven/protocivilpol1992.html)

IMO Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971
(http://www.admiraltylawguide.com/conven/imopprotooilpolfund1992.html)

International Convention on Civil Liability for Oil Pollution Damage 1969 *(http://www.admiraltylawguide.com/conven/civilpol1969.html)*

International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 *(http://www.admiraltylawguide.com/conven/oilpolresponse1990.html)*

International Convention on Salvage 1989
(http://www.admiraltylawguide.com/conven/salvage1989.html

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971
(http://www.admiraltylawguide.com/conven/oilpolfund1971.html)

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969
(http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx

United Nations Convention on the Law of the Sea 1982
(http://www.admiraltylawguide.com/conven/unclostable.html)

ABBREVIATIONS

AJRA	Admiralty Jurisdiction Regulation Act
BUMOMS	Business Unit Manager for Offshore Marine Services
CAST	Coastguard Agreement for Salvage and Towage
CLC	International Convention on Civil Liability for Oil Pollution Damage
CMI	Comite Maritime International (International Maritime Committee)
DOT	Department of Transport (SA)
DRMP	Shipping Incident Disaster Risk Management Plan
FC	Fund Convention
IMO	International Maritime Organisation
IOPC	International Oil Pollution Compensation Fund
ISU	International Salvage Union
LOF	Lloyd’s Open Form Salvage Agreement
MCA	Maritime and Coastguard Agency
NCP	National Contingency Plan
NEMA	National Environmental Management Act (SA)
OPA	Oil Pollution Act 1990
OPRC	International Convention on Oil Pollution Preparedness, Response and Co-operation
SAMSA	South African Maritime Safety Authority
SCOPIC	Special Compensation P&I Clause
SOSREP	Secretary of State's Representative Maritime Salvage & Intervention (UK)
UNCLOS	United Nations Convention on the Law of the Sea
USCG	United States Coast Guard
VRP	Vessel Response Plan
WCED	World Commission on Environment and Development
WSA	Wreck and Salvage Act

Academic Thesis: Declaration of Authorship

I, **Durand Martin Cupido**, declare that this thesis and the work presented in it is my own and has been generated by me as the result of my own original research.

Salvage and the Environment

Is the South African law of salvage fit for encouraging and remunerating salvors for environmental protection services in shipping incidents?

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

Signed: …

Date: …30 May 2017…….

Acknowledgements and dedication

First and foremost, I must give thanks to the Lord.

I also thank my supervisor, Professor Hilton Staniland, and my advisors, Professors Mikis Tsimplis and Francis Rose, for their invaluable advice. I also wish to express my gratitude to the Faculty of Law at the University of Stellenbosch for making it possible for me to commence studies in the UK. A special salute must also go to Bollie B, Remo, Raisa, Noodle, Gonzalo and the magnificent Beertjie Peertjie.

This was a long, difficult and unjustifiably expensive experience that I absolutely hated. I came very close to simply giving up. However, despite many difficulties and self-doubt, there were those that never doubted that I would do this. My father, James Melvin Cupido, kept me honest with his oft repeated “how far are you?”. My mother Cornelia “Nellie” Cupido just never had any doubt about my ability to do this or anything else for that matter. My beautiful wife and the love of my life Wilasinee “Stinky” Cupido supported me and made it easier to face the many difficulties I experienced. It is impossible to give up when you have the kind of support I had from these three people.

I dedicate this thesis to my parents who sacrificed so much for me and on whom I could always depend.

(Aan Mammie en “Daddy”)

Introduction

The law has been and continues to be influenced by modern society's growing concern with environmental protection.[1] The law of salvage in particular is an area where environmental concerns have become pertinent.[2] Nevertheless, the environmental protection dimension of salvage is a relatively recent development when compared with salvage law in general. Some tension is therefore to be expected between the general maritime law of salvage, which has been described as 'a truly ancient concept',[3] and the relatively recent but growing public interest in the protection of the environment. This is a tension best described as that between value-driven demands for change in an area of the law traditionally aimed at outcomes potentially at odds with such demands.

Salvors are often the first line of defence against the potential destruction of stretches of coastline[4] following shipping incidents. The *Torrey Canyon* and *Amoco Cadiz* oil spillages are but some of the incidents that have illustrated the valuable practical role that salvors play in the protection of the marine and coastal environment. This was also highlighted in the recent running aground of the Turkish bulk carrier, *Seli 1,* off the coast of Cape Town, South Africa and, of course, the *Rena K* off the coast of New Zealand.[5] In the South African context, the *Seli 1* incident provided good evidence

---

[1] Besides the development of environmental law as a specialised field of study, it has been argued that environmental protection should be a fundamental norm in all spheres of law. In this regard see Van Niekerk "*The Ecological Norm in law or the Jurisprudence of the Fight Against Pollution"* 1975 *SALJ* 78.

[2] The preamble to the 1989 Salvage Convention expressly mentions the "increased concern for the protection of the environment". Article 14 of the 1989 Convention also provides for special compensation where a salvor minimises or prevents damage to the environment. See also, De la Rue and Anderson, *Shipping and the environment* (2nd edn, Routledge, 2009. The authors refer to "fundamental changes" in the law of salvage that "reflect the growth in importance of salvage assistance not only in saving the property imperilled by a maritime casualty, but also as the first line of defence in protecting the environment" at 535. See further, Rose FD, *Kennedy and Rose Law of Salvage* (7th ed, Thomson Reuters, 2009) par 6.001, 207. The author, with reference to the environmental protection dimension of salvage, notes that the "[a] situation necessitating salvage operations may…also require services designed to prevent or minimise environmental damage." At 207.

[3] Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (2nd edn, Juta, 2009) 396. See also Staniland, *"Shipping"* in LAWSA vol 25. See also, Kennedy WR, the law of Salvage 2002 2, and Reeder, Brice on Maritime Salvage, (4th edn, Sweet & Maxwell Ltd, 2003).

[4] The preamble to the Convention expressly mentions the importance of 'efficient and timely' salvage operations, and its contribution to 'the protection of the environment'.

[5] Reports on the recent grounding of the *Rena K* off the coast of New Zealand provides much insight into approaches and priorities following marine disasters. In this regard, it has been reported that, the Tauranga Mayor Stuart Crosby, following the conviction of the Captain and Navigation officer of the *Rena K,* remarked that "[t]he

of the premium placed on environmental protection not only by the salvors, but also the wider South African public.[6] Any attempt by salvors or government to ignore the environmental dimension of the problem, arguably, would have been met by an ever vigilant and critical press reflecting the public's concern over their marine and coastal environment.

While the need for environmental protection services in the context of certain salvage operations is apparent,[7] debates have typically revolved around the remuneration of salvors for such services.[8] These arguments seemingly proceed from the assumption that the law of salvage should, via the necessary adjustments, be the basis upon which salvors are remunerated. This assumption has also influenced modern legislative attempts such as the 1989 London Salvage Convention.[9] However,

---

real concern has always been the damage to the environment and the damage to [Tauranga's] reputation as a tourist destination". The same report also alludes to the central role of salvors in quoting the employer (Daina Shipping Co.), of the Captain and navigation officer: "The Rena owners and our insurers continue to be closely involved in managing the response to the grounding, especially through the activities of our salvage and recovery teams - Svitzer & Smit and Braemar Howells." The employer further noted: "There are many complex legal, environmental and community issues still to be resolved from the grounding and we are committed to working with all affected parties to achieve a satisfactory conclusion." <http://www.stuff.co.nz/national/crime/6984980/Rena-captain-and-officer-sent-to-jail> accessed on 1 October 2012.

[6] See discussion below, ch VII, 236.

[7] Rose FD, *Kennedy and Rose on Salvage* (n 2).

[8] The International Salvage Union (ISU), an association of professional salvors, are at the forefront of calls for the remuneration of salvors that recognises the practical role of salvors in marine environmental protection. The primary role of the ISU is to represent, promote and safeguard the interests of member salvors in legal, political and commercial arenas. Beyond acting as an effective lobbying organisation for the salvage industry, the ISU also works to foster co-operation between members. As a lobbying organization for the salvage industry, the The ISU has played an important role in many legal and commercial developments concerning marine salvage. It is a member of the Lloyd's Salvage Group and also has observer status at the International Maritime Organization and the International Oil Pollution Compensation Fund. For further information on the ISU, see <http://www.marine-salvage.com> accessed on 24 March 2013.

[9] A reading of the Convention (see discussion below ch IV) shows that the Convention is expressive of environmental protection values, both in its statement of purpose in the preamble and the manner in which the substantive provisions appear to be drafted in furtherance of this purpose. See also generally *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd The Nagasaki Spirit* [1997] 1 All ER 502, where Lord Mustill, with reference to the preamble of the convention, accepted submissions made by the late Geoffrey Brice, that the explicit purpose of the Convention is 'to provide "adequate incentives" to keep [salvors] in readiness to protect the environment'. At 512. *Emphasis added.*

discussions regarding the possible amendment of the Convention or even its replacement persist.[10]

This raises pertinent questions about the apparent need to push for changes in the law of salvage and whether it is the best vehicle for the remuneration of salvors' environmental services. While environmental aims and values have contributed to developments in the law of salvage, they have, similarly, influenced other areas of the law. So, why is there so much emphasis placed on development in the law of salvage to reward salvors for their environmental services? This issue gains more significance in view of the historically restricted manner in which the law of salvage developed.[11] Can the private law of salvage really facilitate concerns that are essentially of a public law nature? How should environmental services rendered by salvors be categorised in law? Can the law of salvage be further developed or should alternative legal mechanisms be looked at?

Similar to academic debates about the development of salvage law,[12] actual statutory and contractual developments in response to environmental protection concerns have primarily revolved around salvors' remuneration.[13] This economic incentive was viewed as essential for the encouragement of salvors[14] and, consequently, the furthering of environmental protection in shipping disasters. Little, if any, attention was paid to the question whether salvage law was the appropriate legal

[10] In this regard, the Comite Maritime International CMI) Argentine MLA Colloquium held in October 2010, saw numerous proposals by, among others, the International Salvage Union (ISU), the London Property Underwriters, International P&I Clubs and the International Chamber of Shipping (ICS), on questions pertaining to the possible amendment of the 1989 Salvage Convention. Documents pertaining to the discussions can be accessed at the CMI website, <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 27 September 2012.

[11] The law of salvage was historically restricted to services rendered to property. See discussion below, ch III, 99.

[12] See above n 8 and text thereto.

[13] Other issues of importance are of course who is to pay for such services, which currently falls on the shipowner exclusively (see Art 14 of the Salvage Convention, which provides for special compensation where salvors perform salvage operations in respect of ships and cargo that pose environmental risks. A further issue is that of the type of liability in that salvors' environmental services are not included in the definition provided for "salvage operations" under the Convention. A salvor is therefore not entitled to a claim against third parties that may benefit from their environmental services even though the salvage award may be enhanced by such services. See also Staniland H "Should the 1989 International Convention on Salvage Be Enacted in South Africa" 110 *S. African L.J* (1993) 292, 294.

[14] Art 13 of the 1989 Salvage Convention provides for the assessment of salvage remuneration which includes taking into account efforts by salvors to protect the environment.

basis for such remuneration. However, following disasters such as the *Torrey Canyon* and the *Amoco Cadiz* oil spills, environmental provisions were added to standard form salvage agreements.[15] It has been suggested that these contractual provisions provided for a flexible method of 'adjusting to changing circumstances'.[16] These early contractual attempts contributed to the Montreal Draft Salvage Convention of 1981, which ultimately culminated in the 1989 London Salvage Convention.[17] This Convention was adopted in a considerable number of national jurisdictions.[18]

Following the 1989 Salvage Convention, another contractual mechanism in the form of the Special Compensation Protection and Indemnity Clause (SCOPIC), incorporated into LOF 2000, was devised by the salvage industry. This was primarily to ensure better financial consequences for salvors where salvage operations included environmental services.[19] Even this has not settled the debate on the remuneration of salvors as is evident from subsequent attempts by the ISU[20] to have 'environmental awards' incorporated into the law of salvage.[21] Of course, arguments against the introduction of such environmental awards also exist.[22] However, the arguments offered for and against the introduction of 'environmental awards' do not consider possible alternatives outside of salvage law.

---

[15] LOF (1980) is one such standard agreement that was revised as a consequence of these marine disasters.
[16] Rose FD, Kennedy and Rose on Salvage, above (n 2), 74.
[17] ibid.
[18] The Convention became part of English law via the Merchant Shipping (Salvage and Pollution) Act of 1994, while in South Africa the Convention was incorporated via the Wreck and Salvage Act 19 of 1996. In the USA no special legislation was needed as the Convention automatically became a part of the United States' domestic law as a self-executing Convention, the United States having been a party to the Convention.
[19] SCOPIC was directly consequential upon the perceived inadequacy of the Special Compensation provided for under Art 14 of the Salvage Convention. See discussion below, ch V, 170ff.
[20] See above (n 8).
[21] The notion of environmental awards, if one is to accept that better awards will encourage salvors to engage in environmental services, is certainly gaining popularity. The ISU, in pushing for reviews on how salvors are rewarded, are particularly partial to the notion of "environmental awards". Thus they are pushing for a reward which would not only award them for services to ship and cargo, but also their efforts and success in preventing damage to the environment. In this regard, also see the speech delivered by Mr Todd Busch at the CMI Argentine MLA Colloquium held during October 2010. The pdf document of this speech can be accessed at <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 27 September 2012.
[22] See arguments presented by the ICS and Marine Insurers underwriters. <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 27 September 2012.

South Africa, perhaps surprisingly, is not a party to the 1989 London Salvage Convention. Instead, the South African legislature has opted to incorporate the Convention as a schedule to its own domestic legislation in the form of the Wreck and Salvage Act[23] with the former subject to the latter. As such, South Africa has adopted an approach that, while cognisant of the developments leading up to the Convention, is not subject to the Convention system. Professor Staniland, the draftsman responsible for the Act, has suggested that this approach was necessary to circumvent some of the perceived shortcomings of the Convention such as its inadequacies in encouraging salvors to perform salvage services and to further environmental protection aims.[24] This addition of an environmental protection dimension to salvage law and demands for further changes challenge an area of law developed over many years. This thesis provides an analysis of the South African law of salvage to determine if it provides the appropriate basis for the remuneration of salvors when they provide environmental services during salvage operations.

Hypothesis

The hypothesis underpinning this study is that the current South African law of salvage is not the appropriate legal basis for the remuneration of salvors' environmental services incidental to salvage operations. While a growing public concern with environmental protection has led to a change in the demands placed on salvors the capability of the law of salvage to facilitate all these demands has simply been assumed. Also, while environmental protection values have impacted upon salvage law the same is true for development in the law generally. Property salvage operations take place within a network of measures directed at environmental protection outcomes and can be

[23] Act 94 of 1996.

[24] Staniland "Shipping", (n3), par 36. Some of the shortcomings identified by Professor Staniland pertain to the geographical limitation of environmental damage by the Convention in that a state (South Africa) would not be allowed to "extend the area where damage to the environment may occur, or to extend the convention to an oil rig that is pumping up oil, or to give life salvage priority over property salvage, or to calculate more generously a fair rate for equipment and personnel actually used in salvage operation". While the perceived limitations of the Convention go further than the question of environmental protection, it is apparent that, as was the case with the Convention, environmental protection aims informed the drafting of the South African Wreck and Salvage Act 94 of 1996. Par 36**.** See also, Staniland, *S. African L.J* (1993) above n3, 308, where the author alludes to the potential beneficial effects of future legislation containing the Convention as a schedule thereto. This legislation was eventually drafted by the same author to wit, the South African Wreck and Salvage Act 94 of 1996.

integrated better into this network should the law of salvage not be the basis upon which salvors are remunerated for their environmental services.

The law of salvage has reached a point where attempts to fit environmental services into its framework may lead to uncertainty and unnecessary legal fragmentation in relation to the remuneration of salvors' environmental services. Much of this uncertainty relates to the relationship between the law of salvage and wider environmental protection concerns and unnecessary overlaps between different areas of law. Further attempts to provide for the regulation of salvors' environmental services and their remuneration in the law of salvage will render the law of salvage uncertain and wanting of a clear legal identity.

Aim and methodology

This study, aims to provide suggestions for the remuneration and proper legal placement of environmental services incidental to salvage operations. This involves an examination of the body of salvage law and its limitations and strengths as a basis for remuneration. An examination of the link between salvage law and environmental law, both areas of law having been influenced by environmental values, will also be undertaken. This apparent connection, rather than being a source for confusion, could assist with the determination of the appropriate reach of salvage law and whether salvors' remuneration for environmental services necessarily need be met within salvage law. This will also facilitate a more targeted approach to exploring possibilities outside the law of salvage that could be utilised.

The focus of this study is the South African law of salvage. In this regard, statutory and other mechanisms developed in response to environmental protection pressures will be carefully examined. The study includes an historical and legal theoretical analysis of the law of salvage, thus adopting a doctrinal approach, while also including a comparative dimension. The comparative dimension of the study will not be addressed in a separate chapter but will be integrated throughout the study.

The historical exposition of the law will show that salvage was always directed at the safeguarding of property at sea, although legal development was often triggered by

changes in underlying socio-political and economic values,. However, an illustration of the flexibility of the law of salvage in keeping pace with technological, political, moral, and policy developments, will also serve as a potential counterpoint to the primary hypothesis of this study. From a legal technical perspective, the historical analysis of English salvage law will aid the understanding of South African legislation relevant to the law of salvage.

Regarding the comparative legal analysis, it must be noted that a constitutional imperative exists in South African law for the utilization of international law.[25] Moreover, the origins of the South African body of maritime law and the legislative framework of South African salvage law and admiralty practice, in general, demands a comparative study for a meaningful assessment of, and suggestions regarding the future development of salvage law. Reference will mainly be made to the English legal system, which is relevant for several reasons. English law is the common-law source of South African admiralty law. Where the South African Wreck and Salvage Act is silent, a South African Admiralty Court will apply English law as at 1 November 1983.[26] A comparison of English law and its development is, therefore, necessary to gain the necessary insights. In this regard, English legislation, court decisions and commentators on the law will be carefully examined.

Structure of the study

This study is divided into eight chapters. Chapter I provides a brief but general overview of values as developmental triggers for law and is premised on the link between growing environmental protection concerns and developments in the law. This chapter is primarily intended to explain the value driven aspect of the development of salvage law in relation to environmental protection by means of a general discussion of the interrelationship of values and law. This not only provides background for a better understanding of the link between environmental values and developments in salvage law but also, in the context of the regulatory aspect of law, insight into the tension between policy-driven demands for change and limitations in the law of salvage.

[25] See ss 231-233 of The Constitution of the Republic of South Africa (Act 108 of 1996).
[26] See section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983.

Chapter II focusses on the historical development of salvage law. While it serves to illustrate the impact of values, social norms and policy on the law of salvage it also demonstrates that, from its earliest incarnations, salvage was always directed at the safeguarding of property at sea. This chapter also explains the reception of English Admiralty and salvage law into South Africa.

Chapter III explores the nature and legal theoretical underpinnings of salvage law. As such, an attempt is made to distil the essential tenets of salvage law. This should shed light on the extent to which salvage law could provide a legal basis for remunerating salvors for their environmental services. The chapter also explores the extent to which certain South African common law mechanisms such as *negotiorum gestio* and unjustified enrichment can potentially function as the basis for developing salvage law, environmental services performed in the context of salvage operations and the remuneration of salvors for such services.

Chapter IV assesses salvage specific legislative responses to environmental protection demands and assess the way these instruments address the question of salvors' remuneration for environmental services and other provisions aimed at environmental protection outcomes. Specific attention is paid to the 1989 Salvage Convention and the South African Wreck and Salvage Act, the former being a schedule to the latter. The chapter highlights the difficulties presented by attempts to promote the public interest in environmental protection through salvage instruments, especially in relation to remuneration.

The remuneration of salvors is approached from the narrow perspective of the legal, commercial and property interests of salvors and the owners of salved property, thus maintaining the traditional property bias of salvage. Only the shipowner pays for environmental services although the salvors' actions may be in the interest and at the behest of parties outside the private salvor and salvee relationship. This does not allow for an equitable spread of costs amongst shipowners, cargo owners and the coastal states whose very economies depend on the carrying of cargo. Moreover, the manner in which these instruments provide for the remuneration of salvors contradicts a central tenet of salvage that the recipients of benefits (environmental services within salvage

operations) must pay for such benefits. As such, this chapter serves to demonstrate the extent to which environmentally relevant provisions as well as the compensation of salvors find a very uncomfortable home in the current law of salvage, which has not moved away from its traditional property bias.

Chapter V examines The Lloyd's Open Form Salvage Agreement and SCOPIC focussing on those provisions relating to the environment. This chapter also lays the basis for the later assertion that a direct contractual relationship between salvor and coastal state might provide the better alternative for the promotion of the public's interest in the environment and the remuneration of salvors for environmental services.

Chapter VI investigates the link between salvage law and general environmental law given that both these areas have been influenced by environmental values. This chapter demonstrates the extent to which environmentally relevant norms contained in the law of salvage could potentially be categorised as environmental law. Essentially, this chapter demonstrates the link between the law of salvage and a wider framework of environmental laws. This strengthens the idea that the remuneration of salvors could be addressed outside of salvage.

Chapter VII provides a more practical overview of the placement of salvage operations within coastal state measures directed at the prevention of pollution from ships. The chapter is not an attempt at a comprehensive overview of the coastal state measures. Instead, it serves to highlight the extent to which salvors and salvage services find recognition and are integrated into these measures. This provides support for the idea advanced that developments in the law of salvage in relation to the environment must be mindful of the placement of salvage operations in a wider network of environmental law and environmental protection measures.

The chapter also investigates salvors' claims under instruments devised outside of salvage law. It highlights a problem of two systems of law, both informed by an environmental purpose, seemingly at odds at a legal theoretical level although connected at a practical level. In this regard, the very nature of salvage appears to complicate the possibility for salvors to claim under these instruments. The possibility of

claims outside of salvage also suggests an unnecessary degree of fragmentation in dealing with the issue of salvors' remuneration and environmental protection.

Chapter VIII contains recommendations for the appropriate development of the South African law of salvage and the remuneration of salvors' environmental services. The suggested changes will allow for a better synergy between salvage law and instruments outside of the law of salvage informed by the same environmental protection concerns. Moreover, it will avoid the real possibility of introducing uncertainty into an established system of law, thereby impacting on the sought outcome of order; a key aim of law.

Contribution to knowledge

This thesis provides the first comprehensive investigation and critique of the credentials of the South African law of salvage to effectively promote the public concern with environmental protection in the context of shipping incidents. It argues that the law of salvage cannot be taken any further to provide remuneration for salvors' environmental services lest we introduce significant uncertainty into an established area of law. However, acknowledging the limitations of salvage law will allow us to effectively integrate salvage into an environmental protection framework that consists of public and private instruments. This integration will be achieved via the creation of a direct contractual relationship between salvors and the Republic of South Africa. This view represents a novel approach to the question of salvors' remuneration for environmental services. It contributes to existing knowledge by providing an alternative view in the discourse pertaining to the 'greening of salvage law' and new insights into salvage within a broader environmental protection network.

Chapter I Environmental Values, Norms and Law

1.1 Introduction

In commenting on the justification for environmental protection, Gillespie[1] identifies two approaches, namely, the anthropocentric and the non-anthropocentric justifications for the protection of the environment.[2] The first justifies environmental protection on the basis of its instrumental value for humans, while the latter is based on the intrinsic value of nature. Gillespie also notes that the first of these justifications forms the predominant basis of international environmental law and policy.[3] Central to both ideas however, is the notion of environmental protection as a function of the value we attach to the environment.

The law of salvage, as noted, has similarly been influenced by environmental protection concerns and in relation to the South African Wreck and Salvage Act, its single draftsman noted as follows:

> The demand of the Senate for proactive legislation to encourage salvage services and thereby to prevent, control and reduce pollution was, in effect, the preliminary legislative *imprimatur* with regard to the drafting of the Wreck and Salvage Bill to serve the public policy of South Africa.[4]

The statement acknowledges the need for salvage services as a means of protecting the environment. As such, an obvious purpose of the Act is the prevention, control and reduction of pollution through the encouragement of salvage services. Nevertheless, there is no indication of the reasoning behind this suggested need for protection other than the reference to public policy. As such, it is not immediately apparent which one of the two approaches identified by Gillespies,[5] underpins the South African Wreck and Salvage Act. Nevertheless, both approaches refer to the value attached to the

---

[1] Gillespie A *International Environmental Law Policy and Ethics* (1997, OUP New York).
[2] ibid 1.
[3] ibid 2. Also see Birnie Boyle and Redgwell *International Law & the Environment* (3rd edn, OUP New York, 2009). The authors note that "nature, ecosystems, natural resources, wildlife, and so on, are … of concern to international lawmakers primarily for their value to humanity. This need not be limited to economic value… but can include aesthetic, amenity or cultural value, or be motivated by religious or moral concerns. At 7.
[4] Staniland "Shipping" in Joubert, W.A. and Faris, J. (eds.), *LAWSA Vol. 25(2) reissue 1* (Butterworths 2006) par 36.
[5] Gillespie (n 1).

environment and its protection albeit from different perspectives and the statement clearly identifies this as informing the Act. The notion of environmental values informing the Act suggests a more than tenuous link between values and law and the extent to which the former triggers the latter.

This chapter will provide a brief examination of the relationship between values and the law. Our concern, ultimately, is that of environmental protection values but this discussion will be more general and directed at an understanding of legal development with reference to such values. While the discussion will be general, it is done with the aim of ultimately providing context and an explanation for efforts to develop salvage law in line with environmental outcomes.

1.2 Values and law distinguished

One feature that appears to straddle the classic natural law and positive law divide and which has been described as a 'critical aspect' is the normative character of law.[6] Freeman notes that human laws are 'rules or norms, which prescribe a course of conduct, and indicate what should happen in default'.[7] On the basis of this central feature of law, one may recast the investigation of the nature of values and law as that of values and norms.

Different entries in standard dictionaries on the English language for the terms values and norms suggest that they are distinct concepts. While dictionary meanings do not necessarily capture the entirety of a concept, it would nevertheless be a good idea to look at some of the dictionary definitions provided for the words 'value' and 'norm'. The relevant entry for 'value' in the Oxford English Dictionary reads as follows:

> The relative status of a thing, or the estimate in which it is held, according to its real or supposed worth, usefulness, or importance. In Philos. and Social Sciences, regarded esp. in relation to an individual or group; gen. in pl., the principles or standards of a

[6] Freeman MDA *Lloyd's Introduction to Jurisprudence* (8th edn, Thomson Reuters, London, 2008) 11.
[7] ibid. The centrality of norms appears to be the common denominator in divergent accounts of the nature of law. See also Hart HLA *The Concept of Law* (2nd edn, Clarendon Press, 1997). Hart alludes to this notion by stating that 'the most prominent general feature of the law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory' 6. See further Finnis J *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) at 23-24; Fuller L *The Morality of Law* (Yale University Press, New Haven, London, 1964); Kelsen H 'What is the Pure Theory of Law' (*1959-1960) 24 Tul. L. Rev 270.*

> person or society, the personal or societal judgement of what is valuable and important in life

The Oxford English Dictionary also contains separate and distinctly different entries for the word norm. In the first entry, the word norm is defined as 'that which is a model or a pattern; a type, a standard'. The second entry defines norm as 'A standard or pattern of social behaviour that is accepted in or expected of a group.'

From these definitions, it is apparent that the dictionary meanings of the words 'value' and 'norm' are distinct. The definition of value denotes a particular appreciation of, or the importance of something for either an individual or a society. The first entry for 'norm' appears to be close to that of 'value' in the sense that one would be able to identify commonly held values as a standard or pattern. However, it is different from values in the sense that it denotes actual behaviour rather than the underlying reasons (values) for behaviour.

The second entry for norms suggests a framework of prescriptions that may, initially, appear to be similar to values. However, there are differences. While the entry for values denotes a particular appreciation of, or an internalised notion of importance, the entry for norm suggests a framework of prescriptions. Moreover, the entry for norm presupposes a collective, namely, a society from which the prescriptions for the conduct of its members emanate.

However, as mentioned, dictionary meanings do not always capture the essence or general ways in which terms are conceptualised. Therefore, it would be helpful to make some reference to scholarly use of the concepts. In this regard, the views of Morris are instructive.[8] Morris appreciates the difference between norms and values and notes that

> Values are individual or commonly shared conceptions of the desirable, i.e. what I and/or others feel we justifiably want-what it is felt proper to want.

From the understanding offered by Morris, it is apparent that values involve preferences. In this manner, values are distinct from norms that involve prescriptions

[8] Morris RT 'A Typology of Norms' (1956) *American Sociological Review* Vol. 21 No 5, 610.

instead of individual wants or desires. Nevertheless, our preferences may correspond with a particular normative prescript while our following of a normative prescript does not necessarily imply a preference for the action. For example, salvors may, in keeping with duties imposed by law, do their best to minimise damage to the environment when performing salvage operations without it necessarily being a preference. Thus, the value attached to the minimising of environmental damage or the preference for it may be an explanation for the actions of some salvors while for others it might be a matter of normative obligations.

While norms and values are distinct, they are evidently also closely linked. This becomes clearer when looking at Morris' understanding of values as 'commonly shared conceptions of the desirable', and norms as 'generally accepted, sanctioned prescriptions… or prohibitions… i.e. what others ought to do'.[9] The link is in the likelihood of 'commonly shared conceptions of the desirable' (values) developing into a recognisable body of prescriptive norms. This process of commonly held values triggering the formation of prescriptive norms has been described as 'norm activation'.[10] Thus, the commonly held values within a society could become a system of norms (law) prescribing behaviour. This process can be observed in the development of salvage law and the movement from values attached to environment protection in the context of salvage operations to attempts to develop salvage law to further such values.

1.3 Informal and formal norms (law)

While the notion of values as a set of preferences appears simple, norms appear to be more complex. This complexity relates to the important role norms appear to play in the functioning of society, informally as well as formally. Basu provides an analysis of social norms and law that essentially incorporates the second Oxford English Dictionary entry for norms namely, 'that which is a model or a pattern; a type, a standard'.[11] He adopts a descriptive approach to norms, which could be explained by his observation about the

---

[9] ibid.

[10] See Doremus H 'Shaping the Future: The Dialectic of Law and Environmental Values' *(2003 – 2004)* 27 *Environs Envtl L. 7 Pol'y J. 233.*

[11] Basu K 'Social Norms and the Law' in Newman P (ed) *The New Palgrave Dictionary of Economics and Law* (Macmillan 1997).

difficulties in defining norms.[12] In this regard he notes that 'social norms are easier to recognize than to define'.[13] He accepts that authors may look at norms differently. Specific reference is made to Axelrod's[14] definition:

> *A norm exists in a given setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.*

According to Basu, the above definition is a 'useful working definition' but it presupposes a pre-existing understanding of the concept of a norm.[15] However, the same criticism can be levelled at Basu's descriptive account of norms. Any classification of norms presupposes an *a priori* idea of what norms are. Therefore, a description of norms implies an act of recognition premised on a particular understanding of the concept.

Axelrod's understanding of social norms has an implicit assumption of social regulation.[16] This idea of social regulation (here one may also use the terms social order or control) appears to represent a shared basic understanding of norms amongst academic scholars.[17] Of course, the notion of social regulation is also a feature of the law itself.[18] Law is often described as being normative in nature in the sense that it prescribes behaviour and effect social regulation or control.[19] The difference between formal law and social norms essentially comes down to a difference in enforcement. The objective institutionalised enforcement of formal law is typically the attribute that

---

[12] This descriptive approach to social norms appears to be commonly adopted in non-legal academic writings. In this regard see Morris RT A Typology of Norms *American Sociological Review,* (1956) *Vol. 21 No 5 610; The author provides a brief overview of some of the academic writers that have attempted to classify norms.*

[13] The author notes that "social norms are easier to recognize than to define". At 1.

[14] Axelrod R 'An Evolutionary Approach to Norms' *American Political Science Review* (1986) Vol 80 No 4, 1095 1097.

[15] Basu K (n 11) 2.

[16] Axelrod R *American Political Science Review* (n 14) 1095. The idea of social control is also the point at which norms, often triggered by prevailing values or preferences, can be distinguished from values.

[17] Basu K, (n 11), similarly, alludes to the idea of social control as a salient characteristic of norms common to the different types of norms he identifies. At 5. See also, Cooter, Law from Order: Economic Development and the Jurisprudence of Social Norms *the Selected Works of Robert Cooter* 1997. Available at <http://works.bepress.com/robert_cooter/61> accessed 13 October2015, Cooter Three Effects of Social Norms on Law: Expression, Deterrence and Internalization (*2007) Or. L. Rev. 1, 9* and Ellickson R Law and Economics Discover Social Norms (*1998) 27 J. Legal Stud. 537.*

[18] See discussion below, 18ff.

[19] Kelsen in an instructive article refers to law as a norm, a set of norms or a normative order. See Kelsen H, 'What is the Pure Theory of Law' (1959-1960) *24 Tul. L. Rev 270.*

sets it apart from informal social norms.[20] Importantly also, as evidenced by the statement of the drafter of the South African WSA, these formal laws are informed by commonly shared values that triggered their activation. Thus, we have a set of formal norms such as the law of salvage or aspects thereof, which have been triggered by certain values or the preference for environmental protection, regulating or controlling certain activities (salvage operations and environmental protection incidental to such operations). Here, one may think of a continuum where values, informal social norms and formal, legal norms interact.[21]

The element of social control as a characteristic of law and informal social norms shows that, except for their formal enforceability, there is not much that separates legal from non-legal or social norms.[22] The idea that norms and law share the purpose of social control or regulation also has implications for understanding values as a law informing factor. The idea of social regulation, as a common feature of formal law and informal social norms, logically implies that shared preferences or values could trigger the law in the same way as informal social norms. The idea of norm activation is, therefore, not only a development from commonly held values to informal social norms but also to formal law. In this manner, aside from regulating society, both the law and informal social norms provide information about the preferences of a society. In the context of salvage, aside from the safeguarding of property at sea, this would include the value attached to environmental protection.

1.4 The values-social norms-law continuum.

The idea of a continuum of interacting values and norms is not alien to existing academic literature.[23] While the idea of a continuum implies movement (the process of 'norm activation'), the mechanics and extent of movement on this continuum both as

[20] See Cooter (n 17) and also Basu (n 11).
[21] In this regard Basu, (n 11), notes that 'some norms shade into laws and the boundary between the two are not always sharp'. At 8. See also Cooter (n 17) *2.*
[22] In this regard, Basu (n 11), offers the following insight: 'Instead of thinking of the law and social norms as alternative systems, or worse, as adversaries, it is possible to treat the legal system as part of the general theory of norms.' At 13.
[23] See Basu, (n 11). The author's description of the effects of social norms on law suggests a continuum in that informal social norms could be bolstered by the formalisation thereof. In this sense the law will ensure the kind of behaviour prescribed by a social norm. In essence, a social norm might become a legal norm.

between values and norms and, especially, informal social norms and law remain to be examined. Movement on this continuum could possibly be linked to two issues. Firstly, the importance of a social norm and policy formulation in a society might see it elevated to the formal status of law. Secondly, the answer to the question about the nature of law could also have an impact on movement on the continuum.[24]

1.4.1 The importance of a norm and policy formulation.

The importance of certain values or informal norms in a society could likely be the result of it commonly being observed by a majority of the members of a particular society. Such values or norms might be observed so generally that these are formalised. This movement will not necessarily be a strict progression from value to social norm to formalisation. In view of the commonality of purpose between informal norms and law, a direct development from value (preference) to formal law is possible. Thus, instead of an informal social norm being triggered by certain commonly held values in a society, one could see a direct formalisation of values.

Such direct movement on the continuum between values and formal law could take place where there is a perceived immediate need for legislation. The South African Wreck and Salvage Act[25] provides a good example of this given that it appears to have been a direct result of the *Apollo Sea,*[26] *disaster off the coast of South Africa.* The perceived need was such, that there was no obvious gradual development into social norms and eventually a formalisation thereof. This is not to say that there were no such norms, but merely that there were no obvious generally observed social prescriptions. Viewed in this manner, legislative activity has been triggered, primarily, by the perceived immediate need to enact specific preferences rather than informal social norms.

[24] A natural law adherent could for example argue that a certain accepted moral value should be reflected in the law, or should be law. The idea that law ought to conform to a higher moral order (which is one view on the nature of law and in essence its relationship with moral norms) might therefore, trigger movement on the continuum resulting in a certain moralistic perception, perhaps reflected in a social norm, acquiring formal legal status.

[25] Act 94 of 1996.

[26] The Apollo Sea was a Panamanian registered bulk ore carrier that sank off the coast of South Africa, in June 1994. Oil escaping from the wreck resulted in the contamination of endangered Jackass penguin communities, their feeding ranges and Cape Town's Atlantic coast (including prime tourist beaches) from Granger Bay to Sandy bay. Also, see below, n 33 and text thereto and discussion on p 156.

Social norm activation because of majority held views or preferences may also have political implications in that legislatures might be influenced by such views or preferences. However, while much can be said about certain political, social and ideological complexities that might militate against the formalisation of majority held views,[27] it is ultimately the idea of social regulation or order that will or should determine the issue. Here regulation or order is used in the sense of an area of activity, commercial or otherwise, being subjected to laws such as salvage operations and the activities of salvors and others being subject to salvage law. Thus, the legislature may pursue the formalisation of majority preferences to serve the aim of regulation and order. Of course, in any modern constitutional democracy, the formalisation of social norms or a direct formalisation of values held by the majority or those responsible for legislative drafting, may be trumped by prior existing constitutional norms, as well as principles of non-discrimination and equality.[28] Even where a formalisation of identifiable values or social norms does not occur, it might be the result of the concern with social regulation and the ordering of a society. Therefore, both the formalisation of social norms and values or the decision not to formalise, even where observed by a majority, can be explained with reference to the idea of social regulation and order.

Of course, legal enactment is rarely based on a counting of heads. While majority views, as mentioned, could potentially influence political will, it is more likely the formulation of policy objectives based upon specific preferences that will drive legislative efforts. This is not to say that governmental policy formulation may not be positively influenced by majority held views. Nevertheless, it is often the positive values attached to achieving specific outcomes that will lead to policy formulation. Policy formulation, in turn, positively influences the formulation of laws. While policy formulation is essentially a political function, it involves a weighing of values, and the adoption of a particular normative framework for regulation and order.

---

[27] A basic feature of modern liberal democratic states is the concern for minority rights and guarding against a possible tyranny by the majority.

[28] A good example of this is the issue of the death penalty in South Africa. From media reports it might at times appear as if a majority of South Africans would support the death penalty. However, the constitutional right to life has been authoritatively determined to be inviolable. In this way, one could assume that the right to life is a higher norm which transcends the normative relativism that is typical of modern morally pluralistic constitutional democracies.

The Constitution of the Republic of South Africa[29] (the Constitution) provides for the right of 'everyone... to an environment that is not harmful to their health or well-being; and... to have the environment protected ... through reasonable legislative and other measures'.[30] In keeping with this constitutional imperative, the South African Department of Transport's White Paper on National Maritime Transport Policy[31] identifies protection of the marine environment as a policy objective. One would therefore, expect to see this policy objective being pursued via the necessary legislative enactments. This dynamic would explain developments within the law of salvage that have been described as the 'greening of salvage law'[32] and in relation to the South African Wreck and Salvage Act's serving of public policy relating to environmental protection.

Of course, as mentioned, the Apollo *Sea*[33] incident had a considerable role to play in the drafting of the South African Wreck and Salvage Act and the formalisation of values. While it would be difficult to point to any definite informal social norms, the drafting of the act was, according to its draftsman, in furtherance of policy objectives and the values attached to the prevention and control of pollution.[34] In this regard, the draftsman would have had a value framework and specific outcomes, pursuant to policy objectives, as a guide to drafting the provisions of the Act.

While informal social norms and values may influence governmental policy and ultimately law, this is not necessarily a one-way relationship. Movement on the norm continuum is not just a development from values to informal social norm to law but also from law to social norm or even values. In this regard, Cooter[35] refers to the positive effect of the formalisation of social norms against smoking in public places on

---

[29] Act 108 of 1996.
[30] S24(a)-(b).
[31] The Department of Transport, White Paper on National Maritime Transport, September 2006 30.
[32] See discussion below, ch II, p65, n 166.
[33] See above n 25. Also see Staniland "Shipping" (n 4) par 36. The author also points out other significant disasters where ships caused pollution in the ten years preceding the enactment of the WSA. The ships mentioned are, *Pacifikos*, *Katine P*, *Mimosa*, *Atlas Pride*, *A.B.T. Rosher*, *Alborz*, *Stellabello*, *Castillo de Bellver*, *Venoil* and *Venpet*. In 1991 to 1992 ten ships were assisted, four of which sank: *Starfish*, *Manilla Transport*, *Vosso* and the well-known cruise liner, *Oceanos*.
[34] See above n 4 and text thereto.
[35] Cooter (n 17) *4.*

compliance with the norm. The social norm is bolstered in that more people are willing to confront those acting contrary to the law.

Scott[36] similarly, alludes to the positive effect of law on social norms. The law influences the behaviour of its citizens, through its encouragement of indirect social enforcement techniques like public ridicule and shaming.[37] Therefore, social norms may inform law while the law, in turn, bolsters social norms and values. The SA Wreck and Salvage Act could potentially have this effect to the extent that it encourages salvors, although it would more likely be the increased monetary reward that will encourage salvors.

Plater[38] comments on the above dynamics between law and social norms in the context of environmental law. He refers to 'a paradigm shift in how we perceive the world'.[39] He mentions the extent to which, particularly, the value of 'long-term societal survival' has been incorporated into the operative norms and doctrinal provisions of environmental law.[40] In this way, environmental law embodies or reflects prevailing values and social norms.[41] Although Plater refers to 'values', and how these are reflected by environmental law,[42] his views are also instructive on the relationship between law and informal social norms. The author does not attempt to distinguish between norms and values, instead using values in a manner that mirrors the understanding of norms adopted for this study. In this manner, in shedding light on the

[36] Scott R, The Limits of Behavioural Theories of Law and Social Norms (2000) 86 VA. L. Rev. 1603. See also Axelrod R (n 14) 1106. Axelrod, like Cooter, also refers to the effect of law on social norms relating to smoking. In this regard he notes that 'norms often precede laws but are then supported, maintained and extended by laws'. At 1106.

[37] Scott R (n 36) 1603.

[38] Plater Z Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution (1995-1996) 23 B.C. Envtl. Aff. L. Rev. 733.

[39] ibid 734.

[40] ibid 737.

[41] The author importantly, alludes to the importance of politics in the dynamics between law and social norms. In this regard he states: 'Scratch an environmental law argument and you are likely to find an underlying question of democracy – how individuals, corporations, and communities are to balance their drives and needs, each day and over future years and generations.' 738.

[42] ibid 767.

impact of law on norms, and mirroring the argument offered by Scott,[43] Plater mentions how 'market-players … are forced by environmental law to internalize-public values'.[44]

The abovementioned views on the dynamics between law and norms also resonate with accounts of the law as having an expressive function. In this regard, Sunstein is of the view that the law has expressive content because it makes statements about the underlying non-legal normative framework of a society.[45] This enables the law to bolster efforts to change norms through 'legal expressions about appropriate evaluative attitudes'.[46] Sunstein alludes to the corrective function of law in the absence of appropriate social norms.[47] In this regard, the views of Sunstein, that the law steps in where social norms fail, mirror that of Cooter.[48] The expressive content of the law is basically regarded as a component in the development of, and the 'attempt to alter norms'.[49] A conscious attempt to develop or alter norms is suggestive of an outcomes-based approach to the use of norms. Therefore, the idea of social regulation also appears to be implicit in Sunstein's account of the interaction between norms and law.

An interesting possibility that could be reconciled with the expressive account of law is the idea of law providing information about the underlying informal social control system of norms and also values.[50] In this regard, Scott alludes to the value and cost of information in any modern society.[51] The law, therefore, has the important function of providing valuable 'norm related information'.[52] In essence, the author regards social norms as having the characteristic of a 'public good', in respect of which information, as provided by law, is of value.[53] Consistent with the idea of law having an expressive function, Scott adds an economic dimension or purpose to this expression of norms and

[43] See discussion above, n 36, and text thereto.
[44] Plater Z (n 38) 776.
[45] Sunstein C 'On the Expressive Function of Law' (1995-1996)144 *U. Pa. L. Rev* 2021. Also see Hedman S 'Expressive Functions of Criminal Sanctions in Environmental Law' (1990-1991) 59 *Geo. Wash. L. Rev.* 889.
[46] ibid. 2025.
[47] Sunstein C (n 45) 2031.
[48] See discussion above n 35 and text thereto.
[49] Sunstein (n 45) 2028.
[50] See Scott R (n 36) 1601.
[51] ibid. 1618.
[52] ibid.
[53] ibid.

values. Besides, the fortification and altering of norms and values via the expressive function of law, one also has economic utility because of the law providing us with norm related information.

Considering the above views, an important observation can be made about the formulation of environmental policy in South Africa. The formulation of governmental policy relating to maritime transport and environmental protection was, likely, the direct result of government acting in accordance with an existing constitutional imperative or a constitutional norm. One could also argue that the constitution was similarly influenced by prevalent values and social norms, but there is ultimately no point to engaging in a chicken or egg argument. Whichever was first, there can be no doubt that, in regulating society or aspects thereof, formal legal norms and informal social norms and values are inextricably linked.

Moreover, the South African constitution and environmental laws provide valuable norm related information, while also being expressive of a growing public concern with environmental protection. In this regard, the substantial media coverage and social response to relatively minor maritime disasters off the South African coast could be indicative of majority views on the value of environmental protection. Therefore, it stands to reason that the enactment of environmental legislation and development in areas of law where environmental concerns are pertinent (salvage) is a natural consequence of the values attached to environmental protection and governmental policy considerations.

Consistent with the understanding that laws and social norms are complementary; the new legislation also reflect (express) underlying values and norms while bolstering the enforcement of these underlying social norms. In expressing these underlying values and norms, the law, including the law of salvage, also provides valuable norm related information and the value attached to environmental protection.

1.4.2 The function of law and the interaction between law, informal norms and values.

Discussions on the connection between law and values often arise in discourses on the nature of law, hence the point made earlier of movement on the continuum between

values, social norms and law being a function of the nature of law. While it is beyond the course and scope of this study to provide a detailed analysis of the various theories on the nature of law, it is worthwhile to reach a basic understanding of law that explains this apparent link. This will also facilitate an understanding of references made to a conflict between an environmental value and policy driven demand for change in the law of salvage and the legal theoretical limitations of salvage itself to facilitate such demands.

Allot,[54] in his commentary on the nature of law, notes that 'no one has any clear or settled idea about the true nature and function of law in general, least of all lawyers'.[55] The author, without expressly noting it, appears mindful of the numerous accounts of law that purport to distil its nature. Allot resorts to a descriptive account of the nature of law in which he extracts what he terms 'five distinct explanatory horizons of the law-phenomenon.'[56] He regards the law as a system that integrates 'all five levels'[57] thus spanning the extent of existing discourse and the varied expositions of the nature of law.

Allot also alludes to the function of the law in a liberal democratic state. In this regard he notes that law is a 'reconciliation of horizontal and vertical law-making, the exceptionally efficient system… for resolving conflicting particular interests within the common interest of society'.[58] The author accepts the problem of the complexity of law and, in his opinion, the problem of theorists talking at 'different levels of explanation in different realms of discourse'.[59] This situation, that can be described as a problem of conceptual pluralism, prompts the author to adopt, what can be called, a functional approach to law. More in particular, he adopts his functional approach to law with

[54] Allot P 'The True Function of Law in the International Community' (1997-1998) 5 *Ind. J. Global Legal Stud.* 391.
[55] ibid 395-396.
[56] ibid 396. In this regard the author identifies the following five horizons: (1) 'law as a self-sufficient, self-explaining system' with Thomas Hobbes, Austin and Kelsen as its proponents, (2) "law as a value-processing system with proponents Fuller, Rawls, Nozick and Dworkin, (3) "Law and society are conterminous with proponents like Karl Marx, and Max Weber, (4) "Law [as] the actualizing of reason with proponents like Aquinas, Grotius and Wolff, and (5) "law is a participation in universal order".
[57] ibid 398.
[58] ibid 406-407. See also Cooter, (n 17).
[59] ibid 398.

reference to the role of law in a liberal democratic dispensation and the promotion of social order.

A similar functional approach is adopted by Kheng-Boon Tan[60] in an instructive article on the role of law in Singapore. The author alludes to the fact of law being used as a tool to further the national agenda in Singapore. In this regard, he notes that one can

> Discern a norm of instrumentality in the treatment of law *vis a vis* the government's development agenda and a dichotomy in the approach towards law in the commercial and non-commercial spheres.[61]

From Kheng-Boon Tan's account of the function of law, Singapore law is different in the commercial and non-commercial spheres because of the different goals and different policies pursued in these different spheres. Thus, law is used to further policy as set by government. Essentially, what the law ought to be is a function of outcomes pursued rather than any account of its nature. So, the law is purposefully structured to achieve the goals set by government in the form of policy. Applied to salvage, the law should therefore be structured to achieve specific outcomes. If this outcome or one of the outcomes is the protection of the environment and the remuneration of salvors, then the law should be structured to achieve this very purpose.

A functional understanding of the law may even provide one with a tool for understanding the positivist-natural law discourse on the nature of law. The question of what the law ought to be becomes less problematic as one would not be dealing with the dictates of morality. In this respect the views of Hart are particularly noteworthy.[62] Hart's contention that 'legal systems had been powerfully influenced by moral opinion and, conversely, that moral standards had been profoundly influenced by law',[63] is consistent with the understanding of norms and values adopted for this study. However,

[60] Kheng-Boon Tan E 'Law and Values in Governance: The Singapore Way' (2000) 30 Hong Kong L.J. 91.
[61] ibid 91.
[62] Hart HLA 'Positivism and the Separation of Law and Morals' 71 *Harv. L. Rev.* 1957 593.
[63] 598.

despite his understanding of the possible confluence of law and morality, Hart rejects the idea of the validity of law being dependent on the moral desirability thereof.[64]

Hart, in looking at the way judges interpret laws and arrive at decisions, accepts that the question of what the law ought to be arises in 'a penumbra of debatable cases'.[65] In these cases, the question, of what the law ought to be, must be answered with reference to the social aims of the particular society.[66] He, nevertheless, acknowledges the possibility of conflicting social aims that could lead to different, but still rational decisions. Answering the question - what the law ought to be - with reference to the aims of a particular society would render the question morally neutral. There would be no need to insist on the separation of the law from the question what the law ought to be.[67] A functional understanding of the law demands that the question of what law ought to be is addressed in the light of the social aims, policies and ultimately the attainment of social order for the particular society. This notion, similarly, ought to inform suggestions regarding the future development of the law of salvage.

A functional approach is also apparent from the views of Sunstein and Hedman on the expressive function of the law.[68] Sunstein, in his comment on the nature and function of law, highlights its purpose of achieving a specific outcome in the form of norm altering.[69] In this regard, the author appears to discount any absolute notion of the essence of law. He distinguishes the expressive function of an action (law) from the intrinsic right or wrong thereof.[70] The functional approach ties in with the author's view of the law being used as a 'corrective' and as an 'effort to produce adequate social norms'.[71] Viewed in this manner the question of what the law ought to be, similar to the views offered by Hart, is not a moral question but one relative to the outcomes desired.

---

[64] 599. In this regard the author expressly agrees with both Bentham 'A Fragment on Government', (1859) in 1 Works 221 Bowring Ed. and Austin 'The Province of Jurisprudence Determined' in Library of Ideas ed. 1954.
[65] Hart HLA (n 62) 607.
[66] ibid. 611.
[67] In this regard, Hart ascribes the idea of law being valid because of its moral content as a misunderstanding of the ought question. He notes that 'it is easy to slide from that [what the law ought to be for the purpose of furthering social aims] into saying that it must be a moral judgment about what law ought to be'. 608.
[68] See Sunstein C (n 45) and Hedman S (n 45).
[69] Via its expressive function, the norm altering dimension of law should include the altering or instilling of values.
[70] Sunstein (n 45).
[71] ibid. 2031.

Thus, the function of law is relative to its bolstering of existing social norms through its expression thereof and the altering of norms and values.

The adoption of a functional approach ties in conveniently with the understanding of the interaction between values and norms adopted for this study. Moreover, adopting this approach may suggest that the law of salvage necessarily needs to reflect environmental outcomes perhaps through the remuneration of salvors' environmental services. However, it is here that one should be mindful of the notion of regulation and order. While a functional approach to the law would certainly explain demands relating to the remuneration of salvors, any developments should never be at the expense of proper regulation and order within an area of the law through the introduction of uncertainty. In this regard, it is submitted that the pursuit of order, even within a distinct area of law applicable in a mere sub-set of society, demands, at least an orderly and certain system of law. In relation to the analysis of salvage law in chapters to follow, more light will be shed on this potential conflict between outcomes sought in law and development of the law to facilitate such outcomes.

The existence of the South African WSA can be explained in terms of its functionality. In this regard, mention has already been made of the views of Professor Staniland, that the legislation was necessary to 'encourage salvage services … thereby to prevent, control and reduce pollution'.[72] In this regard, it has been noted that the drafting of the WSA serves 'the public policy of South Africa'.[73] A concern with the pollution of the marine and coastal environment informed the drafting of the WSA. The legislation expresses underlying values pertaining to environmental protection while furthering specific policy objectives.

1.5 Conclusions

Any understanding or analysis of developments in the law of salvage pursuant to environmental protection aims demands an understanding of the concepts of, and interaction between values, norms and law. It has been demonstrated that informal

[72] See discussion above 11.

[73] ibid.

social norms and formal norms (law) form an interdependent network of rules aimed at the ordering and regulation of society. The only difference between informal and formal norms would be the institutionalised enforcement of the latter. In this way, any reference to norms ought to be mindful of the dichotomy that is the informal and formal aspects thereof.

Law and informal norms are generally underpinned by the prevalent values of a particular society. Where a critical mass of values exist it could lead to, 'norm activation'. In this regard, mention has been made of the development of informal norms from values and the eventual formalisation of the former. However, the activation of informal social norms is not a necessary precursor of law. Perceived, underlying social values could lead to legislative enactment directly, especially where such values inform government policy. In this respect specific mention was made of the South African Wreck and Salvage Act and the views of Professor Staniland,[74] which supports the idea of a direct formalisation of environmental values without any obvious preceding social norms, due to a perceived need identified by the legislature.

To explain the interaction between law and values efficiently, one has to adopt a functional understanding of the former. What the law is or ought to be, must be answered with reference to the specific values, policies and outcomes sought in a particular society. In this manner, the network of interconnected values, social norms and law contribute to the proper functioning of society or sub-sets of society. Thus, both the law and informal social norms, as informed by the prevalent values of society, besides their forming an inextricably linked matrix for social regulation and order, are tools for achieving the goals set for a society or within an area of the law.

The understanding of values, informal norms and law adopted in this study, has definite implications for the analysis of the law of salvage and the extent to which its development ought to be predicated upon environmental values. First, it ought to be clear that the law of salvage has come to be viewed as a mechanism to promote environmental values. Moreover, to the extent that values do lead to norm activation, this phenomenon was probably to be expected. However, this same dynamic is to be

[74] ibid.

observed in other areas of the law. This raises pertinent questions about assumptions that the environmental protection concerns, where salvage services are rendered, need to be addressed in the law of salvage and indeed the very function of salvage law. Therefore, while the environmental value, informal norm, law continuum explains developments in the South African law of salvage, the impact of this on the body of salvage law remains to be examined. Can the law of salvage remain the orderly system needed to ensure order?

In view of the functional understanding of law and acceptance by the draftsman of the Wreck and Salvage Act and the drafters of the Salvage Convention of the supposed need to pursue remuneration for environmental services in the law of salvage, demands for the introduction of environmental awards ought not to be surprising. Nevertheless, the question whether the legal technical framework of the law of salvage can facilitate current environmental policy pressures without sacrificing certainty remains. This is a question that must be answered should one accept, as argued in this chapter, the feature of law that is regulation and the pursuit of order as this should be premised upon an orderly, certain, system of law.

Chapter II A history of Salvage

2.1 Introduction

This chapter will provide an historical analysis of the English law of salvage, which appears to have been influenced by the mediaeval Rolls of Oleron,[1] and its reception into South Africa. This historical overview seeks to demonstrate how the law of salvage, throughout its development, despite different contexts, primarily pertained to the safeguarding of property. Nevertheless, the analysis will also show that, while involving maritime property, salvage related provisions contained in early codes and legislation were often also directed at concerns that fell outside the modern conception of salvage. In this way, this chapter is more than a factual chronicle of the law of salvage in that it demonstrates how the law of salvage often provided a response to specific outcomes sought.

English Admiralty law, including salvage, was originally imported into the provinces of the Cape and Natal that had British Colonial status.[2] The Supreme Courts of the Cape and Natal later became Colonial Courts of Admiralty with the same jurisdiction as that exercised by the English High Court of Admiralty.[3] For this reason, the history of the English law of salvage and the English Admiralty Court is important for an analysis of the South African law of salvage.

In the absence of relevant South African legislation, either English law or Roman-Dutch law may potentially be applicable to a maritime claim in a South African court.[4] The law of salvage is no exception and one would typically, in the absence of statutory guidance, refer to the law as developed through cases.[5] This development of the law has been chequered in that two systems of law have left their indelible marks on the

---

[1] See Sanborn *Origins of the Early English Maritime and Commercial Law* (The Century Co. New York London, 1930) 269.

[2] The old Cape Province was annexed by the British in 1806 and, together with Natal, saw the introduction of British legal tenets, despite initial aims to leave the already existing legal system intact.

[3] See discussion below 56ff.

[4] See discussion of s 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 below 58-60.

[5] This is referred to as the common law of South Africa which is in contradistinction to the common law that is often regarded as the English system of law. It should also be noted that no South African cases have applied the Roman Dutch law to cases of salvage. See also Hare J *Shipping and Admiralty Jurisdiction in South Africa* (2nd edn Juta, 2009).

South African legal landscape, namely the English common law and that of the Province of Holland transplanted to the Cape of Good Hope in 1652.[6] This system, often referred to as Roman-Dutch law, may, in the appropriate circumstances,[7] be applicable to a maritime claim in South Africa.

As was the case with the English common law and the civil law typically applied in Admiralty,[8] a similar battle between the English law and Roman-Dutch law could be observed in the South African context.[9] The South African jurisdictional battle informed the enactment of the Admiralty Jurisdiction Regulation Act (the AJRA)[10] and the wording of s 6 of the Act, which provides as follows:

> **6. Law to be applied and rules of evidence.** — (1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—
>
> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

---

[6] See Fagan E *Roman-Dutch Law in its Historical Context* (1996) in Zimmermann R and Visser D (eds) Souther Cross-Civil Law and Common Law in South Africa (Clarendon Press, 1996) 33-64, at 38-39.

[7] S 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983, provides determines that Roman Dutch Law will be applicable in the case of a cause of action over which a South African court of admiralty would not have had jurisdiction immediately before the commencement of the Act. This would be before 1 November 1983, which is the date of commencement of the Act. See immediately below.

[8] See discussion below 48ff.

[9] See generally, De Vos *Roman-Dutch Law in South Africa at the End of the Century – And Thereafter* in Legal Visions of the 21st Century in Anghie A and Sturgess G (eds) Essays in Honour of Judge Christopher Weeramantry (Kluwer Law International, The Hague, London, Boston, 1998). 73-98 See also below n 11.

[10] Act 105 of 1983.

This section represents a compromise between early pragmatists that accepted the value added by English Admiralty law in South Africa and those that resisted the application of English law in South Africa, the so-called purists.[11] This also explains the curious phrasing of s 6 of the AJRA for determining the law applicable in maritime claims in South Africa. This determination, in the absence of applicable South African legislation, essentially turns on whether (or not) Colonial Courts of Admiralty[12] had jurisdiction over a cause of action at the commencement of the Act. Therefore, the history of English admiralty practice is of importance in relation to maritime claims in South Africa in that historical facts (whether or not the Court of Admiralty exercised jurisdiction over a matter) may impact upon the law applicable to maritime claims in South African courts.[13] An understanding of the historical development of English salvage law, therefore, facilitates an understanding of key South African legislation relevant to salvage, such as the AJRA and the South African Wreck and Salvage Act (the WSA)[14]. While the latter act, currently, regulates the South African law of Salvage, it should be noted that in matters not covered by it the English law of salvage remains potentially relevant up to 1 November 1983, which is the date of commencement of the AJRA.

[11] See generally, Mulligan G '*Bellum Juridicum* (3): Purists, Pollutionists and Pragmatists' (1952) 69 *SALJ* 25. See also Van der Merwe CG, Du Plessis J, De Waal M and Zimmermann R 'The Republic of South Africa' Valentine (ed) Mixed Jurisdictions Worldwide The Third Legal Family (2nd edn, CUP, 2012). The authors point out that, generally, "the 'pollutionists were English and had an English legal education [while]the 'purists' …were Afrikaners who had had an Afrikaans (and perhaps also Dutch) legal education". At 209.

[12] See discussion below 58.

[13] This could be either English law, s 6(1)(a), or Roman-Dutch law in terms of s 6(1)(b) if it is a matter over which the a Colonial Court of Admiralty would not have had jurisdiction. This would explain why in matters pertaining to charterparties , subject to contractual provisions that may provide otherwise, Roman-Dutch law would be the applicable law. See also Hofmeyr G Admiralty Jurisdiction in South Africa (1982) *Acta Juridica* 30. In commenting on the jurisdiction of the South African Colonial Courts of Admiraly, observing that these courts applied admiralty law as applied by the English High Court of Admiralty in 1890, Hofmeyr, at 30, notes notes that 'it is impossible to master or evaluate this law without a knowledge (*sic*) of its sources and historical development'. Despite the fact that the Act extends the period for which the English Law is relevant to the date of commencement of the Act, 1 November 1983, the historical development of English admiralty law remains relevant.

[14] Act 94 of 1996.

2.2 Early Maritime law and Codes

The modern legal understanding of salvage has undergone a number of significant changes.[15] One important change was the shift from awarding those who recovered property that had been lost, to rewarding those whose efforts prevented the loss of property at sea.[16] This change occurred before the 19th Century, which has been referred to as the 'classical' period of salvage law.[17] A second change, which occurred at the beginning of the 19th Century, was that the owner of a vessel could also claim a salvage award.[18] Prior to this, the lack of personal involvement of the owner of a salving ship would have precluded such an owner from claiming a salvage award.[19] A third important change was the emergence and the encouragement of professional salvors, which took place at the end of the 19th century.[20] In this regard, in *The Glengyle,*[21] it was stated that

> The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers (sic) and appliances at great expense, and have no remuneration to look forward to except that which may be earned by occasional salvage services.[22]

The performance of salvage under contract was another important change. It has been suggested that this development was incidental to the establishment of specialist providers of professional salvage services.[23] The most recent significant change was the introduction of a claim for 'special compensation' where salvage services were rendered in respect of a vessel and cargo constituting a threat to the environment.[24]

---

[15] Clift R and Gay R 'The Shifting Nature of Salvage Law: A View from a Distance'. (2004-2005) 79 *Tul. L. Rev*, 1355.
[16] ibid 1357-1358. See also Rose FD *Kennedy and Rose on Salvage* (7th edn Thomson Reuters (Legal) Limited, London (2010) 64.
[17] Clift R and Gay R (n 15) 1356.
[18] ibid. 1360.
[19] See *The Charlotte* 166 Eng. Rep. 888. In this case Lord Lushington stated that 'In order to entitle a person to share as salvor, he must, I conceive, have been personally engaged in the service. This principle has long prevailed as the acknowledged doctrine of this court." At 896. Quoted by Clift R (n 15) at 1361.
[20] Clift R (n 15) 1364.
[21] *The Glengyle* [1898]P.D. 97 (Eng. High court & C.A.) See also the following cases quoted by Professor Rose (n 16): *The Rosa Luxemburg* (1934) 49 Ll.L. Rep 292, *The Envoy* Shipp. Gaz. W.s. February 28, 1888; *The Makedonia* [1958] 1 Q.B. 365.
[22] *The Glengyle* [1898] P.D. 97 at 102-103.
[23] See Rose FD (n 16) par 10.012, 400.
[24] Art 14 of the 1989 Salvage Convention.

This last development, like the ones preceding it, was clearly the result of changes in values and the formulation of policy objectives in relation to environmental protection. It is possibly for this reason that the notion has been advanced of the law of salvage as 'a fixed body of doctrines that only require to be applied to fresh circumstances'.[25]

Changes in the law of salvage were primarily addressed through legislative enactment and judicial pronouncements on the law.[26] It is through these enactments and judicial pronouncements that a decidedly functional approach to the law has become apparent. Regarding the development of early maritime law, it has been noted that the 'Italian cities [have] built up a maritime law to suit mediaeval needs'.[27] Therefore, early maritime codes that contained provisions ostensibly related to salvage, provide more than just historical records of the law. They are expressive of the prevailing values, informal norms and needs that they were designed to address and good evidence of how the law was utilised to further specific objectives.

2.2.1 The Rhodian Law of the Sea

Academic writings on the law of salvage often refer to the ancient origins thereof.[28] The Rhodian Law of the sea has been referred to as an example of such an 'ancient' source of law.[29] This code influenced law on both sides of the Atlantic and some of its provisions are commonly regarded as early precursors to the law of salvage. A brief

---

[25] Clift R and Gay R (n 15) 1355.

[26] The right of salvors to claim special compensation was introduced internationally via the 1989 Salvage Convention, while in the South African context this was achieved through the incorporation of the Salvage Convention *via* the South African Wreck and Salvage Act 94 of 1996. As will be shown, the change from rewarding those who recovered property that had been lost, to rewarding those whose efforts prevented the loss of property at sea, was, in England, also effected via legislative enactment. The particular encouragement of professional salvors was primarily the result of the public policy of encouragement informing salvage law. This, according to Professor Rose (n 16), has informed the special measure of generosity with which 'the court encourages the initiative and enterprise that go into the building and maintenance of salvage equipment and organisations'. At 25.

[27] Holdsworth WA, *A History of English Law* (1924) Vol *V*, 77. In reaching this conclusion the author refers specifically to Ashburner, the Rhodian Sea Law (The Clarendon Press, Oxford, 1909) and provisions of Italian statutes of the twelfth and thirteenth centuries.

[28] See Rose FD (n 16). The author describes the law of maritime salvage as an 'ancient and important part of the wider law governing marine perils and safety at sea'. At 1. See also, Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* (n 5) 396. See also See Clift R and Gay R (n 15) 1355.

[29] Clift R and Gay R (n 15), 1355. The authors note that it is 'conventional to begin discussions of the law of salvage with references to maritime codes of great antiquity, including the Laws of the Rhodians, the Roman Pandects, and the Laws of Oleron.' At 1357.

look at some of the provisions, typically quoted in works on salvage, provide good evidence of the functional value attached to the law of salvage.[30]

Part III, Chapter *XXXVIII* of The Rhodian Law provided:

> if a ship loaded with corn is caught in a gale, let the captain provide skins and the sailors work the pumps. If they are negligent and the cargo is wetted by the bilge, let the sailors pay the penalty. But if it is from the gale that the cargo is injured, let the captain and the sailors together with the merchant bear the loss; and let the captain together with the ship and the sailors receive the six-hundredths of each thing saved. If goods are to be thrown into the sea, let the merchant be the first to throw and then let the sailors take a hand. Moreover, none of the sailors is to steal. If any one (*sic*) steals, let the robber make it good twofold and lose his whole gain.[31]

Chapter *XL* provided that where,

> [a] ship is wrecked, and part of the cargo and the ship is saved. The passengers have on them gold or silver or whole silks or pearls. Let the gold that is saved proved a tenth, and the silver contribute a fifth. Let the whole silks, if they are saved dry, contribute a tenth, as being equal to gold. If they are wetted, let an allowance be made for the abrasion and the wetting, and let them come into contribution on that footing. Let the pearls according to their valuation contribute to the loss like a cargo of gold.[32]

It is immediately apparent that the above provisions were directed at very specific mischiefs. The chief concern of these provisions appears not to have been salvage in the modern sense but the attempt at regulating situations consequential to shipwreck. While, the first of these provisions spell out the rights and duties of the captain and sailors of a ship 'caught in a gale', the second relates primarily to the question of contributions to be made by merchants and passengers where goods are saved. Nevertheless, the idea of a reward to those that rescue property, although restricted to those on board the ship, is established. The specific mention of 'a ship loaded with corn'

[30] For the purpose of this study, for an appropriate English translation of the Rhodian Sea Law, the seminal work of Ashburner W, The Rhodian Sea-Law edited from the manuscripts (The Clarendon Press, Oxford, 1909), has been used as primary reference.
[31] ibid. 112.
[32] ibid. 114.

would suggest a very limited sphere of application for the provision, in that the ills pertaining to the transportation of goods appear to have been a concern. The criminal penalty attached to the first provision, also provides much insight into the regard the drafters had for the sailors on board such ships. Nevertheless, at the centre of the mischief addressed was the notion of the safeguarding of property involved in the maritime adventure.

Ashburner, in commenting on the possible reasoning behind the above provisions, notes that

> the percentage payable in respect of gold… by the owner had nothing to do with contribution. It is a reward payable to the captain and sailors, partly for their exertions in for their exertions in assisting to save the articles in question, partly for their self-restraint in not knocking the merchant or passenger on the head and possessing themselves of his belongings. It must be remembered that there was no hard and fast line between the mariner and the pirate. In the Mediterranean, piracy, until a much later period than the date of the Sea-law, was the resource of the young, active, and resolute among the sea-faring population. The merchant service was manned to a great extent by pirates who were getting too old for that honourable calling. There must always have been some danger that the temptation of a large booty would revive the habits of youth; it was the object of these provisions to offer a counterpoise to such temptation.[33]

The passage also suggests a functional appreciation of the law in that these provisions were aimed at expected ills consequential upon ships being wrecked. They were directed at what would have been a major concern in those days, namely the absence of a 'hard and fast line between the mariner and the pirate'.[34] Thus, the purpose of the reward payable to the captain and sailors, while suggestive of an early kernel of salvage, had more to do with the encouragement of proper behaviour on the part of those involved in the adventure as well as their exertions in saving property. In this

[33] Ashburner *The Rhodian Sea-Law* (n 30) cclxii. See also Sanborn F (n 1), 37-39.
[34] Ashburner (n 30).

manner, the provisions are informed by the social realities and aims of their time while also expressing prevalent values.[35]

The second provision appears to have more to do with the situation of a general average contribution in the context of shipwreck. In the case of a general average loss,[36] those that benefitted from a general average act[37] are required to make a contribution in proportion to the value of their property on the voyage.[38] Therefore, as stated in Arnould's Law of Marine Insurance and Average,[39] general average operates 'directly between the co-adventurers, that is to say the owners of the ship, the cargo, and the freight'.[40] This, of course, is different to a claim in salvage which arises 'when a person, acting as a volunteer (that is without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger'.[41] Therefore, the provision is different to the situation in which salvage applies in that it applies to the parties involved in the

[35] For a brief reference to some of the unsavoury elements of life at sea, see Runyan TJ 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England' (1975) *Vol 19 No 2 The American Journal of Legal History* 95. The author, debunking the myth of complete lawlessness by virtue of the operation of early maritime codes, notes that 'life at sea was harsh, and those who chose it and persevered were up to the challenge. They acted as individuals at sea and behaved only as well as forced to under the command of their masters. The tales of keelhauling, drownings (*sic*) and piratical massacres leave the impression of lawless men on a lawless sea.' At 95.

[36] S 66(1) of the English Marine Insurance Act 1906 defines a general average loss as a "a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice". The term general average act is defined in s 66(2) as one 'where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure'.

[37] ibid.

[38] See the Marine Insurance Act 1906 s 66(3). For an account of general average in South Africa, see Bradfield *Shipping* in The Law of South Africa (LAWSA) (2012) 2nd edn, Vol 25(2). Bradfield provides the following definition of general average: 'The term 'general average' refers to a legal relationship, arising by operation of law, among parties interested in a common maritime venture when, in circumstances of imminent, real danger, an authorised person, usually the ship's master, commits an intentional, reasonable act of extraordinary sacrifice or expenditure for the common benefit of the interested parties and the venture is not entirely lost. Where a ship's master is compelled by circumstances of imminent real danger to make such extraordinary sacrifice, or incur extraordinary expenditure to preserve the interests of those involved in a voyage, the master's act is termed a "general average sacrifice", or "general average act". The resulting loss is termed a 'general average' loss and is borne by all interests involved in the voyage in proportion to the value of their property on the voyage. Each is liable, as a matter of law, to make a contribution, termed a 'general average contribution', to the loss. Par 123.

[39] Gilman J and Merkin R *Arnould's Law of Marine Insurance and Average* (17th edn, Sweet & Maxwell London, 2008).

[40] ibid 1184.

[41] Reeder J, *Brice on Maritime Law of Salvage* (4th ed, Sweet & Maxwell, London 2003) 1.

maritime adventure. It involves no potential volunteers outside of the maritime adventure rendering services.

Sanborn, in his discussion of chapters XXVI to XLIV, also suggests that these are provisions relating to 'the question of contribution i.e. the extent to which, where there is a maritime loss, ship or cargo in so far as saved is to make good ship or cargo in so far as injured or lost'.[42] Of course, it is not clear whether Chapter XL encompasses the kind of sacrifice that is required for an act of general average, namely a sacrifice voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.[43] This may suggest that the provision does not truly deal with a general average contribution, or at least in the manner in which it is currently understood. However, while this may not expressly be stated, it can be read into the provision without much difficulty.

Ashburner, suggests that the provision does not relate to contribution because of the possibility that small valuable items could potentially contribute more than ship or cargo, which is more than could equitably be expected.[44] For this reason, he suggests that this provision, ostensibly relating to contribution, is more properly placed under the heading of salvage law and not the law of general average-contribution.[45] While Ashburner may be right about the potential inequity of the relatively large contribution of the small valuable items, it does not, necessarily, follow that the provision is to be placed under the heading of salvage law. The provision appears more in line with the modern understanding of general average contributions,[46] than it does with the modern understanding of salvage. In this regard, Ashburner's explanation for the reward to the captain and sailor - that it is 'partly for their self-restraint in not knocking the merchant or passenger on the head and possessing themselves of his belongings'[47] - may possibly explain the apparent inequity of the contributions to be made by these relatively small articles.

---

[42] Sanborn (n 1) 37.
[43] See above n 36.
[44] Ashburner (n 30) cclxii.
[45] ibid. cclxiv.
[46] See nn 36 and 38.
[47] See text to n 33 above.

Ashburner also refers to chapters XLV, *XLVI* and *XLVII* as evidence of early salvage provisions. Chapter *XLV* provides that '[i]f in the open sea a ship is overset or destroyed, let him who brings anything from it safe on to land receive instead of reward the fifth part of that which he saves.'[48] Chapter *XLVI* provides that if

> A boat breaks the ropes and gets off from its ship and is lost with all hands. If those on board are lost or die, let the captain pay their annual wages for the full year to their heirs. He who saves the boat with its rudders will give them all back as he in truth finds them and receive the fifth part of what he saves.

Chapter *XLVII* provides further:

> If gold or silver or anything else is raised from the sea from a depth of eight fathoms, let the salvor receive one-third. If it is raised from a depth of fifteen fathoms, let the salvor receive one-half by reason of the danger of the sea. Where things are cast from sea to land and found there or carried to within one cubit of the land, let the salvor receive one-tenth part of what is salved.

While the above chapters appear to be closer to a modern conception of salvage, being suggestive of a third party possibly being a salvor, they are nevertheless drafted upon the supposition of property lost as a consequence of shipwreck. Therefore, the provisions, while often quoted in academic work containing references to the origins of salvage,[49] are narrower than the modern idea of rewarding an independent third party that voluntarily prevents losses from occurring. These provisions, together with those ostensibly relating to contribution, are primarily aimed at those that attempt to murder or plunder, and the finding of goods lost at sea. In this sense the provisions are informed by the prevailing dangers of the time, in which the lack of distinction between mariner and pirate, and the very real possibility of shipwreck featured prominently.

In essence, should one look at these provisions as early precursors of the law of salvage, it is clear that the theme of recovering property at sea or the safeguarding of property at sea was a central concern. It is also apparent that they were directed at the prevalent ills of the time such as piracy and looting thus alluding to a functional usage of

---

[48] ibid.

[49] In this regard see Staniland H, Staniland, *"Shipping"* in Joubert, W.A. and Faris, J. (eds.), *LAWSA Vol. 25(2) reissue 1* (Butterworths 2006) par 33.

law to achieve specific outcomes. This same phenomenon of laws apparently drafted to address a particular concern can also be noted in later codes although the central concern with the safeguarding of property remained.

2.2.2 The Laws of Oleron

The Rolls of Oleron have been described as '[t]he most influential to emerge in northern Europe during the Middle Ages'.[50] This code has been traced back to the judgments of the Maritime Court of the island of Oleron, a port city in the province of Bordeaux.[51] The 'burgeoning wine trade' between England, Aquitaine and Flanders appears to be the context within which the Rolls were adopted.[52] It has been suggested that the Laws of Oleron have significantly influenced the development of English law.[53] In this regard, Holdsworth noted that 'England based its maritime law upon the laws of Oleron just as the other sea-port towns which bordered upon the Mediterranean, the Atlantic Ocean, the English Channel, or the North Sea based their law upon similar codes of maritime usage'.[54] In this regard, Frankot refers to 'a mention of the laws in a report written in the 12th year of Edward III's reign (1329) [which] confirms that the laws were in use in England in the first half of the 14th century'.[55] As an expression of the values and norms of its times, the Rolls of Oleron and those provisions that relate to salvage mirror the

---

[50] Cumming CS 'The English High Court of Admiralty' (1993) 17 *Tul. Mar. L.J*. 209, 214-215. See also Paulsen GW 'An Historical Overview of the Development of Uniformity in International Maritime Law' (1983) 57 *Tul. L. Rev.* 1065, 1067.

[51] See Cumming (n 50) , 215 and Paulsen GW (n 50), 1070.

[52] Hutton N 'The Origin, Development and Future of Maritime Liens and the Action in Rem' (2003)28 *Tul. Mar. L.J.* 81. See also Cumming (n 50) 215.

[53] See Rose FD (n 16) 3. See also, Sanborn (n 1). The English Black Book of Admiralty, which is a compilation of official documents copied by the English Exchequer of the Middle Ages, contains as the 4th docucument a copy of the Rolls of Oleron. However, the original 24 articles of the Rolls have been expanded by an additional eighteen articles. See Mangone G 'Commerce by water All Cases of Admiralty and Maritime Jurisdiction' (1993) 11 *Del. Law*. Also see Holdsworth WS *A History of English Law* (1903, Volumes *I to III*) (1924, Volumes *IV* and *V*) Methuen & Co. Ltd. London. Paulsen GW (n 50) at 1070, expresses uncertainty on whether these laws were stated by Eleanor, the mother of England's Kind Richard I or by the King himself while in Oleron on his return from the Crusades. Nevertheless, he contends that this code became accepted as maritime law in both England and France after Richard I inherited Oleron on the death of his mother.

[54] Holdsworth WS *A History of English Law* vol *V* (1924) 129. For an account of how the Rolls of Oleron might have become relevant in England see Hutton N (n 52), 81.

[55] Frankot E 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea' in Communities in Montojo JP and Pedersen F (eds) European History: Representations, Jurisdictions, Conflicts Representations Jurisdictions Conflicts (Edizioni Plus Pisa University Press Pisa 2007) 151-172, 153.
This report claims that Richard I (1189-99) wrote the laws at Oléron on his way back from the Holy Land and subsequently brought them to England.

earlier Rhodian Sea laws. Nevertheless, it is also apparent that the trade context provided the background for the drafting of the rules and very clearly so in relation to the provisions relating to salvage.[56]

Article iii provided that,

> [i]f any vessel, through misfortune, happens to be cast away, in whatsoever place it be, the mariners shall be obliged to use their best endeavours for saving as much of the ship and lading as possibly they can; and if they preserve part thereof, the master shall allow them a reasonable consideration to carry them home to their own country. And in case they save enough to enable the master to do this, he may lawfully pledge to some honest persons such part thereof as may by sufficient for that occasion. But if they have not endeavoured to save as aforesaid then the master shall not be bound to provide for them in any thing, but ought to keep them in safe custody, until he know the pleasure of the owners, in which he may act as becomes a prudent master; for if he does otherwise, he shall be obliged to make satisfaction.

In similar vein to the above passage, Article *iv* provided,

> If a vessel…happens in the course of her voyage, to be rendered unfit to proceed therein, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage. But if the master can readily repair his vessel, he may do it; or if he pleases, he may freight another ship to perform his voyage. And if he has promised the people who helped him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, without any regard to the promises made them by the parties concerned in the time of their distress.

While it has been suggested that Art iii, above, is of relevance to the law of salvage,[57] this is not immediately obvious from a reading thereof. This provision appears, primarily, concerned with the duties of the mariners in the event of a maritime misfortune and their

[56] It is evident from a reading of the Rolls of Oleron that, while perhaps better developed, it has taken over some of the provisions of the Rhodian Sea law. See Sanborn F (n 1) 37. In terms of provisions relating to salvage, it appears as if similar concerns informed the drafting of the provisions of the Rolls of Oleron as the Rhodian Sea Law.
[57] Staniland H "Shipping" (n 49).

entitlements upon their fulfilling these duties. The direction to the master to allow them reasonable consideration upon the performance of their duties appears to be in consideration of these duties and not a reward for salvage services in the modern sense. Essentially, the imposition of these duties on the mariners would place the provision outside of the modern conception of salvage.

Nevertheless, Professor Staniland suggests that this provision was one of those contained in the Rolls of Oleron that deal with issues related to salvage.[58] The provision for reasonable consideration does appear to be directed at the encouragement of mariners to perform their obligations as spelled out in the provision. Moreover, Art iv expressly employs the term salvage. However, this provision essentially spells out the options available to the shipmaster *vis a vis* the merchants in the event of a vessel being unfit to proceed on her voyage and where the mariners have saved the lading. Even though the word salvage is used, it is clear that the provision does not provide a reward, but merely, that the merchant, upon redelivery of his goods, pay costs relating to salvage.

More provisions regarded as related to salvage (providing for rewards where mariners save some of the cargo or parts of their shipwrecked vessels) that hint at a limited functional value while also being expressive of prevailing values of the day provide as follows:

> Art *XXV* If a ship or other vessel arriving at any place, … the wind or tide being contrary, and a contract be made for piloting the said vessel into the said harbour accordingly; but by reason of an unreasonable and accursed custom, in some places, that the third or fourth part of the ships that are lost, shall accrue to the lord of the place where such sad casualties happen, as also the like proportion to the salvors, and only the remainder to the master, merchant and mariners; the persons contracting for the pilotage of the said vessel, to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, do like faithless and treacherous villains, sometimes even willingly, and out of design to ruin ship and goods, guide and bring her upon the rocks, and then feigning to aid, help and assist, the now distressed mariners, are the first in dismembering and

[58] ibid.

pulling the ship to pieces; purloining and carrying away the lading thereof contrary to all reason and good conscience; and afterwards that they may be the more welcome to their lord, do with all speed post to his house with the sad narrative of this unhappy disaster; whereupon the said lord, with his retinue appearing at the places, takes his share; the salvors theirs; and what remains the merchant and marines may have. But seeing this is contrary to the law of God, our edict and determination is, that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said goods, shall be accursed and excommunicated, and punished as robbers and thieves, as formerly hath been declared. But all false and treacherous pilots shall be condemned to suffer a most rigorous and unmerciful death; and high gibbets shall be erected for them in the same place.

Art *XXVI* If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villainies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house.

Art *XXIX* If any ship or other vessel sailing to and fro, and coasting the seas, as well in the way of merchandizing, as upon the fishing account, happen by some misfortune through the violence of the weather to strike herself against the rocks, whereby she becomes so bruised and broken, that there she perishes, upon what coasts, country or dominion soever; and the master, mariners, merchant or merchants, or any one of these escape and come safe to land; in this case the lord of that place or country, where such misfortune shall happen, ought not to let, hinder, or oppose such as have so escaped, or such to whom the said ship or vessel, and her lading belong, in using their utmost endeavors for the preservation of as much thereof as may possibly be saved. But on the contrary, the lord of that place or country, by his own interest, and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners, in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage…; and in

> case any shall act contrary hereunto, or take any part of the said goods from the said poor, distressed, ruined, undone, shipwrecked persons, against their wills, and without their consent, they shall be declared to be excommunicated by the church, and ought to receive the punishment of thieves; except speedy restitution be made by them.

Similar to the provisions relating to salvage in the Rhodian Sea laws, the purpose and aims of the rules appear to be geared towards the consequences of shipwreck. While the term salvor (Art *XXV)* is employed, it is apparent that the concept and appreciation of salvage is subsidiary to those ills perceived as consequential upon shipwreck. Moreover, the provisions, considering the context within which the Rolls of Oleron were adopted,[59] appear to relate more to the regulation of relationships between merchants, captain and sailors. Therefore, the provisions appear to be only incidentally related to salvage as opposed to being aimed at the ills potentially following shipwreck although the safeguarding of property is implicit.

In commenting on the sphere of application of the Rolls of Oleron, Holdsworth notes that:

> The laws of Oleron… provided a set of rules which were no doubt generally sufficient to enable juries of merchants and mariners to settle most of the problems of maritime law which arose in the sea-port towns in the early mediaeval period. That they would require to be supplemented as soon as any extension of sea-borne commerce took place is clear.[60]

In the above context of trade at sea and the prevalent ills concomitant therewith, the functional value of the provisions can be appreciated. Aside from the obvious intricacies of this trade, these rules were clearly drafted against the further backdrop of what were major concerns of the time. These concerns related primarily to navigational dangers due to 'the violence of weather',[61] and those, both on land and at sea, that sought to capitalise upon the misfortunes intrinsic to sea-trade. Even those provisions relating to,

---

[59] See above 39ff.
[60] Holdsworth WS (n 27) 123.
[61] See discussion of Art *XXIX* of the Rolls of Oleron above, 42 .

or viewed as precursors to, salvage, notwithstanding the central property concern, were directed at these concerns. Thus, Holdsworth further notes that

> [t]he various legal possibilities which might arise out of the contract of carriage by sea were fully worked out and this involved a treatment of such subjects as the results of loss from pirates, fire, or wreck […].[62]

While modern academic writers often refer to these early codes when commenting on the origins of salvage, circumstances were clearly different and provisions relating to salvage were narrow in operation and directed at specific mischiefs. Moreover, the purpose was not so much the encouragement of volunteers than the furthering of trade and the prevention of specific ills. Essentially, while the body of modern salvage was developed at a later stage, its precursors in the form of loose standing provisions in early codes, were already developed as an adjunct to trade law. Moreover, in keeping with the idea of social regulation, the provisions formed an integral part of preventive measures aimed at the encouragement of desired behaviour on the part of sailors and those on land. While more limited than modern salvage, the theme of encouragement in the interests of commerce was, nevertheless, established. Essentially the interests of commerce and trade was furthered through the safeguarding of property by means of encouraging or discouraging certain types of behaviour.

2.3 English Admiralty law and salvage

The basic principles of salvage law in England were laid down by decisions of the Admiralty Court.[63] It should be noted that much of the legislative development of early English salvage law was closely linked to the development of the English Court of Admiralty. For this reason, a brief discussion of the English High Court of Admiralty will facilitate better understanding of the historical development of English salvage law.

---

[62] See above (n 27). The author refers to the dangers of pirates, fire and wreck as 'the three normal maritime dangers'. At 85. Holdsworth, with Reference to Ashburner, The Rhodian Sea Law (n 30), *cxxx-ccxciii*, appears to agree with the contention of the latter author that 'the Italian cities built up a maritime law to suit mediaeval needs'. The very same idea seems to underpin the provisions of the Rolls of Oleron, in that its provisions were geared towards the potential consequences of trade by sea. In this regard, even the early references to salvage were for the attainment of very specific outcomes and the prevention of certain types of behaviour.

[63] Rose FD (n 16) 1.

2.3.1 The High Court of Admiralty

The High Court of Admiralty was an instrument of the office of the Lord High Admiral to which the Crown has delegated the Royal Prerogative in maritime affairs.[64] The Admiral exercised jurisdiction through 'deputies who became the first Admiralty judges'.[65] This court applied civil law and, albeit not the first to do so, the Rolls of Oleron found application through this court.[66] This court exercised a general jurisdiction, its instance or inherent jurisdiction, which have been impacted upon by various statutory enactments over time.[67] Originally, the inherent jurisdiction of the Admiralty was limited to cases of piracy, the restitution of goods taken piratically on the high seas and the condemnation of such goods, belonging to pirates, to the Crown as droits of Admiralty.[68] Thus, in early matters brought before the Admiralty Court, matters relating to piracy and spoil were predominant.[69] In this regard, Professor Sanborn has noted that 'its jurisdiction was confined to cases of violence at sea'.[70] This mirrors some of the concerns that informed and provided context to the provisions relating to salvage contained in early maritime codes such as the Rolls of Oleron.

The original duties of the Admiral were not judicial but administrative and military. However, these duties together with the disciplinary powers exercised by the Admiral, eventually developed into adjudication, mainly in matters pertaining to piracy.[71]

---

[64] Wiswall FL The Development of Admiralty Jurisdiction and Practice since 1800 (CUP, London, 1970).
[65] Hofmeyer G "Admiralty Jurisdiction in South Africa" (1982) *Acta Juridica* 30.
[66] See Sanborn FR (n 1). Sanborn, quoting Holdsworth, notes that '[t]he courts which had jurisdiction in maritime matters were for the most part the courts of seaport towns'. At 268. See also Holdsworth, above (n 54). Holdsworth mentions specific seaport courts that preceded the eventual Admiralty Court and that had jurisdiction in maritime matters. In this regard he identifies the courts at Padstow and Lostwithiel, Yarmouth with courts 'which sat at tide time on the seashore'. At 531. With the coming into being of the Admiralty Court, these courts, by royal charter, got exemption from the jurisdiction assumed by the Admiralty Court. It is also apparent that these courts had some jurisdictional battles against the Admiralty Court which ultimately culminated in the demise of most of these courts by 1835 due the legislation (Municipal Corporations Act of 1835). Only the Cinque Ports retained local jurisdiction. These Cinque courts are described by the author as 'oldest of all the courts which have ever exercised Admiralty jurisdiction in England'. At 532. For a more complete account of these local port courts see pages 530 – 534.
[67] Rose FD (n 16), 63.
[68] Sanborn FR (n 1) 288.
[69] ibid. 285.
[70] ibid. 290.
[71] ibid. 280-281. The author notes that 'for more than half a century after the first occurrence of the title "Admiral", no mention is to be found…of the existence of an Admiral's Court having power to hear pleas and to

Professor Sanborn also provides examples of early cases of the Admiral's enquiries into complaints pertaining to spoils at sea, piracy and murder. This jurisdiction, as mentioned, was restricted to the inquisitioning of pirates and the arrest of pirates' ships.[72] The actual judicial proceedings were held in common law courts.[73] What were originally inquisitions, ultimately culminated in what might have been, in the words of Professor Sanborn, the 'first judicial proceeding rather than an administrative one' and possibly the 'first record of Admiralty jurisdiction' in the year 1347.[74]

Practical considerations appear to have informed the eventual development from purely administrative and disciplinary powers to the exercise of judicial functions. This much is alluded to by Holdsworth:

> He [the Admiral] …get (sic) such [wider] jurisdiction…owing to the diplomatic difficulties in which the king found himself involved, from the want of some efficient authority to coerce the marauding an piratical propensities of his subjects. It appears…that the kings of England had been constantly negotiating with foreign countries-more specifically France and Flanders-as to claims in respect of piracies committed by English subjects.[75]

Readily apparent from the above contention of Holdsworth, is the extent to which the development of the Admiral's jurisdiction was a function of very specific needs.[76] It has also been suggested that the Admiralty court was, aside from possible legal technical reasons, a product of political and economic design, and the 'chance events of history'.[77] Cummings notes that

> The Crown…[was]acutely aware of the revenue derived from fines, proceeds from the sale of wrecked goods, fees from merchants, and other droits of these [Cinque Courts]

---

administer justice between parties.' At 281. One could safely assume that such jurisdiction was probably exercised by those local port courts that exercised maritime jurisdiction prior to the establishment of the Admiralty Court.

[72] ibid. 281.

[73] ibid.

[74] ibid. 282. Professor Sanborn refers to I matter in which the 'deputy of the Admiral of the West certified that a ship was forfeited to the Kind for robbery committed at sea'. Also see, Holdsworth (n 54), 544-546.

[75] Holdsworth (54), 544.

[76] This need appears to be that of a tribunal suited to hearing the claims in respect of piracies committed by English subjects. See Holdsworth (n 54), 544-545.

[77] Hofmeyer G (n 65). Hofmeyer, in commenting on the development of the law and admiralty notes that '[i]t was shaped by the exigencies of maritime commerce, suppressed in England by the jealousy of the courts of common law (a jealousy which was fanned by parochialism, financial self-interest and antipathy towards the civil law) and given impetus by the chance events of history.' At 30.

> local courts. In order to derive money from the local courts and to extend the influence of the royal courts, Edward I enacted a statute in 1274 extending the jurisdiction of the Admiral's court.[78]

Comments such as the above provide some context to legislative developments in the jurisdictional battle between the Court of Admiralty and common law courts, whether in the form of extending jurisdiction or the curtailment thereof. These contextual realities, needs and the values that underpinned the development of a separate Court of Admiralty influenced the very substance of the law, including the law of salvage.[79]

Similar practical, albeit it more legal, considerations appear to underpin the eventual assumption of a wider civil and commercial jurisdiction. Holdsworth notes that, 'no technical jurisprudence peculiar to any country would have been satisfactory to traders coming from many different countries'.[80] Of course, it makes sense that merchants involved in foreign trade would prefer rules of law that they are more familiar with.[81] Also, as noted by Holdsworth, the collection of customs recorded in the Black Book of Admiralty was distinct from anything at common law and 'of the contents of this customary law the common law courts… knew very little'.[82]

The incorporation of a collection of customs, most notably the Rolls of Oleron, into the Black Book of Admiralty, would have provided a readily available source of rules pertaining to commercial relationships. For this reason, the eventual development of a wider civil and commercial jurisdiction was probably to be expected. After all, as mentioned, the provisions of the Rolls were drafted within a context of commerce at sea

---

[78] Cummings CS (n 50), 209. See also Runyan TJ 'The Rolls of Oleron and the Admiralty Court in Forteenth Century England' (1975) *The American Journal of Legal History* Vol 19, 95. '[W]ithout an understanding of the laws and the admiralty within the social milieu in which their marriage occurred, a great portion of the significance of the event [the development of the Admiralty Court] would be lost.' At 97.

[79] See Melikan R 'Shippers, salvors, and sovereigns: Competing interests in the mediaeval law of Shipwreck' (1990) *The Journal of Legal History* 11.2 163. The author in commenting on the law of shipwreck in mediaeval England, describes it as being feudal. This of course implies a particular value system as underlying the law. In the modern era, it would of course be the value attached to environmental protection that informs current attempts at changing the law of salvage.

[80] Holdsworth W (n 27) 543.

[81] Holdsworth WA (n 27). The author notes that 'the civil law procedure of the Admiralty, because it was based on the technical ideas of the civil law, was far more intelligible to the foreign merchant than the procedure of the common law courts'. At 128.

[82] ibid.

and the ills consequential thereto. This is not to say that the incorporation of the Rolls was necessarily the only reason for the development of a commercial jurisdiction, but it does provide additional evidence for explaining it.

Considering the reasoning of Holdsworth, in partially explaining the rationale for the establishment of a separate Court of Admiralty,[83] one may be tempted to suggest that the eventual civil and commercial jurisdiction of the court may have been more coincidence than design. From the discussion of the earlier codes, it would appear as if their inclusion in the Black Book of Admiralty provided the Admiralty with a proverbial doorway to commercial matters. In view of the noted unsuitability of the common law courts[84] to matters of foreign trade, one could almost pre-empt the assumption of jurisdiction over commercial matters and, of course, shipwreck and salvage. Of course, this jurisdiction over commercial matters might have occurred without the necessary regard for the original aims or rationale informing provisions pertaining to these heads. Thus, Sanborn notes the eventual development of an Admiralty jurisdiction that included 'civil cases, criminal cases, royal and admiralty droits, and prize'.[85]

This widening of the jurisdiction of the Admiralty Court, led to an encroachment on the jurisdiction of the seaport towns that possessed admiralty jurisdiction and of course on the ordinary common law courts. This led to various attempts to curtail the burgeoning Admiralty jurisdiction. These attempts were in the main legislative and through the issuing of writs of prohibition by the common-law courts to ensure compliance with limiting statutes.[86] However, it is apparent that the jurisdictional jostling between the Admiralty and common law courts cannot be divorced entirely from extra-legal socio-political and economic factors.[87]

[83] See above nn 80-82 and text thereto.
[84] See above n 80.
[85] Sanborn FR, (n 1) 292.
[86] Holdsworth W A (n 27), 548-549.
[87] See Wiswall FL (n 64). Wiswall notes that '[f]or reasons which ranged from petty jealousy to righteous indignation at real encroachment upon their jurisdiction, the courts of common law very soon became resentful of the power exercised by the civil law Court of Admiralty'. At 4.

2.3.2 The impact of legislation on Admiralty Jurisdiction

The result of the common-law courts' indignation over the encroachment of the Admiralty court on their jurisdiction was the enactment of numerous statutory restrictions on the latter court's jurisdiction. During the reign of Richard II, statutes were drafted to avoid the perceived mischief of a growing Admiralty jurisdiction's encroachment on that of common law courts. In this regard, a 1389 statute expressly noted that

> A great and common clamour and complaint hath been often times made before this time, and yet is , for that the Admirals and their deputies hold their sessions within divers places of this realm as well within franchise as without, accroaching to them greater authority than belongeth to their office.[88]

The statute clearly identifying the mischief of a growing Admiralty jurisdiction, addresses it by an express restriction of the Admiralty Court's jurisdiction, providing that 'the Admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea'. A later statute of 1391,[89] went even further with a decidedly territorial approach to the Admiralty's jurisdiction, providing that

> Of all manner of contracts, pleas, and quarrels, and all other things arising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power nor jurisdiction. [N]evertheless, of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers, the Admiral shall have cognizance.

These provisions may not always have had the desired effects as even more efforts were forthcoming in later years.[90] A statute in 1400 provided for the right of action for double damages to those wrongfully sued in Admiralty.[91] The manner in which these statutes were interpreted by common law courts also did much to strengthen their

[88] 13 Richard II. St. 1 c. 5.
[89] 15 Richard II. C. 3.
[90] See Holdsworth W A (n 27), 548.
[91] 2 Henry IV. C. ii.

impact. In *Sir Henry Constable's* Case,[92] the Kings Bench's consideration of 'wreck' under the 1391 Act had the effect of entirely removing certain cases pertaining to wreck from the jurisdiction of the Court of Admiralty. This, of course, was in line with the geographical delineation of the court's jurisdiction.

Of course, these statutes reflected a particular attitude towards the Admiralty at a particular time, and one can see later examples of the Admiralty Court's jurisdiction being extended. This is especially true during the Tudor period, when the Court of Admiralty was empowered both by Letters Patent and by statute.[93] The court's jurisdiction was extended to charterparties, damage to cargo due to negligence, contracts made abroad, bills of exchange, freight, non-delivery of cargo, negligent navigation, and breach of warranty of seaworthiness[94] However, such extensions were continually challenged by the issue of writs of prohibition and the restrictive interpretation of legislation by common law courts.[95] In this regard, Lord Coke who served as Chief Justice of the Court of Common Pleas, with reference to the statutes of Richard II,[96] reined in the jurisdiction of the court by precluding it from hearing matters pertaining to contracts on land.[97] However, this changed with the appointment of Lord Stowell as Admiralty Judge. During Lord Stowell's tenure, The Admiralty Court experienced growth, which 'later grew to the statutory expansion of its instance jurisdiction'.[98]

From a South African perspective, 19th century legislation in the form of the 1840 and 1861 Victorian Acts are of particular importance in relation to the extension of Admiralty jurisdiction.[99] The preamble to both Acts makes this extension of Admiralty jurisdiction clear, stating the legislative intention 'to improve the practice and extend the jurisdiction of the High Court of Admiralty in England'. One of the heads of jurisdiction

---

[92] (1601) 5 Co. Rep. 106a.
[93] Hare J, *Shipping Law and Admiralty Jurisdiction in South Africa* (n 5) 11.
[94] 32 Henry VIII. C. 14.
[95] In this regard, Lord Coke, Chief Justice of the Court of Common Pleas, is singularly significant. Lord Coke has been described by authors as putting the Admiralty Court under siege. See Hare J, (n 5) 12.
[96] See above n 93 and nn 88-89..
[97] Hare J, (n 5) 12.
[98] Wiswall FL above (n 64) 20.
[99] The Victorian statutes, regulating jurisdiction and practice in admiralty. 3 & 4 Vict. C65 (1840); 9 & 10 Vict c 99.

which was expressly included as part of the jurisdiction of the Admiralty Court was claims relating to salvage.[100]

This continual contraction and expansion of the jurisdiction of, what was historically a separate Court of Admiralty, undoubtedly provides a window on the jurisdictional strife of the times. However, the jurisdictional battle, as mentioned, had less to do with the substance of law than the forum in which a certain type of claim was to be heard. The separate Court of Admiralty eventually ceased to exist with the establishment of a new Supreme Court of Judicature in which Admiralty matters were heard in the Probate, divorce and Admiralty Division. Currently, Admiralty matters are heard in an Admiralty Court located in the Queen's Bench Division.[101] This did not entirely do away with the jurisdiction of the old Admiralty Court as supplemented by statutes such as the Victorian Acts.[102] The jurisdiction and procedure of the Admiralty Court as a division of the Queen's Bench is now regulated by the Senior Courts Act, 1981 and the Civil Procedure Rules.[103]

2.3.3 English salvage law

It is apparent that the jurisdictional battle between the Court of Admiralty and the common-law courts found some expression in the development of those heads of jurisdiction heard in admiralty. Considering the statutory enactments that impacted upon admiralty jurisdiction, it remains to be seen what the impact was upon the law of salvage in particular.

2.3.3.1 Early English Admiralty Jurisdiction pertaining to salvage

Early Admiralty jurisdiction in matters pertaining to salvage were largely a matter of property that had become wreck.[104] In this regard, it has been noted that 'what may be called the land jurisdiction, as opposed to the Admiralty jurisdiction, was concerned with wreck alone, and the Admiralty jurisdiction was concerned mainly, if not entirely, with

---

[100] See below 58ff.
[101] Judicature Acts of 1873-1975.
[102] The Victorian statutes, regulating jurisdiction and practice in admiralty. 3 & 4 Vict. C65 (1840); 9 & 10 Vict c 99 (1846); 17 & 18 Vict c 104 (1854); 24 Vict c 10 (1861) 31 & 32 Vict c 71 (1861).
[103] Rose FD (n 16) 63.
[104] ibid. 64.

flotsam, jetsam, lagan and derelict.'[105] In this sense, the modern idea of preventing shipwreck was absent.

Moreover, it is clear that in early statutes pertaining to salvage, the payment of a salvage reward had less to do with a right on the part of the rescuer of property than the retention of title by the original owner. Thus, a statute of 1275 provided that

> [c]oncerning Wrecks of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge, nor any Thing within them, shall be adjudged Wreck: (2) but the Goods shall be saved and kept by View of the Sheriff, Coroner, or the King's Bailiff,***and* the Hands of such as are of the Town where the Goods were found; (3) so that if any sue for those Goods, and after prove that they were *his or perished* in his Keeping, within a Year and a Day, they shall be restored to him without Delay; and if not, they shall remain to the King.[106]

Thus, any shipwrecked goods would be restored to an owner who could prove title, while unclaimed wreck would belong to the Crown.[107] Title passing to the crown, of course, had bestowed considerable benefits upon the Admiral. The rights of the Crown to unclaimed wreck on the high seas were granted to the Admiral, thus becoming perquisites of the Admiral.[108] This does much to explain some of the academic views offered on the extent to which the extension of Admiralty jurisdiction *vis a vis* earlier maritime courts may have largely been a matter of economic design.[109]

According to Professor Rose,[110] The wording of this statute led to later statutory enactments[111] aimed at those who, would kill or prevent people from leaving ships, in order for goods to constitute wreck. In this manner, as was the case with provisions relating to salvage in the Rolls of Oleron, there was a decidedly functional and pragmatic approach to legislative efforts. It appears to be accepted that the first statute

---

[105] ibid. 66.
[106] The Statute of Westminster I (1275). 3 Edw. 1 c 4. Also see Rose FD, above n 103.
[107] ibid.
[108] Rose FD (n 16) 65.
[109] See above nn 77-79 and text thereto.
[110] Rose FD (n 16).
[111] 12 Anne c. 18 (1713); 4 Geo. 1 c.12 (1717); 26 Geo. 2 c. 19 (1753). The first of these Acts were drafted to remedy the situation, apparently created by the wording of the earlier statute of Westminster I (1275), which would see conscious efforts on the part of some, to prevent anyone from escaping from a ship.

relating to salvage was enacted in 1353.[112] This statute by Eward III, while regarded as pertaining to salvage is, however, entitled Staple, Merchant Strangers, Money Act (1353). Thus, once again, the provisions relating to salvage are subsidiary to a larger mercantile context, and narrower than any modern conception of salvage. Nevertheless, as with the Rolls of Oleron, the salvage provisions contained in this Act are evidently expressive of a particular value background and directed at very specific outcomes.

The eventual alteration of the concept of 'wreck', restricting it to shipwrecked goods cast up on land, was of some significance to Admiralty jurisdiction. Admiralty jurisdiction was primarily concerned with flotsam, jetsam, lagan and derelict.[113] Jurisdictional questions aside though, it is clear that any questions pertaining to the payment of salvage rewards would only arise in the context of shipwrecked goods. In this regard, payment would be received either from those who were able to show title or those with rights to such goods granted by the Crown.[114] However, any assistance rendered prior to goods being constituted wreck, or flotsam, jetsam or lagan would not see payment of any awards. In this regard, Professor Rose suggest that it is also unclear, when the modern notion of the prevention of disaster was accepted as a salvage service worthy of reward.[115]

The primary means for establishing the right to a reward for preventing disaster appears to have been established by statute. What is clear though is that these statutes were not based on any prior legal technical bases but primarily on the legislative pursuit of the safeguarding of ships and goods on board such ships. In this manner, one can clearly observe the extent to which specific outcomes and policy considerations have triggered legal development. In this regard, Professor Rose[116] refers to an Act of 1713,[117] which was aimed at the protection of ships and their owners by providing for rewards for salvage services rendered on or near the coast. While the purpose of the Act was the prevention of the stranding of ships, it was not salvage in the true sense in

[112] ibi*d.*27 Edw. III, c. 13 (1353). See also Reeder, Brice on Maritime Salvage 4th ed(2003) 12 Sweet and Maxwell London and Hare J (n 5). Hare describes the statute as the 'first purposeful British salvage legislation'. At 399.
[113] Rose FD (n 16) 66.
[114] ibid.
[115] ibid.
[116] ibid. 67.
[117] 12 Anne c. 18 (1713).

that those who would render such assistance would typically have been ordered (i.e. their actions were not voluntary) by a sheriff, justice of the peace, customs officers or other public officers.[118] Essentially, while an aspect of modern salvage can be observed in this Act, the purposive use of the legislation to achieve specific outcomes is clear. The apparent failure of this Act to successfully achieve the obvious aimed behind its enactment led to further legislation.[119]

The preamble to Act 26 Geo. II, c. 19 of 1753 specifically refers to prior legislation and 'the many wicked enormities [that] had been committed' and 'grievous Damage of Merchants and Mariners of our own and other Countries'. Various penalties are then provided where those lawfully authorised by the Act,

> shall be assaulted, beaten and wounded, for or on account of the exercise of his or their duty, in or concerning the salvage or preservation of any ship or vessel in distress, or of any ship or vessel, goods or effects, stranded, wrecked, or cast on shore, or lying under water, in any of his majesty's dominions.[120]

Thus, with the appropriate penalties in place, the Act not only punishes those that may exploit or cause incidents of shipwreck, but also encourages those that prevent disasters. It goes further than the earlier 1713 Act by also providing for a reward for those that may not have been instructed by the appropriate official to render services:

> In case any person or persons not employed by the master, mariners or owners, or other persons lawfully authorized, in the salvage of any ship or vessel, or the cargo or provision thereof, shall, in the absence of persons so employed or authorized save any such ship, vessel, goods or effects, and cause the same to be carried, for the benefit of the owners or proprietors, into port, or to any near adjoining custom house or other place of safe custody, immediately giving notice thereof to some justice of the peace, magistrate, or custom house or excise officer, or shall discover to any such magistrate or officer where any such goods or effects are wrongfully bought, sold or concealed; then such person or persons shall be entitled to a reasonable reward for such agreement

[118] Rose (n 16) 67.
[119] ibid.
[120] 26 Geo. II c 19 s *XI*.

> about the quantum, in like manner as the salvage is to be adjusted and paid by virtue of the statute made in the twelfth year of the reign of her late Majesty Queen Anne.[121]

The reference to the Act of Queen Anne in the above extract would be the 1713 Act,[122] which originally introduced the notion of services to prevent shipwreck. The Act, however, goes further by introducing an issue pertinent to the modern concept of salvage, namely, the volunteer salvor being entitled to a reward.[123] However, the introduction of this concept which became part and parcel of the modern concept of salvage was a definite response to certain social realities of the times. In this sense, the above Acts, just like those enacted subsequently, often addressed very particular concerns that included salvage related matters but were not necessarily confined thereto.

The Acts of 1809,[124] 1813,[125] and 1821[126] are good examples of legislation that have incrementally added to a growing body of salvage law. The Act of 1809 is expressly directed at the 'preventing of frauds and depredations committed on merchants, ship owners, and underwriters, by boatmen and others; and also for remedying certain defects relative to the adjustment of salvage in England under an act made in the twelfth year of Queen Anne.'[127] The Act, not only remedies the perceived defects of the earlier 1713 Act,[128] but also extends its application to those of its provisions dealing with the salvage, sale and marking of anchors.[129] A significant aspect of the Act, relevant to the earlier discussion of the Admiralty Court, is that it conferred appellate jurisdiction on the High Court of Admiralty.[130]

The later 1813 Act,[131] in addition to conferring concurrent jurisdiction on the Admiralty and common law courts, provided for rights of carriages to pass over land in

---

[121] ibid. s V.
[122] See above n 117.
[123] See above n 121.
[124] 49 Geo. III, c. 122.
[125] Frauds by Boatmen Act, 53 Geo. III, c 87.
[126] Frauds by Boatmen Act Acts 1 & 2 Geo. IV, c. 75.
[127] This is the long title of the 1809 Act. See above n 124.
[128] 12 Anne c. 18 (1713). See above n 117.
[129] See Rose FD (n 16) 68.
[130] ibid.
[131] See above n 125.

order to reach vessels and goods for the purpose of salvage services.[132] Nevertheless, while one had this extension of Admiralty jurisdiction, the provisions pertaining to salvage providing an incremental building up of salvage specific laws, were still a response to very specific aims. In this sense, the idea of a category or system of salvage law was not readily apparent. The right of salvage consisted of provisions found in different Acts, often directed at aims to which salvage law was an adjunct.

The piecemeal approach to matters relating to salvage changed with the enactment of the English Wreck and Salvage Act, 1846. In this regard, Professor Rose notes that 'the rights to salvage separately conferred by various previous Acts were consolidated'.[133] This Act, in addition to the existing appellate jurisdiction of the Court of Admiralty, conferred jurisdiction over claims and demands in the nature of salvage services.[134] The Wreck and Salvage Act 1846 was later repealed, and its provisions were re-enacted in the Merchant Shipping Act 1854, while the inherent jurisdiction of the Court of Admiralty over matters relating to salvage was secured.

2.4 The South African Court of Admiralty and Salvage

The reception of Admiralty law in South Africa was originally via Vice-Admiralty courts that were established in the English colonies.[135] The Supreme Courts of the Cape and Natal - these provinces having been English colonies at the time - were thus constituted Vice-Admiralty Courts. These courts exercised the jurisdiction exercised by the English High Court of Admiralty. The Vice-Admiralty courts were eventually abolished by the Colonial Courts of Admiralty Act of 1890. It is this Colonial Courts of Admiralty Act, together with the Victorian Acts that, in the words of Hare, 'form the kernel of the

[132] In this regard the Act mirrors both the English Merchant Shipping Act, 1995, and the current South African Wreck and Salvage Act, which in s 12 thereof grants 'powers to pass over adjoining lands' to those performing salvage services.
[133] Rose FD (n 16) 70.
[134] ibid. 71
[135] See Hofmeyer G Admiralty Jurisdiction and Practice in South Africa (2nd edn, Juta Law, Cape Town 2011) 5. See also *In re the Ship Myvanwy* (1883) 4 NLR 43 and *Crooks & Co v Agricultural Co-operative Union Ltd* 1922 AD 423 at 428.

historical colonial admiralty jurisdiction of the Cape [South Africa]'.[136] The Colonial Courts of Admiralty Act, 1890 provided:

> Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in the Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.

When this Act came into effect,[137] the Supreme Courts of the Cape and Natal had original unlimited civil jurisdiction. The courts in these colonies thus became Colonial Courts of Admiralty with jurisdiction as circumscribed in the Act. This status meant that 'the whole bundle of statutory and inherent jurisdiction, common law, civilian practice and judicial precedent' [138] relevant to admiralty and maritime matters in England was received into these areas. These Colonial Courts of Admiralty survived both the formation of the Union of South Africa in 1910 and the Republic of South Africa in 1961. This situation persisted until the enactment of the South African AJRA.[139]

While early admiralty jurisdiction in South Africa was the direct result of a transplant, the South African legislature, nevertheless, decided to retain the old jurisdiction. This retention was certainly not for the same extra-legal reasons that influenced the historical development of both Admiralty jurisdiction and the law of salvage in England. More likely this retention was due to practical considerations. In this regard, it should be noted that the passing of the AJRA was probably because of the need to extend the admiralty jurisdiction in South Africa to all maritime matters.[140]

By the time the AJRA commenced, the separate English Court of Admiralty had, of course, ceased to exist, and in this respect the same model in operation in England was followed. Thus, the legislature has retained the one court with different divisions

[136] Hare J (n 5) 13.
[137] 1 July 1891.
[138] Hare J (n 5) 14.
[139] Admiralty Jurisdiction Regulation Act 105 of 1983.
[140] Hare J (n 5) 16.

approach in that the High Court of South Africa has retained its special Admiralty Jurisdiction over 'maritime claims'.[141] In this regard, section 2 of the AJRA provides as follows:

> 2. Admiralty jurisdiction of Supreme Court. —(1) Subject to the provisions of this Act
>
> each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.
>
> (2) For the purposes of this Act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

The 'Supreme Court' of South Africa,[142] therefore, has 'admiralty jurisdiction' over all 'maritime claims', which includes

> salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salved or which would, but for the negligence or default of the salvor or a person who attempted to salve it, have been salved, and any claim arising out of the Wreck and Salvage Act, 1996;[143]

More importantly, this Act also provides for the law applicable to maritime claims, and this is the point at which the historical jurisdiction of the English High Court in Admiralty is of importance. Section 6(1) of the Act, which has been described as a 'ubiquitous instrument of compromise,'[144] provides that

> Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—

---

[141] AJRA s 1.
[142] The Supreme Court of South Africa is now known as the High Court of South Africa (since 1996) and will henceforth be referred to as such.
[143] AJRA s 1(1)(k).
[144] Hare J (n 5) 403.

> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
>
> (2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

The above section highlights the importance of an historical understanding of the English Admiralty jurisdiction in South Africa. The provision retains the applicability of English Admiralty law, as applied in the High Court of Admiralty, where there is no applicable South African legislation.[145] English law, however, will only be applicable in matters over which the High Court of Admiralty had jurisdiction up to 1 November 1983, the date of commencement of the AJRA. In this sense, the High Court in exercising its admiralty jurisdiction, unlike the earlier Colonial Courts of Admiralty, has seen a temporal extension to its jurisdiction. The court, where it has to apply English law, will have recourse to a wider array of English law such as statutes and case law between the years 1890 and 1 November 1983.

With regard to salvage matters, from the historical exposition of English salvage law, it ought to be apparent that the English High Court of Admiralty exercised jurisdiction over matters pertaining to salvage. In this regard, the Victorian Act of 1840[146] expressly provided for such jurisdiction.

> [T]he High Court of Admiralty shall have jurisdiction to determine all claims and demands whatsoever, in the nature of salvage for services rendered, or damage received, by any

[145] Paragraph (a) of s 6(1), is subject to ss (2).
[146] S 6 thereof.

> ship or sea-going vessel; and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high sea at the time when the services were rendered, or the damage received, or the necessaries furnished, in respect of which such claim is made.

Consequently, in terms of the AJRA,[147] to the extent that there is no applicable South African statute, and subject to any choice of law provision in the appropriate contract, English law as at 1 November 1983, will apply to salvage disputes in South Africa. For matters, not within the jurisdiction of the English High Court of Admiralty at the relevant date, Roman-Dutch law would be the applicable law.[148] While one may question the extent to which English law was retained, it has been suggested that this was due to the 'fragmentary and relatively undeveloped' nature of the earlier Roman-Dutch law in relation to maritime matters applicable in South Africa.[149]

Of course, the subsequent enactment of salvage specific legislation in the form of the South African Wreck and Salvage Act[150] means that there is no need to traverse the complicated mechanism introduced by s 6 of the AJRA. This means, that English law remains applicable in relation to salvage questions only insofar as the current WSA is silent on an issue. Where such a situation arises, the English law of salvage will function as a fall-back system and one would have to make reference to any statutes and case law up to 1 November 1983.[151]

2.5 Modern developments in the law of Salvage

The nineteenth century has seen numerous practical and technological changes that impacted upon the law of salvage. One such significant development was the development of powered vessels which triggered development on a number of levels. At a practical level, the growth of a corps of professional salvors is probably a direct result

[147] S 6.
[148] S 6(1)(b).
[149] See Hofmeyer G (n 135), 13.
[150] Wreck and Salvage Act 94 of 1996. This Act incorporates the 1989 Salvage Convention into South Africa with the latter subject to the provisions of the former.
[151] Admiralty Jurisdiction Regulation Act s 6(1)(a).

of the development of powered vessels.[152] The invention of the steam tug and the resultant birth of the professional salvor, in turn, triggered development in the law. In this manner, the development of salvage law cannot be divorced from extra-legal factors such as technological development, values, policy and of course the pursuit of international legal uniformity. In this regard, it has been noted that the very basis of salvage compensation was changed with the invention of the steamship.[153] In *The Glengyle,*[154] the House of Lord, *per* Lord Shand, attached

> a very great importance to the circumstances that these ships [salvage steamers] had crews specially fitted for the service, that they had captains who were apparently familiar with several languages in order that they might perform their services thoroughly, and that they had appliances which were suited for saving vessels in distress. All those are considerations which ought to weigh with the court in assessing the amount which ought to be given by way of salvage.

The notion of a liberal salvage award was used to encourage the professional salvor to maintain the necessary equipment for salvage services. In this regard, in elucidating the encouragement element of salvage awards, the Court of Appeal in *The Glengyle*[155] referred with approval to an earlier judgement of Lord Stowell:[156]

> The principles upon which the Court of Admiralty proceeds lead to a liberal remuneration in salvage cases, for they look not merely to the exact quantum of service performed in the case itself, but to the general interests of navigation and commerce of the country, which are greatly protected by exertions of this nature.

While the encouragement element is certainly an element of salvage, it is also clear that the development of the law in this regard was primarily aimed at the achievement of a very specific outcome. Therefore, a close relationship between technological development, the birth of the professional salvor and the extent to which the law can be

---

[152] The performance of salvage services was less personal in that the chief instrument of salvage was the salving vessel rather than the physical exertions of the crew. Also see Clift R and Gay R above n 15, 1355 1361. It is almost to be expected that business-minded individuals would seize upon the opportunities provided by powered vessels to provide a service that is highly lucrative.

[153] Clift R and Gay (n 15), 1355 1361.

[154] [1898] A.C. 519 (H.L). 8 Asp Mar Law Cas 436.

[155] 8 Asp Mar Law Cas. 341.

[156] *The William Beckford* 3 C. Rob. 355.

used to pursue practical benefits is apparent. In this regard, the notion of a liberal salvage award is used to further the interests of navigation and commerce which is not at all different to the manner in which earlier loose standing salvage provisions functioned. At the time of the Glengyle decision, there was, of course, already a significant body of law, developed through cases, which could be categorised as the maritime law of salvage. However, evident from the words of Lord Stowell, as quoted in the *Glengyle,* is the functional value of this developed body of law.

Another development prompted by the birth of the professional salvor,[157] was the extent to which the general maritime law of salvage was gradually replaced by salvage services performed under contract.[158] In this regard, the standard form Lloyd's Form of Salvage Agreement (LOF) has become the most widely used contract under which salvage services are rendered. Changes to the standard form (devised towards the end of the 1800s) were made from time to time and this was necessary 'to accommodate developments in case law, practice, and technological and other changes'.[159] It was also LOF, albeit much later, that provided us with the first real efforts of recognising an environmental dimension to the provision of salvage services.

This development, once again, was the result of technological advancement. With later advancements in technology came super-size tankers and potentially hazardous substances began to be shipped around the world creating a risk of harm to marine and coastal environments that did not exist before.[160] Contractual provisions that were formulated in response to these new realities, ultimately culminated in legislative efforts to address concerns with environmental protection. Aside from the obvious policy considerations and the outcomes at which these legislative efforts were directed, there was a considerable commercial undertone to the drafting of the 1989 Salvage Convention.[161]

---

[157] Rose FD, (n 16), 72 and 400.
[158] See discussion below ch V.
[159] Rose FD, (n 16) 401.
[160] De la Rue C and Anderson C Shipping and the Environment (2nd edn, Informa, London, 2009) 561. See also Shaw R 'The 1989 Salvage Convention and English Law' (1989) *L.M.C.L.Q* 202.
[161] See Shaw R (n 160). Aside from the obvious pursuit of governmental policy, the author alludes to the role played by the Committee of Lloyd's, through their 1980 revision of the Lloyd's Form salvage contracts and the

2.6 Environmental pressures

The growing concern with environmental protection has been identified as a significant factor for reassessing the law of salvage.[162] Marine disasters such as those involving the *Torrey Canyon (*1967) and the *Amoco Cadiz (*1978) drove home the impacts of maritime casualties on the marine environment.[163] Attempts to align salvage operations with environmental protection aims became the order of the day. As mentioned, original efforts were in the form of contractual provisions such as in Lloyd's Open Form (LOF 1980). This was followed by the Montreal Draft Salvage Convention of 1981, and ultimately the International Salvage Convention of 1989.[164] The 1989 Salvage Convention is generally regarded as a direct consequence of the 1978 *Amoco Cadiz* disaster, which saw 1 300 000 tons of oil being released into the ocean off the French Atlantic coast.[165] In this regard it has also been noted by Redgwell that the *Amoco Cadiz* disaster is a 'useful starting point for a discussion of the greening of salvage law'.[166] In this regard, there has been a definite development from the crystallisation of values, evident from industry responses in the form of contractual arrangements, to the eventual formalisation of these values in the form of international conventions and national legislation.

A look at the manner in which the environmental protection part of salvage law developed highlights several issues. Contractual provisions relating to environmental protection such as in LOF 1980 reflected a need for the protection of the environment

---

marine insurance industry. Shaw notes that '[t]he International Group of P. & I. Clubs, whose members insure virtually the entire world tonnage of merchant ships against third-party liabilities, including oil pollution, had … done much work on the interaction between oil pollution and salvage.' At 205.

[162] See the Committee on Marine Salvage Issues, National Research Council's A reassessment of the marine salvage posture in the United States of America (1994) National Academy Press Washington, D.C. Also see Mohr E "Environmental norms, society and economics" *Ecological Economics* (1994)229. Mohr notes that environmental norms "appear to be on the advance everywhere" at 243. Also, see discussion of salvage law, ch. 3, below.

[163] Catherine Redgwell 'The greening of Salvage Law' (1990)14 *Marine Policy* 142, 142, fn 3; Edgar Gold 'Marine Salvage: Towards a New Regime' (1989) 20 *Journal of Maritme Law and Commerce* 487, 489; Michael Kerr 'The International Convention on Salvage 1989 – How it came to be' (1990) 39 *International and Comparative Law Quarterly* 530, 535. The Liberian tanker, Amoco Cadiz, came into distress as a result of a steering failure and the ship and her cargo were finally lost off the coast of Brittany and could not be salvaged. See further De La Rue C and Anderson C (n 160).

[164] Rose FD (n 16).

[165] ibid. 208. Also see Brice (n 111) and Staniland (n 57).

[166] Redgwell (n 163) 142. The author notes that the disaster was the 'impetus for a number of changes in the international law of salvage'.

following maritime disasters.[167] Thus, environmental values or preferences were incorporated in the commercial dealings between salvors and ship owners. The eventual formalisation of these arrangements, in the form of the 1910 London Salvage Convention, appears consistent with the notion of the interaction between values and norms expressed in the preceding chapter. Moreover, the functional value of the law of salvage, quite evident from the early history of salvage (earlier this was less the law of salvage then loose standing provisions that contained elements of salvage), in addressing specific outcomes, is also evident. While the environmental concern addressed by the 1989 Salvage Convention is very different to earlier concerns that triggered development in the law of salvage, the pattern of legal development in response to specific needs persists.

2.7 Conclusions

It has been illustrated how early salvage provisions were often directed at aims one would not necessarily associate with the modern law of salvage. The categorisation of such early provisions as salvage law could only ever be done in hindsight. While these provisions contributed to a growing body of salvage law, the early development was often incidental to the achievement of wider social aims. The notion of addressing a specific mischief, or attaining specific goals, was the primary informing trigger in the early law of salvage. This could possibly be explained by virtue of the fact that early legislators did not necessarily have the luxury of a developed framework of law, which would also explain the fragmented nature of early English salvage law. However, these early precursors of the law of salvage also provide good evidence for the fact that, notwithstanding any particular context prompting legal development, the safeguarding of property (ships and cargo) was always involved.

Very important, as mentioned, technological development in shipbuilding contributed much to the environmental protection pressures placed on salvors. The practical connection between salvage operations and the danger of environmental damage emanating from marine disasters provide some perspective on the environmental pressures placed on salvors. The practical role played by salvors in

[167] See discussion of LOF and SCOPIC below ch V.

averting or minimising such disasters and the extent to which a developed system of salvage law apply to their work, does explain assumptions pertaining to the environmental protection credentials of this system. An already existing framework of salvage law would necessarily be the first port of call in developing the law pertaining to salvage operations where there is a threat of environmental damage. This possibly also explains current assumptions that the law of salvage can deal with the added challenge of environmental protection, which is part and parcel of modern salvage operations.

The point of departure in the drafting of early salvage provisions appears to have been the outcomes desired by the drafters. This was achieved without any regard for the legal theoretical categorisation of these provisions, which is an exercise that came afterwards.[168] The modern concern with marine environmental protection in the context of salvage operations has arisen within a context substantially regulated by law. Moreover, this system has, throughout history, proven itself to be adaptable to technological and other changes. Therefore, the assumption that this system can deal with the relatively new challenge of environmental protection comes as no surprise. However, whether the law of salvage can effectively facilitate this further concern remains to be seen, especially given the extent to which environmental protection services appear to fall outside of one constant feature throughout history, namely, the safeguarding of property.

[168] See the discussion of Ashburne on the appropriate categorisation of provisions that ostensibly dealt with contribution in the event of shipwreck, above 37.

Chapter III The legal theoretical nature of Salvage

3.1 Introduction

The development of salvage law, as shown in the previous chapter, despite its property focus, has always evinced a degree of flexibility that has allowed it to respond to policy changes. Therefore, pressures on this area of the law to respond to environmental protection concerns are understandable. However, this might be a concern beyond the reach of an area of the law that developed in a restricted admiralty context and that only rewarded services to ship and cargo. This chapter will examine the legal theoretical basis of the law of salvage and the extent to which it can be reconciled with such concerns.

While the law of salvage operates in a well-established legislative framework, the question of its legal theoretical nature must be determined with reference to the common law. In the South African context, this necessarily involves an investigation of English law.[1] Nevertheless, while this may be the case, it has been suggested that the Roman-Dutch common law of South Africa may provide a basis for the legal theoretical categorisation of salvage.[2] Thus, salvage may be viewed as an example and application of the general principles of *negotiorum gestio*. In this regard, the South African law offers the possibility of a claim in the nature of salvage, while defined as a maritime claim, nevertheless, being amenable to the jurisdiction of an ordinary common law court. In dealing with such a claim, the court will likely have reference to the institution of *negotiorum gestio*, which covers those instances that in the English Law is dealt with under the heading of necessitous intervention.[3] This chapter will also explore the extent to which the common law could provide a basis for the inclusion of environmental concerns in the law of salvage.

---

[1] See discussion of s 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983, ch II, 58-60.

[2] Van Niekerk 'Salvage and Negotiorum Gestio: Exploratory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage' (1992) *Acta Juridica* 148.

[3] See Burrows A *The Law of Restitution* (3rd edn OUP, Oxford, 2011) 469 – 476. Burrows provides instances of necessitous intervention and expressly includes salvage as an area where the English law provides the intervener a remedy. See also Virgo G *The Principles of the Law of Restitution* (OUP, Oxford, 1999), Goff R and Jones G, *The Law of Restitution* (London, 1966).

3.2 A basic definition of salvage

Definitions, often, do not capture the totality of an area of law and tend to be unduly restrictive. Nevertheless, definitions may help with the identification of the salient attributes, or concerns, of an area of the law. The law of salvage has developed over centuries and one can expect development in the area it seeks to regulate to challenge standard definitions as formulated over time.[4] Therefore, it comes as no surprise that legislatures and judges have, at times, hesitated to provide clear definitions of salvage law. In this regard, Lord Stowell observed that

> no exact definition of salvage is given in any of the books. I do not know that it has, and I should be sorry to limit it by any definition now.[5]

Of course, this cautious approach of Lord Stowell has proven to be well founded. In the year 1815, no attempt to define salvage could have been mindful of future challenges such as the growth in the oil and chemical ocean trades. Modern marine casualties pose dangers to interests other than that of ship-owners and cargo owners, e.g. the often unidentifiable third parties that may have interests in environmental protection services.[6] However, the traditional law of salvage never considered parties and issues outside of the group comprised of the owners of salved property, their insurers and salvors. In *The Nagasaki Spirit,*[7] Lord Mustill in noting the 'widespread contamination of sea, foreshore and wild life' resulting from the escape of cargo from the wreck of the Torrey Canyon, observed that

> the traditional law of salvage provided no answer, for the only success which mattered was success in preserving the ship, cargo and associated interests; and this was logical,

---

[4] Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (2nd edn, Juta 2009) 396. See also Staniland, *"Shipping"* in Joubert D (ed) LAWSA vol 25(1) (2006). See also, Kennedy WR and Rose FD, *Kennedy and Rose, the law of Salvage* (6th edn, Sweet & Maxwell, 2002) 2, and Reeder, Brice on Maritime Salvage, (4th edn, Sweet & Maxwell, 2003). See also *Semco Salvage & Marine Pte Ltd v Lancer Navigaton Co Ltd (The Nagasaki Spirit)* [1997] 1 Lloyd's Rep. 323 [HL], where Lord Mustil noted that "[t]he law of maritime salvage is old, and for much of its long history it was simple. At 1.

[5] The Governer Raffles (1815) 2 Dods. 14, 17.

[6] Rose FD, Kennedy & Rose Law of Salvage (7th edn, Thomson Reuters, London 2009) 207.

[7] *The Nagasaki Spirit* (n 4).

> since the owners of those interests, who had to bear any salvage award that was made, had no financial stake in the protection of anything else[8]

The environment and concerns about its protection were simply not an issue in earlier years. Definitions formulated at the time would, necessarily, have limited the scope of an area of the law that, in modern times, is closely associated with environmental protection.

Academic scholars have provided basic definitions of salvage, typically with reference to the underlying elements of a successful salvage claim. Professor Rose, despite acknowledging the limitations of legal definitions, has provided the following as a working definition of salvage:

> [A] service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor.[9]

Brice also provides a definition of salvage that includes the same basic elements.[10]

> In English law a right to salvage arises when a person, acting as a volunteer (that is without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger.[11]

From these academic definitions, one can distil the basic elements that must be present for a service to be classified as a salvage service. The service must be voluntarily and successfully performed, to a recognisable subject of salvage in peril. Professor Rose expands the elements somewhat further by noting that salvage applies where:

> (i) In maritime circumstances (ii) there is a recognised subject of salvage (iii) which has come into a position of danger necessitating a salvage service to preserve it from loss or damage and (iv) a person falling within the classification

[8] ibid 327.
[9] Rose FD, *The Law of Salvage* (n 6) 8.
[10] *Brice on Maritime Law of Salvage* (n 4).
[11] ibid 1.

> of salvors (traditionally called a volunteer) (v) is successful or meritoriously contributes to success in preserving the subject from danger.[12]

In the South African context, Professor Hare, agreeing with the definition of salvage provided by Professor Rose, uses it to extract what he regards as the essential elements of salvage at common law.[13] He identifies the following elements:

a) Salvage services of a particular nature; rendered to
b) Salved maritime property – perhaps coupled with saved life; giving rise to
c) A salved fund from which an award is made; to
d) A salvor whose conduct does not vitiate or reduce the award

While the elements appear to omit the obvious requirements of danger and voluntariness, this is addressed by the explanation provided for the first element identified. Professor Hare explains the element of 'salvage services of a particular nature' with reference to the nature of property salvaged and the situation which gives rise to the salvaging of such property.[14] Noting that salvage services may be maritime or non-maritime,[15] he suggests that salvage services derive their maritime nature from the nature of the property salvaged and the situation which gives rise to the salvaging of such property.[16] This is a reference to the fact that salvage services, whether land or sea based takes place in marine circumstances and in relation to maritime property.[17] This is in line with Professor Rose's expansion of the basic definition where he refers to the fact that the services rendered to a recognised subject have to be rendered in 'maritime circumstances'.[18] Viewed in this manner, the first element is best understood as services rendered to property that is involved in or related to a 'maritime

[12] Rose FD (n 6).
[13] See Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* (n 4) 410.
[14] ibid.
[15] ibid.
[16] ibid.
[17] In this regard, see Rose FD, (n 6). Professor Rose notes that 'a claim for maritime salvage (with all its peculiarities) only arises from circumstances of a maritime nature'. At 86.
[18] See above n 12 and text thereto.

adventure'.[19] Thus, it would be the fact that services, whether based on land or sea, are rendered in maritime circumstances that determine their maritime nature.

It is in relation to this first element that Professor Hare also notes that salvage services must be voluntary and rendered in circumstances of danger to the salved property.[20] Thus, the first element of salvage encompasses the traditional elements of salvage. This raises questions about the added elements of salvage identified by the author. The second element, (saved maritime property-perhaps coupled with saved life), appears to be self-evident from the discussion of the first element.

Elements (c) and (d) as identified by the author, are less elements of salvage services than factors that determine whether a salvor gets paid for salvage services rendered.[21] The salved fund (constituted by the property saved) from which an award is to be made could only become relevant once it has been established that salvage services were in fact rendered. Similarly, the absence of conduct that does not vitiate or reduce an award, presupposes that salvage services have in fact been rendered. Therefore, logically, the last element is less an element of salvage than an after-the-fact factor that may prevent a salvor from getting a reward where salvage services have been rendered. The author appears to blur the issue of salvage services and the obtaining of a salvage award for the rendering of such services. Professor Hare's use of the term salvage signifies the manner, as described by Professor Rose, in which 'salvage is used indifferently in legal parlance to denote the salvor's service and the salvor's reward'.[22]

In contradistinction Bradfield offers a definition which mirrors that of the English authors more closely.[23]

---

[19] ibid. 94. In this regard, the author does note that the requirement of a maritime adventure is not 'an independent condition for a salvage award' albeit a potential *'de facto* requirement'.
[20] See above n 13.
[21] ibid. The author mentions the value of salved property as a factor relevant to "satisfying the element of success, or under the convention, a 'useful result'. However, this requirement is a prerequisite of an award of salvage following on a salvage operation, not of whether there is a salvage operation in the first place." At 10.
[22] ibid 9.
[23] Bradfield *"Shipping"* in Joubert WA (ed) LAWSA (2012) Vol 25(2) Second Edition Volume para 140.

> Salvage may be described as, a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and in so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.

The definition offered by Bradfield omits the reference to 'maritime circumstances' but it is conceivable that from a South African perspective services would typically take place in maritime circumstances given the geographical delineation of salvage services offered by the author. In this regard, Bradfield is of the view that '[t]here is no restriction on the form the service must take to qualify for a salvage reward, provided that it is a service to a vessel or property in navigable waters.'[24]

From these definitions offered by academics, it is clear that salvage law is traditionally concerned with the saving or preservation of property in peril at sea or the saving or preservation of property in maritime circumstances.[25] This limitation appears, primarily, to be a result of the admiralty context in which salvage was developed. In this regard, Professor Rose has noted that the Admiralty Court's jurisdiction was a property based jurisdiction.[26] This limitation, necessarily, would have influenced the formulation of the elements of salvage that can be distilled from the definitions provided. However, there is nothing in the above definitions that expressly link the law of salvage to environmental protection,[27] while the marine and coastal environment would also not fit the notion of 'a vessel or property in navigable waters' or be regarded as 'a recognised subject of salvage'. As will be shown, the definition of salvage operations provided in the 1989 Salvage Convention maintains the property bias of salvage operations with no apparent link to environmental protection concerns.[28]

---

[24] ibid para 148.

[25] Brice on Salvage above (n 4) 397. Also see Rose FD, (n 6) 1.

[26] Rose FD, 'Restitution for the Rescuer' (1989) 9 *Oxford J. Legal Stud.* 167.

[27] See Rose FD, Kennedy and Rose on Salvage (n 6). Professor Rose, notes that the traditional law of salvage was inadequate to provide a resolution of environmental issues which would satisfy the interests of all the parties involved when a casualty arises. At 207. Also see Shaw R "The 1989 Salvage Convention and English Law (1989) *L.M.C.L.Q* 202.

[28] Art 1(d) provides the following definition of a salvage operation: Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever. Also see discussion below ch 4.

3.3 The legal theoretical basis of salvage

In South Africa, development in the law of salvage because of environmental protection concerns was effected through legislative enactment in the form of the Wreck and Salvage Act (WSA),[29] with the 1989 Salvage Convention attached as a schedule thereto. Nevertheless, this Act is not exhaustive and the common law remains relevant where it is silent on a matter, which includes questions about the legal theoretical basis of salvage. As such, in terms of s6 of the South African Admiralty Jurisdiction Regulation Act (AJRA),[30] the English law of salvage will be relevant.

3.3.1 The position in English law

3.3.1.1 The equitable nature of salvage

In English law, salvage is regarded as being of an equitable nature.[31] This much is also readily apparent from early salvage cases, both with regard to the right to claim salvage and the determination of the appropriate salvage award. In *The Calypso*,[32] Sir Christopher Robin described salvage in the following manner:

> Salvage resolves…[itself] into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. This is a general principle of natural equity: and it was considered as giving a cause of action in the Roman law; and from that source it was adopted by jurisdictions of this nature in the different countries of Europe.[33]

While the above statement is phrased in wide terms, it was, given the property based jurisdiction of admiralty courts, limited to property in maritime circumstances. Nevertheless, with regard to the equitable principles underlying the right to claim salvage, it has been noted that these principles relate more to the general approach of courts in salvage matters than the specific principles applied by such courts.[34] However, this does not mean that courts have not had recourse to the more systematic body of

---

[29] Act 94 of 1996.
[30] Act 105 of 1983. See discussion above ch II.
[31] Rose FD, (n 6) 11.
[32] (1828) 2 Hagg. 209.
[33] ibid 217-218.
[34] Rose FD, (n 6) 12.

equity as applied and understood in Chancery.[35] In this regard, Professor Rose refers to cases that provide evidence of both types of approaches to matters of salvage. In The Juliana,[36] the court followed a general equitable approach with reference to the rules of natural justice. In contrasting the respective approaches of the common-law courts and Admiralty, it was held that

> this court certainly does not claim the character of a court of general equity; but it is bound by its commission and constitution to determine the cases submitted to its cognisance upon equitable principles, and according to the rules of natural justice.[37]

However, the eventual systemisation of equity as applied in Chancery had an influence in Admiralty. In contradistinction to the approach in The Juliana, The Teh Hu[38] followed a distinctly rules based approach. In the latter case the court denied salvors the right to have a salvage award assessed that considers currency fluctuations. In this regard, Salmon L.J[39] held that

> the salvors rely upon salvage having been described in some cases as a peculiarly equitable jurisdiction. But equity operates according to principles which today are considerably more rigid than those of the common law. I know of no principle of equity nor any decision which is of help to the salvors.

Thus, while the equitable basis of salvage and two senses of ‘equity’ is confirmed, the specific approach adopted by courts over time has ranged from a general equitable approach in line with the dictates of natural justice to the application of crystallised rules of equity. Notwithstanding this difference in approach, there appears to be consensus about the essentially equitable basis of the right to claim salvage.

3.3.1.1.1 Benefits conferred as the basis for salvage

Professor Rose, in expanding upon and explaining the general equitable base of salvage, describes salvage as founded upon two considerations, thus referring to the

[35] ibid 13.
[36] (1822) 2 Dods. 504.
[37] ibid 520-521.
[38] [1970] P. 106.
[39] ibid 130.

twin bases of salvage law.[40] The first of these bases is the notion of rewarding salvors for the benefits they confer, which for historical and jurisdictional reasons have been limited to benefits to property.[41] These benefits inform the liability of their recipient for the payment of or a contribution to salvage awards. In this regard, 'each and every interest which has received a benefit from the salvage service provided must contribute'.[42]

3.3.1.1.2 Public Policy

The second base of salvage is that of the public policy of encouragement,[43] which really suggests more than an equitable basis to salvage. In this regard, Dr Lushington, in The Fusilier remarked that

> [d]irect benefit is not the sole principle upon which salvage reward is required to be paid. I am of the opinion that the payment of salvage depends upon more general principles; and in saying this, I think I am supported both by Lord Stowel and Story J. Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and marine commerce. All owners of ships and cargoes and all underwriters are interested in the great principle of adequate remuneration being paid for salvage services; and none are more interested than the underwriters of the cargo.[44]

Clear from the remarks of Dr Lushington, is the fact that the benefits conferred are assessed in balance with wider policy considerations such as the general interests of ships and marine commerce. This balancing exercise persists in the modern law of salvage and especially in the determination of appropriate salvage awards. This reasoning also explains the contention of Professor Rose that a 'potential detriment to

---

[40] Rose FD, (n 6) 14.

[41] ibid. The apparent piecemeal development of the body of law of salvage has been influenced by the parallel carving out of a distinct Admiralty jurisdiction in England. In this regard, Professor Rose has noted that 'the jurisdiction of the admiralty court originated as one over property which was within the geographical jurisdiction of the Lord High Admiral'. See also Rose FD, *Oxford J. Legal Stud. (n 26)* 167, 183. Chances would always be that a law of salvage developed within the context of Admiralty with its liberal adoption of civil law concepts would acquire a distinct identity. Also see ch 2 for the historical analysis of the law of salvage.

[42] Rose FD, *Kennedy and Rose on Salvage* (n 6) 15.

[43] ibid 14.

[44] (1865) Br. Of Lush. 341, 347.

commerce may similarly be a reason for discouraging salvage claims for a modest service [benefit].'[45] Essentially, one is dealing with a balancing act in which no single factor takes a place of priority compared to others.

Similarly, in American jurisprudence, there is the notion of a balancing exercise. In The Henry Ewbank,[46] Story J, in alluding to this balancing exercise, notes how, in the case of salvage it is a question of combining 'private merit and individual sacrifices' with 'larger considerations of the public good of commercial liberality and of international justice'.[47] Thus, in the words of Story J, salvage should be treated as a 'mixed question of public policy and private right equally important to all commercial nations and equally encouraged by all'.[48] While *The Henry Ewbank* and *The Fusilier* provide clear support for the public policy underpinnings of salvage, there is also express reference to the fact that this is in combination with direct benefits conferred.[49] Story J alludes to this component as the 'private right' component of the mixed question that is salvage. Nevertheless, these cases shed no further light on the legal theoretical nature or basis of this 'private right' or the benefit conferred.

Professor Rose, however, sheds some light on this informing component to the question of salvage by noting that the benefits received may be dealt with as a manifestation of the principle of unjust enrichment.[50] He also notes the increasing extent to which salvage has come to be included within the modern law of restitution for unjust enrichment.[51] He notes further that, subject to particular rules applicable to the type of situation in hand, a defendant receiving a benefit at the expense of the claimant, in circumstances where he would be prima facie unjustly enriched must make restitution to

---

[45] Rose FD, (n 6) 15.
[46] (1883) 11 Fed Cas. (Case No 6376) 116.
[47] ibid 1170.
[48] ibid.
[49] See text to n 44 above.
[50] Rose FD *Kennedy and Rose on Salvage* (n 6).
[51] ibid 20. Professor Rose provides as an example of authors that include salvage within the modern law of restitution for unjust enrichment Goff R and Jones G, *The Law of Restitution* (London, 1966), Klippert G, *Unjust Enrichment* (Butterworth, Toronto, 1983), which is indeed correct. However, this categorisation of salvage within the law of unjustified enrichment has not been uniformly observed. Examples of authors that do not include salvage within the law of unjustified enrichment are Lord Wright, *Legal Essays and Addresses* (1939) Cambridge, Birks P, *Introduction to the Law of Restitution* (OUP, 1985), Virgo, *Principles of the Law of Restitution* (OUP, 1999), Burrows A, *The Law of Restitution* (3rd edn, OUP, 2011)

the claimant for it.[52] An important aspect of Professor Rose's suggestion is the fact that his enrichment analysis pertains specifically to the actual right to claim a salvage award. In this regard, it would appear to be separate from the enquiry into the actual salvage award, which may be inflated for policy considerations.[53] This contrasts with the position at common law. At common law, the claims of those that have bestowed an unrequested benefit are typically not permissible. In *Falcke v Scottish Imperial Insurance Co,*[54] it was held that

> work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create a lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will.[55]

The above situation, of course, contrasts with salvage in that the scenario as described by the judge would typically find a claim in Admiralty. In this regard, it is suggested that salvage law, given its specific policy underpinnings, is an exception to the general approach to necessitous intervention.[56] Lord Bowen, in *Falcke,* albeit obiter, expressed the situation as follows:

> There is an exception to this proposition [that liabilities are not to be forced upon people behind their backs] in the maritime law. With regard to salvage… the maritime law differs from the common law..… The maritime law, for the purposes of public policy and for the advantages of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.[57]

---

[52] Rose FD, (n 6) 20.
[53] ibid 21.
[54] (1886) 34 CH.D 234.
[55] ibid 248-249.
[56] In this regard see, Burrows A, *The Law of Restitution* 3rd edn (n 3).
[57] See above, n 54.

It is apparent that the specific rules developed in salvage were a consequence of its placement in Admiralty. In this regard, the availability of a remedy for one qualifying as a necessitous intervener often depended on the particular forum within which a matter arose.[58] Aitken,[59] in commenting on the common law's aversion to providing a remedy to volunteers, notes that it 'may be explained historically, and in particular, by examining the jurisdiction of those courts in which the volunteer…[would be] accorded some courtesy'.[60] The extent to which the admiralty court has maintained a peculiarly equitable jurisdiction and flexibility in its administration,[61] may explain the development of a body of salvage rules in line with the civil law *negotiorum gestio.*[62] Therefore, while the law of salvage may arguably be viewed as an admiralty specific case of necessitous intervention, it has no readily apparent equivalent in the common law.

Professor Rose, in an attempt to distil a general system of restitution at common law, also notes that 'the law of salvage is the leading paradigm of English law's admission of recovery for necessitous intervention and affords a developed scheme for implementing it, so that, although it is impossible to transpose directly into the common law, it merits constant reference'.[63] Therefore, while the law of salvage provides an exception to the common law, it is at the same time an improvement on the approach to necessitous intervention on land. Such a reference to salvage will therefore allow for the logical extension of the rules of necessitous intervention to land, which appears to be the intention of Professor Rose.

---

[58] See Aitken "*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach" (1986-1988) *11 Sydney L. Rev* 566.

[59]ibid.

[60] ibid 566.

[61] Rose FD, *9 Oxford J. Legal Stud* (n 26) 167, 171.

[62] ibid. Prof Rose notes that '[t]he civil law, together with other sources, has also provided the foundation of the maritime law of salvage administered on similar principles, albeit as part of different national jurisdictions, by the admiralty courts of England and Scotland'. At 170. Also see ch 2 for a discussion of the history of salvage law. See also Aitken, (n 58). Aitken in providing a jurisdictional explanation for remedies in cases such as bills of exchange, burial and salvage, regards the forum in which they were heard as paramount. Thus he states that these 'courts were under the control of judges whose training and outlook was pre-eminently civilian [and that] [i]t is no surprise if examples of *negotiorum gestio* should survive in such an environment, away from the encroachment of the common law'. At 568.

[63] Rose FD, *9 Oxford J. Legal Stud* (n 26), 171.

Professor Rose, noting the peculiarity of certain rules to the law of salvage, alludes to very practical reasons that make the identification of salvage with the general law of restitution a worthwhile exercise. In this regard, he refers to the availability of a greater body of authoritative guidance for the resolution of practical issues.[64] Apparent from the cases mentioned and the views of Professor Rose, is that public policy, by itself, cannot be a complete explanation of the jurisprudential basis for the right of salvage. In this respect the views of Professor Waddams[65] are also instructive. He notes that in relation to maritime salvage, 'it has operated directly so as actually to impose…obligations to pay rewards'.[66]

However, Professor Waddams' view might not entirely be accurate and even somewhat misleading. He links the question of public policy with the right to claim salvage, which is not entirely correct. As noted by Professor Rose, public policy 'derives from the central purpose of encouraging salvage services by, wherever possible, inflating the salvors' award rather than to impose an obligation where none is otherwise assumed to exist'.[67] Essentially, the public policy of encouragement would come into play once the right to claim an award has been established. Therefore, while public policy is an important component in the determination of salvage awards, it cannot be said to provide the basis for the right to claim. This much is also borne out by the historical analysis of salvage, where it was shown that the right to claim salvage was established by legislation. Such legislation may be explained with reference to specific outcomes and policy considerations, but it is first and foremost the legislation that provides the basis for the right to claim salvage.

Nevertheless, Professor Waddams is correct in noting that 'private law concepts, considered alone, do not explain why the reward element in salvage claims should be owed by the defendant'.[68] At the same time, however, it should be noted that while public policy informs the reward element of a salvage claim there would be no doctrinal

---

[64] Rose FD, *Kennedy and Rose on Salvage* above (n 6) 21.
[65] Waddams S *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP, 2003).
[66] ibid 215.
[67] See text to n 64 above.
[68] Waddams S *Dimensions of Private Law* (n 65).

impediment to an analysis of the private right to claim salvage as a manifestation of the principles of unjust enrichment. In noting the shortcomings of private law concepts in explaining the reward element of salvage, Professor Waddams' argument mirrors that of Professor Rose. Therefore, in order to explain the right to salvage and the reward element thereof, one has to have reference to both public policy considerations and private law concepts, which, as pointed out by Professor Rose, may be that of unjustified enrichment. This mirrors the observation of Story J that salvage should be treated as a 'mixed question of public policy and private right equally important to all commercial nations and equally encouraged by all'.[69]

3.3.1.2 A contractual basis for salvage

Should the benefits conferred in a salvage operation be viewed as a manifestation of restitution for unjustified enrichment, this would be in the situation where there is no contract regulating the provision of salvage services. Of course, in this regard, it should be noted that the bulk of modern salvage operations are performed in terms of contract. The question of a contractual basis for the right to salvage has also received academic attention.[70] Stoljar has suggested that modern salvage services are contracts implied in fact.[71] The author appears to ascribe this as a consequence of the development from early salvage law primarily concerned with cases of wrecks and their salvage to the provision of "direct assistance of one ship to another".[72] Thus, the issue of assistance provided by salvors leads to the author's contention that the parties are essentially concluding an emergency contract, which leaves only the terms pertaining to the price and the details of the performance open.[73]

However, this notion of a contractual basis for the right to claim salvage has not found general support in academic writing.[74] Brice, while acknowledging the fact that salvage services are in most cases rendered pursuant to a salvage agreement, notes

---

[69] See above 76, n 47.
[70] See Stoljar S *The Law of Quasi- Contract* (Law Book Co. for New South Wales Bar Association, 1964).
[71] ibid 171-176.
[72] ibid 172.
[73] ibid 174.
[74] In this regard see Gaskell N "The Lloyd's Open Form and Contractual Remedies (1986) *Lloyd's Maritime and Commercial Law Quarterly* 306, and the authorities cited in fn 1-2.

that the 'existence of an agreement or contract is not, and never has been a prerequisite to the right to recover salvage if salvage services have in fact been performed without an agreement or contract'.[75]

The notion of a contractual basis for the right to claim salvage has also been dismissed by English Courts. In commenting on the legal nature of salvage and the way the right to salvage arises, the case of *Five Steel Barges*[76] provides some insight. While the court acknowledged the equitable character of salvage, it also held that

> [t]he right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract upon the subject. I think that the proposition equally applies to the man who has had a benefit arising out of the saving of the property.[77]

The above statement, which is cast in a very liberal fashion, was approved in *The Cargo Ex Port Victor*.[78] The court expressly did away with any attempt to deal with the right of salvage as arising from an implied request from an owner of property in danger to salvors or an implied contract. Sir Francis Jeune P, in dismissing the notion of an implied request for help and an implied contract, held that

> [t]he true view is, I think, that the law of Admiralty imposes on the owner of property saved an obligation to pay the person who saves it simply because in the view of that system of law it is just he should; and this conception of justice naturally imposes a proportionate obligation on any person whose interest in that property is real, though falling short of that of ownership. I see no reason, therefore, why… a man who has had a benefit arising out of the saving of the property is liable to a claim for salvage no less than the actual owner of it.[79]

---

[75] *Brice on Maritime Salvage* (n 4) 39.
[76] [1890] 15 P.D. 142.
[77] ibid 144.
[78] [1901] P. 243 (confirmed on appeal).
[79] ibid 249. See also *The Meandros* [1925] P. 61. In the latter case the court similarly referred to the legal liability created by salvage as arising from the saving of property, where the owner who has had the benefit of such a service has to remunerate those who have conferred the service. At 68.

It is clear from these statements by English courts that the right to salvage, while it may involve contractual arrangements, does not arise from contract. Although there is a consensual element in the context of non-derelicts, this does not mean that the right to an award arises from contract. Moreover, a contractual basis would clearly not provide a basis for salvage in the case of derelicts. In *The Toju Maru,* in connection with the salvage of non-derelicts, Lord Diplock held that 'even if there was a consensual element, the implied obligation lacked mutuality in that the salvor assumed no obligation to continue to provide his services'.[80]

3.3.2 South African law of Salvage.

From a South African perspective, Professor Hare notes that, as a first principle of salvage, it is 'to a greater extent than most other law, governed by equity.'[81] In this regard, Professor Hare's use of the term equity is a reference to the general notion of 'fairness and justice'.[82] His use of the term excludes the more formalistic distinction between the English common-law courts and Chancery, and the latter's eventual application of more distinct rules of equity. Professor Hare also quotes with approval from the judgment of Dr Lushington in *The Fusilier,*[83] for the assertion of the general motivations of public policy as a basis for salvage.[84]

However, as noted, even though this may have been alluded to in case law, such a statement is not entirely accurate. As acknowledged in cases such as *The* Fusilier, this is but part of the enquiry into the right to claim salvage and salvage awards.[85] Also, as noted earlier,[86] while public policy may constitute informative elements of the law of salvage, one should not lose sight of the fact that policy considerations function as a triggering element for legal development in general. In this regard, in relation to the historical development of the law of salvage, it has been noted how the right to salvage, in the modern sense (providing a reward for the prevention of loss) was introduced

[80] *The Toju Maru* [1972] A.C 242, 292.
[81] Hare J (n 4) 409.
[82] ibid.
[83] *The Fusilier* (n 44).
[84] Hare J (n 4) 409.
[85] *The Fusilier* (n 44).
[86] See discussion of values and policy considerations in the development of law, ch I.

through statutory enactment. Therefore, public policy may be used to explain the legislative development pertaining to salvage, but it cannot by itself be said to provide a legal theoretical basis for the right to claim a salvage reward. Such legislative enactment in vesting a right to salvage was not necessarily informed by any underlying private law concepts such as unjustified enrichment. Instead, the right vested through legislative enactment appear to have been directed at the achievement of very specific outcomes. Therefore, policy objectives may have triggered legislative enactment, but they have not in themselves vested the right to a reward for preventing the loss of property at sea. In this regard, it should be noted that legislation may provide a right to claim a reward where environmental benefits are conferred in salvage operations without any reference to commercial policy considerations.[87]

Nevertheless, with reference to pronouncements on the law of salvage in English cases, Professor Hare expresses the view that the

> right to claim salvage is a fundamental right of international maritime law, depending neither upon any contractual engagement between the salvor and the owners of the salved property nor upon a cause of action in delict (tort). It is a right *sui generis,* though it may display similarities to established causes of action such as *negotiorum gestio* and unjustified enrichment.[88]

In expressing the view that salvage has stood upon its own foundations in maritime law from the earliest times, Professor Hare relies on the views expressed by Sir Francis Jeune P in *The Cargo ex The Port Victor.*[89] In this case, Sir Francis Jeune P expressed the view that 'the law of Admiralty imposes on the owners of property saved an obligation to pay the person who saves it simply because in the view of that system of law, it is just he should'.[90] This view expressed by Sir Francis Jeune P, does lend itself to the conclusion that the right to claim salvage is a *sui generis* maritime specific institution. Bradfield shares the views of Hare in this respect stating that '[t]he rendering of salvage services, without more, has long been recognised as giving rise to an

[87] See Rose FD, (1989) 9 *Oxford J. Legal Stud* (n 26) 173.
[88] Hare J (n 4) 408.
[89] 9 Asp. Mar. Law Cas 163.
[90] ibid 166.

entitlement to a reward for doing so. The nature of such claim is generally regarded as *sui generis* based on considerations of public policy and equity'.[91] In support of his contention Bradfield makes express reference to British and American case law referred to above.[92]

Thus, authors like Hare and Bradfield, aside from their recognition of the public policy element of salvage, explains the private right to claim a salvage award as a *sui generis* concept of maritime law. However, Professor Rose's suggestion that this aspect of salvage may be regarded as a principle of unjustified enrichment, finds some resonance in South African legal literature, albeit in the guise of a civil law approach to the question. Thus, it has been suggested that the South African law of salvage may be viewed as a form of *negotiorum gestio*,[93] which, as mentioned, would cover instances dealt with in English law under the heading of necessitous intervention.[94]

3.3.2.1 Negotiorum Gestio

N*egotiorum gestio* entails the voluntary management by one person (the *negotiorum gestor*) of the affairs of another (the *dominus negotii*) without the consent or even knowledge of the latter.[95] At first blush, should one consider the definition of salvage offered by Brice,[96] it is understandable why authors such as Hare, would comment on the similarities between it and institutions like *negotiorum gestio*. The requirements for a claim based on *negotiorum gestio* are fourfold in that a) there must be a management of another's affairs;[97] b) the dominus must be absent or, if not absent, at least unaware and ignorant of the fact that his or her affairs are being managed by another;[98] c) the gestor must act with the intention of managing the affairs of another (*animus negotia aliena gerendi*), and must have the intention of recovering from the dominus any disbursements or expenses suffered by him or her during the course of the

[91] Bradfield Shipping (n 23) par 141.
[92] Bradfield quotes with approval from cases such as *The Calypso* (1828) 2 Hagg 209; The Fusilier (1865) Lush 341 and the American case of *The Henry Ewbank* (1883) 11 Fed Cas 1166. The author also refers to Hare's views in this regard.
[93] Van Niekerk JP (1992) *Acta Juridica* (n 2).
[94] See above n 3.
[95] Joubert DJ and Van Zyl DH *Mandate and Negotiorum Gestio* in LAWSA 2nd ed Vol 17(1) para 17.
[96] See *Brice on Salvage* and text to (n 10) above.
[97] Joubert DJ and Van Zyl DH (n 95) para 21.
[98] ibid para 22.

management of the affairs of the dominus;[99] and d) The management of the affairs should have been conducted in a useful or reasonable way (*utiliter*).[100]

a) Management of another's affairs

To the extent that salvage is in principle a service to maritime property, thus conferring a benefit on the owner, the first requirement, (a), appears to be aligned with the law of salvage. Similarly, with regard to salvors' environmental services, it is apparent that through these services benefits are conferred. In this regard, Brice suggests that

> The salvor may confer a substantial benefit upon those ashore. Further, governments and other authorities may be anxious to ensure that salvage services are not only undertaken but that they are performed in such a way as to ensure that the protection of the public interest is paramount.[101]

There is an undeniable public interest in the protection of the environment. While salvage services were traditionally performed with the interests of the owners of the salvaged ship and cargo owners in mind, this has no doubt changed.[102] In respect of the environmental services rendered by salvors, it ought to be apparent that, except as provided for in the context of salvage operations,[103] there is no general duty on salvors to render such services. However, the South African National Environmental Management Act (NEMA)[104] confirms the State's trusteeship of the environment on behalf of the country's inhabitants.[105] This legislation is pursuant to chapter 2 of the South African Constitution, which imposes a constitutional duty on the state to protect the environment through reasonable legislative and other measures.[106] Therefore, it is clear that where a salvor renders environmental services, this would benefit the State or any other party tasked with or with an interest in such services. Of course, this would be

[99] ibid para 23.
[100] ibid para 24.
[101] *Brice on Salvage* (n 4) 397.
[102] ibid. Also see De La Rue C & Anderson C *Shipping and the Environment* (2nd edn, Informa, London, 2009) 535.
[103] See discussion of the duties of the salvor in terms of Article 8 of the 1989 Salvage Convention below ch 4, 136ff.
[104] Act 107 of 1998.
[105] NEMA Ch 1 s 2(1)(o) expressly provides that '[t]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage'. Also see, generally, Van der Linde (ed) *Compendium of South African Environmental Legislation* (Pretoria University Law Press, 2007).
[106] South African Constitution, s 24.

a benefit conferred upon those with an interest that is not within the traditional matrix of interests recognised. Moreover, this would be in relation to property that does not traditionally fall within the traditional restrictive conception of maritime property. Essentially what we have, is a benefit being conferred, partly, on a party or parties outside of the traditional salve matrix, namely owners of salved property and salvors.

b) The dominus must be absent or, if not absent, at least unaware and ignorant of the fact that his or her affairs are being managed by another

This requirement essentially means that the *gestor* should not have any authority, implied or tacit, to conduct another's affairs.[107]It has been suggested that this requirement of *negotiorum gestio* will result in it becoming 'increasingly rare as means of communication improve'.[108] In the case of modern salvage it would seldom be the case that an owner is unaware of the peril to his ship. Thus, this second requirement would appear to conflict with the realities of a modern maritime casualty. Essentially, any policy based extension here would essentially take away that which has been described as the very essence of *negotiorum gestio,* namely the absence of any authority.[109] It is indeed difficult to see how the circumstances of a maritime casualty and the operation of maritime policy considerations could assist with an extension of this requirement.

In relation to environmental services, the same would apply in that coastal states would typically be informed where a marine casualty poses environmental risks. In such a scenario, salvors would be best placed to address such concerns, even though overall management of procedures may not be the responsibility of the salvor.[110] This knowledge on the part of the coastal state and its potential involvement in directing salvage services would appear to take the actions of the salvor outside of the reach of *negotiorum gestio*.

[107] Joubert DJ and van Zyl DJ (n 95) para 22.
[108] Du Plessis *The South African Law of Unjustified Enrichment* (Juta, Cape Town, 2012) 255.
[109] Joubert DJ and Van Zyl DH (n 107).
[110] See Swan C "The Restitutionary and Economic Analysis of Salvage Law" (2009) 23 *A&NZ Mar LJ* 99 103.

c) *The gestor must act with the intention of managing the affairs of another (animus negotia aliena gerendi), and must have the intention of recovering from the dominus any disbursements or expenses suffered by him or her during the course of the management of the affairs of the dominus*

This third requirement, which consists of two elements, is not completely reconcilable with salvage. In this regard the required intention to manage another's affairs would differ from the situation in salvage. A salvor can claim a reward even if the salvage operation was performed under the mistaken assumption that the property belongs to the salvor.[111] Should a *gestor* operate under a similar mistaken impression, there would be no claim based on *negotiorum* gestio.[112] Thus, in contradistinction to *negotiorum gestio*, there is no requirement that the salvor intends to benefit another. Of course, where the gestor manages his or her own affairs under the mistaken impression that they are those of another, the intention to manage that person's affairs is irrelevant, since no *negotiorum gestio* arises.[113]

The second element, namely, that the *gestor* intends to recover his disbursements or expenses would appear to be more in line with the typical salvage situation. In this regard, Professor Rose, notes that a salvage claim will fail 'if the claimant performs the service with the intention, however formed, of not claiming salvage, thus with the presumed intention of conferring a voluntary benefit on the salvee'.[114] Nevertheless, while this may impact upon the right of the salvor to claim a reward, it does not change the fact that there was salvage. In relation to the environmental services, it is apparent that salvors do expect to be adequately paid for their services. This also informs current attempts by salvors to see the law changed so that they are not only rewarded on a salvage basis for saving ship and cargo, but also

[111] Rose FD (n 6) 31. In this regard the author refers to the case of *The Liffey* (1887) 6 Asp. M.L.C. 255. In this case, Sir James Hannen expressed the view that 'it makes no difference whatever with what idea the man has rendered the services'. At 256.
[112] Joubert DJ and Van Zyl DH (n 95) para 23.
[113] ibid.
[114] Rose FD (n 6) 31.

for their efforts and success in preventing damage to the environment.[115] However, what should this right to an award be based on? While the beneficiary of services should pay, it is quite apparent that this is not the case in relation to environmental services given that, under current salvage law, benefits conferred on coastal states are not paid for by coastal states.[116]

d) The management of the affairs should have been conducted in a useful or reasonable way (*utiliter*).

As long as the conduct of the gestor was *utiliter* at the time of commencement of the management of affairs, the gestor is entitled to the usual remedies, even if the final result of the gestio was unsuccessful or ineffective.[117] In determining whether the management of affairs complies with the requirement of *utiliter coeptum*, an objective approach is followed.[118] Therefore, if the act was one which the dominus would have performed personally, having regard to all the circumstances, such an act will be considered *utiliter*, regardless of the final outcome.[119]

It is apparent that the position of the salvor is different, in that the success of the salvage operation is a requirement. This requirement of success is commonly expressed in the adage 'no-cure-no-pay', meaning that a salvor who has failed to preserve any property will receive no reward for his efforts.[120] This, of course, is primarily the result of the salvage fund being constituted by the property saved. In commenting on this difference, Professor Van Niekerk suggests that, in the case of salvage,

> it appears to be a requirement not because the salvor's claim is dependent upon the fact and extent of the salvee's enrichment but, on the contrary because of the salvor's right to a reward which is given for his preservation of the property and not merely for his

[115] See paper by Archie Bishop "The development of Environmental Salvage and Review of the Salvage Convention 1989" accessable at <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 4 March 2013.
[116] See discussion of Article 14 of the 1989 Salvage Convention, ch IV, 122ff.
[117] Joubert DJ and Van Zyl DH (n 95) para 24.
[118] ibid.
[119] ibid.
[120] See below, n 126 and text thereto.

> expenses and efforts. Unlike his terrestrial counterpart, the salvor, being entitled to a reward, bears the risk of his actions not being successful.[121]

The author appears to regard the success requirement as a counterpoint to the increased reward that a salvor may be entitled to. This raises questions about the express reference to the usefulness of salvage operations in the 1989 Salvage Convention. The Convention expressly provides that 'salvage operations which have had a useful result give right to a reward'.[122] It also provides that 'except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result'.[123] Nevertheless, it has been suggested that the Convention has not brought about any changes to the common law requirement[124] of success and that it was intended to continue the common law requirement.[125] Lord Diplock's statement in the T*he Toju Maru,*[126] regarding the success element in the law of salvage explains the common law requirement succinctly:

> The first distinctive feature is that the person rendering salvage services is not entitled to any remuneration unless he saves the property in whole or in part. This is what is meant by 'success' in cases about salvage.[127]

It is, therefore, clear that the success requirement in salvage specifically relates to the actual preservation of property, whether in whole or in part.[128] Where the salvor fails to achieve this, unlike the *gestor*, he will not have any entitlement to a reward. In this regard Professor Rose, in his interpretation of the word 'useful' as employed in the

---

[121] Van Niekerk JP (n 2) 173.
[122] Art 12(1).
[123] Art 12(2).
[124] The common law requirement of success was set out in the case of *The Melanie (Owners) v The San Onofre (Owners)* [1925] A.C. 246.
[125] Rose FD *Kennedy and Rose on Salvage* above n 114, 366 citing the 1984 CMI Report 20.
[126] [1972] A.C 242, 293.
[127] ibid.
[128] In this regard see *The Fusilier* (n 44); *The Henry Ewebank* n 46; *The Cargo ex Port Victor* 78. In *The Henry Ewebank,* Story J noted that 'salvage must be earned, not by attempting merely to rescue, but by the actual rescue of the property from its perils. The property must be effectually saved. It must be brought into some port of safety; and it must be there in a state capable of being restored to the owner, before the service can be deemed completed'. At 1171.

Salvage Convention, states that the usefulness of the salvage operation is a measure of the contribution made to the preservation of property.[129]

Professor Rose also notes that the term 'useful' as employed by the Convention may possibly be an indication that a change to the traditional law was intended.[130] In this regard, he draws a distinction between the terms 'success' and 'useful', in that a salvage operation may be successful because property was preserved, but not necessarily 'useful' in that such property may have no value.[131] However, the author does suggest that this distinction between 'success' and 'useful' is a false distinction.[132] Essentially, whether one views useful as a term distinct from success or not, a salvor would not be entitled to claim.[133] The salvor may perform what amounts to a salvage operation for all intents and purposes, but his right to claim will be offset by the fact that this is not useful, or in common law parlance not successful.

The term 'useful' as an element of the fourth requirement of *negotiorum gestio* is not linked to the ultimate success or the ultimate usefulness of the *gestor's* actions. This is also acknowledged by Van Niekerk, thus distinguishing the objective usefulness of a *gestor's* actions at their inception from their ultimately being successful.[134] In this regard the author also refers to the fact that the person whose affairs have been managed by the *gestor* cannot raise his 'non-enrichment' as a defence.[135] The unavailability of the defence of 'non-enrichment' also leads the author to conclude that the salvor's right to a reward is not based on unjustified enrichment.[136]

In relation to environmental services, it is apparent that salvors' services when attending to the rescue of a ship and cargo posing a threat to the environment are undeniably useful. Moreover, the 1989 Salvage Convention in its preamble takes cognisance of the fact that salvors have an important, and undoubtedly useful, role to

[129] Rose FD (n 6) 366.
[130] ibid 367.
[131] ibid.
[132] ibid.
[133] ibid.
[134] Van Niekerk JP (n 2) 173.
[135] ibid.
[136] ibid.

play in the prevention or minimising of environmental damage. Nevertheless, it is not only the ship-owner that benefits from these useful services.

From the requirements for a claim based on *negotiorum gestio,* it is clear that while salvage services may in limited circumstances fit its area of operation, there are nevertheless differences that do not fit the requirements of *negotiorum gestio*. Nevertheless, Joubert and Van Zyl, in describing instances of the management of the affairs of another, include 'salvaging a vessel in peril at sea'.[137] They include salvage as an instance of *negotiorum gestio* despite the fact that the Wreck and Salvage Act[138] regulates salvage and the residual application of English law where this Act is silent on a matter.[139] These authors provide no explanation of the manner in which salvage services fit the *negotiorum gestio* framework in spite of the obvious differences in the treatment of the salvor and the *gestor*.

The authors do not explore the statutory entrenchment of English Admiralty law through the operation of section 6 of the Admiralty Jurisdiction Regulation Act.[140] Therefore, one may argue that their reference to salvage as an instance of *negotiorum gestio* may refer to the situation where a claim pertaining to salvage services is heard in a South African High Court not sitting as a court of admiralty.[141] In principle, as will be shown, the High Court, exercising its ordinary parochial jurisdiction, may exercise jurisdiction over a maritime claim.[142] Of course, the South African common law does not have the same aversion to the claim of volunteers bestowing unrequested benefits that has been noted in relation to its English counterpart.

The views of Joubert and Van Zyl of salvage as an instance of *negotiorum gestio* appears to be formulated with reference to the work of Professor Van Niekerk,[143] who

---

[137] Joubert DJ and Van Zyl DH, (n 95) para 19. In this regard the authors in support of their view expressly refer to Van Niekerk (n 2) and the following authorities: *Associated Boating Co v Baardsen*: *in re The "Lief"* (1895) 12 SC 330; *Table Bay Harbour Board v New Zealand Steamship Co* (*The "Papanui"*) (1901) 18 SC 34; *Maytom v The Master "Harry Escombe"* 1920 AD 187. See also Du Plessis J, *The South African Law of Unjustified Enrichment* (n 108).

[138] Act 94 of 1996.

[139] See s 6 of the South African Admiralty Jurisdiction Regulation Act 105 of 1983.

[140] Act 105 of 1983.

[141] See discussion of s 7(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983 below 109.

[142] ibid.

[143] Van Niekerk JP (n 2) 132.

explains this possibility with reference to the work of the Roman-Dutch writer, Grotius.[144] In his chapter dealing with the topic of *negotiorum gestio* (the administration of affairs) Grotius stated as follows:

> Under the name of administration of affairs is included trouble taken at sea for the salvage of other people's property. Since this is accompanied by great danger, and without it much property might be lost, the institution of salvage-money has with much reason been introduced amongst us.[145]
>
> *Onder deze naem van onderwind* [negotiorum gestio] *behoort mede de moeite die genomen wird om ander luiden goed in zee te berghen, t'welk alzoo ghemengt is met groot ghevaer, ende dat by gebreck van dien veele goederen zouden gaan verlooren, zoo is met groote reden in deze landen ingevoert berg-loon* [salvage award].

The purport of the above quotation is clear in that the author expressly includes the typical salvage situation (*om ander luiden goed in zee te berghen)* under the concept of *negotiorum gestio* [*onderwind*]. With reference to the original Dutch text, Professor Van Niekerk regards this as an extension based on considerations of public policy.[146] While not expressly stated as such, his reasoning may be informed by the phrase 'salvage-money has with much reason been introduced amongst us'. In this regard, there is no reference to any other jurisprudential foundation or source for the statement other than 'much reason'.

Of course, aside from the differences noted in relation to the requirements, salvage also differs from *negotiorum gestio* in that the *gestor* (he who manages the affairs of another) is only entitled to claim the actual amount of his expenditure and no additional profit or remuneration.[147] This restriction on the claim of the *gestor* is noted by Grotius who provides that 'the administrator is entitled… to be indemnified against losses and costs.'[148] However, the same restriction does not apply in relation to

---

[144] For the purpose of this study, reference was made to the English translantion by Professor RW Lee of Grotius' Jurisprudence of Holland Vol. 1 (1926) Oxford: At the Clarendon Press.

[145] This is the translation provided by Professor Lee in his translation of the work of Grotius. See Lee RW (trans. Grotius', Jurisprudence of Holland Vol. 1 (1926) Oxford: At the Clarendon Press 435. This work will hereafter be referred to as Grotius' Jurisprudence of Holland.

[146] Van Niekerk JP (n 2) 167.

[147] *Williams' Estate v Molenscoot and Schep (Pty) Ltd* 11939 CPD 360.

[148] Grotius' Jurisprudence of Holland (n 144) 435.

'salvage-money', which is contained in a separate provision. In relation to salvage, should the value of the property exceed the cost of salvage by one hundred Guilders, the salvors would be entitled to 'a quarter of the value if the salvors are content therewith; otherwise the assessment is left to the discretion of the judge.'[149] This reference to the discretion of the judge should a salvor be unhappy with the award raises the possibility that the salvor's reward could potentially be more than his costs. Also, it is conceivable that 'a quarter of the value' of the property may exceed the 'losses and costs' incurred by the salvor. Therefore, despite a lack of guidance on the manner in which a judge was to exercise his discretion, it would appear that the salvor might have been treated in a different manner from the ordinary administrator.

Nevertheless, in South African law, the *gestor's* claim is limited to his expenses. In the case of *Williams' Estate v Molenscoot and Schep (Pty) Ltd*,[150] the court explained the limitation on the right of the *gestor* with reference to the public policy consideration of reducing the danger of officious intervention by would-be *gestors*.[151] This particular concern also appears to have informed the approach of English common law courts to the question of necessitous intervention. The difference, however, is that the English common law courts are averse to providing a remedy in the case of necessitous intervention because of this concern.[152] In the South African context however, this concern is regarded as being adequately addressed by the limitation on the right of the recovery of the *gestor.*[153] Should one accept this argument for the limitation of the *gestor's* claim to expenses and cost, it may be easier to explain Grotius' separate and apparently less restrictive provision for a salvage award and its calculation;[154] aside from the general statement about the *gestor's* entitlements.[155] This, less restrictive

[149] ibid ch 27.7, 436.
[150] (n147) 372.
[151] ibid. In explaining the limitation in a claim based on *negotiorum gestio* Davis J, noted, 'I may add that I am not sorry to see this limitation on the right of action of the *negotiorum gestor.* With it, the *dominus* is in less danger of having onerous services thrust upon him: nobody usually can object to paying for things at absolute cost price. But without it, even though there are other safeguards into which it is unnecessary at the moment to enter, he might not be by any means so safe: the out-of-work carpenter or builder (or even the mason) looking for a job might well be a menace in such circumstances'. At 370. See also Van Niekerk JP (n 2) 168.
[152] See generally, *Falcke v Scottish Insurance Co* (1886) 34 Ch.D. 234.
[153] See above n 147.
[154] See above n 148.
[155] See above n 146.

aspect of salvage awards, in line with earlier observations, may be explained with reference to the policy of positively encouraging salvage services, often effected through the inflation of the salvage award to include an element of reward.[156]

However, it should be noted that no South African court has explained or analysed the position of the salvor with reference to the Roman-Dutch law. The separate provision for salvage awards was never considered because salvage was a matter subject to English law. Nevertheless, one might argue that a consideration of the separate provision for salvage awards coupled with the policies underpinning rescue at sea, might have resulted in the South African law of salvage (without any reference to the English law) not restricting the claim of a salvor to costs and expenses. Of course, in the absence of historical evidence, one can only speculate.

In spite of the difference between the common law *negotiorum gestio* as developed in South African law and salvage, Professor Van Niekerk, with reference to Grotius, suggests that 'our common law regarded salvage as a form, and an exceptional one at that, of …*negotiorum gestio'*.[157] While the author concedes that salvage cannot be explained 'solely with reference to *negotiorum gestio*' given the obvious different treatment of claimants,[158] he explains this difference with reference to the 'different considerations applying in two different spheres of human activity'.[159] In this regard, the author specifically mentions the considerations of 'international custom and maritime policy…[that] required a different response from the law than in the case of terrestrial *negotiorum gestio*'.[160] Professor Van Niekerk regards this viewing of salvage as a species of *negotiorum gestio,* and not as a *sui generis* institution in Roman-Dutch law, as the reason for its sparse treatment by the Old Dutch authorities.[161] This sparse treatment of salvage in Roman-Dutch law and the available principles of salvage

[156] See Rose FD (n 6) 176.
[157] Van Niekerk JP (n 2) 169.
[158] ibid. In this regard, the author's focus on the apparent different treatment of the salvor to the *gestor* is with reference to the terrestrial *gestor* and not the salvor as expressly provided for by Grotius.
[159] ibid.
[160] ibid.
[161] ibid.

received from England *via* the system of Vice-Admiralty Courts,[162] might explain why South African courts have not developed salvage as an instance of *negotiorum gestio*.

This treatment of salvage also informs Professor Van Niekerk's contention that the principles of *negotiorum gestio* as taken over and developed in South African law must be extended by means of analogy to the maritime sphere in which salvage finds application.[163] This extension must take place with reference to public policy considerations peculiar to the maritime context. Such an extension will, therefore, allow courts to consider the special context of salvage, thus allowing for salvage awards over and above a mere claim for expenses as is the case with the *gestor.* Thus, the author argues that the salvor's action would 'by reason of policy considerations…[be] a progression from the *negotiorum gestor's* action'.[164]

In relation to the public policy considerations that may inform the different treatment of salvors, the English case of *Falcke v Scottish Insurance Co*,[165] *may* provide some guidance. Bowen L.J., commenting on the informing policies underlying salvage, noted that

> the maritime law for the purpose of public policy and for the advantages of trade imposes in these cases [salvage] a liability upon the thing saved… which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land nor to anything except ships or goods in peril at sea.[166]

Hence, the main distinguishing factor appears to be the special context in which salvage occurs and the underlying purpose of and the policies informing salvage. The advantages of trade are mentioned in addition to public policy which would include the encouragement of maritime navigation and commerce and the preservation of maritime

[162] See discussion of the reception of English Admiralty law in South Africa above ch II.
[163] Van Niekerk JP (n 2) 169-170.
[164] ibid 171.
[165] (1886) 34 CH.D 234.
[166] ibid 248-249.

property.[167] To this, as suggested by Bowen L.J., one may add the peculiar nature of marine perils addressed in the salvage context. Paleaz distinguishes marine perils from their terrestrial equivalents by noting that 'even unspectacular troubles can lead to catastrophic losses to both property and lives when encountered upon the high seas or upon other bodies of navigable waters'.[168] Also, it has been suggested that, in the case of terrene perils, many rescue alternatives exist and many people will have the opportunity to render assistance, while the same is not true in the marine context.[169]

Should one take Professor Van Niekerk's suggestions to their logical conclusion, these public policy considerations that inform salvage coupled with the peculiar nature of marine perils would be used as the basis for a policy informed adjustment to the situation of the marine gestor (salvor). For example, with reference to the requirements of *negotiorum gestio,* the strict application of the requirement of the intention to manage the affairs of another would not be suited to the peculiarities of the salvage context where the saving of maritime property is of paramount concern. With *negotiorum gestio,* the locus of the right to claim is less the actual benefit conferred than the mind-set which accompanies the decision to manage another's affairs. However, it is clear how the importance of the saving of maritime property may demand less of a focus on actual intention. This concern with the actual saving of maritime property may also explain why the salvor should be treated different in terms of the success of his services.

Professor Staniland[170] provides a view contrary to that of Professor Van Niekerk. He dismisses the idea of salvage as an instance of *negotiorum gestio* on the basis that they are distinct.[171] One reason offered is that the *gestor's* claim is restricted to his

---

[167] See Pelaez AS 'Salvage-a New Look at an Old Concept' (1975-1976) *7 J. Mar. L. & Com* 505. In commenting on these informing considerations in the law of salvage it has been noted that salvage furthers 'maritime commerce by preserving property used in such pursuits that might otherwise be lost and by encouraging additional investments in the maritime industry by decreasing the chance of lost.'At 507.

[168] ibid 508. Also see *The Goring* [1987] Lloyd's Rep. 15. In *The Goring* Gibson LJ stated as follows: 'There are at sea no neighbours, normally no public services such as fire brigades, and few passers-by to provide assistance either from moral obligation alone or from public duty. On land different circumstances have produced different rules of law'. At 24.

[169] Pelaez AS (n 167). The author notes that 'the availability of …alternative sources of rescue are unlikely at sea. Normally, vessels are simply less available than alternative land-based sources of rescue'.

[170] Staniland H "Shipping" (n 4).

[171] ibid para 35.

useful and necessary expenses, provided that his actions are reasonable in the circumstances. In contradistinction, a salvage award, is only granted where the property is saved from distress and the owner of the property benefits from the service.[172]

Of course, it might be argued that a reward over and above restitution due to policy considerations does not change the essential legal nature of the benefits conferred in salvage. In this regard, it has been shown that, even in the English law, arguments for salvage as an exception to the common law aversion to necessitous intervention exist. In arguing that salvage and *negotiorum* are distinct, Professor Staniland might be blurring two distinct issues. The first is the wider legal theoretical classification of salvage and second, the particular rules regarding claims in salvage as a maritime permutation of *negotiorum gestio*.

A second reason offered by Professor Staniland, is that a claim based on *negotiorum gestio* is not a maritime claim as defined in the Admiralty Jurisdiction Regulation Act. However, as mentioned, the Act is not concerned with the issue of legal classification. It is concerned with salvage services, which, some academics have suggested to be a maritime specific application of *negotiorum gestio.* This classification need not be reflected in the Act; only the fact that it is concerned with salvage as a maritime claim. While, *negotiorum gestio* generally is not a maritime claim, salvage even if regarded as a permutation thereof, is. In defining maritime claims, the act is not concerned with the legal theoretical foundations of such claims but the connection of claims to the maritime context. This would also explain a provision such as s(1)(1)(ee) of the Act, which defines as a maritime claim “any other matter which by virtue of its nature or subject matter is a marine or maritime matter”.

Assuming that salvage is a form of *negotiorum gestio,* one would, nevertheless, not expect it to define *negotiorum gestio* as a maritime claim because it provides a foundation for claims ranging from maritime to those with no maritime connection at all. However, salvage as an instance of *negotiorum gestio* with its own particular rules is provided for. This is not because it is an instance of *negotiorum gestio* but because it is

[172] ibid.

undoubtedly a maritime matter. For this reason, salvage being defined as a maritime claim has no bearing on its potential jurisprudential foundation.

This matter can also be explained by means of an analogy. Contracts do provide a jurisprudential foundation for claims. Nevertheless, the Admiralty Jurisdiction Regulation Act does not attempt to define contracts as a maritime claim. It does however, expressly provide for contracts concluded in a maritime context. In this regard, the Act defines 'the carriage of goods in a ship, or any agreement for or relating to such carriage'.[173] A car rental contract would not be provided for, not because it is not a contract but because it has no maritime connection. Therefore, contracts just like *negotiorum gestio, would* not be defined as a maritime claim. However, where they provide the basis for a claim in a maritime context, the Act provides for such. In this sense, salvage as a maritime instance of *negotiorum gestio,* as viewed in early Roman-Dutch law and by some modern South African writers, is provided for.

Professor Staniland is of the view that, even if *negotiorum gestio* is defined as a maritime claim, it would be restricted to a claim which arises within the land of South Africa.[174] However, there appears to be no reason, doctrinally, to limit *negotiorum gestio* to land. This much is readily apparent from the early Roman-Dutch approach to salvage. Professor Staniland's contention that *negotiorum gestio,* even if defined as a maritime claim, would be restricted to a claim arising within the land of South Africa is therefore a curious one. Should policy based adjustments to the requirements of *negotiorum gestio* prove feasible, there would probably be no doctrinal reasons prohibiting a reward that goes beyond the necessary expenses of a salvor.

Different to the approach in English law, South African law treats negotiorum gestio as distinct from the law of unjustified enrichment. In this regard, Lotz[175] expressly states that '[t]he action of the *negotiorum gestor* is not an enrichment action'. However, it should be noted that a claim which fall short of meeting the requirements for *negotiorum gestio* may, in the appropriate circumstances find a claim in unjustified

[173] S(1)(1)(h)
[174] See discussion above, 97-98.
[175] Lotz JG (Updated by Brand FDJ) "*Enrichment"* in LAWSA Vol 9 para 222.

enrichment.[176] In this regard, it has been suggested that *negotiorum gestio* is but an exceptional case of enrichment liability.[177] However, the South African law has not developed in this manner.[178] Professor Du Plessis suggests that salvage might be such an exceptional case of *negotiorum gestio* where the requirements for *negotiorum gestio* are not met and where an extended enrichment action may be available.[179] This argument, of course, would be a denial of salvage as a form of *negotiorum* gestio. Therefore, *quasi negotiorum gestio,*[180] also known as the extended enrichment action, merits brief discussion.

3.3.2.2 Quasi Negotiorum Gestio (the extended enrichment action)

The possibility of an action based on *quasi negotiorum gestio* suggests a more than tenous link between unjustified enrichment and *negotiorum gestio.* Thus, it has been suggested that *negotiorum gestio* could perhaps be viewed as an exceptional case of enrichment liability.[181] An in depth investigation of this is, however, beyond the course and scope of this study. Nevertheless, it is apparent that the idea of restitution provides a wider context to these two sources of obligations. In this manner, the English approach of discussing necessitous intervention against a backdrop of restitution makes sense.

Unjustified enrichment as a source of obligations in the South African law is used to describe the situation where a person's estate is increased at the expense of another without legal cause.[182] In *negotiorum gestio* the focus is on the *gestor's* impoverishment and not the enrichment of the person whose affairs are being managed.[183] Professor Du Plessis regards this as the reason why *negotiorum gestio* is treated as a source of

[176] ibid paras 222-223. Also see Joubert DJ and Van Zyl DH (n 95) para 35.
[177] Du Plessis J, (n 108) 256.
[178] ibid.
[179] ibid 258.
[180] ibid 256. See also Van Niekerk "Of Ships' Masters, Maritime Salvors, Agents of Necessity, and *Negotiorum Gestors*" (2002) 14 *S. Afr. Mercantile L.J.* 626, 633.
[181] Du Plessis J (n 108) See the works cited in fn 23.
[182] Lotz JG (n 175) par 207.
[183] Du Plessis J (n 108) 256.

obligations distinct from contract, delict (tort) and unjustified enrichment.[184] However, one could add, as will be shown, that different factual permutations inform the difference in focus between the two sources of obligations.[185]

While arguments in favour of a general enrichment action in South African law exist,[186] this approach has not been followed in South African law. South African law grants relief based on unjustified enrichment in specific instances that correlate to those found in classic Roman law.[187] These instances or more commonly referred to as *condictiones*[188] relating to unjustified enrichment are fourfold. First, the *condictio indebiti* is used to recover money or other property transferred in intended payment or performance of a non-existent debt.[189] Second, the *condictio ob turpem vel iniustam causam,* would be used in the instance where money or property was transferred in terms of an illegal agreement.[190] The *condictio causa data causa non secuta* would be used to recover that which has been transferred on the assumption that a particular event will take place in future and the event does not take place.[191] The fourth instance is the *condictio sine causa,* more specifically the *condictio sine causa specialis,* which is available in circumstances where none of the other could be instituted.[192] Rather than the development of a general enrichment action, South African courts have in the

[184] ibid. Also see, generally, Kortmann *Altruism in Private Law-Liability for Non-Feasance and Negotiorum Gestio* (OUP, 2005).

[185] This is in addition to the fact that the two were treated as different categories in the Roman-Dutch law. Grotius, in his *Jurisprudence of Holland,* dealt with the two sources of obligations under different headings, which may explain the the South African approach.

[186] Scholtens JE 'The General Enrichment Action that was' (1966) 83 *SALJ* 391, 394–395; Van Zyl DH "The General Enrichment Action is Alive and Well" *(*1992) *Acta Juridica* 115, 123–125.

[187] Lotz JG (n 175) para 208.

[188] ibid. The term *condictio* is derived from the Roman law *legis actio per condictionem* which was a special form of process within the early Roman *legis actio* procedure in terms of which a plaintiff claimed either a fixed sum of money (*certa pecunia*) or a specific thing (*certa res*) without specifying the cause of action. When the *legis actiones* were replaced by the formulary system of procedure, the name *condictio* continued to be used for those actions which had formerly been brought before a judge by way of a *legis actio per condictionem*. In this regard those *condictiones* that related to enrichment actions were retained in the South African system *via* the reception of Roman-Dutch law. See generally, Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co., Cape Town, South Africa and Kluwer, Boston, 1990).

[189] Lotz JG (n 175) para 211.

[190] ibid 214.

[191] ibid 217.

[192] ibid 219.

appropriate circumstances elected to effect *ad hoc* extensions to these four *condictiones.*[193]

However, despite the different instances in which the South African law would allow an enrichment action, general requirements for any action based on unjustified enrichment have been distilled.[194] First, the defendant must be enriched, which may be constituted by (a) an increase in the defendant's assets which would not have taken place but for the enriching fact, (b) by a non-decrease in his assets which would have taken place but for the actions of the plaintiff, (c) by a decrease of liabilities which would not have taken place or (d) by a non-increase of liabilities which would have taken place.[195] The second requirement is that the plaintiff must be impoverished. In this regard the quantum of the claim would be the lesser of the enrichment of the defendant or the impoverishment of the plaintiff.[196] Thirdly, the enrichment must be at the expense of the plaintiff. In this regard, there must be a causal link between the enrichment and the impoverishment.[197] The fourth requirement is that the enrichment must be unjustified.

While these requirements might possibly be satisfied in some instances by a salvor, it ought to be apparent that the law of salvage provides a wider basis for recovery. First, there is no need in the salvage context to show impoverishment, and a causal link between such impoverishment and the enrichment of a shipowner. Moreover, it is obvious that, should a salvor possibly be impoverished, the salvage award would not be restricted to the smaller of the enrichment or impoverishment. This feature of the salvage award is also the reason why, in the English context, it has been noted that 'the positive incentive historically given by means of the remedy of a reward, to encourage successful rescue takes that area [salvage] outside restitution of an unjust enrichment.[198] Nevertheless, while this feature of the award is undoubtedly different, the

---

[193] See *Rubin v Botha* 1911 AD 568, *Hauman v Nortje* 1914 AD 293, *Spencer v Gostelow* 1920 AD 617, *Ras v Vermeulen* 1937 OPD 5 and *Williams 'Estate v Molenschoot and Schep (Pty) Limited* 1939 CPD 360.
[194] See Lotz (n 175) para 209.
[195] ibid.
[196] ibid.
[197] ibid.
[198] Burrows A, *The Law of Restitution* (n 3) 486. See also Swan C (2009) 23 *A&NZ Mar LJ* (n 110) 99.

informing policy of encouragement may, arguably, as in the context of *negotiorum gestio*, provide an explanation for this difference.

The instances of unjustified enrichment, or the *condictiones*, provide some explanation for the difference in focus between *negotiorum gestio* and unjustified enrichment. The connecting factor between the *condictiones* appears to be the fact that they all relate to circumstances where property had been transferred pursuant to a juristic act which was unenforceable form its inception or subsequently has become inoperative.[199] For this very reason, salvage would not fit any of the *condictiones* in that there would be no actual transfer of property in satisfaction of any debt. It is also difficult to see how an extension of any of the *condictiones* would cover a situation where no actual transfer takes place. A salvage operation does not involve a transfer as is the case with the *condictiones* but rather the rendering of services to property in maritime circumstances.[200] This would, as suggested earlier, give it an identity closer to that of *negotiorum gestio,* because the salvor's actions benefit another through the rendering of specific services.

However, as mentioned, South African cases have allowed for *ad hoc* extensions to these recognised *condictiones*. Despite the transfer bias of the *condictiones*, the extended enrichment action was given in certain instances where services were rendered (typical in the *negotiorum gestio* context) and where such services have fallen short of the requirements for *negotiorum gestio*. This means that an enrichment action would be available in what has been referred to as cases of 'impure' management of another's affairs.[201]

These instances of 'impure' management of another's affairs appear to be limited to instances where (a) the gestor has administered the affairs of a minor; (b) where the gestor has *mala fide* administered the affairs of another for his or her own benefit; (c) where the gestor has administered the affairs of another in the bona fide belief that they were his or her own; or (d) where the gestor has administered the affairs of another

[199] See Lotz JG (n 175) para 210.
[200] See Art 1(d) of the 1989 Salvage Convention.
[201] Du Plessis J (n 108) 254.

contrary to the prohibition of the dominus.[202] Of these instances (b) and (d) may in very limited instances correspond with a salvage operation. In respect of instance (b) the *mala fides* appear to be established by the fact that the intention primarily is not to benefit the other.

However, while a salvor may be interested in benefitting himself it is unlikely that such management would be *mala fide* in view of the public policy of encouraging the saving of maritime property that informs salvage. This would equally apply to the situation where a salvor renders environmental services. In the case of salvage, including those that involve environmental services, the intention of the salvor is of less importance, unless the intention was to bestow benefits gratuitously.[203] Instance (d) may in the appropriate situation also align with the salvage situation. In this regard, the 1989 Salvage Convention would allow a claim for salvage where the owner's prohibition of salvage services was unreasonable.[204] In *Standard Bank Financial Services Ltd v Taylam* (*Pty*) *Ltd,*[205] the court allowed the extended enrichment action even though it was against the express prohibition of the *dominus.*

However, the court mindful of the dangers of indiscriminate 'meddling' alludes to the fact that the particular circumstances giving rise to the enrichment would be an important factor in determining whether it was just or not.[206] Also, it was held that meddling would be allowed in 'circumstances where such meddling is necessary in order to do justice between man and man'.[207] However, the case gives no guidance or any indication of how the pursuit of 'justice between man and man' may influence the determination of a just cause for disregarding the wishes of the *dominus*. In salvage, the policy underpinnings and, especially, the premium placed on the saving of maritime property would explain the extent to which an unreasonable refusal of salvage services would not affect a salvor's claim for an award. However, where such a refusal is express and reasonable, no award would be payable. Should salvage be viewed as a

[202] See Joubert DJ and Van Zyl DH (n 95) para 37.
[203] See above n 114 and text thereto.
[204] Art 19 of the 1989 London Salvage Convention.
[205] 1979 (4) All SA 1 (C).
[206] ibid 10.
[207] ibid.

case of *quasi negotiorum gestio*, this would probably constitute circumstances where 'meddling' would not be allowed. In the case of a salvor's environmental services, the same concerns would probably hold true.

A claim based on the the extended enrichment action is clearly distinct from the *condictiones.*[208] Nevertheless, Professor Du Plessis raises the possibility of salvage as a case of 'impure' management which may trigger the applicaton of an extended enrichment action.[209] However, Professor Du Plessis points out the legislative intervention and statutory remedies in the form of the Wreck and Salvage Act,[210] and consequently does not engage this particular issue.[211] Professor van Niekerk similarly alludes to the availability of the action based on *quasi negotiorum gestio* as a possible alternative to the view of salvage as a maritime permutation of *negotiorum gestio.*[212]

The notion of an extended enrichment action based on the 'impure' management of another's affairs brings one back to the basic question of the manner in which salvage awards go beyond mere restitution.[213] In this regard, one would again have to refer to the informing policies and peculiar context in which salvage services are rendered. More importantly, while *negotiorum gestio* and unjustified enrichment are treated as distinct sources of obligations, it is apparent that the unifying theme is that of restitution within particular factual situations. In the case of *negotiorum gestio,* the potential absence of an actual transfer of property would explain the focus on impoverishment. In unjustified enrichment, the *condictiones, all involving the transfer of property or money,* would explain the focus on actual enrichment. However, the extent to which impure forms of the former may give rise to a claim in unjustified enrichment would explain the increased clamouring for a general enrichment action in South African

[208] See Du Plessis J (n 108) 254.
[209] ibid 258.
[210] Act 94 of 1996.
[211] Du Plessis J (n 108) 254.
[212] Van Niekerk "Of Ships' Masters, Maritime Salvors, agents of Necessity and *Negotiorum Gestores*" 14 *S. Afr. Mercantile L.J.* (2002) 626, 634.
[213] It is also this feature of the salvage award that informs the views of authors such as Swan C and Burrows that salvage cannot be explained by unjustified enrichment. See above, text to nn 110, 198.

law that would encompass the instances of 'impure' management of another's affairs.[214] Nevertheless, whether one regards the South African law of salvage as a maritime permutation of *negotiorum gestio* or *quasi negotiorum gestio,* this will not provide a complete picture of the law of salvage without reference to the peculiar public policy considerations underpinning salvage.

The fact that one could explain the differences between restitution (in the South African context the two distinct sources of obligations of *negotiorum gestio* and unjustified enrichment) and salvage with reference to policy differences does not really answer the question of how the law should be developed in relation to a potential reward for environmental services. In spite of the earlier criticism levelled at the reasons for Professor Staniland's view of salvage as distinct from *negotiorum gestio,* he is, nevertheless, correct in relation to the South African legislature's approach to the development in salvage. In its passing of the South African Wreck and Salvage Act,[215] the legislature has chosen not to develop *negotiorum gestio* as a possible substitute for salvage.

Here, one may add that any policy based development, even considering possibilities offered by *negotiorum gestio,* would have to take place through the appropriate legislative development. *Negotiorum gestio,* even with the necessary adjustments for the maritime context, never played any role in the drafting of the Act. Of course, the Act was never concerned with the determination of the jurisprudential foundation of salvage. It formulated rules relating to salvage and attempted to address specific issues such as environmental protection in the context of salvage. In this regard, it has been suggested that the Act contains provisions that cannot be traced to either the law of *negotiorum gestio* or the law of salvage.[216] These provisions are entirely new statutory creations that are unique to South Africa.[217]

---

[214] See Du Plessis (n 108). Professor Du Plessis argues that 'South African law may by now have reached a stage of maturity which makes it unnecessary to justify the recognition of new instances of imposed enrichment on the basis that they are "impure' cases of management of another's" affairs'. At 254. See also *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* [1979] 4 All SA 1 (C).

[215] Act 94 of 1996.

[216] Staniland H (n 4) par 35.

[217] ibid.

Whether there is any real benefit to be gained from regarding salvage as an instance of *negotiorum gestio* is doubtful. Even if salvage could be argued to be an instance of *negotiorum gestio* in South African law, it would be a considerably more developed form thereof, not least in the manner in which a salvor's claim goes beyond restitution. This much is also clear from Professor Rose's statement that 'the law of salvage is the leading paradigm of English law's admission of recovery for necessitous intervention and [that it] affords a developed scheme for implementing it'.[218] Professor Rose's attempt to distil rules of general application in cases of necessitous intervention with reference to salvage, suggests that the law of salvage may not necessarily be 'enriched' by viewing it as an instance of *negotiorum* gestio.

This much is also apparent from the views of Blommaert,[219] who argues for the development of the traditional rules of *negotiorum gestio* with reference to the more developed salvage. He regards salvage as the 'only possible touch-stone for developing our law [South African law] in order to supply the rescuer with a reward'.[220] However, the author acknowledges the fact that such development would involve major policy decisions.[221] This does raise questions about the extent to which the classification of the law of salvage as an instance of *negotiorum gestio* in the South African context would be beneficial in relation to the environmental services of salvors. While one could conceptually use *negotiorum gestio* as a framework, albeit a rather limited one, to explain salvors' environmental services, it is difficult to see how this framework would offer practical benefits such as increased rewards over and above that of the maritime law of salvage.

This issue gains further significance if one considers salvage services rendered on the high seas. From a restitution perspective, who could be said to have benefitted from these services? It is difficult to see how *negotiorum gestio,* even if adjusted in accordance with the policies underpinning salvage, would afford the salvor an appropriate remedy. In this regard, it is to be noted that the South African Wreck and

[218] See text to n 64.
[219] Blommaert AK "*Negotiorum Gestio* and the Life-Rescuer" (1981) *J. S. Afr. L.* 123.
[220] ibid 134.
[221] ibid.

Salvage Act affords salvors a claim irrespective of the place where the claim arose, as long as the vessel which enjoyed the salvage service is within a South African port.[222] Moreover, under the Wreck and Salvage Act, damage to the environment is not restricted to coastal waters and areas adjacent thereto.[223] Thus, unlike the potential problems to be observed in relation to the use of *negotiorum gestio* as the basis for a claim where environmental services were rendered on the high seas, the law of salvage does attempt to provide a solution. In this regard, it is once again clear that the rules of salvage go much further than South African courts have been prepared to take *negotiorum gestio.*

It is highly unlikely that any South African Admiralty court would extend the principles of *negotiorum gestio* solely on policy grounds given the primacy of legislation as a source of law in salvage matters.[224] In this regard, in the matter of *The MV Cleopatra Dream,*[225] the court made short shrift of an attempt by counsel to introduce *negotiorum gestio* as a potential basis for a salvage claim in which the voluntariness of the operation was in issue. The court restricted itself to an application of the Wreck and Salvage Act, which incorporates the 1989 Salvage Convention. The court simply noted the doubts expressed in English law about the derivation of salvage from *negotiorum gestio,*[226] and left it at that.

While there is no need for the court to constrain itself in this manner because of doubts expressed about the origins of salvage in English law, the attitude of the court as evident from the judgement of Heher JA, with whom the other judges concur, is clear. The High Court, exercising its admiralty jurisdiction, will simply restrict itself to an application of the relevant legislation. Therefore, it is doubtful that any High Court in the exercise of its admiralty jurisdiction would entertain an argument calling for a possible extension of *negotiorum gestio,* in spite of academic discourse favourable to such an extension. The point of departure for any admiralty court in adjudicating a salvage

[222] See s 2 of the Admiralty Jurisdiction Regulation Act 105 of 1983.
[223] See discussion of s 2(7) of the Wreck and Salvage Act below 158ff.
[224] See also *The Goring* [1987] Lloyd's Rep. 15 where the English court per Lord Justice Gibson noted how an extension to the law of salvage by judicial decision cannot be justified on policy grounds alone. At 24.
[225] *Transnet Limited t/a National Ports Authority v The MV Cleopatra Dream and The Cargo Laden on Board* (163/10) [2011] ZASCA 12 (11 March 2011).
[226] ibid. par 53.

matter will be the Wreck and Salvage Act and the Salvage Convention. Where the Act and Convention is silent on a matter, the court will have recourse to the English law on salvage as at 1 November 1983.[227] However, even in English law, there is no uniform acceptance of the notion that salvage is a form of *negotiorum gestio*.[228]Thus, even if one were to suggest policy extensions to *negotiorum gestio*, such extension will have to be effected by means of legislative enactment.

However, the High Court exercising its common law jurisdiction would, in principle be able to entertain *negotiorum gestio* as the basis for a salvage claim. However, even then such a court would restrict the claim of a salvor to his reasonable expenses in line with existing authority.[229] Any possible policy based extension would have to emanate from the legislature. However, it should be noted that the Admiralty Jurisdiction Regulation Act contains a mechanism to avoid the situation of a maritime claim being heard in an ordinary common law court. In this regard, section 7 of the Act provides as follows:

> **7. Disputes as to venue or jurisdiction**
>
> …
>
> (2) When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that-
>
> a. the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act;
>
> b. the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an incola [a person residing within the jurisdiction of the court] of the court, the court may

[227] See the Admiralty Jurisdiction Regulation Act 105 of 1983 s 6.
[228] *Brice on Maritime Law of Salvage* (n 4) 5.
[229] *Williams' Estate v Molenscoot and Schep (Pty) Ltd* 11939 CPD 360. See above nn 148-149 and text thereto.

> order the action to proceed as if the property had been attached by an incola, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.

One of the aims of the above section was to deal with issues arising from the overlapping of the ordinary parochial jurisdiction of the Supreme Court and its jurisdiction, originally, as a colonial court of admiralty.[230] This means that different systems of law would apply to a claim depending upon the jurisdiction exercised by the Supreme Court. Nevertheless, the Act does not exclude maritime claims from the ordinary jurisdiction of the High Court, which means that such a court would be competent to exercise jurisdiction over a maritime claim. Moreover, faced with a claim where salvage services have been rendered, the court will likely refer to the Roman-Dutch law and not the English law of salvage as would the court in the exercise of its admiralty jurisdiction. Therefore, it is likely that such a court in deciding on a maritime claim of salvage would have recourse to sources of obligations such as *negotiorum gestio* and perhaps unjustified enrichment. Of course, the terrene bias that has prevailed in decisions on *negotiorum gestio* would likely see a salvor being entitled to considerably less than would be the case in admiralty under the rules of salvage.

Nevertheless, courts, in view of a long line of consistent judicial authority on the limitations on the claim of a *gestor,* would not entertain the kind of wholesale policy adjustments as argued for by Professor van Niekerk. Even though, there appear to be no doctrinal impediments to such extension, it would amount to a case of judicial overreaching in violation of the basic principle that judges do not make law. Even should courts be willing to go through the exercise of rediscovering old Roman-Dutch law, where salvage matters were decided with reference to *negotiorum gestio,* this would be decidedly impractical in the face of the developed rules of salvage that are available. It is also difficult to see how recourse to the principles of *negotiorum gestio* would improve the situation of salvors and further the particular policies at play in the context of salvage. While, a restitutionary analysis can be employed to explain the environmental

[230] *See Nel v Toron Screen corporation (Pty) Ltd and Mutual and Federal Insurance (Pty) Ltd "The Wavedancer"* (600/94) [1996] ZASCA 80 (23 August 1996).

services of salvage, it does not offer the salvor a reward. Any attempt at a policy based extension would call for intervention by the legislature.

However, in practice, should a maritime claim be instituted in a court exercising its ordinary parochial jurisdiction, the question of the nature of the claim would likely be raised. In such a situation, s 7(2) of the Admiralty Jurisdiction Regulation Act will be triggered. The manner in which s 7(2) is phrased is an indication that the question may be raised by any of the parties or by the court *mero motu*. Where this happens, the court will have to decide upon the nature of the claim and if the matter is indeed a maritime claim, s 7(2)(a) requires that the matter 'shall be proceeded with in a court competent to exercise its admiralty jurisdiction'. In such a case, the court will not be permitted to exercise its ordinary parochial jurisdiction to adjudicate the maritime claim. However, if the matter is not raised, the court will be entitled to exercise its ordinary parochial jurisdiction over a maritime claim. Therefore, the peremptory wording of s 7(2) becomes applicable only once the court decides that the claim is a maritime claim.[231]

As mentioned, no salvage claim has been instituted in the High Court exercising its ordinary jurisdiction, although this could conceivably happen. Should this happen, the chance of the question arising as to the nature of the claim is almost certain. For this reason, legislative intervention appears to have precluded any real possibility of the High Court, exercising its parochial jurisdiction, developing the rules of *negotiorum gestio* to account for salvage operations. Even if such an unlikely scenario were to occur, the court would at best be able to suggest legislative reform. Any judicial attempt to extend *negotiorum gestio* for policy reasons would amount to improper law-making by judges.

3.4 Roman-Dutch law as an alternative to the English law

Professor Van Niekerk's arguments about policy based extensions to *negotiorum gestio*, is primarily an attempt at providing an alternative to the salvage principles received from the English law. However, such an approach while academically feasible is not in accordance with the practical realities of the South African legal system. The

[231] *The Wavedancer* (n 230) 20.

system is not a Roman-Dutch system or a common law system. While the historic Anglo-Dutch tug-of-war for political dominance of the country also found expression in legal development of the country, it does not make sense to advocate the replacement of rules derived from English law in favour of a Roman-Dutch solution. In this regard, Professor Hare has noted that South Africa's

> diverse cultural history is reflected in the South African legal system, which is a vibrant hybrid of indigenous African customary law, the European is commune and the English common law. It is, at once a civilan legal system… and a common law system, greatly influenced by a century and a half of British rule and judicial practice.[232]

The extent to which English law has influenced South African law in the area of maritime law was so significant that the legislature has chosen to retain it with the enactment of the Admiralty Jurisdiction Regulation Act. This was largely due to the fact that the Roman-Dutch law was considered to be 'fragmentary and relatively undeveloped as a modern system of maritime law'.[233] More importantly, English maritime law, when applied by a South African High Court sitting as a court of Admiralty, is not considered to be foreign law.[234] For this reason it would amount to a non-sensical exercise to substitute a Roman-Dutch based solution to the question of salvage. As said, the law of salvage has more developed and statutory entrenched rules not affected by the same limitations as found in the area of *negotiorum gestio.* The extent to which courts have applied these principles over the years, thus making them part and parcel of the South African legal landscape, would render any attempt at their negation and replacement otiose.

The extent to which the development of *negotiorum gestio* in cases of salvage may have been precluded by the 1806 British occupation is an historical fact which explains the development of South African law. However, the debate over English law versus Roman-Dutch law should be confined to the pages of history and debates regarding South African legal development should proceed from the acknowledgement

---

[232] Hare J (n 4) 2. Also see, generally, Beinart 'The English Legal Contribution in South Africa: The Interaction of Civil and Common Law' (1981) *Acta Juridica* 7.

[233] Hofmeyer G Admiralty Jurisdiction Law and Practice in South Africa (2nd edn, Juta, Cape Town, 2012) 13.

[234] Stiebel M 'Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – An Analysis, Comparison and Examination of the Case Law: Part 1' (2001) *S. Afr. Mercantile L.J* 226.

of the indelible influence of both systems. This certainly appears to have been the thinking of the South African legislature in its adoption of the Admiralty Jurisdiction Regulation Act and the Wreck and Salvage Act.

3.5 Conclusion

The definitions employed in salvage and its legal theoretical nature took shape in a context that had much to do with the establishing of jurisdictional boundaries between admiralty and common law courts in England. This resulted in a law of salvage that was historically limited to services to property on the high seas and in tidal waters unconcerned with the environment. Admiralty courts made liberal reference to and utilised concepts grounded in civil law while developments in common law were arguably premised upon a resistance to the importation of such civilian concepts. This would also explain the attempts of both common law courts and admiralty courts to distinguish peculiarly admiralty matters such as salvage from the practice in common law.

Nevertheless, while salvage may arguably be related to the civil law *negotiorum gestio* (which is also the way in which it was viewed in early Roman-Dutch law), this is not the manner in which the latter was developed in South African law. While salvage and environmental services in the context of salvage can conceivably be explained with reference to *negotiorum gestio* or against a restitutionary backdrop, it offers no more to the question of the remuneration of salvors, than what is available under the law of salvage. For this reason, the arguments advanced about salvage as an instance of *negotiorum gestio* that could be developed as an alternative to the English based principles takes the matter no further.

Development in the law of salvage, in the South African context, has surpassed *negotiorum gestio* to the extent that the former is perhaps better viewed as a *sui generis* source of obligations. The contention of some modern authors, that salvage is an instance of *negotiorum gestio* could only possibly find traction in a non-admiralty context. However, as shown, this possibility has likely been precluded by s 7(2) of the South African Admiralry Jurisdiction Regulation Act. Furthermore, such a development would offer no more than the law of salvage in view of the restricted manner in which

negotiorum gestio has been developed by South African courts. Aside from the impact of s 7(2), any attempt by a court sitting as a common law court to develop *negotiorum gestio* to give a salvor a reward for saving property or environmental services would amount to inappropriate judicial law making. This would upset judicial precedent establishing the ambit of *negotiorum gestio* and established over a significant period of time. Therefore, any attempt to develop *negotiorum gestio* would have to take place *via* appropriate legislative enactment.

The possibility of such a development in the High Court sitting exercising Admiralty jurisdiction is even less likely. Especially in relation to environmental services, assuming that such services should be remunerated within the law of salvage, development will also have to be through the necessary legislative enactment. In this regard, the very issue of environmental protection and salvage has informed the drafting of the 1989 London Salvage Convention and in the South African context, the Wreck and Salvage Act. The extent to which salvage, including the environmental services of salvors, has come to be regulated by statute has left no conceivable room for development of the common law. Therefore, in the South African context, any development in relation to a reward for salvors' environmental services would have to proceed from an analysis of existing legislation while suggestions for change would involve legislative enactment or the amendment of existing legislation.

Chapter IV The 1989 Salvage Convention, Wreck and Salvage Act and Salvors' environmental services.

4.1 Introduction

In the previous chapter, it has been shown that, in relation to salvors' environmental services, the South African common law provides no alternatives that would be an improvement on the existing law of salvage. Moreover, aside from an obvious public interest in environmental protection in the context of salvage operations, the key private law legal relationship is between the salvor and the owner of salved property. However, the recipients of benefits emanating from salvors' environmental services may fall outside of the traditional salvage matrix. As shown, any policy based changes to the traditional law of salvage that goes beyond its property bias, would probably have to be the result of legislative action, as there appears to be no way in which the common law can account for such changes.

The South African legislature, perhaps mindful of the limitations of the traditional law of salvage, has enacted the Wreck and Salvage Act (WSA),[1] which incorporates the 1989 London Salvage Convention (the Convention) as a schedule thereto. Moreover, the Convention was expressly made subject to the provisions of the Act.[2] In relation to environmental protection concerns, the single draftsman of the WSA has noted that 'the Convention was considered not to provide adequate encouragement to salvors especially in respect of the prevention and minimisation of pollution'.[3] This chapter will examine these two instruments, the extent to which they provide for the remuneration of environmental services and further environmental protection concerns. The first part of this chapter, which also represents the major part of the discussion, will examine the Convention, while the second part will examine the key changes enacted in the WSA. The aim is to determine whether the WSA, from an environmental protection perspective, represent a real improvement on the perceived shortcomings of the Convention and the extent to which these instruments provide for the serving of interests outside the traditional salvage matrix.

---

[1] Act 94 of 1996.
[2] ibid S 2(1).
[3] Staniland H "Shipping" in Joubert DJ (ed) *LAWSA* Vol. 25(2) reissue 1 (2006) para 36.

4.2 The 1910 Salvage Convention

A brief look at the earlier 1910 Brussels Salvage Convention highlights the fact that environmental concerns did not feature in the law of salvage at that time. The Brussels Convention does not mention the environment or its protection in any way. Therefore, the law of salvage had no apparent link with environmental values or any design at environmental protection. From a functional perspective, and clear from its preamble, the Brussels Convention had as its primary aim the attainment of international uniformity.[4] The preamble to the Brussels Convention provided that

> Having recognised the desirability of determining by agreement certain uniform rules of law respecting assistance and salvage at sea, … [the parties to the convention have decided] to conclude a Convention to that end.

The Brussels Convention added nothing to the traditional law of salvage that could be regarded as reflective of underlying environmental protection values. Nevertheless, Kerr[5] notes that by the 1960s 'serious problems were emerging' in two contexts, one of which was 'the ever increasing risks of marine and coastal pollution'. This highlighted the fact that the law of salvage as provided for in the 1910 Brussels Convention was in need of a review.[6] He notes further that the 1978 *Amoco Cadiz* disaster 'was the single most important event which ultimately led to the 1989 Convention'.[7] In this regard it has also been noted by Redgwell that the *Amoco Cadiz* disaster is a "useful starting point for a discussion of the greening of salvage law".[8]

4.3 Environmental Protection and the 1989 Salvage Convention (the Convention).

Unlike the 1910 Brussels Convention, the increased concern with environmental protection is immediately apparent from a reading of the 1989 Convention. This is apparent from the way in which environmental protection finds expression in the substantive provisions of the Convention as well as the very statement of its purpose. The Convention's preamble provides as follows:

---

[4] See also Kerr M "The International Convention on Salvage 1989-How It Came To Be" (1990) 39 *I.C.L.Q* 530 531.
[5] ibid 532.
[6] ibid.
[7] ibid 535.
[8] Redgwell C "The Greening of Salvage Law" (1990) *Marine Policy"* 142.

THE STATES PARTIES TO THE PRESENT CONVENTION

RECOGNIZING the desirability of determining by agreement uniform international rules

salvage operations,

NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

CONSCIOUS of the major contribution which efficient and timely salvage operations can

make to the safety of vessels and other property in danger and to the protection of the

environment,

CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger."

While the Convention retains the kernel of its predecessor, namely, the notion of international uniformity, it expressly acknowledges the central role played by salvors in a wider environmental protection matrix.[9] The preamble, expressly notes an 'increased concern with the protection of the environment' as a factor that demands a review of the international rules contained in the 1910 Convention. While not expressed in this manner, it is apparent that this review was demanded because of the value attached to environmental protection and the need for the law to respond.

A comparison of the wording of the preamble of the Brussels Convention with that of the 1989 Convention suggests that the drafters of the latter were more cautious in their phrasing. In establishing the aims of the Brussels Convention, the drafters expressly acknowledged the conclusion of the instrument as a means 'to that end', namely the attainment of international uniformity. The preamble to the Convention avoids such an unequivocal statement of purpose, instead opting for words such as

[9] See discussion below, ch VII regarding the positioning of salvage services in coastal state pollution response mechanisms, which provides concrete support for the contention of the role of salvors in a wider environmental protection matrix.

'noting' and 'acknowledging'. This may be an indication of the fact that the Convention was not drafted solely as a means to an environmental protection end. Given the added concern of environmental protection, not traditionally a concern of the law of salvage, the choice of wording might have been a conscious attempt at not departing from or altering the traditional limited property bias of salvage.

While there is an express noting of the 'increased concern for the protection of the environment' this is noted in addition to other 'substantial developments'. Thus, the growing concern for environmental protection is portrayed as one instance of noted substantial developments that demanded a change to the regime created by the Brussels Convention. However, these 'substantial developments' referred to in the preamble is not elaborated upon any further and one is left to wonder what the contents of substantial developments other than environmental protection concerns might be.

Nevertheless, despite the phrasing of the preamble, the importance of environmental protection as an informative component in the drafting of the Convention is clearly established.[10] This much also becomes clear when looking at the environmentally relevant substantive provisions of the Convention, which are discussed below.[11] While not as direct as the Brussels Convention in its statement of outcomes, the primacy of environmental protection is established, at least, by necessary implication. Therefore, while the efficacy of the Convention in attaining the stated aims contained in the preamble remains to be determined, the primacy of environmental protection concerns and the role of salvors in furthering this concern is expressly acknowledged.[12]

4.3.1 Substantive provisions relating to environmental protection

The substantive provisions of the London Convention give further prominence to the theme of environmental protection. In line with the acknowledged growth of environmental protection concerns, it recognises the importance of encouraging salvors

[10] See Reeder J, *Brice on Maritime Law of Salvage* (4th edn, Sweet & Maxwell, 2003). The author in interpreting the meaning behind the preamble identifies the increased concern with environmental protection as the primary point of reference in any determination of the scope of the Convention and the interpretation of its provisions.
[11] See discussion below 119ff.
[12] *Brice on Salvage* (n 10).

to engage in the salvaging of marine property where there is a threat to the marine environment. The encouragement element is driven by incentives in the form of potentially larger salvage awards or, at least, the recovery of salvage expenses.[13] This, of course, would be of concern to a salvor engaged in the salvage of low-value marine property posing a threat to the environment. In addition to the introduction of financial incentives, the convention also imposes environmentally relevant duties on the parties involved in salvage operations where there is the threat of environmental damage.[14] In this way, with the careful balancing of incentives and duties the convention seeks to achieve its stated aims.

4.3.1.1 Encouragement and financial incentives (Articles 13 and 14 of the Convention).

Article 13 of the London convention provides the primary mechanism for the calculation of the traditional salvage award. However, it sees the addition of the 'skill and efforts of salvors in preventing or minimizing damage to the environment'[15] as a criterion for the fixing of the award. Therefore, the 'skill and efforts of salvors in preventing or minimising damage to the environment', could see an increase in the potential salvage award. Article 13 makes it clear that the fixing of an appropriate salvage award is the primary incentive for the encouragement of salvage operations. Art 13(1), which expressly creates the link between the award and the encouragement of salvors, provides that

> [t]he reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

Article 13(1) then proceeds with the listing of the criteria that include 'the skill and effort of the salvors in preventing or minimizing damage to the environment'.[16] While the appropriate salvage award serves as encouragement for future salvage operations, the size of such an award would depend on the observing of the criteria listed in Article 13(1). The criterion pertaining to environmental protection appears to be on an equal footing with the other criteria where the size of the award is determined. The particular

[13] See below for a discussion of articles 13 and 14 of the London convention.
[14] See discussion below 137ff.
[15] London Convention Art 13(1)(b)
[16] ibid.

circumstances of every individual salvage operation would possibly determine the relevance of a particular criterion.

Article 13 gave rise to significant debate at the diplomatic conference leading up to the Convention before settling into its final form. Nevertheless, it is apparent that Article13(1)(b) represents a radical expansion upon the traditional factors informing a salvage award in that it appears to be directed at an interest outside of the traditional salvage matrix. In this regard, the Travaux Preparatoires of the Convention, commenting on the addition of paragraph (b), mentions that the purpose was to

> allocate the compensation payable to the salvors in respect of services performed with a view to preventing or minimizing damages to the environment between the owners of the cargo and their insurers and the owners of the vessel and their liability insurers.[17]

This was supposed to represent a 'sound commercial compromise'.[18] Very importantly however, and indicative of the importance of environmental protection as an outcome, the Comite Maritime International (CMI) expressed the idea that the purpose behind Article 13 and 14 was less to ensure a viable salvage industry, then 'to cope with environmental problems alone'.[19] However, this being said, it is apparent that practical commercial considerations played a significant role in the deliberations. This is clear from the involvement of insurers in negotiations leading up to the Convention and the fact that express mention was made of the fact that 'in a salvage situation…it is not the owners of such interests, but the insurers who bear the risk of economic loss and who derive the economic benefits from successful salvage operations'.[20]

While these practical considerations are understandable, the sentiments, from a legal perspective, might be misplaced. From a legal perspective, insurers' duty to pay is

---

[17] The Travaux Preparatoires of the Convention on Salvage 1989, *Comite Maritime International, 295.* <http://www.comitemaritime.org/Travaux-Pr%C3%A9paratoires/0,27126,112632,00.html> accessed 12 October 2014.

[18] ibid. Document LEG 54/7 in The Travaux Preparatoires, 329.

[19] The Travaux Preparatoires (n 17) 353. The CMI is a non-governmental not-for-profit international organization tasked with the international unification of maritime law (see the CMI website http://comitemaritime.org) that undertook a review of the private law of salvage at the request of the International Maritime Organisation (IMO). It submitted a draft text that after consideration at the diplomatic conference in London became the 1989 Salvage Convention (See the foreword to the Travaux Preparatoires).

[20] ibid. 16.

the result of a contractual undertaking. What the considerations, however, appear to do is to conflate two entirely different subjective rights namely the extent of the contractual undertaking of the insurer to its client and rights emanating from salvage operations. Essentially, what has happened was to include a practically related but legally irrelevant duty into the legal relationship between a salvor and the recipient of salvage services. It is entirely logical to think that insurers pay only to the extent that they are legally bound by the contractual relationship between themselves and their clients. Moreover, this inclusion may be said to be removed from the third party interests in environmental protection in that the idea of remuneration is linked to the interests of the insurers involved, notably P&I and Hull and Machinery and apportionment as between them. In this way, any potential award is automatically linked only to the interests of the owners of salved property.

While related to the payment of special compensation under the Article 14, the argument that 'insurers of ship and cargo cannot reasonably be required to cover fully the expenses for salvage operations from which another group of insurers – the liability insurers – regularly benefits, is a curious imposition that is based entirely on commercial sentiment and not law.[21] While one may accept that the appropriate division of payment as between different insurers will provide a more equitable distribution of the overall cost of salvage, this is an issue that should be addressed within the law of insurance. In the insurance context, the issue can conceivably be regulated with the appropriate contractual clauses.

Returning to Article 13(1)(b), it can be argued that Article 13(1)(b), being one of the factors to be taken into account in the determination of the appropriate salvage award, does not elevate environmental protection relative to the traditional concerns of salvage.[22] Nevertheless, the practical consequence of salvage operations mindful of this factor will be increased salvage awards and indirectly the protection of the

[21] Travaux Preparatoires, above n 19.

[22] In *Semco Salvage and Marine Pte Ltd v ancer Navigation Co. Ltd (The Nagasaki Spirit)* [1997] 1 ALL ER 502, at 505, Lord Mustill held that 'the services performed remain, as they have always been, services to ship and cargo, and the award is borne by those standing behind ship and cargo'.

environment.[23] In this manner environmental protection is positioned, indirectly, via financial incentives, as an outcome of salvage operations. This is in line with the observations in the preceding chapter of encouragement as a matter of public policy, which is regarded as being at the root of, or as the basis of salvage law.[24]

Article 14, which embodies the move away from the traditional no-cure-no-pay principle, takes the environmental protection credentials of the Convention further. While Article 13 does not elevate the position of environmental protection relative to that of the other criteria in the determination of the salvage award, Article 14 serves to set it apart. Article 14 provides as follows:

> Article 14-Special Compensation
>
> 1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.
>
> 2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

In contrast to the traditional law of salvage, the article ensures that a salvor carrying out salvage operations in respect of a vessel, which by itself or its cargo threaten damage

[23] ibid.
[24] See above chII. Also, see Rose FD, Kennedy & Rose Law of Salvage (7th edn, Thomson Reuters, 2009) 14.

to the environment, will recover at least its expenses. Professor Rose refers to this as the basic entitlement of the salvor.[25]

It is clear from the wording of Article 14(1) that special compensation can only be triggered where a salvor carries out salvage operations in respect of the vessel or property that pose a threat to the environment. Therefore, the basic entitlement to special compensation only arises in respect of salvors carrying out traditional salvage operations, where the same property threatens the environment. This may raise the question whether such salvage operations must have been intended by the salvor. In this regard, Brice has suggested that the salvor, initially, must have *bona fide* been concerned with undertaking a salvage operation rather than the removal of wreck or the threat of environmental damage.[26]

However, this view is not borne out by the wording of the article itself, or by pre-Convention case law on the extent to which a salvor must have had an intention to provide salvage services. In *The Liffey*[27] Sir James Hennen held that 'it makes no difference whatever with what idea the man [salvor] has rendered the services'. Therefore, while the Convention may widen salvage operations in respect of property and geographical location, the pre- Convention case law on the question of intent remain relevant. The view of Professor Rose that the 'salvor's motives for intervening…are irrelevant' is therefore, to be preferred.[28] If the drafters wanted to depart from the common law, it would have been a simple exercise expressly to refer to the intention of the salvor to render assistance to a vessel or other property in danger.

The basic entitlement to special compensation is calculated with reference to the expenses of the salvor.[29] Thus, Article 14(1) provides that the salvor shall be 'entitled to special compensation…equivalent to his expenses as defined herein'. Therefore, the recognised expenses of the salvor are the determining factor in the calculation of special compensation also functioning as a cap to the basic entitlement. This means

[25] Rose FD (n 24) 215.
[26] *Brice on Salvage* (n 10) paras 6-145 to 6-147.
[27] *The Liffey* (1887) 6 Asp. M.L.C at 256.
[28] Rose FD (n 24) 215.
[29] See also *The Nagasaki Spirit*, (n 22) 505.

that a salvor will not be entitled to any special compensation where no expenses have been incurred.[30] This makes the basic entitlement more akin to compensation, as is the case with *negotiorum gestio*,[31] which fits the name 'special compensation'.

In addition to the salvor carrying out traditional salvage services in respect of a property threatening the environment and incurring actual expenses due to environmental services, the assessed special compensation must also exceed or, at least, be equal to any Article 13 reward. Any entitlement to special compensation is, therefore, dependent on the independently fixed traditional salvage award under Article 13.[32] Article 13, aside from the other criteria for a salvage award listed therein, also include the expenses of the salvor as a factor in the fixing of a traditional salvage award. The understanding might be that an award in terms of Article 13, to the extent that it exceeds the basic entitlement, would already have considered the expenses of the salvor and services to the environment. This also explains Professor Rose's contention that Article 14 provides no additional financial incentive beyond the expenses of a salvor.[33] Thus, where the salvor carries out salvage operations in respect of property threatening the environment, there is, at least, the guarantee that they will recover their expenses in the event of a failure to save property. Over and above this, there would be no real award as such.

There is, however, a problem should one accept the idea that an Article 13 award exceeding the Article 14 special compensation means that due consideration has been given to environmental protection services. This would logically imply that no consideration was given, or perhaps not enough consideration was given in the case of a smaller Article 13 award. Of course, it has been recognised that 'the assessment of salvage has never been an exact science'.[34] Should one look at the factors that a judge

[30] ibid. Professor Rose suggests that, in practice, it would be difficult for this requirement of expenses on the part of the salvor not to be satisfied. (n 24) 216.
[31] See discussion of *negotiorum gestio* and its requirements, above ch 3, 83ff.
[32] A 'Common Understanding' pertaining to the interaction between Arts 13 and 14 attached to the Convention (Attachment 1) provides that in 'fixing a reward under article 13 and assessing special compensation under article 14…. The tribunal is under no duty to fix a reward under article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under article 14'.
[33] Rose FD (n 24) 214.
[34] *Nagasaki Spirit* (n 22) 467.

must consider, one might find it difficult to assign a percentage to any single factor considered in the assessment of the award. In this regard Professor Rose notes that 'the Admiralty Court has eschewed the weighting of factors'.[35]

While the presence of an environmental threat would make the environmental factor highly relevant, how would its weighting be determined? This issue of the relationship of paragraph (b) with the other factors contained in Article 13 was also alluded to by the CMI in the negotiation of the Convention mentioning difficulties to quantify the increase of salvage awards due to Article 13(b).[36] Nevertheless, the distinction drawn between an Article 13 award that is smaller and one bigger than an Article 14 award amounts to a logical curiosity. Whether smaller or bigger, where the threat to the environment exists one would assume that the factor would have been considered. A possible explanation for this additional factor provided under Article 13(1)(b) is that it would be an additional factor only where an eventual Article 14 award of special compensation might not exceed an Article 13 award. This understanding would fit the common understanding adopted by the conference,[37] which provides that a 'tribunal is under no duty to fix a reward under article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation…under article 14'. Nevertheless, the question of its relative weight remains problematic in that it would at best be speculative, unlike Article 14 where one has calculable expenses.

If the requirements for the basic entitlement under Article 14(1) have been satisfied, Article 14(2) allows for a discretionary uplift thereof. However, such uplift requires that a salvor, in performing salvage services, must have actually succeeded in preventing or minimising damage to the environment. Should the salvor be able to show such success, then an uplift of up to 100 per cent of the basic entitlement may be awarded. This uplift is entirely in the discretion of the tribunal and not a matter of entitlement as is the case with the basic entitlement of special compensation. Therefore, unlike Article 14(1), 14(2) includes a reward element for actual success in preventing or

[35] Rose FD (n 24) 698.
[36] Travaux Preparatoires, (n 17) 353.
[37] Attachment 1 to the Salvage Convention.

minimising environmental damage, albeit in the discretion of the tribunal. Of course, here the public policy of environmental protection ought to feature prominently in the exercise of this discretion.

In spite of the uplift possibility provided by Article 14(2), Professor Rose suggests that this uplift is still with reference to expenses.[38] He points out that the Article 13 factors that are to be taken into account in fixing the Article 14(2) uplift, namely, promptness, availability, state of readiness and efficiency can be regarded as expenses and not factors that may enhance a salvage award.[39] However, it is submitted that such a reading of Article 14(2) is unduly limited, while also not being suggested by the wording of the provision itself. While Article 14(3) in its definition of expenses directs the tribunal seized of the matter to include paragraphs 1(h), (i) and (j) of Article 13, which admittedly are related to expenses, Article 14(2) is not limited in this manner. It simply refers to 'relevant criteria set out in article 13, paragraph (1)'. Thus, in deciding on the uplift under Article 14(2), one could arguably include factors other than paragraphs (h), (i) and (j), provided that these are relevant. As such, one could see how paragraphs (b), (c), (d), (f) and (g) may also be relevant.

In the calculation of the basic entitlement under Article 14(1), paragraphs (h), (i) and (j) would have already been taken into account and one may ask how these same paragraphs could by themselves inform a possible uplift over and above the basic entitlement. While one may agree with the decision in the *Nagasaki Spirit* that expenses as defined in Article 14(3) do not include a profit element, one should not unduly limit the extent to which relevant criteria other than paragraphs (h), (i) and (j) may inform the discretionary uplift. It is also apparent from a reading of Article 14(2) that the discretionary uplift is predicated upon already ascertained expenses which call into question any uplift based upon the exact same factors. Given the definition of expenses provided in Article 14(3), it would amount to a contradiction of the article's terms for the tribunal to assess the discretionary uplift with reference to only those factors relating to expenses, which, as defined do not include a profit element. Any uplift ought to go beyond the expenses of the salvor that have already influenced the determination of the

[38] Rose FD (n 24) 214.
[39] ibid.

basic entitlement under Art 14(1). Anything less than this would mean that Art 14(2) is there more for its perceived looks in the furthering of environmental protection than its actual impact.

Despite the obvious public benefit conferred by salvors, Article 14(1) makes it clear that the salvor is 'entitled to special compensation from the owner of [the] vessel'. Why would it be the case that special compensation is only payable by the owner of the vessel and not cargo interests or perhaps other interests? This is the case in spite of benefits conferred outside of the traditional salvage matrix. As noted in the previous chapter, 'each and every interest which has received a benefit from the salvage service provided must contribute'.[40] Should this aspect of the basis for salvage indeed be a central tenet of salvage, then Article 14(1) raises interesting issues by singling out the vessel owner to pay special compensation.

First, the liability of the vessel owner to pay this award must be predicated upon the fact that a benefit of some kind had been bestowed. In relation to this it is very difficult to imagine any benefit to the vessel owner other than its potential liability for environmental damage caused. Nevertheless, benefits conferred may exceed such liability. Second, and implicit to the acknowledgement of conferred benefits resulting in an award, is that cargo owners or other third parties must have received no benefit or a benefit not worthy of recognition under the Convention. Even in relation to cargo owners, any potential benefit could only be in relation to their potential liability for damage caused.

However, cargo interests typically do not incur liability for environmental damage as is the case with the shipowner. Therefore, there would be no benefit resulting in a duty to pay. This would certainly explain their exclusion from Art 14(1) special compensation. This results in an anomaly given that cargo owners are liable for an Article 13 award which includes consideration for 'the skill and efforts of the salvors in preventing or minimizing damage to the environment'.[41] What would be the benefit conferred upon cargo owners under Article 13(1)(b), over and above their property

[40] See above ch III, 75.
[41] Article 13(1)(b)

interest, given that there is no liability? While, for the purpose of Art 14(1), one may accept that liability for environmental damage attach to the shipowner only,[42] because of its operational role in the transportation of potentially polluting cargo,[43] it does not explain the liability of cargo owners pursuant to Article 13(1)(b). Moreover, arguments are consistent on the idea that no such distinction is to be entertained and that any enhancement of an award should be borne by all salved property rateably in accordance with salved values.[44] This is also expressly confirmed by Article 13(2). The result here is that special compensation, by excluding cargo owners due to their not having received a benefit, is more in line with a central tenet of salvage than the Art 13(1)(b) situation.

The third issue raised by Article 14(1) singling out the shipowner, is that benefits bestowed on interests outside of the traditional salvage matrix such as coastal states are not considered for the purpose of special compensation. While it appears to contradict the central tenet that involves payment for benefits conferred, it makes sense if one acknowledges and maintain the traditional notion of salvage as a service to maritime property only. In this regard, Brice has alluded to the fact that under existing salvage law it is only where the salvor has conferred a benefit that he is entitled to remuneration but it is not everyone who benefits who is liable to reward him.[45] Essentially, while parties outside of private salvage relationship benefit, these are simply not relevant for the remuneration of salvors under Article 14(1) which imposes the duty to pay on the shipowner.

Academic authors have raised questions regarding this apparent inequity with Witte suggesting that an appropriate remuneration system 'should be based on a more equitable sharing of responsibility for salvage costs'.[46] Gold, similarly, alludes to the fact that 'costs for this protection has to be spread equitably',[47] which the current scheme

---

[42] See *The Velox* [1906] P. 263.
[43] Khee-Jin Tan A, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge OUP, 2006) 38.
[44] See Brice on Salvage, (n 10) 411.
[45] ibid. 418.
[46] Witte A, LOF and defence of the marine environment <https://www.marine-salvage.com /media-information/conference-papers/isus-associate-members-day-april-2008/> accessed 2 September 2016.
[47] Gold E 'Marine Salvage: Towards a New Regime' (1989) 20 *J.Mar.L.&Com* 487, 503.

appears not to be. Of course, this could be the result of such remuneration simply not being regarded as salvage costs, which would also be consistent with the Convention's definition of salvage operations,[48] and a narrow conception of salvage.

Of course, while underpinned by public policy considerations, salvage is essentially a private law relationship between salvor and the owner of salved property. Any potential liability of a coastal state to pay for environmental services from which they benefit falls outside this private law relationship. The law of salvage, given its property bias is simply not geared towards this public benefit. Brice has noted that 'the changes which have taken place in the nature of sea transport and the cargoes carried gave rise to problems which had ramifications both in public and in private law.[49] Nevertheless, given the basic legal relationship between salvor and owner of salved property, it is difficult to see how any remuneration paid for environmental services by coastal states could be facilitated under the law of salvage as well as the way this should be paid. Moreover, the liability of only the shipowner to pay for such remuneration appears at best to be a commercial compromise based on the ease with which such liability can be attached.[50]

Brice has also noted that beneficiaries, outside the traditional salvage matrix, might not be easy to ascertain and that normal insurance would not cover such a payment in so far as it exceeded that which was payable under a customary form of marine insurance upon ship, cargo and freight.[51] As such, the idea of benefits conferred resulting in remuneration appears to be partially absent in relation to both Articles 13 and 14. Brice also notes that, 'neither the owners nor the underwriters of ship, cargo and freight would wish to pay for benefits, perhaps of a very substantial nature, conferred upon third parties, certainly not more than the normal enhancement envisaged in making awards of salvage remuneration in the customary manner.[52] Therefore, it appears as if the very legal theoretical structure of salvage preclude any

[48] Salvage Convention Art 1(a).
[49] (n 44).
[50] Kee-Jin Tan A, (n 43).
[51] Brice on Salvage, (n 10) 419.
[52] ibid. 418.

real possibility of an award within salvage that would represent a fair spreading of the costs for such remuneration among all that benefit.

Should one wish to explain the shipowner's liability to pay under Article 14(1) in a manner consistent with the twin bases of salvage, then it has to be that this liability arises because a benefit has been conferred. The extent to which other beneficiaries are excluded will nevertheless, be consistent with the idea expressed by Brice that 'it is not everyone who benefits who is liable to reward'[53] the salvor. This, in spite of the clear environmental aims of the Convention, appears to be quite restrictive albeit consistent with a traditional understanding of salvage. This also appear to conflict with the pursuit of environmental protection outcomes and the equitable remuneration of salvors. Special compensation, while not expressed as such, is clearly structured on the unduly limited notion of averting potential shipowner liability suggesting an unwillingness on the part of the drafters of the convention to fully integrate environmental services incidental to property salvage operations into the law of salvage. Or perhaps this is simply not feasible.

4.3.1.2 Penalties and environmental protection

In addition to the incentives contained in articles 13 and 14, the Convention contains further provisions that indicate an increased concern with environmental protection. The convention uses both the positive encouragement provided by articles 13 and 14 and the imposition of duties and penalties to reflect and bolster the underlying 'environmental protection concerns' alluded to in the preamble.

Article 14, besides its encouragement of environmental services, sees an imposition of what appears to be a penalty on the salvor whose actions impede the minimising or averting of environmental damage. In this regard article 14(5) of the convention provides:

> If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this Article

[53] ibid.

Given the liability of the shipowner for the payment of special compensation, one may question the phrasing of this provision. Essentially, the phrasing of this provision would probably have made more sense if it was to have read, 'if the salvor has been negligent and has thereby failed to prevent or minimize the shipowner's liability for damage to the environment'. In its current form, the provision's phrasing suggests more than it actually says, especially to the extent that shipowner liability appears to be at the centre of the operation of the article.

The aforementioned aside, the addition of this penalty appears to detract from the encouragement value of Article 14 and the Convention generally. However, one could argue that the addition of Article 14(5) serves to maximise the potential environmental benefits of salvage services. The possibility of special compensation encourages salvors to render salvage services in circumstances where environmental protection is a priority. However, Article 14(5) ensures that they act in a manner that promotes the attaining of this outcome. The environmental protection aims of the Convention are thus bolstered through the employment of positive encouragement while conduct that may impact negatively upon environmental protection is discouraged.

In the absence of the provision contained in Article 14(5), it would theoretically be possible for a salvor to claim expenses despite conduct that may actively prevent the averting or minimising of environmental damage. Article 14(1) only requires salvage services in relation to a vessel 'which by itself or its cargo threatened damage to the environment' and the failure of the salvor to 'earn a reward under Article 13 at least equivalent to the special compensation' of Article 14.[54] Therefore, one could have a salvor recover expenses in spite of behaviour that would be considered contrary to the environmental protection aims of the Convention. One could possibly argue that such environmentally negative conduct by a salvor would fall foul of Article 18 of the Convention.[55] However, as will be shown, this article by itself is not the ideal way to deal with conduct that may prevent the minimising or prevention of environmental damage.[56]

[54] See above 121.
[55] See discussion of Article 18 above, 131.
[56] See discussion of interaction of arts 14(5) and 18 below, 133ff.

In terms of Article 14(5), conduct of the salvor that may defeat the object of environmental protection only impacts upon special compensation or a part of such special compensation. This may appear excessively lenient for the punishing of conduct contrary to the environmental aims of the Convention. However, it might actually bolster the centrality and the ultimate attainment of environmental protection. Any attempt to link 'environmentally negligent conduct' to an Article 13 salvage award could arguably defeat the public policy pertaining to the encouragement of salvors.

Salvors are, therefore, encouraged to go to the assistance of the environment without fear of legal technicalities that could render their salvage efforts a financial disaster. While the possibility of the enhancement of special compensation would encourage conduct conducive to environmental protection, art 14(5) would discourage conduct that may prevent it. This reading of art 14(5) informs the earlier assertion that art 18, by itself, is not ideal for the furthering of the environmental protection credentials of the Convention. In order to effectively further the environmental aims of the Convention, articles 14(5) and 18 are both necessary.

In spite of the argument offered about Article 14(5) encouraging appropriate conduct on the part of salvors, questions regarding its necessity have been raised. Professor Rose, has suggested that the article might be superfluous in view of the provisions contained in Article 18 of the Convention.[57]

> A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct

Professor Rose argues that Article 14(5) is superfluous because the special compensation provided for under Article 14 is included in the word 'payment' used in Article 18.[58] He argues that the only practical function of Article 14(5), 'if any, is to

[57] See Rose FD, (n 24) 226. Also see Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991-1992) *16 Tul. Mar. L.J. 1, 63.*
[58] *Ibid*.

emphasise that one of the types of misconduct mentioned in the more widely drafted article may have the effect of reducing or eliminating a potential award of special compensation'.[59] Professor Gaskell similarly alludes to the possibility of Article 14(5) being superfluous because of Article 18, without a firm statement to that effect.[60] However, the aforementioned views, especially that of Professor Rose, are too reliant on the single word 'payment'.

Why would the drafters of the Convention insist on an an additional Article 14(5), or indeed an Article 18, if the two are essentially addressing the same issue? The need for both articles become apparent if one interprets them with reference to their respective underlying purposes and against the purpose of the convention as a whole. This would be in line with the approach of Lord Mustill in the *Nagasaki Spirit.* The Judge, in interpreting the relevant provisions of the Convention, read the words 'in the general context of the new regime'.[61] In this regard, Lord Mustill also alluded to the correctness of an approach that pays heed to the history of the convention.[62] Lord Mustill, therefore, commenced his interpretation with the wording of the convention 'in the general context of the … regime'.[63]

If one follows the approach endorsed by the House of Lords in the *Nagasaki Spirit,* one would have to interpret Article 14(5) in context. In this regard, the immediate context of the article would be that of Article 14 as a whole. Thus, the idea of special compensation and the policy underpinnings of the scheme ought to be instructive in any interpretation of Article 14(5). In this regard, Brice notes that 'what Article 14 was seeking to do was to give salvors extra encouragement'.[64] The aforesaid extra encouragement, as mentioned before, is in the form of the 'special compensation'

[59] *Ibid.*
[60] Gaskell 16 *Tul. Mar. L.J.* (n 57).
[61] *The Nagasaki Spirit* (n 22) 512.
[62] Ibid.
[63] Ibid.
[64] Brice, Maritime salvage (n 10) 444.This line of argument was also followed by Mr Brice QC, as he then was, pointing out to the court in the Nagasaki Spirit that 'the explicit purpose of the new salvage regime… in the words of the preamble [is] to provide 'adequate incentives' to keep themselves in readiness to protect the environment' Lord Mustill regarded this the teleological method proposed by Mr Brice as correct.

where salvors render services in a situation that may otherwise have been economically unattractive.

While Article 14 encourages salvors to direct their attention at the averting or minimising of environmental harm, it also underpins the general concern with environmental protection as established in the preamble of the Convention. Scholarly opinion has suggested that environmental protection is the *raison d' etre* for the Convention. In the words of Brice, the 'underlying purpose of the London Convention was to encourage and to some extent compel salvors to take action during the course of salvage operations to protect the environment'.[65] Therefore, any contextual reading of Articles 14, 14(5) and 18 of the Convention demands that one pays attention to the environmental concerns embodied by the Convention as a whole.

A literal reading of Articles 14(5) and 18 appear to support the view that the former is superfluous because of the latter's provisions. It cannot be denied that, normally, the term 'payment' as used in Article 18 would be wide enough to cover the special compensation awarded under Article 14. In terms of Article 18, a salvor 'may be deprived of the whole or part of the payment due under this Convention'. Thus, a salvor could potentially lose the whole, or a part of, the traditional salvage where his actions necessitate salvage operations or make commenced operations more difficult. The sanction contained in Article 18 clearly goes further than that of Article 14(5). In contrast, negligent conduct by a salvor in terms of Article 14(5) only impacts upon the special compensation component of payment under the Convention. This formulation serves to promote the encouragement of salvors, while keeping their conduct honest in relation to environmental protection.

The contention that Article 14(5) is superfluous or subsumed under Article 18 fails to explain the problem of the latter taking away that (the penalty being limited to the special compensation part of payment) which is given under the former. Moreover, the notion that Article 14(5) is subsumed under Article 18 is not consistent with the overall environmental aims of the Convention. So, is it possible to reconcile Article 14(5) with

[65] ibid. While the use of the word "compel" might prove to be somewhat strong, the idea of environmental protection nevertheless finds expression through its addition to the duties imposed on salvors and owners by the convention. See discussion of Article 8 below, 136.

Article 18? One could, both on a literal and teleological reading, reconcile the two articles thereby furthering the overall environmental protection aims of the Convention.

While the term 'payment' serves as the basis for the argument that Article 14(5) is superfluous, other terms together with a teleological reading of the provisions appear to point in a different direction. Firstly, the use of the term 'salvage operation' in Article 18 distinguishes it from Article 14(5). 'Salvage operation' is defined in Article 1(a) of the Convention as, 'any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever'.

Thus, it would appear as if the mischief address by Article 18 is different from that of Article 14(5). The latter makes no mention of 'salvage operations' but, instead, regulates negligent conduct in relation to the prevention and minimising of environmental damage. A 'salvage operation' is distinct from environmental services with the latter only becoming an issue in the performing of the traditional 'operation'. In this regard, the words of Lord Mustill in the Nagasaki Spirit may once more prove to be instructive.

> [T]he right to special compensation depends on the performance of 'salvage operations' which, as already seen, are defined by art 1(a) as operations to assist a vessel in distress. Thus, although art 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award. The only structural change in the scheme is that the incentive is now made more attractive by the possibility of obtaining new financial recognition for conferring a new type of incidental benefit. Important as it is, the remedy under art 14 is subordinate to the reward under art 13, and its functions should not be confused by giving it a character too closely akin to salvage.[66]

The words of Lord Mustill, when applied to Articles 14(5) and 18, suggest a definite difference in focus. The former introduces new 'financial recognition' for conferring a 'new type of incidental benefit', which can be described as the 'environmental services' that are rendered where a marine disaster poses an environmental risk. While environmental services and the award of special compensation in terms of Article 14 are definitely linked to the performance of salvage operations, the former is not synonymous

[66] The Nagasaki Spirit (n 22) 513.

with the latter in a legal technical sense. Thus, fault or neglect, fraud and other dishonest conduct in relation to salvage operations as provided for in Article 18 are distinguishable from negligence in relation to the minimising or averting of damage to the environment. This reading allows an effective reconciliation of the articles while also serving the underlying purpose of the Convention.

On Professor Rose's argument, one might assume that Article 14(5) could be removed without significantly impacting upon the reading of Article 18. However, the extent to which one could distinguish between 'salvage operations' as defined in Article 1 and the 'environmental services' contemplated by Article 14 would still leave the problem of explaining how the former could include the latter. Notwithstanding the wide definition of 'payment' in Article 18, it is difficult to see how one could get around the limited confines of 'salvage operations' as defined in Article 1(a) of the Convention.

On a teleological reading of the provisions, the argument for a distinction between articles 14(5) and 18 gains further ground. As mentioned, Article 14 generally serves to encourage salvors to apply their minds to the minimising or averting of environmental damage. However, the absence of Article 14(5) might potentially have the exact opposite effect. It is difficult to imagine how a salvor could be encouraged to engage in environmental services when fault could potentially result in the loss of the complete salvage award. Therefore, the view of Professor Rose that the article is superfluous might not be mindful of the aims of the Convention while also not being sensitive to the difference in the aims of the provisions. Article 14(5) deals with conduct in relation to environmental services while Article 18 deals with 'salvage operations' as defined by art 1 of the Convention. While intimately linked, these concepts are not synonymous. Given the general policy underpinnings of the Convention and especially insofar as it relates to the encouragement of salvors to minimise or prevent damage to the environment, articles 14(5) and 18 are best kept as distinct and separate provisions.

One appropriately drafted provision could possibly take care of the concerns raised. However, such a provision would have to be drafted with the legal technical limitations of the Convention in mind. Moreover, it must be appreciated that the attachment of Article 18 consequences to environmental services might have a negative

impact on the encouragement of salvors. Such a provision would, therefore, have to similarly distinguish between the penalties as provided for in articless 14(5) and 18. Nevertheless, the regulation of the salvor's conduct in relation to environmental services, to the extent that it is incorporated into the Convention, is better dealt with in a paragraph of the provision specifically dealing with the issue of special compensation and the averting or minimising of damage to the environment.

4.3.1.3 Duties and environmental protection

In addition to the penalties found in articles 14(5) and 18, the Convention contains a separate Article 8 spelling out the duties of the salvor, owner and master. The environmental protection aims of the Convention also find clear expression in the way these duties are formulated. Article 8 provides as follows:

> **Duties of the Salvor and of the owner and master**
>
> 1 The salvor shall owe a duty to the owner of the vessel or other property in danger:
>
> (a) to carry out the salvage operations with due care;
>
> (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment;
>
> (c) whenever circumstances reasonably require, to seek assistance from other salvors; and
>
> (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.
>
> 2 The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor;

> (a) to co-operate fully with him during the course of the salvage operations;
>
> (b) in so doing, to exercise due care to prevent or minimize damage to the environment; and
>
> (c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

While the article expressly refers to environmental protection,[67] it falls short of imposing a direct separate environmental protection duty on the salvor. Nevertheless, some academic authors have gone as far as reading a direct environmental protection duty into the article.[68] Gaskell, in an analysis of the article, expressly mentions the 'four duties of the salvor'.[69] He lists paragraphs (a) to (d) as the four duties that the Convention imposes on a salvor. Thus, Article 8 imposes the duty on a salvor to 'exercise due care to prevent or minimize damage to the environment'.[70] While this reading would be consistent with a teleological and indeed functional understanding of the Convention, it is not necessarily supported by a literal reading of the article itself.

The exercise of due care to prevent or minimise damage to the environment is formulated with reference to the duty 'to carry out the salvage operations with due care'[71]. In this manner, Article 8(1)(b) could be read as a qualifier to the duty contained in art 8(1)(a) rather than a separate duty. The phrasing of paragraph (b) and its express reference to Article 8(1)(a) precludes the possibility of it being separate and distinct from the latter. Thus, one might read paragraph (b) as an informative component to the duty contained in Article 8(1)(a). One might go as far as suggesting that paragraph (b) introduces environmental protection values into the very fabric of traditional salvage operations in the way it is connected to paragraph (a). On this understanding, a failure to exercise due care in relation to the protection of the environment would amount to an

[67] See articles 8(1)(b) and 8(2)(b)
[68] See Gaskell (n 57).
[69] ibid, 42.
[70] Art 8(1)(b).
[71] Art 8(1)(a)

improperly discharged Article 8(1)(a) duty. However, it is unlikely that this possible reading was intended given the maintenance of the property bias in the definition of salvage operations in the Convention.[72]

De la Rue has suggested that it is only in performing the salvage operations that the salvor is under any duty of care to prevent or minimise pollution.[73] The author further notes that

> [w]hilst this duty may … affect the manner in which he carries out any act or activity undertaken to assist a vessel or any other property in danger, it does not impose on him any obligation to engage in preventative or clean-up measures unconnected with such assistance"[74]

This view of De la Rue provides a good explanation of the relationship between paragraph (b) and (a) while it also fits the wording of the article better.

Of course, if paragraph (b) is an informing component of paragraph (a), to what extent does it inform or qualify the latter? As said, if the idea of 'care to prevent or minimise damage to the environment' is added as a factor to be considered when determining whether the paragraph (a) duty has been properly discharged, this may contradict the earlier point made that 'salvage operations' and environmental services are distinct.[75] However, it may also be the case that an interpretation of paragraph (a) with reference to (b) would be facilitative of an increased concern with the environment. In essence one would be saying that environmental protection concerns form an appropriate backdrop to 'salvage operations' where a threat exists. Essentially, whether a salvor has properly discharged the art 8(1)(a) obligation will involve an assessment of the extent to which the paragraph (b) factor was considered. Therefore, one would be giving content to the paragraph (a) duty rather than imposing a separate duty.

---

[72] Art 1(a).

[73] De La Rue, Shipping and the Environment (2nd edn, Informa, London, 2009)

[74] Ibid. Also see, Liang Chen 'Recent developments in the Law of Salvage of the Marine Environment' (2001) *16 Int'l J. Marine & Coastal L.* 686. Dr Liang Chen, in commenting on environmental salvage and its subordinate nature to the traditional salvage of marine property notes that the 'subordinate nature… can also be seen clearly from from the wording of Article 8(1)(b) which makes the duty of marine environmental salvage secondary to that of ordinary marine property salvage as provided in Article 8(1)(a)'. At 688. Of course, the reference to an environmental duty amounts to the creation of a separate duty which as argued does not follow from the wording of Article 8.

[75] See discussion of the interaction between arts 14(5) and 18 above.

Another, and possibly less radical way of looking at paragraph (b) would be to argue that it forms a natural limitation to the positive duty imposed by paragraph (a). Thus, while the salvor has to perform 'salvage operations' with due care, he should never lose sight of a different concern namely, the importance of minimising or preventing damage to the environment. In this manner, a balancing of the potential conflicting aims of the traditional salvaging of ship and cargo and the protection of the environment is introduced. This is consistent with the practicalities of a salvage operation. In performing salvage operations salvors often have to make the conscious decision to release harmful substances into the sea in order to prevent much larger spills. Of course, with the emphasis on environmental protection, these decisions are often made to prevent a much larger environmental disaster.[76]

In forming a natural limitation to the paragraph (a) duty, paragraph (b) essentially provides the appropriate counterweight to all or nothing property 'salvage operations'. This reading would not contradict the earlier argument of the separate nature of 'salvage operations' and 'environmental services'. Instead, paragraph (b) provides the appropriate backdrop for 'salvage operations' in the same vein that Article 13(b) adds the environmental protection criterion to the assessment of the salvage award. This reading serves to maintain the distinction between 'salvage operations' and 'environmental services' without denying their intimate connection. Nevertheless, while paragraph (b) qualifies, informs and counterbalances paragraph (a), it, and the Convention literally does not provide for a separate duty to minimise or prevent damage to the environment.

The above reading is also consistent with the notion of the salvor's Article 8 duty being a duty owed to the recipient of salvage services. Regarding paragraph (b) as a separate duty, raises the question of the extent of the benefit bestowed by such a duty on the recipients of salvage services. The recipients of property salvage services could not possibly obtain a greater benefit from a freestanding environmental duty than the extent of their possible liability for environmental damage. Therefore, the imposition of a duty on a salvor, which amounts to a private duty beyond the confines of potential

[76] See "The New Bunker Convention" at <http://www.gard.no/web/updates/content/53290/the-new-bunker-convention Accessed 10 August 2016> accessed 10 August 2016.

liability on the part of the recipient of salvage services, would not be directed at securing the interests of the recipient of salvage services. Thus, the duty owed to ship and cargo is linked to potential liability and any argument that it could be more than this would take the duty beyond the confines of a duty owed between the parties to the salvage operation. Moreover, this would be taking the duty beyond the wording of Article 8, which provides that '[t]he salvor shall owe a duty to the owner of the vessel or other property in danger'.

Another possible reading of Article 8(1)(b) is to regard it as one of a bundle of factors that could determine whether the salvage duty contained in paragraph (a) has been properly discharged. However, this would only make sense to the extent that salvage operations are for the benefit of ship and cargo, including potential liability. Linking and limiting the duty in this manner means that Article 8(1)(b) could serve as an informative component in properly discharged salvage operations. This, of course, means that the idea of environmental protection is secondary to the prevention of liability on the part of the recipients of salvage services. Such a reading would also be consistent with the arguments offered about the interrelationship between Articles 14(5) and 18 of the Convention.

It has been mentioned how Article 14(5) addresses the potential problem of salvage operations that are not mindful of environmental protection concerns.[77] Without denying the interrelationship between 'salvage operations' and environmental services, the articles impose the necessary penalties without compromising the encouragement element. These separate penalties are, of course, dependent on the extent to which one can distinguish between 'salvage operations' and environmental services. In this regard, it has been argued that, while the two concepts are linked, the former does not include the latter, which explains the separate penalties imposed by articless 14(5) and 18. Thus, while the separate articles 14(5) and 18 are separate responses to improper conduct in relation to distinguishable services, Article 8(1)(b) serves more to emphasise the balancing of and interrelationship of interests that may at times conflict.

[77] See discussion of the relationship between arts 14(5) and 18 above.

The extent to which Article 8(b) introduces and emphasises the notion of a balance between ‘salvage operations’ and ‘environmental services’ suggests a connection between Article 8, 14(5) and 18. It can be argued that the latter two articles are underpinned by the Article 8 duty in the sense that they provide the penalties for a breach of the Article 8 duty. In this regard, it is to be noted that Article 8, itself, does not provide any sanctions for a breach of the duty contained therein. However, the Convention provides for the expected penalties through articles 14(5) and 18. It is evident that articles 14(5), 18 and indeed 8(1)(b) underpin the understanding of salvage operations as expressed in Article 1 while, at the same time, being directed at the furthering of environmental protection aims.

Regarding paragraphs (c) and (d) of Article 8, it is immediately apparent that, unlike paragraph (b), they have no express connection with paragraph (a). This may suggest that they are indeed separate duties. However, such a reading would depend on the answer to the following basic question. Could one breach the duties contained in articles 8(1)(c) and (d) without breaching the duty imposed by art 8(1)(a)? In view of the wording of paragraph (a), the answer to this question would have to be no.

The wide wording of paragraph (a) potentially covers a failure to seek or accept assistance. Consequently, it would be impossible to breach any separate duties involving a failure to seek assistance or a failure to accept help, without a concomitant breach of paragraph (a). Article 8(1)(a), by its very wording, covers the scenarios contemplated in paragraphs (c) and (d). Thus, if one were to determine whether paragraph (a) has been breached, a failure to seek or accept assistance would be relevant factors to consider. Viewed in this manner, paragraphs (c) and (d) are but specific instances of a failure to exercise due care in the performing of salvage operations. Therefore, Article 8 says the following and no more: Where a salvor engages in salvage operations, these operations should be performed with due care. Whether this duty has been discharged will be answered with reference to the factors expressed in paragraphs (b), (c) and (d), without being limited thereto. In this manner, it can be argued that Article 8 contains a single duty that includes environmental

protection considerations although this is limited to the potential liabilities of the shipowner.

From the preceding discussion, it ought to be clear that the provisions of the Convention should not be read in isolation. Any interpretation should be mindful of the underlying aims of the Convention, while it has also been shown how some provisions could be instructive in the interpretation of others.[78] Moreover, as shown, the preamble of the Convention is more than merely suggestive of the underlying environmental protection aims of the Convention. Reading the provisions together as a functional whole, further rather than detract from the environmental protection credentials of the convention, albeit in a rather limited fashion.

4.3.1.4 Further provisions expressive of environmental values.

The expression of environmental protection values in the Convention is not restricted to those provisions dealing with the encouragement of salvors and the imposition of duties and penalties. As of necessity, basic definitions pertaining to salvage needed to be reconsidered. In this regard, it has been shown how the definition of 'salvage operations' contained in Article 1(a) is instrumental for the proper understanding of articles 14, 14(5) and its interaction with Article 18. Therefore, one ought not to restrict the investigation of the extent to which environmental protection finds expression in the Convention to those provisions that expressly mention the 'environment'.[79]

Nevertheless, the 'environment' does find expression in Article 1(d), which provides a definition of 'environmental damage'. Article 1(d) defines damage to the environment as

> substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

[78] See discussion of articles 14(5), 18 and 1(a) above. In this regard, it has been shown how a reading of Article 8 against the backdrop provided by articles 14(5) and 18 would point at an interaction between these different provisions that might not be immediately apparent when reading them in isolation.

[79] In this regard, also see De La Rue Shipping and the Environment (n 73) 550. The author refers to the prominence of Article 1 in the interpretation of Article 14 and special compensation.

This is the first provision to concretise the environmental theme introduced by the preamble. The definition of 'environmental damage', read in isolation, amounts to a rather abrupt, almost loose standing, introduction of the environment. However, it does serve to create the expectation that the Convention will address issues concerning environmental damage. The substantive provisions of the Convention, for example, those that encourage salvors, impose duties and penalties (where salvage operations are not mindful of environmental protection concerns), bear out this expectation.

The separation of Article 1(d) from 1(a) is consistent with the extent to which a distinction was drawn between salvage services and environmental services in the discussion of articles 14(5) and 18. This separation, which is maintained in the definitions, can be explained with reference to the various interests that had to be satisfied in the negotiations leading up to the finalisation of the Convention.[80] From a strict legal theoretical perspective, this separation would undoubtedly satisfy the salvage purist or traditionalist. However, equally obvious, is the setting of the theme of environmental protection through the definition contained in Article 1(d) and those substantive provisions following on it.

Article 1(d) makes more sense when it is read with paragraphs (a), (b) and (c) of Article 1. In this regard, it has been noted that the definitions contained in Article 1 must be read with other articles and of course one another.[81] Article 1(b) in its definition for vessel provides that it 'means any ship or craft, or any structure capable of navigation'. The article provides information (the definition for vessel) that is instructive in the interpretation of Article 1(a). In informing Article 1(a) in this manner, it becomes clear how it is essential for the proper understanding and separation of environmental services from 'salvage operations'. Paragraph (c) defines property as 'property not permanently and intentionally attached to the shoreline [including] freight at risk'. Article 1(c) is thus restricted to marine property, not including the coastal environment. The article also informs the reading of Article 1(a) which provides for any 'any other property'. Therefore, the article operates as a limitation on what would otherwise have been a very wide notion of property.

[80] See Gaskell (n 57).
[81] ibid 24.

Unlike paragraphs (b) and (c), there appears to be no link, expressed or otherwise, between paragraph (d) and paragraph (a). In this manner, the introduction of the 'environment' in paragraph (d) is not introduced as a component of, or as a part of any possible definition of salvage. This separation pre-empts the way in which the Convention in later provisions distinguishes between traditional salvage operations and environmental services.[82] However, it is to be noted that the wording of (d), read in isolation, go much further than what one would typically expect in an instrument dealing with the law of salvage. There appears to be no confining of environmental damage to the geographical area typically within the area of operation of salvage. In this regard, it ought to be clear that 'damage to the environment… in inland waters… caused by pollution, contamination, fire explosion or similar major incidents', might not necessarily be the result of marine disasters.

Nevertheless, despite the wide purport of the wording of Article 1(d) when read in isolation, it contains a few restrictions. The restrictions are contained in the geographical delineation of damage to the environment, the minimum levels of damage that is recognised (substantial damage) as environmental damage and of course the causes enumerated. This precludes any possibility of the law of salvage addressing environmental protection issues outside the confines of salvage operations. Nevertheless, the role of salvors in preventing or minimising environmental damage in the performance of salvage operations is established. This is done while staying true to the traditional definitions employed in the law of salvage.

As mentioned, the preamble to the Convention acknowledges the role of salvors in a wider environmental protection matrix. Furthermore, the Convention was drafted, mindful of legal factors outside its ambit that could impact on efforts aimed at environmental protection. In this regard, specific mention must be made of articles 5, 6 and 11 of the Convention, which represent public law aspects of salvage law and environmental protection concerns. These articles add to the expression of environmental protection ideals central to the Convention, but appear to be clumsily added on public law provisions, that do not in all instances interact comfortably with the

[82] See discussion of the interaction between arts 14, 14(5), 18 and 8 above.

essentially private law nature and limitations of salvage law. However, they do stand as good indicators of the point Brice makes:

> Whereas until recent years a salvage service and the incident giving rise to it could only be expected to affect the salvor and the owner of ship, cargo and freight, the changes which have taken place in the nature of sea transport and the cargoes carried gave rise to problems which had ramifications both in public and in private law.[83]

4.3.1.4.1 Article 5.

Article 5 of the Convention, while not expressly concerned with the environment, nevertheless, impacts upon environmental protection issues. In this regard, it is a given that coastal states would be concerned with the protection of their coastlines.[84] Of necessity, such a coastal state would be concerned about salvage operations where environmental damage threatens, seeking to involve themselves. Such involvement will typically be through the agency of the appropriate public authorities.[85] For this reason, while the provision is not expressly linked to environmental services, it is clearly in furtherance, even if only indirectly so, of environmental protection by the acceptance of national legislation that may charge the appropriate public authority with environmental protection duties. Article 5 provides as follows:

> **Article 5 - Salvage operations controlled by public authorities**
>
> 1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.
>
> 2. Nevertheless, 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.
>
> 3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

[83] Reeder J, Brice on the Maritime law of Salvage (5th edn, Sweet & Maxwell, 2011).
[84] See discussion below, 221ff.
[85] See ch VII.

From the provisions of Article 5, it is evident that salvage operations actually performed by public authorities are left to the national legislation of the particular coastal state. However, insofar as the salvage operations are performed by private salvors under the control of such public authorities, their rights in terms of the Convention are retained. In this regard, this will be the rights afforded a salvor as against the recipient of salvage services. Thus, while the coastal state may direct such private salvors, the salvors' rights against the owners of ship and cargo are not affected. Nothing, however, is said about the extent to which the coastal state's directing of private salvors may negatively impact upon the work of salvors and how such potential conflicts are to be resolved.

Nothing in the Convention precludes such a coastal state from providing additional forms of compensation to such a salvor.[86] Moreover, the services rendered by such a private salvor will retain its nature as salvage services for the purposes of the rights and duties flowing from salvage services. Here one should note that such services, insofar as they may be directed by public authorities, may theoretically not amount to salvage services.[87] However, Article 5(2) precludes this possibility. Nothing prevents a coastal jurisdiction from similarly regarding those operations performed by public authorities as salvage proper, which is an approach that has been followed.[88]

Article 9, which is related to Article 5, provides for the rights of coastal states while also highlighting the importance of environmental protection. It provides that

> Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which my reasonably be

[86] ibid.

[87] Such services might from a legal theoretical perspective lack the voluntariness requirement that is one of the traditional requirements for salvage services. Moreover, as demonstrated in ch 7 below, remuneration of salvors may take the form of pre-arranged contracts, often involving the retaining of salvage tugs on standby, for the purpose of protecting the environment in marine casualties. These contracts are often entered into on the basis of a hire of the tug with remuneration consisting of the payment of hire. Such contracts, strictly, would not be salvage contracts.

[88] In the South African case of *The MV Mbashi* [2002] 2 Lloyd's Rep 602; 2002 (3) SA 217 (D) the South African High Court in the Durban and Coast Local Division, held that 'the requirement of voluntariness is not lacking in case salvage services are rendered by a company, fully owned by the state to which the state has transferred, as a going concern, its commercial enterprise that had *inter alia* the power to control and exploit harbours and other services, and was entitled as such to claim a reward for salvage services rendered to a vessel in distress'.

> expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

In addition to informing the reading of Article 5, Article 9 also expresses underlying environmental protection values behind provisions such as itself and Article 5. The provision highlights the concern with environmental protection, while also elucidating the positioning of salvage relative to this concern. While the Convention observes an important distinction between traditional salvage operations and environmental services, it is mindful of the importance currently attached to environmental protection. Provisions such as articles 5 and 9, which might appear to rein in the scope of the convention relative to the powers of coastal states, can be read as rather being in furtherance of the stated aims of the Convention albeit not necessarily of traditional salvage operations.

These provisions also appear to emphasise two issues alluded to earlier. Firstly, it ought to be clear that, while traditional salvage operations are kept intact, the wider concern with environmental protection is recognised as an important outcome of the law of salvage. In this regard, with the Convention remaining mindful of the public law dimension of law that could impact on private rights and duties, the private law of salvage is also potentially positioned as a component of environmental protection efforts,[89] which is a theme that is highlighted in chapter 7 below. In balancing potential conflicting public and private law issues, the protection of the environment appears to be the central factor.

4.3.1.4.2 Article 6.

Article 6 of the Convention similarly maps out the public-private-divide of salvage operations. In this regard, the contractual dimension of salvage is entrenched while its position relative to the environmental protection aims of the Convention is clarified. Article 6(1) provides that

> This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.

[89] See discussion below ch 7, 221ff.

The article expressly allows for the Convention to be supplanted by a contract between the salvor and the recipient of salvage services.[90] This reflects the modern realities of salvage operations where the bulk of such services are rendered in terms of contract. While the application of the Convention is thus limited, the primacy of environmental protection concerns is not compromised. Article 6(3) provides that

> Nothing in this Article shall affect the application of Article 7 nor duties to prevent or minimize damage to the environment.

Article 6(3) provides a limitation on the extent to which a contractual arrangement may supplant the provisions of the Convention. It essentially precludes contractual arrangements that may seek to exclude duties under the Convention to prevent or minimize environmental damage. Therefore, the principle of contractual freedom is maintained but not at the expense of the Convention's environmental protection aims. The article, contrary to what has been argued earlier, makes reference to 'duties to prevent or minimize damage to the environment'. However, the reference to 'duties to prevent or minimize' is probably not related to Article 8 in a literal sense. It is simply a reference to the wording employed in Article 8 rather than an express acknowledgement of separate environmental protection duties.

In view of the earlier analysis of the extent to which environmental protection outcomes form part of properly performed salvage operations[91], the primacy of the environmental protection aims of the Convention ought not to be doubted. Article 6(3) is clearly expressive of the overarching importance of environmental protection efforts and indeed policies. Rather than being a direct reference to possible environmental duties, the article would seem to remove any doubt about the extent to which environmental protection aims, as an expression of public policy, could trump contractual arrangements.

Nevertheless, while the essence of contracts is maintained, the special nature of salvage services and the special circumstances that may accompany salvage contracts

[90] See discussion of LOF and SCOPIC below, ch V.
[91] See discussion of Article 8, 14(5) and 18 above.

are emphasised. Here the terms of Article 7, which is not affected by Article 6, are to be noted. Article 7 provides as follows:

> 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 sevices actually rendered.

Article 7 allows for the rather far reaching consequences of a contract being annulled or modified by a court of law. While courts would generally be reluctant to interfere in the contracts between parties, Article 7 appears to allude to the special circumstances under which salvage contracts may be concluded. Here, the use of danger is of importance and examples exist of contracts being modified by courts where salvors use the presence of danger to get more favourable contractual terms.[92] The presence of danger, a situation under which salvage contracts are commonly entered into, appears to be the factor that necessitates the special and close scrutiny of salvage contracts by courts and other tribunals. However, besides recognising the peculiar characteristics of the salvage contract, Article 7 merely confirms basic contractual principles. Generally, contracts entered into under undue influence or duress can be set aside. However, Article 7 is not linked to environmental protection outcomes in any fashion so it suffices to say while it may circumscribe the consequences to be attached to improperly concluded salvage contracts, it does not appear to impact on the public policy concerns insofar as they relate to environmental protection. It merely serves to confirm the essence of contractual arrangements while allowing for the special context of salvage.

4.3.1.4.3 Article 11.

The balancing of divergent interests against an environmental protection background is also apparent from the wording of Article 11. Coastal states, already having the power

[92] See discussion in Brice on Maritime Law of Salvage (n 83) 357ff.

to direct salvage services in terms of Article 9, are almost implored by Article 11 to take private relations into account in their direction of salvage services. The article provides that

> A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in danger.

While environmental protection appears to be of paramount concern in the Convention, it remains, in essence, a salvage convention. Therefore, while the importance of the law of salvage in relation to environmental protection efforts is promoted, the essence of traditional salvage and the integrity thereof is maintained. Article 11 ought to be read with this balancing of often divergent aims in mind. While the immediate reaction of coastal states (rightly or wrongly) often have been to simply deny stricken ships access to ports where there was a threat of pollution, Article 11 asks for the proper balancing of issues. Therefore, while environmental protection is of importance, coastal states are essentialy implored not to ignore the importance of the salvor in a matrix that consists of salvors, other interested parties and public authorities.

Article 11 posits the co-operation between these parties as not only important for the 'successful performance of [traditional] salvage operations' but also for 'the purpose of saving life or property in danger as well as preventing damage to the environment'. In this regard, this provision does not do much to put an obligation on states to admit vessels in distress into their ports.[93] Nevertheless, the balancing of divergent focuses that was also apparent from the discussion of other articles of the Convention is very clear from this provision. Moreover, the role of the salvor and the notion that all the parties to a salvage operation ought to co-operate are highlighted. However, while Article 11 implores coastal states to be mindful of the importance of salvage in the

[93] In negotiations leading up to the finalisation of the Convention arguments were offered to have this provision strengthened in order to put an obligation on states to admit vessels in distress into their ports. Also see, Gaskell, *16 Tul. Mar. L.J.* (n 57).

context of environmental protection efforts, it remains a fact that their interests might nevertheless outweigh those of the commercial property interests of salvors and the recipients of salvage services. Here one may also add the interests of shipowners in the minimising of their exposure to liability and the extent to which salvors' duties appear to be linked to this rather than the interests of coastal states.

4.3.1.5 The Convention and Environmental Protection?

While the practical impact of salvage is more an issue of statistics than law, the purpose of the salvage Convention is clear. The Convention is expressive of environmental protection values both in its statement of purpose and in the manner the substantive provisions appear to further this purpose. Nevertheless, it is also clear that the Convention will at times be challenged by concerns that fall outside the ambit of salvage law proper. In this regard, while the instrument went significantly further than the environmentally neutral Brussels Convention, it remained a decidedly conservative instrument. While idealistic in its statement of purpose, the Convention represents an attempt to steer a course between the maintenance of the traditional law of salvage and the recognised concern with environmental protection.

The Convention, to the extent that it encourages environmental services, appears to be directed at a situation where shipowners may incur liability. As such, any benefits conferred on coastal states as well as the furthering of a public interest in environmental protection is not fully accounted for or, at best, incidental to the performance of environmental services in accordance with the Convention. The Convention simply appears not to be geared towards those benefits that might be conferred outside of the traditional matrix of salvage relationships. Of course, as noted by Brice, 'it is not everyone who benefits [from salvage operations] who is liable to reward him [the salvor]'.[94] While the provisions of the Convention, both private and public, are consequential upon an increased concern with environmental protection the limitations of private salvage law are maintained.

[94] Brice on Maritime Salvage (n 83) 418.

While coastal states and the public undoubtedly benefit from salvors' environmental services, these interests do not contribute to the reward that salvors are entitled to. This would appear to run contrary to one of the traditional tenets of salvage that savors are 'rewarded for the benefits they confer',[95] and that 'each and every interest which has received a benefit from the salvage service must contribute'.[96] However, the reason for this appear to be the fact that in spite of changes effected to the law of salvage over the years, the understanding of salvage operations as a service owed specifically to the owners of specially recognised categories of property has remained intact. This understanding informs the way one also ought to read the apparent environmental duties in the context of salvage operations.

Without a willingness to expand on the basic definition of salvage services, or to recognise interests such as that of a coastal state in environmental protection, salvage law and an instrument like the Convention, will not be able to fully facilitate the public interest in environmental protection. The addition of public law provisions reflective of a public interest in the protection of the environment, at best, impose limitations without adding significant expansion to the law of salvage for fully facilitating the public interest in the environment. In relation to the remuneration of salvors for such services, the liability of the shipowner to pay for benefits conferred on outsiders to the private law relationship appears to contradict the central feature of salvage, namely, that the recipient of benefits must pay.

Nevertheless, the overall ambitions of the instrument cannot be doubted while the purpose, as identified, often assists with the interpretation of seemingly inconsistent and sometimes tautologous provisions of the Convention. Hoever, while the overarching concern of environmental protection may prove helpful in the reconciliation of these provisions, [97] it has also led to interpretations that cannot be justified on a literal reading of provisions.[98]

[95] See discussion above ch III, 73-74.
[96] ibid.
[97] See discussion of art 14(5) and 18 above.
[98] See discussion of the 'duties' imposed by art 8 of the Convention above.

The extent to which the Convention insists on maintaining the traditional understanding of salvage operations while attempting to steer a course between it and environmental protection does raise certain pertinent issues though. It is apparent that the public interest is provided for in the Convention in a manner which challenges an area of law that has always involved the limited issue of the rescue of property at sea. Perhaps the time has come to recognise that the compromises and strict adherence to categories, as evidenced by the Convention, are there for a reason. While a strict adherence to categories may on some level limit rather than promote the environmental protection credentials of the law of salvage, any unnecessary tampering with clear definitions and not accepting limitations may result in legal uncertainty.

The only outcome with the addition of special compensation under the Convention, was to bring the very concept of liability salvage, which has been rejected as the basis for a salvage award, back into the fold. Special compensation is quite obviously structured upon the potential liability of the shipowner, although the benefits conferred go further than this. Ignoring the considerable benefit conferred on coastal states and defining the environmental duties of the salvor with reference to the liabilities of the shipowner significantly detracts from a value driven approach to environmental protection. In this regard, the significant achievement that is the 1989 London Convention appears to be strained at the edges.

The Convention fails to adequately synergise the private law of salvage with the obvious public law outcome of environmental protection. While this does not detract from the extent to which environmental values and informal norms are reflected by the Convention, the legal theoretical challenges posed by the public dimension to the law of salvage are not dealt with.

Any future changes to the law of salvage will have to be functionally mindful of the public-private issues that tend to arise pursuant to large maritime disasters as well as the extent of benefits conferred. Much of the way in which the potential private-public discourse of salvage is to take place would appear to be left to national jurisdictions, with the provisions of the Salvage Convention merely alluding to such a discourse. Therefore, while the Convention expresses environmental values, and while a functional

approach does much for making sense of the instrument, challenges regarding the true nature and province of salvage law proper remain. This has profound implications for any attempt to introduce a concept such as 'environmental salvage' into the framework of salvage law.

4.4 The South African Wreck and Salvage Act 94 of 1996 (WSA)

South Africa has not acceded to the 1989 London Salvage Convention (the Convention). Instead, it has opted to incorporate the Convention into national law by means of the WSA with the articles of the Convention subject to the provisions of the WSA.[99] The primary reason for this approach is evident from debates of the senate following the loss of the bulk carrier, the *Apollo* Sea of the coast of Cape Town, which resulted in pollution damage and clean-up costs of about R7 million.[100] Thus, as noted by Professor Staniland,

> [t]he demands of the Senate for proactive legislation to encourage salvage services and thereby to prevent, control and reduce pollution was…the preliminary legislative *imprimatur* with regard to the drafting of the Wreck and Salvage Bill to serve the public policy of South Africa even if it meant non-accession to the International Salvage convention of 1989.[101]

The answer given by the then Minister of Transport to questions as to why South Africa has chosen not to accede to the Convention also highlights why accession to the Convention was not considered the best option to further South African public policy:

> If South Africa accedes to the convention, then under international law she can only reserve her right not to apply the convention where that is expressly provided for in the convention. For example, article 30 of the convention allows a state party not to apply the convention to historic shipwrecks… However, the convention does not allow a state to extend the area where damage to the environment may occur, or to extend the convention to an oil rig that is pumping up oil, or to give life salvage priority over property salvage, or to calculate more generously a fair rate for equipment and personnel actually used in salvage operations. Because South Africa has not accede to the convention, we

[99] S 2(1).
[100] *Debates of the Senate (Hansard)* 20 May to 16 November 1994, 237-267, cited in Staniland (n 3) para 36.
[101] Staniland H (n 3) para 36.

> have been able to go further than the convention, we have been able to go further than the convention in making these changes, and we have done so.[102]

The above observations by the then Minister of Transport and that of the draftsman of the WSA suggest that the Convention was, at least in four areas, considered not to go far enough in relation to efforts directed at environmental protection. These areas are the subjects of salvage, the definition of damage to the environment, the calculation of a fair rate for equipment and personnel actually used in salvage operations and the fact that environmental services under the Convention does not give a maritime lien to the provider of environmental services. Also, the Convention does not provide the appropriate encouragement to salvors. Thus, the WSA through the changes effected in relation to these four issues was supposed to represent an improvement on these perceived shortcomings of the Convention.[103]

4.4.1 Subjects of salvage

The WSA provides that,

> Notwithstanding anything to the contrary in article 3 or any other article of the Convention, a subject of salvage shall include any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of sea-bed mineral resources.[104]

The provision extends the application of the WSA to platforms and drilling units whether or not engaged in the exploration, exploitation or production of sea-bed mineral resources. This is an express expansion of property subject to salvage as provided for under the Convention, which in Article 3 thereof excludes platforms and drilling units as subjects of salvage. Nevertheless, it fits the basic conception of property provided for in the Convention. In view of the expressed reasons underlying the adoption of Article 3 of the Convention, questions might be raised about the value of this extension in relation to the protection of the marine environment. In this regard, the adoption of Article 3 of

---

[102] *Debates of the National Assembly (Hansard)* 15 January to 7 November 1996 4746. Cited in Staniland H (n 3) par 36.

[103] ibid. Also see Hare J *Shipping and Admiralty Jurisdiction in South Africa* (2nd edn, Juta, Cape Town, 2009) 402 fn 27.

[104] S 2(6).

the Convention appears to have been informed by the same concern as that which informed the extension under the WSA, namely environmental protection.[105]

Much of the debate around the eventually accepted Article 3 revolved around its placement within the Convention, and whether it should have been an exclusion or a reservation clause under Article 24 of the Convention. Nevertheless, the underlying sentiments pertaining to the installations excluded under the article were articulated in a manner which leaves no doubt about the role played by environmental concerns. In this regard, the United States delegation, expressed the following views on the possible unintended consequences of applying the Convention to these installations:

> In submitting this proposal for an outright exclusion in article 2 in place of a reservation possibility in article 24, 1(c), United States wishes to express strong concern about the potential unintended consequences of possible application of the draft Convention to fixed or floating platforms and drilling vessels that are directly engaged in the exploration, exploitation of seabed mineral resources. In most circumstances, such application would be undesirable, in that casual or inexpert salvors might thereby be induced to attempt assisting an offshore facility which might or might not actually be in peril. In either case, it is highly unlikely that such salvors would be able to accomplish any positive results with respect to these offshore facilities and owing to the nature of such facilities their attempt could indeed cause serious property damage or even grave environmental harm.[106]

The US submission reflects a desire to discourage the salvors from attempting to provide salvage services to these installations, not only because of the nature of these offshore facilities but also because of the potential environmental harm that may result from salvors' actions. However, while specific mention is made of inexpert salvors, Article 3 is drafted in a manner that would also discourage the professional salvor. While the application of the Convention is more restricted than the WSA, the reasoning behind its restriction includes the important consideration of environmental protection.

---

[105] *Traveaux Preparatoirs* (n 17) 136-153.

[106] ibid. 143 LEG/Conf.7/VR.40-43. This submission by the United States delegation, which eventually found expression in art 3 of the Convention was supported by the delegations of the United Kingdom, Spain, Federal Republic of Germany, Greece, Norway and France.

Nevertheless, from the perspective of property salvage, the WSA appears to provide more encouragement to salvors.

However, the reasons that informed the drafting of art 3 and their wide acceptance do raise questions about the lack of safeguards in the WSA in relation to inexpert salvors that may be incapable of providing aid to these facilities. Therefore, it is not clear whether the practical impact of the WSA extension would be improved environmental protection as such. Of course, albeit not spelled out in the WSA, those in charge of such a facility would probably be able to refuse the services of such inexpert salvors.

4.4.2 Damage to the environment

The WSA provides that,

> Damage to the environment as defined in article I of the Convention shall for purposes of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.[107]

The above provision does away with the geographical limitation of damage to the environment as contained in the Convention, which is definitely an improvement on the Convention. In this regard, Professor Staniland has suggested that the wording of the convention and the geographical limitation of damage to coastal or inland waters or areas adjacent are uncertain in law.[108] How far outward would areas adjacent to coastal waters extend? When would a salvor engaging in salvage operations have to start contemplate the possibility that such an operation may be outside of the area adjacent to coastal waters? It is submitted that, aside from Professor Staniland's contention that the Convention definition appears to have been made for litigation,[109] the restrictive provision of the Convention may negatively impact upon the encouragement of salvors.

---

[107] S 2(7).

[108] Staniland H (n 3) para 44. See also generally, Bishop A "The Development of Environmental Salvage and Review of the Salvage Convention 1989" accessable at <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 4 March 2013.

[109] ibid.

More importantly, as noted by Professor Staniland,[110] why should the prevention or minimisation of pollution outside of the areas covered by the Convention not be encouraged?

S 2(7) of the WSA appears to take care of the above problematic questions by simply not demarcating any areas that would be covered for the purpose of environmental protection. In this sense it goes further than the Convention, while also providing more encouragement to salvors to engage in salvage operations. The provision also suggests that a significant premium is placed upon the very possibility of environmental damage and not just on the immediate interests of the Republic as a coastal state. Thus, a South African court, may grant special compensation notwithstanding the fact that no South African interests may have been threatened. This represents a considerable elevation of the value attached to environmental protection.

Nevertheless, while the protection of the environment is probably enhanced by the WSA, it is difficult to see how a South African court may apply this provision. To date, no South African court has had an opportunity to apply this provision. While this provision takes care of potential debates on the meaning of areas adjacent to coastal waters, the mechanics of determining special compensation remains unchanged. Another problematic part of the Convention definition that is not addressed by the WSA provision is the meaning of substantial damage to the environment.

Article 1(d) of the Convention only recognises 'substantial damage' to the environment although it does not define the concept of substantial damage. It has been suggested that this excludes the possibility of trivial damage.[111] However, this places quite a burden on a salvor pursuing special compensation in that he will have to prove that threatened damage, which would trigger Article 14(1), was substantial. In this regard it has been noted that 'LOF arbitrators appeared to take a fairly relaxed view of the word [substantial] on numerous occasions'.[112] Nevertheless, it is also clear that the determination of substantial is not always a straightforward matter as illustrated by the decision of the arbitrator in *The Castor,* and that it is not simply a matter of quantities of

[110] ibid.
[111] Brice, (n 10) 423.
[112] Bishop A, (n 104) 69.

the polluting substance but also the peculiarities of the particular area.[113] The arbitrator in *The Castor* found,

> I have considered as carefully as I can whether the damage to the birds and fish, which might have ensued from a grounding off Cabo de Palos, can be described as "substantial physical damage to marine life" within the meaning of the Convention…. [T]he scope for damage to birds, plankton and benthos and hence fish, in the event of a grounding off Cao de Palos in winter, appears to me to have been very restricted indeed, notwithstanding the large volume of gasoline that might have escaped. Whilst there might have been some fatalities amongst birds and fish and some tainting of fish flesh, there was no evidence that the fish stocks or bird population would be significantly depleted by the limited damage which might have occurred. I have, therefore, found it difficult to conclude that there was a risk of "substantial physical damage to marine life" of Cabo de Palos.*[114]*

The opinion expressed by the arbitrator here appears makes it apparent that this is a matter that might give rise to difficulties on the part of salvors to show 'substantial damage'. Moreover, to the extent that the arbitrator made his decision with reference to the impact of an admittedly large spillage, which no salvor would probably be able to predict when deciding to go to the assistance of a vessel, this might have a decidedly negative impact on the encouragement of the salvors involved. As such, more might have been done under the WSA to clarify the issue of 'substantial damage' to the environment instead of simply taking away the demarcation of the areas where damage to the environment will trigger the application of the Convention.

4.4.3 The Calculation of Special Compensation

S 2(8) of the WSA was drafted after the Admiralty Court[115] and Court of Appeal[116] decisions in the *The Nagasaki Spirit* and against the prospect that the House of Lords may decide that a 'fair rate' under Article 14 of the Convention does not include an

[113] ibid. 70.
[114] The opinion of the LOF Appeal Arbitrator as cited in Bishop A, (n 104) 70.
[115] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44.
[116] [1996] 1 Lloyd's Rep 449.

element of profit.[117] This assumption, of course, proved to be correct. Consequently, s 2(8) of the WSA provides that,

> Notwithstanding the provisions of article 14(3) of the Convention, for the purposes of this Act, the expression "fair rate" means a rate of remuneration which is fair having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature.

The provision was drafted in this manner primarily because 'the need to encourage salvors was, in the particular circumstances of South Africa, considered to be of paramount importance'.[118] Thus 'fair rate' in the WSA is defined with reference to the scope of the work done and market rates for such work rather than the use of equipment and personnel. This reference to market rates for work done would allow a South African court to include an element of profit in the calculation of a fair rate.[119] Therefore, it is apparent that the WSA potentially provides better financial incentives than Article 14 of the Convention where salvors prevent or minimise environmental damage.[120] However, it remains to be seen how a court would interpret this provision of the WSA. Nevertheless, from the wording alone, it is apparent that the determination of the 'fair rate' would include factors that might result in higher compensation under the WSA.[121]

4.4.4 Maritime Lien for environmental services

The WSA in s 2(10) thereof provides that 'any claimant under this Act shall be entitled to enforce a maritime lien'. Therefore, a claim for special compensation would, just like an ordinary property salvage claim, afford the claimant a maritime lien. Under the

---

[117] Staniland H (n 3) para 48.
[118] ibid.
[119] Hare J (n 103) 443.
[120] In the *The Nagasaki Spirit* in the House of Lords, Lord Mustil curiously expressed the view that salvors were adequately remunerated and that there was no need for a profit element in order to encourage salvors to go to the assistance of the environment.
[121] See Hare J (n 103) 404. Professor Hare assumes that a South African court would include an element of profit in its determination of a fair rate.

Convention a claim for special compensation does not attract a maritime lien.[122] Therefore, under South African law, a salvor would be able to arrest a ship for the purpose of a claim for special compensation or as security therefore. While this provision certainly makes the enforcement of a claim for special compensation easier, the obvious shortcoming is the fact that the salvor's claim will be limited by the value of the ship exclusive of cargo as the shipowner is liable for the special compensation. It is, however, no guarantee of an award which truly reflects the salvor's efforts to prevent or minimise damage to the environment.

4.4.5 Do the changes brought about by the WSA address the perceived shortcomings of the Convention?

It is apparent that the WSA's addition to the Convention regime is essentially that of a tweaking of definitions. The Act extends the subjects of salvage, broadens the definition of damage to the environment, appears to include a profit margin in the calculation of a fair rate for equipment and personnel actually used in salvage operations and gives a maritime lien to the provider of environmental services. Nevertheless, problems remain.

While subjects of salvage are indeed extended, the environmental benefits are at best indirect and not necessarily certain, especially considering arguments informing Article 3 of the Convention, which excludes platforms and drilling units as subjects of salvage. In relation to damage to the environment the scope of application of the Act is clearly wider than the Convention. Nevertheless, this appears to have been a response to difficulties in the understanding of what 'substantial damage' to the environment might entail.

Regarding the profit element that might be included in the calculation of special compensation, the Act clearly represents an improvement from the perspective of salvors. Nevertheless, it is not clear how a court might apply this in practice. A further issue that remains despite this apparent extension is that of the salvage fund, which remains as limited as that under the Convention. So, while the there is this possibility of higher amounts of special compensation, the salvage fund remains tied to property

[122] Bishop A "The Development of Environmental Salvage and Review of the Salvage Convention 1989" accessable at <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html> accessed 4 March 2013.

saved. The addition of a maritime lien similarly, ties the provision of environmental services to the ship salved.

While the WSA, undoubtedly, provides a less restricted approach to the question of environmental services rendered by salvors it still represents an approach where property salvage is the primary concern. As such, the apparent improvements are at best cosmetic with a number of uncertainties remaining. In terms of the recognition of interests outside of the traditional salvage relationship between salvors and the direct recipients of salvage services, the issues noted in relation to the Convention persist.

4.5 Conclusions

Legislative attempts to reflect an increased concern with environmental protection in the law of salvage have not addressed the pertinent issues that may address salvors' clamouring for awards that recognise the benefits conferred upon coastal states. There has been no attempt to directly address the provision of and remuneration of services to interests outside of the traditional salvage matrix. Considering the changes over the years and the hesitance to expand upon the basic understanding of the law of salvage, it might prove difficult to see changes such as an award for pure environmental services that goes beyond the linking of these services to the potential liability of the shipowner. A clear pattern noted is that, whatever the changes, the understanding of salvage law and salvage operations as a service to property has been maintained. In this regard, the law of salvage, in relation to environmental services and the remuneration of such, has probably reached the pinnacle of its development.

The Convention represents a strained combination of provisions clearly geared towards a private law relationship and provisions that are aimed at taking account of an obvious direct public interest in the performance of salvage services. This is done in a manner which does not consider the conflicts and difficulties this approach might bring. It appears as if public law provisions were simply pasted into a private law instrument, which serves to challenge the essence of traditional salvage law. These provisions

benefit and promote interests outside the basic salvage law matrix thereby resulting in a system of remuneration that seems patently unfair and limited due to its linking with the liability of shipowners. As long as remuneration is linked to the prevention of liability, there would appear to be no legal basis for a pure environmental award that goes beyond the extent of such liability, unless interests outside of the traditional salvage relationship are recognised and the law of salvage fundamentally altered. The WSA, aside from the tweaking of definitions mentioned, can take this matter no further and has taken the Convention as far is at can go without fundamental changes to the law. The result of this would be to render the law of salvage protean and uncertain thus impacting on the key attribute of law that is regulation and order.

Chapter V. Salvage Contracts (LOF), SCOPIC and Environmental Protection

5.1 Introduction

In terms of legislative responses to a growing environmental protection dimension in salvage operations the position of salvors, in relation to remuneration for responding to casualties involving threats to the environment, has undoubtedly improved. However, the 1989 Salvage Convention provides at best a strained legal fusion of environmental services and traditional salvage operations through provisions designed to promote the public interest in the protection of the environment. Regarding the remuneration of salvors, special compensation provides no more than a recovery of expenses. While the South African Wreck and Salvage Act extends the special compensation under the Convention to include profit, it remains to be seen how the relevant provision will be applied in practice. Regarding environmental services, remuneration provisions do not reflect the reality that benefits conferred by salvors go beyond the interests of shipowners, these being precluded by the inherent theoretical limitations of salvage law. As such, current legislation simply does not provide room for the introduction of an award for environmental services that go beyond the potential liability of shipowners.

However, as noted previously, the general maritime law of salvage was gradually replaced by salvage services performed under contract, primarily because of the birth of the professional salvor.[1] Mention has also been made of the fact that marine disasters such as that involving the *Torrey Canyon*[2] led to contractual arrangements between salvors and the owners of salved property that reflected a growing concern with environmental protection. Standard forms of salvage agreement have been promulgated over the years, 'providing for quantification of the salvors' reward by arbitration if it cannot be agreed between the parties'.[3] The most well-known and frequently used of these is the Lloyd's Open Form (LOF).[4]

The 'Lloyds Standard Form of Salvage Agreement-No (Cure-No Pay)', is published in London by the Committee of Lloyd's and dates back to the nineteenth

[1] See discussion above ch II 62ff.
[2] See discussion above ch II 63.
[3] Miller A, 'Lloyd's Standard Form of Salvage Agreement – LOF 80: A Commentary' (1981) 12(2) *J. Mar. L. & Com* 243-261, 243-244.
[4] ibid.

century.[5] While, the LOF has been revised over the years,[6] the first environmental provisions only appeared in the 1980 iteration thereof. This chapter provides an investigation of the Lloyd's Open Form Salvage agreement (2011) and the Special Compensation and Professional Indemnity Clause (SCOPIC), the latter developed to address the perceived shortcomings of Article 14 of the Salvage Convention.[7] The purpose of this investigation is to determine the impact of these contractual mechanisms on salvors' remuneration for environmental services. Do they further, or have the potential to futher, environmental protection aims in a meaningful manner and could they address the shortcomings noted in relation to the Wreck and Salvage Act and the Convention? Moreover, can a contract concluded between salvors and salved property interests regulate remuneration for the furthering of an interest, which is not entirely that of the contracting parties?

5.2 Lloyd's Open Form Salvage Agreements (LOF) and the Special Compensation P&I Clause (SCOPIC)

The LOF and SCOPIC represent the definitive contractual responses to a growing concern with environmental protection in the context of salvage operations. The key driver of changes to the LOF and the development of SCOPIC appears to be dissatisfaction with the calculation of remuneration for salvors' environmental services, especially following the decision of the House of Lords in the *Nagasaki Spirit*.[8] The dissatisfaction with the special compensation scheme under Article 14 of the Convention was specifically addressed through the drafting of a separate clause, SCOPIC, which was meant to supplement the LOF.[9]

5.2.1 LOF 2011

The LOF 2011 is a relatively short document when compared with commercial contracts in general. It contains 9 (nine) boxes for basic details about the salvage operation,[10] 12 provisions - A to L – and 4 notices numbered 1 to 4.[11] The LOF 2011

[5] ibid. Also see Rose FD, *Rose and Kennedy on Salvage* (7th edn, Thomson Reuters, 2009) 401.
[6] 1908, 1924, 1926, 1950, 1953, 1967, 1972, 1980,1990, 1995, 2000.
[7] See discussion below par 5.2.
[8] Rose FD, (n 5) 209.
[9] ibid.
[10] The boxes provide for details on the salvage contractors, property to be salved, an agreed place of safety, currency for a potential salvage award, the date and place of the agreement, whether SCOPIC is incorporated in the LOF agreement and two separate boxes for the persons signing on behalf of the salvage contractor and the property.

retains the traditional 'no cure no pay' principle of salvage in respect of salvage operations,[12] although salvors appear to be of the opinion that the LOF 2011 gives 'priority…to the protection of the marine environment'.[13] However, while this might be a laudable sentiment, it remains to be seen whether the document prioritises the protection of the marine environment in a way that surpasses that as noted in relation to the Salvage Convention.

5.2.1.1 Parties to the LOF 2011

The LOF does not refer to salvors, instead describing those performing the salvage services as the 'salvage contractors' in box number 1. Nevertheless, in this chapter, the term salvor shall be used instead of contractor. Box 2 provides for the property to be salved while box 9 provides for the captain or other person signing for and on behalf of the property. This, as will be shown, has definite consequences in relation to the provision for environmental services, especially in relation to the remuneration of salvors and the facilitation of the public interest in the protection of the environment.

5.2.1.2 Environmental Clauses in LOF 2011.

Clause B of LOF 2011 expressly addresses the issue of environmental protection by imposing a positive duty on salvors.

> While performing the salvage services the contractors shall also use their best endeavours to prevent or minimise damage to the environment.

Similar to the position under the Convention, the issue of environmental protection is treated as an addition to what is regarded as the Contractor's basic obligation under Clause A. In terms of clause A, the contractors 'agree to use their best endeavours to salve property'. The clause B duty only arises in the performance of the traditional salvage operation, which is the basic obligation of the salvor. Therefore, in the absence of a traditional property salvage scenario, there would be no free-standing duty on a salvor to perform environmental services.

---

[11] See LOF 2011 accessible at: <http://www.lloyds.com/~/media/files/the%20market/tools%20and%20resources/agency/salvage%20arbitration%20branch/agency_lof_2011.pdf>

[12] <http://www.marine-salvage.com/media_information/Press/ISU%20LoF%202011%20Press%20Release.pdf> accessed 3 July 2016.

[13] ISU webpage: <http://www.marine-salvage.com/overview/no-cure-no-pay/> accessed 3 July 2016.

Nevertheless, the link between Clauses A and B is that once a salvage operation commences, there will be the further obligation to minimise or prevent environmental damage. One might argue that LOF 2011, on an interpretation of wording alone, goes further than the Convention. In this regard, it has been argued that what is often regarded as an environmental protection duty under the Convention,[14] reads more like a qualifier to the actual duty placed on a salvor in relation to the performance of a salvage operation. The duty imposed by Clause B appears to be independent of the basic obligations in that it is not phrased as a qualifier thereto, although the duty will be triggered by property salvage operations. As such, the Clause B duty only arises in the context of salvage operations, which highlights the essence of salvage law as a service to property.

Alternatively, one could link this apparent environmental protection duty to the fact that salvage operations by their very nature might represent a threat to the marine environment. As such, it could potentially be regarded as an instruction to salvors not to imperil the environment through their decisions taken with respect to the salvaging of property. It is common knowledge that salvors sometimes release potentially polluting substances into the sea in order to successfully keep vessels afloat. As such, the clause could be viewed as a duty on the part of salvors to carefully balance their decisions against potential environmental damage. As such, the protection of the environment has become an important factor in the making of salvage related decisions. In earlier times, salvors would not have had this added factor to consider. This reading suggests that protection of the marine environment is not truly prioritised in a way that surpasses that as noted in relation to the Salvage Convention and as suggested by the ISU.[15]

It is important to be mindful of the fact that this obligation is a contractual promise to the owner of property salved. Besides the public concern with environmental protection, the owner of salved property has a real interest in a salvor taking the necessary care when performing salvage operations. However, (not precluding the possibility that a shipowner might have a preference for environmental protection divorced from potential liability) this interest is probably linked to the question of potential liability for environmental pollution damage. As such, a clause

[14] See discussion ch. IV, 136-142.
[15] See n 13 and text thereto.

placing a duty on the salvor to minimise or prevent environmental damage has a definite commercial underpinning for the parties to the contract. Nevertheless, while a commercial reason for the inclusion of a provision such as Clause B is apparent, protecting the owner of salved property against potential liability never took off as a basis for an enhanced award to salvors for environmental services. In fact, this possibility had been rejected in the diplomatic conference leading up to the Salvage Convention. Of course, in contract, there would be no impediment to prevention of liability as consideration for the remuneration of the salvor, and the contract could provide for the extent of the remuneration or a formula for remuneration in addition to property salvage.

It is also doubtful whether this contractual relationship between the owner of property salved and the salvor can effectively account for the benefits bestowed upon potentially unidentifiable third parties. In this regard, the 'principles relating to privity of contract apply to salvage agreements as they do to other contracts'.[16] This is unless the agreement between the salvor and the recipients of salvage services are intended to confer a benefit on parties outside of the contract.[17] However, while there might be a *de facto* benefit for third parties, there is nothing in the clause itself to suggest that it is intended to confer benefits on any parties outside the salvage agreement.

The consequences of a breach typically impact on the payment that a salvor will receive under the contract.[18] In this regard Professor Rose also notes that that potential third party beneficiaries of the salvor's Lloyd's Form duty will not acquire rights by virtue of the Contracts (Rights of Third Parties) Act 1999.[19] It is not immediately apparent why Professor Rose has this contention but the wording of the clause, together with the typical consequences of a breach suggest that Professor Rose's view is indeed correct.

5.2.2 SCOPIC

As mentioned, the development of SCOPIC was a response to perceived difficulties experienced with the special compensation scheme under Article 14 of the Salvage

[16] Rose FD, (n 5) 236.
[17] See Merkin R (ed), Privity of Contract (2000).
[18] Rose FD, (n 5) 515.
[19] ibid.

Convention and the decision in *The Nagasaki Spirit.*[20] These difficulties related to the manner in which the interpretation of special compensation was dealt with in *the Nagasaki Spirit* and the concerns of salvors regarding 'their financial incentive[s]…, the calculation of remuneration for salvage and environmental services and the promptness with which payments were made'.[21] Additionally, Brice suggested that the 'uncertainties surrounding the assessment of Article 14 claims and the necessity to prove a threat of environmental damage or that damage to the environment was averted (to earn an increment on the expenditure) caused salvors to have an interest in the devising of some alternative'.[22] Therefore, SCOPIC) was devised to rectify the perceived inadequacies of the special compensation scheme devised under the Salvage Convention, in relation to the remuneration of salvors.

5.2.2.1 SCOPIC and LOF

SCOPIC 2014, the latest version, is more a scheme than an actual clause, given that it is quite detailed and made up of 16 so-called sub-clauses. This SCOPIC scheme or package consists of the SCOPIC clause itself, three appendices, two codes of practice and a salvage guarantee form. SCOPIC is a voluntary addition to the LOF in that parties have the option to incorporate SCOPIC into their LOF salvage agreement.[23] As such, there is no automatic application of SCOPIC in the absence of an expressed incorporation of it into the LOF contract.[24] When the parties incorporate SCOPIC, they essentially replace the special compensation regime under Article 14 of the Convention with the remuneration method provided for under SCOPIC. In this regard clause 1 of SCOPIC provides; '[i]f this SCOPIC clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14'.

While Article 14 of the Convention is replaced by SCOPIC, Article 13 remains of relevance. Clause 2 provides that,

[20] Semco Salvage & Marine PTE. Ltd. V Lancer Navigation Co. [1997] A.C. 455 HL. For a discussion of the findings in this case see ch V.
[21] Rose FD (n5) par 6.005, 209.
[22] Reeder J, *Brice on Maritime Law of Salvage* (5th edn, Sweet and Maxwell, London, 2011) 613.
[23] Bishop A, 'The Development of Environmental Salvage and Review of the London Salvage Convention (2012-2013) 37 *Tul. Mar. L.J. 65*
[24] Box 7 of the LOF 2011 asks the following: 'Is the Scopic Clause incorporated into this agreement? State alternative : Yes/No'.

> The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement ("Article 13").

Moreover, clause 6 clearly provides that salvage services under the main agreement shall continue to be assessed in accordance with Article 13 of the Convention, even where SCOPIC had been invoked by a salvor. Similar to Article 14 special compensation, the SCOPIC remuneration is also payable by 'the owners of the vessel'. However, this is to be expected given that we are dealing with a contract between salvors and the owners of salved property. A SCOPIC award will only be payable to the extent that it exceeds the total Article 13 award, which is payable by all salved interests including cargo, bunkers.[25]

In this regard, the SCOPIC remuneration mirrors the interaction of Article 14 of the Convention with Article 13. This would, once again, be an indication that the contract distinguishes between salvage operations proper and environmental services rendered in the context of such services. Thus, the reluctance observed under legislative efforts to erode the traditional understanding of salvage operations is maintained. Of course, nothing prevents the contracting parties to depart from the basic definitions employed by the Convention by for example making the provision of environmental services for the benefit of the property interests part and parcel of the operations.

The incorporation of SCOPIC into the LOF is not all that is required for it to become operative as between the contracting parties. For the SCOPIC scheme to apply, clause 2 requires that the contractor must

> invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a 'threat of damage to the environment'.

A failure to invoke SCOPIC will result in a salvor not being able to use the SCOPIC method of remuneration. However, a failure to invoke SCOPIC does not mean that

[25] SCOPIC clause 6.

Article 14 of the Convention will be reinstated given that clause 1 removes the salvor's right to claim pursuant to Article 14 upon the incorporation of SCOPIC. This, however, is subject to a clause 9 withdrawal of a shipowner from the contract.[26]

Where the salvor invokes SCOPIC, clause 3 is triggered immediately. This clause provides for the provision of security.

> The owners of the vessel shall provide to the Contractor within 2 working days… after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P&I Club letter… in a form reasonably satisfactory to the Contractor providing security for his claim for SCOPIC remuneration in the sum of US$3 million, inclusive of interest and costs.

This clause addresses a key practical concern of salvors under the salvage convention, namely the difficulties to obtain security under the Convention.[27] Article 21 of the Convention provides that, '[u]pon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor'. However, salvors often found it difficult to enforce this provision primarily, it appears, because special compensation does not provide for a maritime lien.[28]

While the addition of a contractual basis does not necessarily address the aforesaid concern, clause 4 provides some relief to the salvor should the owners of a vessel not provide the security as required. Clause 4 essentially allows the salvor

> at his option, and on giving notice to the owners of the vessel [the right to] withdraw from all the provisions of the SCOPIC clause and revert to his rights under the Main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed.

A proviso to this also contained in clause 4 is that

> this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initial Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.

---

[26] See discussion of clause 9 below, 174.
[27] Bishop A, (n 23) 74.
[28] ibid.

A notable difference between the SCOPIC scheme and the special compensation regime under the Convention is that there is no requirement for a threat to the environment as under the Convention. This, of course, immediately excludes any possibility of arguments ensuing regarding the existence or not of a threat to the environment. More specifically, the whole uncertainty on the issue of substantial damage and what this may be is excluded and there would be no need for salvors to show 'substantial damage'. There are also no geographical restrictions under SCOPIC. In this regard, the SCOPIC scheme mirrors the approach under the South African Wreck and Salvage Act.[29]

While the above might suggest that salvors would simply always invoke SCOPIC, this is not the case. SCOPIC contains what might be regarded as a penalty[30] should a salvor unnecessarily invoke the scheme. Clause 7 provides as follows:

> If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.

The policy reason for this provision is essentially to discourage salvors from unnecessarily invoking the SCOPIC clause. Without this clause, salvors would naturally 'have nothing to lose from invoking the SCOPIC Clause on day one of salvage in every case'.[31] This would remove the traditional principle of 'no cure-no pay' in its entirety.[32] However, unnecessarily invoking SCOPIC would result in any article 13 award that would have been awarded being discounted by 25% of the difference between it and the SCOPIC assessment.[33] In this manner, salvors have to make an honest assessment of the existence or not of an environmental threat

[29] See discussion above, ch IV, 157-158.
[30] Brice, (n 22) 622.
[31] Bishop A, (n 23) 83.
[32] ibid.
[33] SCOPIC Clause 7.

because a normal Article 13 award that exceeds the SCOPIC remuneration might be discounted.

Clause 9 similarly provides a counter to salvors unnecessarily invoking SCOPIC in that it gives the shipowner the right to withdraw from SCOPIC with 5 days' notice to the salvors.[34] As such, shipowners are not entirely at the mercy of salvors unnecessarily invoking SCOPIC. However, a very important restriction of this right is the fact that a shipowner can only withdraw where shore authorities permit them to do so. The contractual balancing of the parties' interests is, therefore, subject to the powers of 'Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered'.[35]

Clause 9(i), which affords salvors the right to terminate their services under SCOPIC, provides that

> The Contractor shall be entitled to terminate the services under the SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR[36] (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property …will exceed the sum of:
>
> (a) The value of the property capable of being salved; and
>
> (b) All sums to which he will be entitled as SCOPIC remuneration

Therefore, a salvor who runs the risk of operating at a loss can terminate services under the main agreement and SCOPIC. However, this right to terminate is also subject to the powers of governments, local authorities and other officially recognised bodies with jurisdiction over the area where services are rendered.[37] The extent to which public authorities can interfere with the contractual rights of salvors and shipowners, presumably in the public interest, is similar to the situation under the Convention. Therefore, interests outside of the contractual matrix, take priority over the contractual rights of the parties.

---

[34] SCOPIC Clause 9(ii)
[35] SCOPIC Clause 9(iii).
[36] The SCR is a Special Casualty Representative appointed by vessel owners to represent owners during the performance of salvage operations. See discussion below, 177.
[37] See above n 35.

5.2.2.2 SCOPIC remuneration

As mentioned, SCOPIC only replaces Art 14 special compensation under the Convention. The SCOPIC remuneration is devised to take care of the perceived shortcomings of the Article 14 special compensation and especially those brought to the fore by *The Nagasaki Spirit.*[38] In *The Nagasaki Spirit* the court in its assessment of special compensation found that a fair rate did not include any element of profit.[39] However, the court had to consider the article 13(h), (i) and (j) criteria, which would encourage professional salvors to invest in equipment and keep these on standby to use when needed.[40] The problem with this approach was that it gave rise to complications in that salvors' accounts had to be examined, which resulted in 'delay, expense and uncertainty'.[41]

To circumvent the perceived difficulties under the Convention, SCOPIC introduced a tariff rate (clause 5), which replaced the 'fair rate' as provided for under the Convention. The total SCOPIC remuneration in terms of clause 5(i) includes, 'the total of the tariff rates of personnel, tugs and other craft, portable salvage equipment, out of pocket expenses and bonus due'. The tariffs are set out in Appendix 'A' and the tariff rates used are 'those in force at the time the salvage services take place'.[42] Even the out of pocket expenses of salvors are expressly defined by SCOPIC as

> those monies reasonable paid by or for and on behalf of the contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation.[43]

The bonus referred to in clause 5(i) is provided in clause 5(iv).

> In addition to the rates…and any out of pocket expenses, the contractor shall be entitled to a standard bonus of 25% of those rates and out of pocket expenses.

However, Brice has noted that difficulties of interpretation remain.[44] An example of a difficulty would be whether a hired tug would qualify as an out of pocket expense where it is not actually used in the services? However, these are issues that are

[38] (n 20).
[39] ibid.
[40] Bishop A (n 23) 81.
[41] ibid.
[42] Clause 5(ii).
[43] Clause 5(iii).
[44] Brice (n 22) 619.

particular to the mechanics of the SCOPIC remuneration rather than the environmental protection dimension of SCOPIC. As such, it is beyond the scope of this discussion. Nevertheless, it is clear that SCOPIC remuneration provides for more certainty compared to special compensation under Article 14 insofar as it replaces the criterion of a 'fair rate'. It also addresses the concerns of salvors whose arguments for a profit element to a fair rate was not accepted in *The Nagasaki Spirit.* However, to the extent that it improves the financial interests of salvors, the protection of the environment may be furthered in that salvors might be better encouraged to engage in environmental services.

5.2.2.3 Special Casualty Representatives and other Special Representatives

Clause 12 of SCOPIC gives the owners of the vessel the option to appoint a Special Casualty Representative. It appears to be directed at the enabling of the ship owner and his P&I Club to keep 'close watch on the salvage operation and the practical fulfilment by the contractor of his SCOPIC duties'.[45] The involvement of the P&I Club here, points at only one possible interest namely that of the possible liability of the vessel owner, a point that had been noted also in relation to the operation of the Convention.

This ties in with the earlier assertion, that the provision of an environmental duty under LOF can be commercially explained by the potential liability of such a ship-owner. Such an interest is, of course, narrower than any of the identified external parties' interest in the protection of the marine environment. In this manner, the environmental services dimension of the SCOPIC is quite obviously premised upon the interests of the parties to the contract. This, of course, is not to suggest that performance of these contractual duties might not confer benefits beyond the immediate contractual relationship that is SCOPIC.

Clause 13 also provides for the involvement of other interested parties.

> At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the "Special Hull Representative" and the "Special Cargo Representative" and collectively called the "Special

[45] ibid. 628.

> Representatives") at the sole expense of the appointor to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practising lawyers.

While these interested parties are, strictly speaking, outsiders to the contractual relationship the salvage master, vessel owners and the Special Casualty Representatives are obliged to co-operate with the Special Representatives.[46] The Special Representatives 'have full access to the vessel to observe the salvage operation and to inspect …the ship's documents [that] are relevant to the salvage operation'.[47]

5.2.2.4 Provisions directly addressing environmental protection

Compared to special compensation under the Convention, SCOPIC provides more certainty as well as a response to the perceived problems flowing from environmental services not attracting a maritime lien. However, the discussion thus far would suggest that environmental benefits beyond the potential liability of ship-owners are more the the result of public oversight mechanisms contained in SCOPIC rather than any direct contractual duties owed between the parties to the contract. However, there are clauses that appear to be of more direct relevance to environmental protection and the duties as between the contracting parties.

5.2.2.4.1 Clause 10

Clause 10, reiterates the link between SCOPIC and the LOF by simply setting out the main duties of the salvor with reference to the LOF obligations.

> The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment.

The provision appears to confirm the earlier assertion that environmental protection is an add-on to actual salvage services rendered. There is also nothing to suggest that SCOPIC moves beyond the interpretation of the LOF provision provided earlier. Without traditional property salvage services, there would be no independent duty on any salvor to render environmental services. This much is clear from the phrase 'and

[46] SCOPIC Appendix C, 1.
[47] ibid.

in so doing', which refers to the salvor using best endeavours to salve property, linking the further duty to prevent or minimise damage to the environment with a commenced property salvage operation.

Again, it is difficult to see how this could refer to anything more than a salvor having to exercise the necessary care in the performance of its salvage services. Moreover, given that we are dealing with a contractual undertaking by a salvor to salved property interests, one is faced with the question of what these interests are. As mentioned earlier, the owner of property could only have one real commercial interest in obtaining this kind of undertaking from a salvor, namely, its potential liability for pollution damage. As such, one could view the contractual agreement as an undertaking by a salvor to perform the salvage operation with due regard to the potential liability of the ship-owner. This makes the contractual undertaking a devise, which is primarily directed at the interests of the parties to the contract and quite clearly so, the ship-owner who is liable for the payment of SCOPIC remuneration.

It is not immediately apparent what the penalty for a breach of this obligation might be. More importantly, and given its importance in the context of contract breach, how would this term be classified? In English law, the classification of a term of a contract as a condition, warranty or innominate term determines the consequences of a breach. While a breach can always find a claim in damages, where a loss is suffered because of said breach the classification of the terms has further consequences. The breach of a condition entitles the other party to the contract to terminate the contract while the breach of a warranty only entitles the innocent party to damages. Where the term is not easily classifiable as either warranty or condition, the termination of the contract will depend on the severity of the breach and its consequences for the innocent party.[48] Thus, an innocent party may terminate performance of the contract where the breach is such as to deprive such party of 'substantially the whole benefit of the contract'.[49]

How, would one classify the term to prevent or minimise damage to the environment? From the perspective of the shipowner and its very real interests in the avoidance of potential liability one could see how the duty could potentially be regarded as very important. As such, one may argue that ship-owner could

[48] See *Hong Kong Fir Co. Ltd. V Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB. 26.
[49] ibid.

legitimately withdraw from the contractual arrangement with the salvor. However, unlike contracts in general, there is the substantial public law oversight over salvage arrangements such as SCOPIC. While the shipowner can withdraw from SCOPIC,[50] this is subject to the approval off the relevant authorities.[51]

Of course, one may argue that this oversight measure only applies in relation to a withdrawal under Clause 9(ii) and therefore, that a classification of such a breach as a condition, would afford a shipowner the right to cancel. However, such an approach would probably not be countenanced while it would also negate the public interests so clearly promoted under SCOPIC. So, there is a definite tension here between a contracting party's potential rights and the public interest in environmental protection, given that an exercise of the former may impede the pursuit of the latter. Despite the importance of the term, from the perspective of a shipowner, it is perhaps not ideal to regard the right as a condition unless the right to terminate is subjected to the powers of coastal authorities in a manner similar to that encountered under withdrawals in terms of clause 9. As such, one would, again, have the imposition of outside interests and powers on a private contractual relationship.

Given the important public interest dimension, a better approach would be, as suggested by Professor Rose, for a breach to impact upon the salvage award.[52] Professor Rose does not consider the potential classification of the term (clause 10) but notes that

> in a situation where the salvee shipowner is subject to liability for causing environmental damage, a salvor who fails to carry out his environmental duties may become liable to indemnify the shipowner for the liability which he (the salvor) has failed to avert.[53]

He notes further that in most cases 'the significance of imposing environmental duties on a salvor will be to affect the payment(s) which may be made to him [the salvor]'.[54] This construction, of course, would imply that we are not dealing with a condition of the contract. This consequence to a breach of the duty, will be a *de facto*

[50] SCOPIC Clause 9(ii).
[51] SCOPIC Clause 9(iii).
[52] See Rose FD (n 5) 512.
[53] ibid 515.
[54] ibid.

furthering of potential third party and public interests, incidental to a salvor performing a contractual duty owed to the shipowner.

While Professor Rose's contention makes much sense, one is left with the curious situation of an important term of a contract that would undoubtedly be regarded as a very serious term of the contract being limited by public policy considerations. To the extent that the clause 10 environmental duty is one owed to salved property interests, the public interest is probably not sufficiently accounted for in the context of a private relationship. Perhaps a contractual link between salvor and salved property interests can simply never fully facilitate the promotion of the public interest in environmental protection without negatively impacting upon our understanding of the nature of contractual relationships.

5.2.2.4.2 Clause 14

Clause 14 of SCOPIC is another clause seemingly directed at pollution prevention. It provides as follows:

> The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.

This is a rather curios provision and it appears to support the earlier assertion that environmental duties are in fact secondary to property salvage. Regarding the 'removal of pollution', this shall only be taken into account in the assessment of SCOPIC remuneration where the activity takes place in the immediate vicinity of the vessel and 'insofar as this is necessary for the proper execution of the salvage but not otherwise'. Essentially, therefore, once any escape of polluting substances has gone beyond the immediate vicinity of the vessel, this would not be considered. Also, these cleaning up services are only relevant to the extent that it is necessary for the proper execution of the salvage.

This last requirement raises interesting questions about the primacy of environmental protection as well as the informing rationale for the provision. For all intents and purposes this provision suggests that a contractor shall be rewarded for environmental services to the extent that these are undertaken in furtherance of property salvage efforts. Any efforts beyond this shall effectively not be relevant. One may argue that a contractor can validly decide not to provide environmental services,

even where possible pollution emanate from the vessel, once pollution has moved beyond the immediate vicinity of the vessel and is not necessary for the proper execution of the salvage. This does not say much for the encouragement of salvors beyond the limitations imposed by this clause.

However, one could possibly make sense of this clause by reading it together with the duty imposed by clause 10. Essentially, should a salvor ignore pollution beyond the immediate vicinity of the vessel and where not necessary for the proper execution of salvage, he might be guilty of a breach of clause 10 with the consequences as discussed earlier. Even more so, if one were to view the clause 10 undertaking as a contractual promise to prevent liability on the part of the owner. Clear from this clause is the fact that it appears to be premised upon the narrow interests of the salvor and salved property interests. There is an apparent disregard for any potential pollution beyond the immediate vicinity of the vessel or where the removal of pollution is not necessary for the proper execution of salvage. However, as said, this apparent disregard might be balanced out by reading the provision together with clause 10.

5.3 The Stipulatio Alteri (Contract in favour of a party) and the State's interest in environmental protection.

From the above discussion it is apparent that SCOPIC and the LOF, at best, only provide for the incidental furthering of any interests beyond the immediate contractual interests of the parties thereto. However, in the South African context, the contract in favour of third parties (*stipulation alteri)* is well established and it has been used in numerous contexts.[55] The device may even be used in favour of a person, not yet in existence,[56] and has found good use in the context of companies still to be registered and specifically to secure contracts for such companies to be incorporated.[57]

In South African law, a stipulatio alteri exists where A (the stipulans) and B (the promissor) enter into a contract, each in their own names, with the intention of

[55] Van Rensburg A, Lotz JG and Van Rhijn TAR "Contract" in Joubert D (ed) *LAWSA* vol 9 3rd edition (2014) para 350.

[56] ibid.

[57] ibid. See also *McCullogh v Fernwood Estate Ltd* 1920 AD 204.

creating an opportunity for C (a third party) to acquire rights and duties, should he (C) so wish, as against B. Applied within the context of SCOPIC, the recipients of salvage services would be the stipulans, the salvor the promissor and outside third parties such as a coastal state or the public represented by the coastal state would be the third party. Could the *stipulatio alteri* be used to account for the benefit conferred on third parties, such as coastal states? A brief look at the central features of and requirements for the *stipulatio alteri* may help to answer this question.

5.3.1 The central features and requirements for the *stipulatio alteri*

A feature of the *stiplatio alteri* in South African law is that the benefit conferred on a third party can have corresponding duties for such a third party attached to it. In McCullogh v Fernwood Estate,[58] Chief Justice Innes, held that

> It may happen that the befit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other.

In the case of SCOPIC, there is nothing to suggest that any potential rights that might be conferred carry with them any accompanying duties. However, this is one instance where a third party might be required to provide some kind of 'consideration' for the benefit conferred. Essentially, it would theoretically be possible for any rights acquired by a third party under the salvage contract and SCOPIC to be subject to a corresponding duty on the third party to reward a salvor in some way or another. Marais J, in *Malelane Suikerkorporasie (Edms) Bpk v Streak,*[59] also provided an analysis of the above quotation. The Judge contended that the above statement was not consistent with an understanding that the third party will necessarily be better off in a material fashion.[60] Instead, the benefit obtained by such a third party would be the right to create a contractual link with either or both of the original contractors.[61]

From the aforesaid, the intention of the stipulans and promisor in concluding the contract must involve more than a simple conferring of benefits on a third party.[62]

---

[58] *McCullogh v Fernwood Estate Ltd* 1920 AD 204
[59] *Malelane Suikerkorporasie (Edms) Bpk v Streak* [1970] 1 All SA 41 (T)
[60] ibid. 45.
[61] ibid.
[62] See *Mpakathi v Kghotso Development CC* 1993 (3) SA 429 (W)

Essentially, the third party must be given an opportunity to become a party to a contract with the promissor.[63] This issue was emphasised by Schreiner JA in a judgment in *Crookes v Watson*

> What is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two.[64]

A further key feature is that the agreement between stipulans and promissor does not by itself vest any rights or impose any duties on a third party.[65] Acceptance of the benefit conferred is required in order for a third party to demand performance of a stipulation in his favour, failing which, there would be no *vinculum iuris* between such a third party and the promisor.[66] Thus, it is generally accepted in South Africa that a third party will only acquire rights in terms of a a stipulatio alteri by acceptance'.[67] In this regard also, Greenberg J. in *Goldfoot* v. *Meyerson*,[68] said, 'when it is said that a contract made for the benefit of a third party may be adopted by him what is meant is that the third party, by notice of adoption to the promissor, can create a *vinculum juris* between himself and the latter'.[69] As such, any benefits conferred upon a third party need to be accepted, essentially meaning that the *stipulatio alteri* is structured as an offer that might be accepted or not. In this regard, as per Greenberg J in G*oldfoot v Meyerson,* the third party must provide a 'notice of adoption to the promissor',*[70]* thereby becoming a party to the original contract. Innes CJ, in Hyams v. *Wolf & Simpson*,[71] took this idea further, stating that

> The contract must be made, if not in the name of C, then with a view to his benefit, and for that benefit entirely; and C must ratify and accept the contract while it is still open to him to do so. Those are essential conditions of C's right to recover.

---

[63] Van Rensburg *et al* (n 51).
[64] 1956 (1) SA 277 (AD).
[65] ibid.
[66] ibid.
[67] See Sutherland and Cupido, 'Insurance Law' *Annual Survey of South African Law* (2004), 558. See also *Mpakathi v Kghotso Development CC,* (n 58), paras 15-16.

[68] 1926 T.P.D. 242
[69] ibid. 247 quoting with approval from *Mutual Insurance Co.* v. *Hotz,* 1911 A.D. 556 at p. 567.
[70] (n 64).
[71] 1908 T.S. 78

Essentially, the 'benefit' which the third person obtains from the contract, is the right to conclude a contract with the promissor if he so wishes.[72] The analysis provided by Marais J, in *Malelane Suikerkorporasie (Edms) Bpk v Streak,*[73] mentioned earlier, also included comment on the meaning of the phrase 'for that benefit entirely' used in *Hyams v Wolf & Simpson.* Marais J, interpreted the phrases 'with a view to his benefit' and 'for that benefit entirely, as placing the emphasis on 'with a view' which functions to distinguish between a contract with a benefit conferred accidentally on the third party as opposed to a contract where the contractual undertaking in favour of the third party is exclusively for his or her benefit.[74] Marais J, concluded that the undertaking will only be a stipulation for the benefit of a third if the main intention or the main purpose of the undertaking is to confer a benefit on the third party.[75] The right of the third party to elect to accept or reject this undertaking would be the actual benefit conferred not the potentially beneficial consequence flowing from such acceptance.[76]

To apply the *stipulation alteri* model to SCOPIC, one would have to show that the contracting parties had the intention to confer on the third party the right to elect to become a party to the contract. However, nothing in the wording of the relevant clauses 10 and 14 would suggest any such intention to confer benefits on parties outside of the immediate contractual relationship. As noted already, the primary contractual relationship is between the recipients of salvage services with any benefits conferred on outside being incidental. This is precisely the type of situation which Marais J distinguishes from a true *stipulatio alteri.* As noted by Van Rensburg *et al,* '[t]he mere fact that a third party may stand to derive some material advantage from a contract does not necessarily mean that the contract is a stipulation in favour of a third party. It qualifies as such only if the parties intended the person benefited to have the right to become a party to a contract with one of them.[77]

Clause 14 of SCOPIC clearly revolves around the performance of traditional property salvage operations as any attempt to confer benefits on outside parties would have involved a concern with potential pollution outside of the immediate

[72] *Malelane Suikerkorporasie (Edms) Bpk v Streak* [1970] 1 All SA 41 (T)
[73] ibid.
[74] *Malelane Suikerkorporasie (Edms) Bpk v Streak* 45.
[75] ibid.46.
[76] ibid. referring with approval to Crookes v Watson, above n 60.
[77] Van Rensburg *et al* (n 51).

vicinity of operations. Moreover, the concern with cleaning up pollution would not have been subjected to the proviso that it must be necessary for the property salvage operation. Clause 10 simply reiterates the position under the main agreement (LOF) with no possibility in its current guise of a potential contractual conferring of benefits on any outside third party.

5.3.2 The *Stipulatio Alteri* and SCOPIC

Although SCOPIC involves no *stipulatio alteri*, from the aforesaid, it is apparent that it could theoretically be used to account for the interests of third parties in a salvage contract. In this respect, it should be mentioned that South African courts have, generally, not shied away from using the *stipulatio alteri* to explain the involvement of third parties in contracts. However, this would call for a significant amendment to the SCOPIC clauses that involves the express extension of the duty of the salvor as one that goes beyond the interests of the shipowner. Moreover, from a South African perspective, it should enable any third parties to accept this duty being imposed for their benefit in order to become a party to the SCOPIC contract.

In this way, this generally accepted mechanism in South African law could potentially provide directly for the interests of the Republic as a coastal state. This possibility gains more credence because the South African government is regarded as trustee for the public interest in the protection of the environment.[78] Therefore, the public interest in environmental protection could be directly addressed through the agency of the state as trustee. This would also open possibilities for the remuneration of salvors in that the acceptance could be accompanied by a corresponding duty to remunerate the environmental services of salvors. In this situation, the basis of the remuneration would possibly have to be provided for in the contract between salvor and shipowner through the employment of the *stipulatio alteri.* Moreover, this would result in remuneration that is more fair towards shipowners in that it represents a more equitable spread of the costs.[79]

A key problem, even should the duties under SCOPIC be amended to allow for the interests of third parties such as coastal states, is the fact that coastal states are, typically, empowered under international law to take measures to prevent

[78] See discussion above, ch III, 85, n105 and text thereto.
[79] See discussion above, ch IV, nn 46-47 and text thereto.

pollution.[80] Of course, as the bearers of rights under international law, states may also be obliged under international law to take measures in the prevention of pollution.[81] Given these rights of state to intervene, a right typically exercised in situations where salvage operations may present a threat to the environment, there would be little to no incentive for a coastal state to accept any interests conferred under SCOPIC especially insofar as this might involve an additional duty of remuneration. Nevertheless, the *stipulatio alteri* does provide a basis for the remuneration of salvors for benefits conferred upon coastal states that allows for a more equitable spread of costs, in that the direct recipients of benefits and not just the shipowner will contribute.

5.3 Conclusions

While salvors appear to believe that the LOF and SCOPIC prioritise environmental protection this is not borne out by provisions ostensibly aimed at environmental outcomes. As is the case with the Salvage Convention, traditional salvage operations are expressed as the trigger for what appears to be an independent environmental duty under both the LOF and SCOPIC. The environmental duty expressed in LOF is referred to as a basic obligation, which suggest the priority that is the traditional property salvage operation. SCOPIC takes this aspect of things no further, simply setting out the main duties of the salvor with reference to the main agreement that is LOF. Both LOF and the SCOPIC clause, where incorporated, treat any environmental responsibility of the salvor as secondary to traditional property salvage operations.

While both LOF and SCOPIC undoubtedly provide a *de facto* furthering of third party interests in the environment, they are still agreements between salvors

[80] See for example the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, which in its preamble 'affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty'. See also Article 221 of the United Nations Convention on the Law of the Sea, which empowers States, 'pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty [this would probably include salvage operations], which may reasonably be expected to result in major harmful consequences. In this regard, the reference to customary international law would mean that even non-party states would be empowered in the manner provided by the Article.

[81] See for the United Nations Convention on the Law of the Sea (UNCLOS), Part XII, Article 192, which specifically obliges states to 'preserve and protect the marine environment'.

and the owners of salved property. As such, property salvage operations act as a limiting factor on the environmental protection dimension of these contracts. As is the case under the Convention, environmental protection appears to be predicated upon shipowner liability with no direct legal technical basis provided for potential third party interests. This also explains the fact that the shipowner is liable for the payment of SCOPIC remuneration, which is devised to replace special compensation under Article 14 of the Convention. The phrasing and linking of the environmental duties under these contracts to property salvage together with the liability of the shipowner for the payment of SCOPIC remuneration result in a system that takes the remuneration of salvors for environmental services no further. This situation is exacerbated by the nature of contract which typically afford rights and duties to only the parties thereto.

Nevertheless, it was demonstrated that the principle of the *stipulatio alteri* could provide a basis upon which the interests of coastal states can be directly addressed. As mentioned, this mechanism, has seen liberal usage in the South African context in many different legal areas, which in principle could be used in the context of salvage contracts such as LOF and SCOPIC. Of course, this would involve a significant redrafting of the basic provisions of SCOPIC and LOF that, from a South African perspective, might not be viable given that these contracts are subject to English law, which might not be as amenable to such as device as South African law.

Using the *stipulatio alteri,* might also provide the legal basis for the remuneration of salvors where they have performed environmental services. In this regard, a coastal state such as South Africa would have to accept the *stipulatio alteri* contained in the salvage contract and SCOPIC, which might entail the duty to remunerate salvors. From a legal theoretical perspective this would provide a sound basis for the remuneration of salvors in spite of the technical limitations presented by traditional property salvage operations.

However, as mentioned, even should the contract be amended to provide a direct and enforceable benefit to the coastal state, there would be no incentive for a state to accept such a benefit and concomitant duties of remuneration. It would simply not be necessary for a state to rely on such a benefit given the significant

powers awarded to coastal states in terms of public international law. While salvors clearly confer benefits on interests outside of the traditional salvage matrix under LOF and SCOPIC, these instruments simply do not provide a viable improvement in relation to environmental concerns over the Convention. The only benefit appears to be the fact that salvors find a better financial deal under LOF incorporating SCOPIC. Of course, one might argue that this might further the encouragement of salvors, which will indirectly further environmental protection aims.

Chapter VI Environmental Law and Salvage

6.1 Introduction

The 'greening of salvage law',[1] following disasters such as those involving the Torrey Canyon and the Amoco Cadiz, has resulted in a strained fusion of policy and value driven provisions aimed at the public interest and an area of law premised upon the safeguarding of property at sea. However, these disasters also triggered changes in areas of law other than salvage. It is no coincidence that the late 1960's and early 1970's are commonly regarded as the decades that saw the birth of the discipline of modern environmental law.[2] Thus, the development of an environmental dimension to the law of salvage and the notion of '"the environment" as something worthy of protection and enhancement through policies and law-making'[3] appear not only to share the same birth decade but also the same underlying concern. This common concern raises questions about the legal categorisation and placement of norms regulating salvors' services to prevent or minimise damage to the environment.

Academics have argued that environmental law is less of a finite academic discipline than an overarching legal umbrella inclusive of other areas of the law, while others have alluded to the interconnectedness of environmental law and other areas of the law.[4] The terms 'linkage' and 'linkage areas' have been used to describe the extent to which environmental law interacts with other areas of the law.[5] The

[1] See Hedman S 'Expressive Functions of Criminal Sanctions in Environmental Law' (1990-1991) 59 *Geo. Wash. L. Rev.* 889.

[2] Fuggle RF & Rabie MA *Environmental Management in South Africa* (Juta, Cape Town, 1996); Birnie P Boyle A and Redgwell C *International Law & the Environment* (3rd edn OUP, New York, 2009); Bell S, *Ball & Bell on Environmental Law, The Law and Policy Relating to the Environment* (4th edn, Blackstone Press, Limited London, 1997); Kidd M *Environmental Law* (Juta, Cape Town, 2008). Also see Rabie A 'Environmental Law in Search of An Identity' (1991)2 Stellenbosch L. Rev. 202, Plater Zygmunt JB 'Environmental law and three economies: Navigating a sprawling field of study, practive, and societal governance in which everything is connected to everything else' (1999) *23 Harv. Envtl. L. Rev.* 359. Also see Gold, E 'Marine Salvage: Towards a new regime' (1989) *20 J. Mar.L. & Com.* 487.

[3] Bell S & McGillivray D *Environmental Law* (7th edn, OUP, 2008) 8. Also see discussion ch 1.

[4] In this regard see Kidd M (n 2). Also see Wilkinson D Environment and Law (Routledge, 2002). Also see Rabie A 2 *Stellenbosch L. Rev.* (1991) (n 2); Dunoff JL, 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) *19 Harv. Envtl. L. Rev.* 241 and the materials referred to therein; Sunstein C 'On the Expressive Function of Law' (1995-1996) 144 *U. Pa. L. Rev* 2021; Hedman S (n 1).

[5] Dunoff JL (n 4) 281.

concern with environmental protection would be such a linkage area between the law of salvage and general environmental law.[6]

How does the law of salvage and environmentally relevant norms within salvage relate to general environmental law? Could the environmental services of salvors as well as their regulation and remuneration perhaps be addressed as a concern of the area of environmental law? To address these questions, one must proceed from a basic understanding of environmental law; what it is and its characteristic principles. This chapter is not intended to provide an exhaustive account of environmental law and its principles or an in-depth analysis of the prevalent debates in environmental law. Instead, the chapter seeks to establish a basic working understanding of the key characteristics and principles of environmental law and how it relates to salvage law and the environmental services of salvors.

6.2 What is environmental law?

A look at environmental law textbooks suggests that exhaustive definitions of environmental law are not readily available. However, most provide means of identifying environmental law while inevitably providing an overview of areas of operation of environmental law.[7] It has been noted that 'the boundaries of the subject are not particularly well defined' and that 'the subject is not necessarily distinctive'.[8] Nevertheless, this should not impede the exercise of arriving at a working understanding of this area of the law.

A working understanding of environmental law also depends on the approach one adopts. For the purpose of this work, the chosen approach will be the 'subject-matter approach'[9] of environmental law, in which environmental law consists of all legal

[6] See Bell and McGillivray (n 3). The authors in adopting a more restrictive approach to environmental law (excluding laws that may relate to the environment but not primarily tasked with its protection) advance the notion of 'laws and practices which have as their object or effect the protection of the environment'. At 9.
[7] See, Sands P, Peel J, Fabra A and MacKenzie R Principles of International Environmental Law (3rd edn, CUP, Cambridge, 2013). The authors cover areas such as Atmospheric protection and climate change, freshwater resources, oceans, seas and marine living resources, biological diversity, protection of the marine environment and more.
[8] Bell and McGillivray (n 3) 4. Also see, Rabie A 2 *Stellenbosch L. Rev* (n 2).
[9] Cowen D 'Towards Distinctive Principles of South African Environmental law: Some Jurisprudential Perspectives and a Role for Legislation' (1989) 52 *THRHR* 3, 7.

principles, which 'have in common… the subject they regulate'.[10] This subject, according to Rabie, is 'the conservation of the earth's natural resources and the control of environmental pollution'.[11] This much is also alluded to by Van Reenen who suggests that 'the concept 'environmental law' presupposes the definition of the phenomenon of 'environmental conservation' itself'.[12] This subject matter is, therefore, regarded as the conventional way of defining environmental law,[13] and a look at some key texts on environmental law will also confirm this.

Bell and McGillivray in their account of environmental law 'concentrate on those laws and practises which have as their object, or effect, the protection of the environment.'[14] This approach is a clear endorsement of the subject matter approach to environmental law. Clear from this approach, is the fact that environmental law has wide application and that it potentially includes traditional areas of law to the extent that these might be directed at environmental protection and the prevention of pollution.[15] This is in line with the notion that environmental law might be less of a distinct area of law and that the relevant principles are to be found in many conventional branches of law. In this regard, Rabie also notes that 'environmental law … serves a type of omnibus function, accommodating principles of traditional fields of law, which are united only by their common object in serving environmental conservation'.[16]

Thus, aside from the subject of environmental conservation or protection being the object of environmental law, it, environmental law, is also a framework of laws that might include areas traditionally defined as distinct. Wilkinson,[17] similarly, alludes to this link between environmental law and other areas of the law, while Stookes, notes the complexity of environmental law, mirroring the complexity of the environment, and the idea that the former is not delimited by an 'autonomous legal

---

[10] ibid, quoting Fuggle R and Rabie A *Environmental Concerns in South Africa: Technical and Legal Perspectives* (Juta & Co Ltd, Cape Town, Wetton, Johannesburg, 1983) 35.
[11] Rabie A, (n 2), cited in Cowen D, (n 9) 7.
[12] Van Reenen TJ, Reflections on the Codification of South African Environmental Law (2): A Suggested Normative Structure and Content of a Codification (1994) 5 *Stellenbosch L. Rev.* 331, 340 -341.
[13] Kidd M (n 2) 4. See also, Cowen (n 9), who states '[i]t [*the subject matter approach*] is an approach by no means confined to South Africa, for it characterises English legal writing on the subject…and it has been adopted substantially by many writers in the USA, Canada and Australia'. At 7.
[14] Bell & McGillivray (n 3) 9.
[15]Fuggle R and Rabie A (n 2) 3.
[16] Rabie A (n 2) 222.
[17] Wilkinson D (n 4).

system'.[18] Thus, as mentioned earlier, environmental law encompasses principles of traditional fields of law united by the common object of environmental conservation.[19]

One might argue that the notion of an all-pervasive environmental law hinders the formulation of easy definitions and its proper delineation as a distinct area of law. This, perhaps, explains the absence of exhaustive definitions of environmental law from academic literature. Rabie, in fact, cautions against an overly wide notion of environmental law, suggesting that it would 'defeat entirely any effort at distinguishing environmental law as a separate branch of knowledge'.[20] Moreover, Van Reenen suggests that,

> [t]he coming into being of an identifiable, relatively autonomous field of law is a continuous historical process and it is virtually impossible to indicate at which point in time such a field exactly comes to be what it is. In addition… the conditions in which terms of which a field of law is conceived as a systematic category is so uncertain that the very legitimacy of the question as to the possible autonomy of the field of environmental law seems dubious.[21]

The above quotation cast serious doubt about environmental as an autonomous, distinct area of law. However, engaging basic academic debates about the status of environmental law as a distinct academic area of law is beyond the scope of this dissertation. Instead, the primary purpose, as mentioned, is to distil a basic core and commonly agreed upon principles of environmental law and how these relate to salvage law.

From a South African perspective, there is legislative confirmation of the central environmental protection aim of environmental law in the form of the National Environmental Management Act (NEMA).[22] The NEMA, essentially, gives effect to the environmental right provided for in the Constitution of South Africa,[23] which provides as follows:

> 24. Environment. -Everyone has the right-
>
> (a) to an environment that is not harmful to their health or well-being; and

[18] Stookes P *A Practical Approach to Environmental Law* (OUP, New York, 2005) 13.
[19] Rabie A (n 2) 222.
[20] ibid.
[21] Van Reenen TJ, (n 12) 338.
[22] Act 107 of 1998.
[23] The Constitution of the Republic of South Africa Act 108 of 1996, s 24 (the Constitution).

> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The NEMA 'aims to define overarching and generic principles'[24] pertaining to environmental protection, while also functioning as a key source for the principles,[25] relating to, amongst other, 'any…law concerned with the protection or management of the environment'.[26] As such, the NEMA functions as framework legislation for further legislative enactments concerning environmental protection. In setting out the purpose of the NEMA, its preamble provides that.

> everyone has the right to have the environment protected, for the benefit of present and future generations. through reasonable legislative and other measures that—
>
> prevent pollution and ecological degradation;
>
> promote conservation; and
>
> secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development:

This statement of purpose is a verbatim reproduction of paragraph (b) of the constitutional right to the environment.[27] Besides acknowledging the right of South Africans to have the environment protected, it clearly notes the significance of environmental protection and the prevention of pollution. As such, it affirms scholarly accounts on environmental protection and pollution prevention as a core concern of environmental law. Functioning as environmental framework legislation, it essentially provides for the realisation of the constitutional environmental right through reasonable 'legislative and other measures' that prevent pollution and ecological degradation. This legislative expression of environmental protection as a

[24] Kidd M (n 2) 31.
[25] See discussion below 196ff.
[26] NEMA s 2(1).
[27] See above n 23.

concern of environmental law is similarly to be found in the legislation of other jurisdictions.[28]

Therefore, for the purpose of this work, it is accepted that the idea of environmental protection and the prevention of pollution is a key, agreed upon, concern of environmental law. Where laws are concerned with environmental protection or pollution prevention, it can be regarded, at least by environmental law scholars and academics, as environmental law. Accepting that environmental law has the core concern of environmental protection and the prevention of pollution, potentially provides one with an expanded normative framework for an assessment of services relating to the environment and its protection in the context of property salvage operations.

6.3 What is the environment to be protected?

Accepting that 'environmental protection' is a key or central aspect of environmental law, one is still faced with the question of the meaning of the term 'environment'. Aside from the recognised universality of environmental law and the core that is environmental protection, what exactly constitutes the 'environment' that is to be protected? Rabie attributes the uncertainties and divergences in academic debate on the topic of the province of environmental law to the 'lack of clarity over…what is understood by the "environment" …and [the question of] which legal rules pertaining to the environment constitute environmental law'.[29] Once again, one may refer to NEMA,[30] and the definition it provides for the environment to be protected.

> [t]he surroundings within which humans exist and that are made up of-
>
> (i) the land, water and atmosphere of the earth;
>
> (ii) micro-organisms, plant and animal life;
>
> (iii) any part or combination of (i) and (ii) and the interrelationships among and between them;
>
> (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

[28] See discussion of the United Kingdom's Environmental Protection Act 1990 below, 195.
[29] Rabie A (n 2).
[30] NEMA (n 23) s 1.

The act lists specific examples of media that constitute the environment namely 'land, water and atmosphere of the earth'. The definition is capable of being construed widely in that 'aesthetic and cultural properties and conditions' of these media that affect 'human health' and 'well-being' suggest much more than damage to the physical aspects of human surroundings. As such, the definition is not confined to the physical environment.[31] Kidd argues that the definition ensures that pollution impacts that do not have a significant effect on the physical (non-human) environment but that impact on human health would be an environmental issue.

This definition, on a first reading, appears to be wider[32] than the United Kingdom's Environmental Protection Act,[33] which defines the environment as 'all, or any, of the following media, namely, the air, water and land, and the air within other natural or man-made structures above or below ground'.[34] However, while the supposed human element appears to be missing from the definition of environment, the UK act includes the human element and its relation to the physical environment and pollution in its definition of harm:

> Harm means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes offence caused to any of his senses or harm to his property; and "harmless" has a corresponding meaning"[35]

As such, while the definition of environment appears to be confined to the physical media mentioned in the Act, namely, air water and land, this is linked to the issue of human health and well-being (harm). Moreover, the provision mentions harm to any of the senses which could reasonably be construed as similar to the 'aesthetic and cultural properties and conditions' referred to in the South African NEMA. While the exact outer limits of environment might not be clear, as a bare minimum, the physical environment as provided for, namely the air, water and land is definitely included. Moreover, while there is not necessarily one accepted definition of the environment, the key elements invariably included are the physical properties of air, water and land and the relation of these to the well-being and health of people.

---

[31] See Kidd M (n 2) 3.
[32] ibid 2.
[33] UK Environmental Protection Act of 1990.
[34] ibid s 1.
[35] ibid s 1(4).

In relation to salvage operations where there is threat to the environment, the environment is limited geographically and conceptually to instances of environmental protection that emanate from marine disasters. In this regard, the environmental protection scope of the Salvage Convention, and 'environmental damage' as circumscribed by it, would be limited to those instances that would typically be encountered within the area of operation of the Convention. Therefore, the definition of 'damage to the environment' as found in the Salvage Convention limits the environmental protection reach of the instrument to the marine environment, and to the activities of salvors where responding to a marine casualty posing a threat to the environment.[36] Nevertheless, this limited sense of environment employed within salvage is covered by the definition of environment in NEMA.

6.4 Distinct Principles of Environmental law

Notwithstanding wide or narrow definitions of environment and the suggestion by some authors that environmental law is not distinct, environmental law concerns norms and measures aimed at the protection of the environment, including the prevention of pollution. Moreover, such norms might be found within traditional areas of law. So, are there any principles of environmental law that are distinct from any of the so-called traditional areas of law, e.g. salvage?

While academic authors appear to agree on the existence of distinct environmental law principles, the extent of recognition appear to vary. In this regard, Kidd, referring to several different sources, suggests that there are only two universally agreed upon principles, namely the precautionary principle and the polluter must pay principle.[37] Sands also acknowledges the existence of distinct principles and refers to 'general rules and principles that have broad, if not necessarily universal, support'.[38] Henderson,[39] following an analysis of the South

[36] Art 1(d) of the Salvage Convention defines damage to the environment as "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents." The United Kingdom has exercised its liberty to make reservations to the Salvage Convention, most notably to the effect that the application of the Convention is excluded where a salvage operation takes place in inland waters of the United Kingdom and all the vessels involved are of inland navigation (Merchant Shipping Act 1995, s 224(2); Sched. 11. Pt II, para 2). The Convention would also not apply where a salvage operation takes place in the inland waters of the UK and there is no vessel involved (Merchant Shipping Act 1995, s 224(2); Sched. 11. Pt II, para 2).

[37] Kidd M (n 2) 7.
[38] Sands *et al* (n 7) 187.

African constitution and principles enumerated in the NEMA, suggests the following as potential principles of South African environmental law; acknowledging the fact that environmental principles are not settled[40]:

a) Sustainable development;

b) The Duty of care to avoid harm to the environment;

c) The precautionary principle

d) Life cycle responsibility

e) Environmental justice

f) Polluter pays principle

From the above list of potential principles, a, b, c and f appear to be widely recognised by academic authors[41] and a brief overview of these will be given.

6.4.1 Sustainable development[42]

It has been suggested that the principle of sustainable development was coined by the World Commission on Environment and Development,[43] who defined it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[44] The idea of sustainable development denotes an obvious anthropocentric take on environmental law and environmental protection, a theme also clear from the NEMA.[45] While the exact normative content of the principle of sustainable development is not necessarily settled[46], the importance of development, in a manner environmentally sustainable as per the definition of the WCED, is nevertheless clear. In this manner, Field refers to the idea

---

[39] Henderson PGW, 'Some thoughts on distinctive principles of South African environmental law' (2001) 8 *SAJELP* 139

[40] ibid 157.

[41] See, Stookes (n 18), Wilkinson D (n 4), Sands *et al* (n 7) and Birnie Boyle and Redgwell (n2).

[42] NEMA s2(3)

[43] See Kidd, M (n 2) 16.

[44] World Commission on Environment and Development report "Our Common Future" (1987) 43. <http://www.un-documents.net/our-common-future.pdf> accessed 14 June 2016.

[45] NEMA s 2(2), expressly provides that that 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'.

[46] See discussion of the various understandings of the principle of sustainable development in Field T, 'Sustainable Development versus Environmentalism: Competing Paradigms for the South African EIA Regime' *(2006) 123 S. African L.J. 409 411-417.*

that we ‘know how certain economic activities impact on the environment and wish to ensure fairness to present and future generations’ and therefore, that ‘it is logical to accept the principle of sustainable use’.[47] The NEMA goes further, providing that sustainable development requires ‘all relevant factors’ to be taken into account, including those in the list provided in s2(4)(a)(i)-(vii):

> (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
>
> (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
>
> (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
>
> (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;
>
> (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
>
> (vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
>
> (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
>
> (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimized and remedied.

Clear from the expression of sustainable development and factors to be considered in its realization is the notion of balance to be achieved between the ideas of environmental protection and human advancement. Essentially, sustainable development is the basis of the development of international and domestic

[47] *ibid* 416.

environmental law.[48] The notion of development is clearly accepted as standard, but this is to be realized in an environmentally sustainable manner,[49] and in line with the needs of future generations as highlighted in the WCED definition. The list of factors clearly does not represent a closed list, and it remains to be seen how this principle will develop in future. Suffice to say that while not necessarily clearly circumscribed, due to the open-ended nature of factors, the principle is accepted in South Africa.

6.4.2 Duty of care to avoid harm to the environment, (principle of prevention)

Aside from its positive expression in the NEMA, albeit as qualifier to sustainable development,[50] several authors appear to be in agreement on the prevention principle.[51] The principle, essentially, denotes the idea that environmental damage should be avoided as far as possible, as opposed to cured after the fact.[52] Henderson, in suggesting this to be a principle of environmental law, acknowledges that this might not be distinctive.[53] Nevertheless, it is positively expressed in the NEMA, while, it is clearly also in operation in the UK and Europe.[54] Of course, a literal reading of the NEMA, would point at this being a qualifier for any determination of whether an activity or decisions in the context of development is sustainable or not. Nevertheless, whether categorized as principle or qualifier of sustainable development, this duty of care to avoid harm appears to be a core concern of environmental law.

6.4.3 Precautionary Principle

The precautionary principle can be expressed as follows,

Where there is a threat to human health or environmental protection a lack of full scientific certainty should not be used as a reason to postpone measures that would prevent or minimize such a threat.[55] This sounds like the prevention principle but it differs in that it deals with uncertain environmental risks, while the prevention

[48] Sands *et al* (n 7) 53
[49] NEMA s 2(4)(a)(v).
[50] NEMA s 2(4)(a)(i), (ii), (iii) and (iv).
[51] See Wilkinson D (n 4), Stookes P (n 18), Birnie P Boyle and Redgewell (n 2) and Sands P (n 7).
[52] Fisher E, Lange B and Scotford E *Environmental Law, Text, Cases and Materials* (OUP, Oxford, 2013) 411.
[53] Henderson PGW, (n 39) 159. From the discussion of salvage in ch4, it should also be plain how this principle operates in the context of salvage operations.
[54] See discussion in Fisher and others, (n 52).
[55] Fisher and others (n 52) 412.

principle is concerned with known environmental problems.[56] The NEMA expressly provides for this principle, albeit as a factor to be taken into account in the determination of sustainable development.[57]

6.4.4 Polluter pays principle

The principle has its origins in the work of the Organization for Economic Co-operation and Development.[58] The principle essentially requires that those involved in, or causing pollution should be responsible for the costs of preventing or dealing with pollution caused by their activities, rather than passing it on to others.[59] As such, it requires that polluters should pay for the environmental harm that they cause.[60] NEMA expressly recognizes this principle as operational in South African environmental law.

> The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.[61]

The wording of the principle clearly suggests that it has both a preventive and a compensatory aspect as it expressly provides for the remedying of pollution and the prevention thereof.

While the listing of the above principles in NEMA suggests that they are but sub-species of the sustainable development principle,[62] they are nevertheless, widely recognized as distinct principles of environmental law. It is beyond the scope of this dissertation to argue the merits of them being regarded as such, but it shall be accepted that they represent the core of commonly expressed and agreed upon principles of environmental law. These principles will be realized through, among other, legislative enactments for which the NEMA functions as framework legislation.

---

[56] De Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford, 2002) 91.
[57] NEMA s 2(4)(a)(vii).
[58] Fisher E and others (n 52) 413.
[59] Kidd M (n 2) 7.
[60] Fisher E and others (n 52) 413.
[61] NEMA s 2(4)(p).
[62] Wilkinson D, (n 2), describes the principle as 'a meta-principle, under which the others are organised and to which they contribute'. 104.

6.4.5 Environmental principles in the law of salvage

Do these distinct principles find expression in salvage operations and the law of salvage? The extent to which salvage operations are integrated into the pollution prevention measures of coastal states,[63] would point at the recognition of the prevention principle. This recognition, of course, emanates from outside of the law of salvage although salvage services are recognised as integral to pollution prevention measures. A reason for this might be, as noted by Andreas Tsavliris, the President of the International Salvage Union, that 'it is only commercial salvors who have the equipment and expertise to prevent environmental catastrophe'[64] Moreover, the 1989 Salvage Convention itself appears to have been drafted with this principle in mind.[65] From the discussion of the environmental duties under the Salvage Convention and those contained in the LOF and SCOPIC, it is also apparent that this principle finds clear expression.[66]

In respect of the precautionary principle things are not necessarily as clear, especially when looking at incidents such as the collision between the Atlantic Empress and Aegean Captain[67]These two tankers collided off the coast of Tobago in the Caribbean Sea, killing 26 crew members and spilling crude oil into the sea. Nevertheless, the fact that the oil was spilled in international waters, has been described as an instance 'without serious pollution problems'.[68] This sentiment was based on the fact that there was no discernable damage to a particular coast and the spill into international waters was, therefore, considered not to be a disaster from an environmental perspective. This is not only a clear indication of environmental damage being viewed in economic terms but potentially also in conflict with the precautionary principle. As long as coastlines are not befouled and no particular government has to incur the costs of a cleanup, we are not really dealing with a

[63] Ch VII below discusses the extent to which salvage services and standby tugs operate in the pollution prevention schemes of coastal states.
[64] Tsavliris A, 'Pollution prevention and unfair treatment of contractors' <http://www.marine-salvage.com/media-information/articles/recent/pollution-prevention-and-unfair-treatment-of-contractors/> accessed 20 August 2016.

[65] See the preamble to the salvage convention and the discussion above in ch. 4.
[66] See discussion above, ch 4, of Article 8 of the Salvage Convention and ch 5 on the environmental duties contained in LOF and SCOPIC.
[67] Horn S and Neil P (Capt), 'The Atlantic Empress Sinking—A Large Spill Without Environmental Disaster' <http://www.shipwrecklog.com/log/wp-content/uploads/2014/10/mobil-atlanticempress.pdf> last accessed 20 August 2016.
[68] ibid 435.

"serious pollution incident". The precautionary principle would suggest more circumspection in relation to approaches to and sentiments regarding quantities of oil being released into international waters without necessarily understanding its immediate or future environmental impact..

This approach might possibly be explained with reference to the sustainable development principle. The concern with pollution of coastlines seems to be premised on its negative impact on the economic activities of coastal states. The extent, therefore, to which a ship sinking in international waters has no apparent impact upon any particular coastal state and the veritable commercial need for trade might be a recognition of the idea that some pollution might be acceptable for the purpose of the development that efficient trading brings. Nevertheless, the extent to which this approach can be maintained indefinitely is questionable. As such, the precautionary principle appears to be trumped by the more immediate need for trade and the not so obvious negatives attached to oil spillages in international waters. This is certainly an issue that might require a rethink of the obvious anthropocentric approach to environmental protection;[69] implicit in the assumption that a ship towed out to international waters is a prevention of pollution as was the case with the *Atlantic Empress* and *Aegean Captain* collision.

The polluter pays principle finds very clear expression in the law of salvage and specifically in the way that special compensation for salvors are payble by the shipowner alone. This, of course, appears to be premised upon the assumption, right or wrong, that the shipower alone is liable for oil spillages and hence that the shipowner is liable to pay special compensation. As demonstrated in the discussion of the 1989 Salvage Convention,[70] the manner in which payment and environmental duties are expressed in the convention is clearly premised on the assumption of shipowner liability and this, without it being expressly phrased as such, appears to be an implicit recognition of the polluter pays principle.

[69] See discussion above, ch I, 11ff. The anthropocentric approach to environmental protection considers the utility value of environmental protection instead of the environment needing protection for the intrinsic value it has.
[70] See above ch IV.

6.5 Norms contained in other distinct areas of law as environmental law

The extent to which environmental law principles appear to find expression in the law of salvage is consistent with the earlier observed notion of environmental law also operating in certain distinct areas of law. However, are the provisions relating to the protection of the environment in the 1989 Salvage Convention environmental law provisions? The answer to this question ought to have important implications for the question of the regulation of salvors' environmental services and the placement of these provisions in salvage legislation. In this regard, the uneasy relationship between an essentially private area of the law and public law provisions seeking to promote the public interest in the environment has been noted.

6.5.1 Categorising legal rules as environmental law

Environmental protection, as a core concern of environmental law, is also instrumental in ascertaining when norms, found in other areas of the law, can be classified as environmental law. In this regard, as noted already, there is some agreement among legal scholars that norms relating to the protection of the environment can be categorised as part of environmental law.[71] However, academic opinions differ on the extent to which a legal principle, rule or area of law must relate to environmental protection, to be categorised as environmental law.

One can divide these opinions into those of authors that are comfortable with the idea of casting a wide net and those that are more restrictive in approach. Kidd, as an example of an author with a more expansive take on the scope of environmental law, argues that 'any legal principle which relates to environment management, whether directly or indirectly, or which has an actual or potential impact on the environment, should fall within the purview of environmental law'.[72] Of course, viewed in this manner, the notion of an all-pervasive environmental law becomes that much easier to accept.

In contradistinction to this approach, Bell and McGillivray seem more inclined to exclude those areas that 'merely have an indirect impact on the state of the

[71] In this regard, the notion of special compensation as provided by the 1989 Salvage Convention has a definite link with environmental protection purpose. Through the appropriate encouragement of salvors, a definite environmental protection outcome is contemplated.
[72] Kidd M (n 2) 6.

environment'.[73] While this limitation could possibly be explained by the authors' wish to contain the size of their treatise on environmental law, their exclusion is not unique. A similarly restrictive account of the reach of environmental law can be seen in the work of Sands.[74] Sands view the scope of environmental law to be 'those substantive, procedural and institutional rules…which have as their primary objective the protection of the environment'.[75] This account, while alluding to the universalism of environmental law, would exclude those legal principles that relate to the environmental indirectly.

The range of scholarly opinions essentially reinforces the notion of uncertainties in relation to the reach of environmental law. As is the case with questions regarding the nature of law,[76] we, similarly, must contend with different views by different authors. At most, each author offers a particular understanding, model, framework or an approach that fit their ultimate theses. Nevertheless, the approach of Rabie is to be commended.[77] Rabie, mindful of the extent to which scholars may differ on the degree of relevance needed for a rule or an area of law to be considered as part of environmental law introduces the notion of a 'spectrum of legislation which regulates environmental management'.[78] He identifies seven levels of legislation within this spectrum.[79]

1) Exclusive environmental legislation;
2) Legislation predominantly containing environmentally specific norms;
3) Legislation incidentally containing environmentally specific norms;
4) Legislation with direct environmental relevance;
5) Legislation with potential environmental relevance;
6) Legislation regulating environmental exploitation; and
7) Legislation with no environmental relevance.

[73] Bell S and McGillivray D (n 3) 9.
[74] Sands P *Principles of International Environmental Law* (2nd edn, CUP, 2003).
[75] ibid 15.
[76] See above ch 2.
[77] Rabie A *Stellenbosch L. Rev* (1991) (n 2).
[78] ibid 215.
[79] ibid 215-218.

Legislation in category one would contain only environmentally specific norms and would be aimed exclusively at environmental management. Rabie notes that this type of 'legislation is rare, since almost no legislation is so single-minded in…scope'.[80] He provides as examples of this type of legislation those falling in the broad categories of acts pertaining to the conservation of natural resources[81] and pollution control.[82] An example of more recent South African legislation that could be added to the examples provided by Rabie would, of course, be the National Environmental Management Act (NEMA).[83]

Rabie describes the legislation to be included in the second category as that 'calculated to promote an environmental object and which predominantly contains environmentally specific norms, but which also have other provisions'.[84] The third category of legislation, incidentally containing environmental specific norms, includes those the general purpose of which is not directed at environmental conservation or management, but which includes individual provisions which are aimed thereat.[85] Rabie considers the South African Health Act and example of legislation in the second category.[86]

Category four includes legislation that is not directed at environmental protection but which contain provisions that are of direct relevance to the environment.[87] Category five only differs from four in the sense that the legislation not directed at environmental protection contains provisions that are of potential relevance to environmental management. Kidd uses the Income Tax Act as an

[80] ibid.
[81] National Parks Act 57 of 1976, Conservation of Agricultural Resources Act 44 of 1983, Provincial Nature Conservation ordinances.
[82] Atmospheric Pollution Prevention Act 45 of 1965, Hazardous Substance Act 15 of 1973, Dumping at Sea Control Act 73 of 1980, Prevention and Combating of Pollution of the Seas by Oil Act 6 of 1981, International Convention for the Prevention of Pollution from Ships Act 2 of 1986, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties Act 64 of 1987 and the Environmental Conservation Act 73 of 1989.
[83] Act 107 of 1998. Further examples of this type of legislation would be Mountain Catchment Areas Act 63 of 1970. Lake Areas Act 39 of 1975, Forest Act 122 of 1984. A more recent example would be the Marine Living Resources Act 18 of 1998.
[84] Rabie A (n 2) 216.
[85] ibid.
[86] See Kidd M (n 2) fn 32.
[87] The Physical Planning Act 125 of 1991. See Kidd M (n2) fn 46.

example of this type of legislation, noting that it 'could be used to provide for deductions on machinery used for recycling'.[88]

Category six would include legislation that relate specifically to the exploitation of the environment. In providing examples of this type of legislation, Rabie mentions 'early mining' legislation that include no provisions imposing limitations on the extent of said exploitation.[89] However, the author also includes legislation as might relate to the exploitation of the environment with built in limitations.[90] One may assume that legislation pertaining to the exploitation of the environment without the necessary limitations would be a phenomenon of the past. Category seven is, of course, self-explanatory in that no norm contained therein would ever be considered as falling within the purview of environmental law.

Categories one and seven of the Rabie spectrum ought not to pose any categorisation difficulties. Even category two would probably not present difficulties for the categorising of norms as environmental law. However, categories three to six is the part of the spectrum of legislation where divergences in academic opinion can be observed. In this regard, in connection with category six, Rabie suggests that legislation regulating environmental exploitation would not constitute environmental law.[91] The author suggests that even where such legislation contains provisions aimed at the amelioration of its impact; it would still be related to environmental exploitation and thus subsumed under category six.[92] Therefore, such legislation would not be environmental law.

In contrast with the view of Rabie, Fowler extends environmental law to include legislation or norms within legislation that may promote environmentally detrimental activities.[93] In this regard the author notes that environmental law 'viewed as a whole, extends to the appraisal of legal measures which promote activity that is potentially detrimental to the environment. Such measures, through their operation, influence environmental quality directly, even though they may not deal specifically

[88] ibid 5.
[89] Rabie A (n 2) 218.
[90] ibid.
[91] ibid.
[92] ibid.
[93] Fowler R 'Environmental law and its administration in Australia' *Environmental and Planning Law Journal* (1984) 10.

with environmental measures or have environmental quality as one of their principal objectives.'[94]

The difference here seems to pertain to the very notion of 'environmental protection'. The operative factor for Fowler is not so much the primary objective of the legislation but the actual impact on the environment even if only negative. This would of course represent an exceedingly wide notion of environmental law. Nevertheless, his views finds resonance in those of Kidd who also criticises Rabie for being 'over cautious'.[95] As mentioned, Kidd regards 'any legal principle which relates to environment management, whether directly or indirectly, or which has an actual or potential impact on the environment' as falling within the purview of environmental law.[96] Given the stance of Fowler and Kidd on category six legislation, logic would dictate that they would similarly regard legislation falling in categories three to five as environmental law. In this regard Kidd suggests that categories four and five 'whilst…essentially neutral … are environmental law when they are used for environmental purposes'?[97]

Should one look at the views of Sands and Bell and McGillivray, their placement within the spectrum of legislation identified by Rabie would look different. Bell and McGillivray in restricting their work to legislation and activities that have as their 'object or effect the protection of the environment',[98] would certainly exclude legislation in category six from the purview of environmental law. Whether the authors would include categories four and five would ultimately depend not on the purpose of the legislation as such, but on the effect which activities pursuant to such legislation may have.

The views of Sands appear to be more restrictive.[99] The author in focussing on 'those substantive, procedural and institutional rules…which have as their primary objective the protection of the environment' would even exclude legislation in category three. Legislation in this category is not primarily aimed at the protection of the environment and would therefore, in terms of Sands understanding be excluded

[94] ibid 18.
[95] Kidd M (n 2) 6.
[96] Above n 71.
[97] Kidd M (n 2) 5.
[98] Above n 14 and text thereto.
[99] Above n 18 and text thereto.

from the purview of environmental law as a matter of definition. In view of such divergent approaches to the categorisation of legislation or norms within legislation as environmental law, the conclusion reached by Rabie makes all the more sense.

> [a]lthough there seems to be widespread agreement as to what constitutes the hard core of environmental law, a considerable degree of uncertainty remains in respect of its general scope.[100]

The above words are of course mirrored by later views expressed by the same author:

> [P]erhaps one should refer to environmental law in a narrow and a wide sense. It is significant that while most commentators agree on the central core of environmental law, there are some differences of opinion as to peripheral areas, displaying a degree of arbitrariness in the treatment of the subject matter.[101]

In view of the perceived arbitrariness of categorisation, the views expressed by Birnie, Boyle and Redgwell, albeit in relation to international environmental law, may well prove to be instructive.[102] The authors confirm the common view of the universality of environmental law noting that international environmental law is

> different from international human-rights law, the law of the sea, natural resources law, or international law… but there are significant overlaps and interactions with these categories, and the categorization is in some cases a matter only of choice and perspective.[103]

While the authors appear more than mindful of the interconnectedness of environmental law and other areas of the law they appear not to be overly concerned with the exact classification of rules and principles of law. In this regard, they mention further that

> much of contemporary international environmental law deals with sustainable use of fresh water, fisheries, forests, biological diversity or endangered species. This is simply natural-resources law- or perhaps elements of the law of sustainable development-from another perspective. Moreover, even within otherwise discrete bodies of law, specifically environmental norms or applications can also be found.

---

[100] Fuggle and Rabie A (n 1).
[101] Rabie A (n 2).
[102] Birnie P, Boyle and Redgwell (n 2).
[103] ibid 3.

> There is no magic in these categorisations. In the real world, it is simply not possible to address many of the legal issues posed by international environmental problems without also considering the law of treaties, state responsibility, jurisdiction, the law of the sea, natural resources law, dispute settlement, private international law, international criminal law, and international trade law, to name only the most obvious. All of these topics have environmental dimensions or affect the resolution of environmental problems and disputes.[104]

The authors, consistent with the understanding of the pervasive nature of environmental law, resolve the issue of categorisation with reference to perspective or choice. While this appear contrary to the concern of many scholars in trying to distil a distinct area of environmental law it nevertheless has very important implications. This approach would be consistent with a functional understanding of law in that one would be less concerned with the legal theoretical categorisation of a norm. Instead, overarching aims and the perspective from which one looks at an area of the law would be determinant of the issue of categorisation.

In this regard, one would be less concerned with the categorisation of the rule or the principle as environmental law but rather with the gearing of law towards the achieving of the aim of environmental protection. This is consistent with the notion of the interconnectedness of different areas of the law in achieving specific outcomes. Moreover, this understanding would also set the tone for a more integrated approach to a discussion of environmental norms within salvage and the manner in which salvage can best be integrated into a wider environmental protection framework. This approach, of course, identifies issues rather than law. In this regard the authors also mention how, often 'within otherwise discrete bodies of law specifically environmental norms or applications can also be found',[105] which is true of salvage law.

The issue of categorisation, being dependent on choice or perspective, could ultimately be regarded as one of policy and the pursuit of specific outcomes. Whether legislation can be categorised as environmental law would be a matter of

---

[104] ibid 3-4.

[105] ibid. The authors refer to Part XII of the 1982 UN Convention on the Law of the Sea ('UNCLOS') which "deals with 'Protection and Preservation of the Marine Environment' and is one of the most important environmental agreements currently in existence'. In this regard, the authors seem to regard the Convention as regulating a separate category of law but nevertheless inclusive of environmental protection concerns. Also see discussion of the Salvage Convention Ch 4.

policy and the pursuit of specific outcomes. The extent to which legislation or individual provisions thereof could further policy concerns pertaining to environmental protection should be determinant of the issue of categorisation. This should be the case even where such legislation is primarily directed at outcomes distinct from 'environmental protection'.

It is evident from the preceding discussion that the subject of environmental protection is the focal point for the identification of the norms and principles that could be regarded as being in the purview of environmental law. This identification of 'environmental protection' appears to be the standard way in which scholars delineate the body of environmental law. This approach, as mentioned, has also been classified as the 'subject-matter' approach of environmental law.[106] Thus, insofar as the subject of environmental protection can be isolated, laws directed at environmental protection would be considered environmental law. This as mentioned does not preclude more traditional area of law with a primary purpose other than environmental protection, from containing environmental norms. As pointed out, perspective and policy might ultimately be determinant of the exact categorisation in a given situation.

The categorisation of salvors' environmental services under the heading of environmental law could, therefore, be a question of perspective and choice. In this regard, to the extent that provisions in the 1989 Salvage Convention may relate to the protection of the environment, environmental law scholars would probably agree that such provisions would fall within the purview of environmental law. Nevertheless, there would appear to be no problem with these provisions belonging to an area of the law, distinct from environmental law as is the case currently.

While Dunoff suggests that 'environmental protection would be enhanced' if environmental concerns were incorporated into other areas of law governing activities that may impact on the environment [107] (the case with the current law of salvage), the author does not address the question of how this is to be achieved. In this regard, the question of the reconciliation of provisions in furtherance of environmental concerns with such a body of law would be important. For salvage law, the question would be whether the law of salvage could effectively facilitate

[106] See Cowen D (n 9).
[107] See above, (n 4).

such incorporation in a manner that would not negate the essence and certainty of an established area of law. This question should form an integral part of any perspective adopted by one tasked with an assessment of salvors' environmental services within the law of salvage.

6.5.2 The 1989 Salvage Convention on the environmental law spectrum

As noted, the 1989 Salvage Convention was primarily a result of environmental protection concerns. Where would this instrument fall within Rabie's spectrum of environmental legislation and can it be regarded as environmental law?

While environmental scholars are evidently mindful of the pervasive nature of their discipline, scholarly work on the law of salvage does not definitively attempt to create such links between the two disciplines and the potential implications thereof. Nevertheless, the importance of environmental outcomes for the law of salvage is borne out by the 1989 Convention, while salvage also forms an integral component in coastal state environmental protection measures.[108] However, this has not led to attempts to properly investigate the theoretical possibilities provided under the broader heading of environmental law in relation to the regulation of environmental services incidental to salvage operations.

The closest scholarly attempt at a discussion of the impact of environmental law on the law of salvage appears to be that of De La Rue and Anderson.[109] The authors note the 'ever-changing framework of environmental laws and regulations [that] poses a daunting challenge even for experts in the field'.[110] In this regard the authors appear to be mindful of the intricacies and prevalent uncertainties of environmental law as a distinct area of law. The authors discuss various aspects of shipping that are often viewed as different areas within a broader framework of admiralty, marine and maritime law. They link these areas via the common concern of the environment and specifically the question of pollution from ships.[111]

Their understanding certainly appears to resonate with the understanding of environmental protection as the factor or subject that links environmental law with other areas of law and other disciplines. It is also apparent from their description of

---

[108] See discussion below, ch 7.
[109] De La Rue C & Anderson C Shipping and the Environment (2nd edn, Informa, London, 2009).
[110] ibid.
[111] ibid (preface ix).

the extent to which the issue 'extend through most branches of maritime commerce' that the authors are familiar with the universal nature of environmental law (the authors restrict themselves to the issue of pollution from ships).[112] Nevertheless, while a connection between environmental law and the various aspects of shipping is more than merely implied, the authors do not explore the implications of the unifying theme of environmental protection that may potentially affect the categorization of their areas of discussion, or specific norms in these areas.

For this reason, an attempt will now be made to place the 1989 Salvage Convention within the spectrum of legislation identified by Rabie. The discussion will not be in the same numerical order as identified earlier. Instead, the analysis will commence with the two extremities namely, legislation with no environmental relevance and exclusive environmental legislation as the placement of the Convention within any of these two categories will dispose of the enquiry.

6.4.2.1. Level seven (Legislation with no environmental relevance)

It should be immediately apparent that the Convention cannot be categorized as an instrument 'with no environmental relevance'. The very purpose of the instrument as per its preamble is the furthering of environmental protection via the agency of salvors.[113] The preamble, in setting the tone of the instrument, expressly recognises the 'major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment'.[114] This is borne out further by the substantive provisions and definitions, which are geared towards the encouragement of salvors to prevent and or minimise damage to the environment.[115] As shown, the 'environmental protection' goal of the convention even assists with the reconciliation of provisions that, ostensibly, have no apparent connection with the protection of the environment with those that do.[116] The value of environmental protection as expressed via the Convention forms the backbone for a proper understanding of the instrument.

---

[112] ibid.

[113] See discussion of the preamble to the London Salvage Convention above, ch 4, 114.

[114] ibid.

[115] See ch 4 for a discussion of articles 1, 6, 7, 8, 9, 11, 13, 14 and 18 of the 1989 Salvage Convention.

[116] See the discussion of art 1(a) in ch 4 and the manner in which it assists one with the reconciliation of environmental specific provisions with the non-environmental provisions of the Convention. See also discussion of the interaction between arts 14(5) and 18 of the Convention.

6.4.2.2 Level one (exclusive environmental legislation)

While the environmental objective of the Convention is certain, it is, nevertheless, not an instrument that is exclusively concerned with environmental protection. Here, the obvious point to make is that of the historical development of the law of salvage. While the law of salvage has been described as ancient, the environmental protection dimension thereof is a relatively recent development. In this regard, the earlier 1910 Brussels Convention had no apparent link with or design at the protection of the marine environment.[117] It was primarily directed at the achievement of international uniformity in salvage law through the international regulation thereof.[118] The later 1989 Convention continues this ideal while adding provisions relevant to the promotion of environmental protection.

The bulk of salvage law as developed by statute and case law predates the concern with environmental protection. From the historical analysis of the law of salvage, it is also apparent that the law of salvage developed from the very narrow confines of shipwrecked property to the prevention of disasters at sea. The 1989 Salvage Convention adds environmental provisions to an already existing body of law that had no environmental protection outcome. In this regard the very definition of salvage operations contained in the Convention points at a purpose that is essentially private in nature namely, 'any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever'.[119]

6.4.2.3 Level six (legislation regulating environmental exploitation)

The Oxford English Dictionary provides the following two definitions for the word 'exploitation': 'The action of exploiting or turning to account; Productive working or profitable management (of mines, cattle etc.),' and, '[t]he action of turning to account for selfish purposes, using for one's own profit'. The term exploitation would indicate the economic use of whichever medium is being exploited. This would typically be the kind of situation where the aims of environmental management will be balanced as against sustainable development concerns. It is easy to see how the action of

[117] See above ch 4.
[118] See the preamble to the 1910 Brussels Salvage Convention.
[119] 1989 Salvage Convention art 1(a).

mining as an economic activity could have severe environmental implications if not properly regulated.

However, while it could be argued that the carriage of goods amount to the economic exploitation of the oceans, this would be an overly wide notion of the term as defined. Moreover, these terms would seem to imply a notion of consumption for economic purposes. The idea of the diminution of resources is part and parcel of the concept exploitation and one could see how this may be absent from the salvage context. The notions of 'turning to account' and 'profit' that imply consumption, degradation or diminution do not fit properly into the salvage context.

Moreover, an important purpose behind the 1989 Salvage Convention is environmental protection, not environmental exploitation. In this regard, the Convention expressly notes the 'major contribution which efficient and timely salvage operations can make to…the safety of the environment'.[120] The notion of the protection of the environment as opposed to the economic exploitation thereof, is also apparent in the commonly expressed idea of salvage 'as the first line of defence in protecting the environment'.[121] This would exclude it from this category of norms that relate to the exploitation of the environment.[122] While a very wide notion of 'exploitation' may be attached to the notion of the carriage of goods and the extent to which modern ships pose an environmental risk, the norms expressed in the 1989 Salvage Convention cannot be said to fall into the category of legislation regulating environmental exploitation. The law of salvage and the Convention does not regulate the exploitation of the environment as would be the case with mining.

6.4.2.4 Levels five and four (legislation not aimed at environmental management but with potential environmental relevance and direct environmental relevance)

In the words of Brice, the 'underlying purpose of the London Convention was to encourage and to some extent compel salvors to take action during the course of salvage operations to protect the environment'.[123] This statement of Brice, implying that the Convention imposes positive duties on salvors, of course, goes much further than the contention that environmental protection concerns informed the Salvage

[120] See preamble to the 1989 London Salvage Convention.
[121] See De La Rue C & Anderson (n 108) 535.
[122] See preamble to the 1989 London Salvage Convention.
[123] Reeder *Brice on Salvage Law* (4th edn, Sweet & Maxwell, 2003) 444.

Convention. Moreover, as demonstrated, the Convention does not impose any positive duties on the salvor.[124] Nevertheless, albeit obiter, this statement of Brice has found judicial support in *The Nagasaki Spirit*.[125]

This purpose distinguishes the Convention from the legislation provided as examples of legislation on levels five and four.[126] While a statute like the South African Income Tax Act is clearly not directed at environmental management despite it possibly allowing for 'deductions on machinery used for recycling'[127] the same cannot be said of the Salvage Convention. The Convention, aside from being a direct result of a growing concern with environmental protection, expressly acknowledges an environmental purpose in its preamble.[128] Moreover, as shown, its substantial provisions are positively geared towards an environmental protection outcome. These two levels would, therefore, not be appropriate for the placement of the Salvage Convention.

6.4.2.5 Levels three and Two (Legislation incidentally containing environmentally specific norms and that predominantly contain environmentally specific norms)

Levels three and two are the two remaining levels in which one could potentially group the Salvage Convention. Legislation on level three would generally not be geared towards environmental management.[129] However, any assertion that the 1989 Salvage Convention is not geared towards environmental management would be a contradiction of the stated aims of the Convention itself. The Convention is expressive of environmental protection values both in its statement of purpose and in the way its substantive provisions seem to further this purpose. Given the underlying values and overall purpose of the Convention, one would not be able conveniently to categorise it as level three legislation not purposefully directed at environmental management.

---

[124] This study, in ch 4, questioned the extent to which environmental protection duties are placed on salvors. While the triggering effect of environmental protection values was not questioned, it was shown that the Convention is primarily an instrument concerned with the traditional salvage of property.

[125] *Semco Salvage & Marine Pte Ltd v Lancer Navigaton Co Ltd (The Nagasaki Spirit)* [1997] 1 Lloyd's Rep. 323 [HL]. Lord Mustill accepted Brice's suggestion (see text to n 122) stating that "as to the purpose of the Convention, this [Brice's view of the underlying purpose of the Convention] is plainly right" At 331-332.

[126] See above, text to nn 86 and 87.

[127] See above n 87.

[128] See ch 4 for a discussion of the Preamble of the Convention.

[129] See text to n 87.

Such a categorisation would also not be mindful of the developments that led up to the 1989 Salvage Convention. In this regard, it was the very concern with the protection of the environment following the *Amoco Cadiz* disaster which led to questions about the possible replacement of the 1910 Brussels Salvage Convention.[130] As mentioned, industry responses on the part of salvors to provide a more environmentally responsive service eventually culminated in the current Salvage Convention. The development of other public law international conventions parallel to the environmental alignment encountered in salvage is also not without significance. This, as evidenced by the very provisions of the 1989 Salvage Convention, further strengthens the notion of the Convention's environmental management purpose.

The only remaining category within the spectrum for the appropriate placement of the Convention and the law of salvage is level two. Level two includes legislation 'calculated to promote an environmental object and which predominantly contains environmentally specific norms, but which also have other provisions'.[131] As mentioned, the 1989 London Salvage Convention is undeniably calculated to promote an environmental object. This is clear from both the statement of purpose contained in the preamble while provisions such as Article 8(1)(b) expressly enjoins salvors, while carrying out 'salvage operations', 'to exercise due care to prevent or minimize damage to the environment'. Salvage awards and special compensation provided for in the Convention are supposed to encourage salvors to assist ships and cargo, thus indirectly promoting environmental protection, while other provisions are expressly directed at an environmental protection outcome.[132]

Nevertheless, it appears as if the Salvage Convention does not fit completely into this level-two category. One cannot describe the Convention as legislation 'calculated to promote an environmental object and which predominantly contains environmentally specific norms, but which also have other provisions'.[133] As mentioned, while environmental protection appears to be of paramount concern in the Convention, it remains, in essence, a salvage convention. While the environmental protection goal is an added dimension to the law of salvage, the

[130] See De La Rue C & Anderson C (n 108) 543.
[131] Rabie A (n 2) 216.
[132] See ch 4 for a discussion of Articles 13, 14 and 8.
[133] See above n 83.

Convention maintains the essence and integrity of traditional salvage. It is in substantial terms a Salvage Convention which is more than just significantly infused with environmental norms. Here the words of De La Rue and Anderson may once again prove instructive:

> In modern times the law of salvage has undergone fundamental changes to reflect the growth in importance of salvage assistance not only in saving the property imperilled by a maritime casualty, but also as the first line of defence in protecting the environment.[134]

As shown in earlier chapters, developments in salvage in response to a growing concern with environmental protection have not changed the essence of salvage as a service for the rescue of ship and cargo. However, while this essence of salvage have been maintained there has been a relatively strained 'greening of salvage law', through the addition of environmental provisions regulating environmental services. In this manner, salvage has outgrown its original singularity of purpose. Therefore, the Convention, regulating operations with more than a single purpose ('salvage operations' and 'environmental services'), can be regarded as having a dual nature. This much is alluded to in the *Nagasaki Spirit:*

> [T]he promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment. [The right to special compensation depends on the performance of "salvage operations", which are defined by article 1(a), as operations to assist a vessel in distress].[135]

While the court regarded the traditional salvage operation as the cornerstone, it nevertheless accepted the argument that 'the explicit purpose of the new salvage regime [was], in the words of the Preamble, to provide 'adequate incentives' to keep

---

[134] De La Rue C & Anderson C (n 108) 535. However, the authors' choice of the word 'substantial' is perhaps not entirely accurate, in that the fundamental aspects and requirements of the law of salvage have been kept intact. A better choice of word, perhaps, would be "incremental" in that legislative additions to the law of salvage have introduced provisions with an environmental reach without impacting on the existing law of property salvage as such. In this regard, the English House of Lords in *the Nagasaki Spirit* (see above n 83), commenting on the Special Compensation regime introduced by art 14 of the Convention, has noted that 'the remedy under art 14 is subordinate to the reward under art 13, and its functions should not be confused by giving it a character too closely akin to salvage' (Lord Mustill at 333).

[135] The *Nagasaki Spirit* at 332.

themselves [salvors] in readiness to protect the environment'.[136] As pointed out earlier, the court described this argument as 'clearly right'.[137] Therefore, while the outcome of environmental protection is accepted by the court, it is not at the expense of traditional salvage operations.

As demonstrated in chapter 4, environmental services are not legally technically the same as salvage operations but they are closely linked in the Convention. Where there is the threat of environmental damage, salvage operations, and the concomitant environmental protection goal as expressed in the preamble and other provisions of the Convention, may become a carefully balanced, single operation for all practical purposes. It is precisely this dual aspect of salvage operations that have led to complications where salvors have attempted to claim under Civil Liability and Fund Conventions for taking preventive measures in relation to pollution.[138]

The implications of this duality of purpose, as an outcome of the Convention, are significant for its placement within the environmental law spectrum. Firstly, while it undoubtedly falls within this spectrum, its precise location is not a simple matter. It is neither exclusively environmental legislation, nor exactly predominantly environmental with some non-environmental provisions. The Convention is primarily and substantively directed at the regulation of salvage operations. In this manner the environmental provisions and objects of the Convention are predicated upon the provision of traditional salvage services.

At the same time, as shown, it cannot be denied that it is legislation that is calculated to promote an environmental object. No salvor can ignore the environmental norms and outcomes of the Convention and modern salvage operations. The clear environmental protection purpose of the Convention would appear to place it on level two, while the predominance of traditional salvage and the formulation of 'environmental duties' with reference to traditional salvage operations (incidental thereto) would suggest level three.

The difficulty with the placement of salvage in this spectrum does not, however, detract from its environmental protection aims. It can be placed on a high

[136] ibid.
[137] ibid.
[138] See discussion below, ch 7, 245ff.

enough level to satisfy environmental law scholars of its environmental protection credentials. In this regard, some South African scholars have included the Salvage Convention and the South African Wreck and Salvage Act in works on environmental law.[139] Even those scholars that adhere to a more restricted view of the scope of environmental law would be satisfied. It is here that the idea of perspective and specifically policy could be of assistance. In addressing the question of the legal regulation of salvors' environmental services the perspective of one tasked with such investigation is of importance.

While the scholar of traditional maritime and admiralty law may baulk at the idea of these services being a concern of a distinct discipline of environmental law, the utility value of salvage in an environmental protection context ought not to be denied. Similarly, while the environmental law scholar may be driven by a desire to delineate a distinct academic area that is environmental law, this should not collapse into a discourse on reclassification. Instead, an appreciation of the interconnectedness of various traditional fields of law through the common concern of environmental protection ought to be paramount.

Thus, while perspectives may dictate the classifications of an area of law amongst scholars as environmental law, salvage law, criminal law, public law or private law, this should not be at the cost of achieving the objectives of the law. In this regard, from an environmental law perspective, one cannot precisely locate the placement of salvage law on the environmental law continuum. Nevertheless, one can certainly not exclude the law of salvage, and specifically the Salvage Convention from the environmental law spectrum.

While the Convention is, primarily, a salvage convention, it would be short-sighted indeed to lose sight of the link between the law of salvage and a wider body of laws tasked with environmental protection. The Convention, by its very terms, expresses not only the importance of the law of salvage as an important component

[139] See for example Couzens W, 'The Incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005) *S. Afr. Y.B. Int'l L* Vol. 7 128. The author includes a discussion of the Wreck and Salvage Act as domestic legislation that incorporated international environmental law (the 1989 Salvage Convention) into South African law. This, at least on the part of the author, suggest a recognition of the Salvage Convention as international environmental law. See also Van der Linde M, *A Compendium of South African Environmental Legislation* (2nd edn, Pretoria University Law Press, Pretoria, 2010). Van der Linde includes the South African Wreck and Salvage Act in his work on South African environmental legislation.

in a wider context of environmental protection, but actively promotes and encourages behaviour conducive to environmental protection. In this manner, whichever way one may wish to classify environmental salvage services, the driving factor ought to be those aims, objectives or policies which one seeks to realise.

6.6 Conclusion

Environmental law is an all pervasive area of the law that is currently seeking a distinct identity. This appears to be difficult in the face of a lack of uniform definitions, and the added complication of traditional areas of law containing norms that are aimed at environmental protection. As shown, salvors' services relating to the environment and norms regulating these services would be regarded by environmental scholars as falling within the purview of environmental law. In this regard, environmental scholars accept that such norms may be contained in other, distinct, areas of the law.

The environmental services of salvors are, of course, regulated under the law of salvage, perhaps because of assumption that it is the appropriate vehicle for regulating these services. The extent to which the law of salvage can be further developed to regulate these services or their remuneration is a matter that also depends on the extent to which such provisions can efficiently be integrated into the existing law of salvage. In this regard, it has been demonstrated that the provisions aimed at environmental protection do not find an obvious home within the law of salvage. Nevertheless, this chapter has demonstrated that these services could, conceptually, be addressed outside of the law of salvage.

This, of course, would depend on specific perspectives and policy objectives. It is clear that salvage law and salvage operations (the activity) have a definite connection with environmental protection. While there is a clear value driven dimension to debates about development in salvage law to regulate environmental services, the question is not necessarily a salvage law question. In this regard, the pervasive area of environmental law may provide alternative possibilities for the regulation of these services. While the exact manner of regulation may not be clear at this stage, the availability of an alternative legal basis for the regulation of salvors' environmental services should be kept in mind in attempts to develop the law of salvage.

Chapter VII Salvage operations within coastal state marine environmental protection measures and mechanisms outside of salvage for the remuneration of salvors' environmental services.

7.1 Introduction

An issue which has been alluded to in earlier chapters, is the extent to which salvage operations and salvage law operate within a broader environmental protection framework.[1] In this regard, at a practical level, Tsavliris has noted that,[2] 'it is only commercial salvors who have the equipment and expertise to prevent environmental catastrophe'. This reality is also recognized in the Salvage Convention[3] through provisions to further environmental protection and encourage salvors. While the law of salvage promotes outcomes that fit the area of operation of environmental law and salvors have a *de facto* role to play in the prevention of environmental catastrophe, we have yet to look at salvage operations within a broader framework of environmental protection measures.

For the sake of completeness, this chapter will investigate the extent to which salvage operations find recognition in coastal states' marine environmental response plans, mechanisms employed by such states to integrate salvage services into response plans and select international instruments that are of potential relevance to salvors in relation to remuneration for environmental services. This discussion, while involving an analysis of legal instruments outside of the current law of salvage, will be more practical in nature than the preceding chapters. However, one may assume that any suggestions regarding changes to the law of salvage should be mindful of this wider context and the practical realities of current marine environmental response efforts.

This discussion will be restricted to the United Kingdom and South Africa, with brief reference also to the United States. The chapter is not an attempt to provide a complete overview of environmental protection measures but more to explain a context to salvage that goes beyond the narrow confines of the law of salvage. In terms of public instruments outside of the law of salvage, the second part of the chapter will look at salvors' claims under the CLC and Fund conventions, to

[1] See discussion of Article 11 of the Salvage Convention above, ch IV, 151ff.
[2] See discussion above, ch VI, 201, n 64 and text thereto.
[3] See discussion of the preamble of the Salvage Convention above, ch IV, 117.

ascertain the extent to which salvage operations and indeed salvors feature under these instruments. The choice of these instruments is because of their potential relevance to the remuneration of salvors in salvage operations with an environmental protection dimension.

7.2 Salvage within government responses to marine pollution from ships.

7.2.1 The United Kingdom

Government efforts to effectively respond to marine pollution from ships have been influenced significantly by the Sea Empress incident in February 1996, approximately five months before the entering into force of the 1989 Salvage Convention on 14 July of the same year. The Sea Empress, a single hull oil tanker, ran aground off the coast of Wales spilling tonnes of North Sea crude into the sea. Following this incident Lord Donaldson of Tymington was tasked to review the preparedness of the United Kingdom to deal with oil pollution incidents.[4] This review, published in 1999, highlighted the importance of salvage capability as a component of a multi-faceted approach to pollution incidents emanating from ships. In its consideration of major incidents,[5] the report identified salvage as one of 'four main tasks that may be associated with marine pollution incidents'.[6] These four tasks are search and rescue, salvage, clean-up at sea and clean-up of the shoreline.

In this regard, the report highlighted the fact that salvage operations cannot be considered in isolation from other measures 'designed to limit the effects when … an escape [of oil from ships] does occur'.[7] The notion of the role and importance of salvage operations within a wider context is often expressed in the recognition of salvage as a first line of defence[8] and the extent that salvage operations function as a means of preventing oil spillages. This idea of salvage as a component in multi-faceted pollution response matrix is also alluded to in the following statement:

> We have in mind the aerial spraying of dispersing agents, containment by booming, at-sea recovery and shoreline clean-up. The reason for this is that while such

[4] Command and Control: Report of Lord Donaldson's Review of Salvage and Intervention and Their Command and Control <https://core.ac.uk/display/84374> accessed 11 August 2016.

[5] ibid, 45.
[6] ibid, 45.
[7] ibid. 3.
[8] See De La Rue C and Anderson C *Shipping and the Environment* (2nd edn, Informa, 2009) 535.

> measures are not part of the salvage operation, those controlling the salvage operation itself have to take account, so far as is possible, of the need to facilitate the deployment of these second line defences against pollution.

Aside from its acknowledgement of the important role of salvors in the context of wider responses to pollution from ships, the report quite clearly acknowledged the various international law mechanisms that exist alongside salvage and directed at the protection of the environment. In this regard, and in relation to later 1992 protocols to the International Convention on Civil Liability for Oil Pollution Damage (the CLC) and the IOPC Fund Conventions,[9] the report envisaged a close relationship between these and the 1989 Salvage Convention, basically calling for the latter's recognition of the importance of salvage operations in the context of preventive measures taken against marine pollution.[10] While not concerned with the legal theoretical nature and limitations of salvage law, this clearly provides a practical dimension to the theoretical discussion in chapter 6, by alluding to the shared environmental protection outcome linking distinct areas of law.

As a further key recommendation, the report also urged for more use of powers of intervention by the United Kingdom in marine salvage operations where ships and their cargo threaten the environment. In this regard, a conclusion reached in the report was that 'once an incident has developed to a point at which the government, in terms of its statutory powers and responsibilities, has become entitled to give directions as the 'trigger point' has been reached, it has an inescapable and continuing responsibility to monitor and control the whole [salvage] operation'.[11] In this regard, the Secretary of State, acting through his appointed representative (SOSREP), would be the one to make the call as to when the 'trigger point' for intervention has been reached.[12] As such, intervention and control by the coastal state was regarded as an essential component in the handling of salvage operations where there was a threat of pollution. This, as discussed in chapter 4, is

---

[9] See discussion below 243ff. See also Plant G, '" Safer Ships, Cleaner Seas": Lord Donaldson's Inquiry, the UK Government's Response and International Law' (1995) *The International and Comparative Law Quarterly* Vol 44, 939-948. The author notes the fact that a key consequence of this report was that it influenced the United Kingdom's decision to ratify the 1989 Salvage Convention and the 1992 protocols to the 1969 International Convention on civil Liability for Oil Pollution Damage (1969 CLC) and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

[10] See discussion below 242ff.

[11] Lord Donaldson's Review (n 1) 4.

[12] ibid. The office of the SOSREP is also a development following from the Lord Donaldson's Review.

clearly recognised in the Salvage Convention itself although the key concern of the Convention is to maintain salvors' right to an award despite the intrusion from interests extraneous to the legal relationship between salvors and salved interests.

The United Kingdom's powers of intervention derive from certain public international law instruments conferring these powers on coastal states. In this regard, Article 1 of the Intervention Convention[13] grants coastal states the right to

> take measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution of the sea by oil; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

While the power conferred pertains to measures on the high seas it would be logical to assume that these same powers can be exercised in territorial waters. However, while this power is conferred, Article V of the Intervention Convention provides some restrictions on how the coastal state may exercise the powers conferred under Article I.

1. Measures taken by the coastal State…shall be proportionate to the damage actual or threatened to it.
2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I…[and] shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned:
3. In considering whether the measures are proportionate to the damage account shall be taken of:
    a) The extent and probability of imminent damage if those measures are not taken; and
    b) the likelihood of those measures being effective; and
    c) the extent of damage which may be caused by such measures.

While the Intervention Convention does not mention salvors, they would on a literal reading be covered by the reference to 'persons, physical or corporate'. The

[13] International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969. See also, Reeder J, *Brice on Maritime Law of Salvage* (5th edn, Sweet & Maxwell, 2011) The author notes that the Intervention Convention is 'in a sense enacted in ss.137-140 of the Merchant Shipping Act 1995'. 449.

Merchant Shipping Act 1995,[14] unlike the Intervention Convention, provides expressly for salvors, in its conferring of powers on the Secretary of State.

> s.137(2)(c) - For the purpose of preventing or reducing oil pollution, or the risk of oil pollution, the Secretary of State may give directions as respects the ship or its cargo—
>
> … to any salvor in possession of the ship, or to any person who is the servant or agent of any salvor in possession of the ship, and who is in charge of the salvage operation.

These powers to direct salvors are to be exercised in the situations provided for in s.137(1) of the Act.

> **137 Shipping casualties.**
>
> (1) The powers conferred by this section shall be exercisable where—
>
> (a) an accident has occurred to or in a ship; and
>
> (b) in the opinion of the Secretary of State oil from the ship will or may [F62cause significant pollution in the United Kingdom, United Kingdom waters or a part of the sea specified by virtue of section 129(2)(b)]; and
>
> (c) in the opinion of the Secretary of State the use of the powers conferred by this section is urgently needed;

The typical salvage situation, where there is a threat to the environment is clearly the type of situation where these powers will be exercised. While these powers exercised by the Secretary of State are considerable, the use of the word ‘and’ to link paragraphs (a)-(c), probably means that all three requirements ie (a) to (c) must be present. Essentially, the opinion of the Secretary of State as to the urgency of the need to exercise the powers conferred is the manner in which the right to intervene is triggered.

The Donaldson Review clearly had significant impact, given the implementation of aspects of the review in the United Kingdom’s National Contingency Plan for Pollution from Shipping and Offshore installations (the NCP) in

[14] The Merchant Shipping Act 1995 ch II, s 137(2).

the year 2000. [15] The NCP was prepared by the Secretary of State exercising a function as provided for in the Merchant Shipping Act 1995.[16] Its preparation is also in line with requirements under the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) adopted by the International Maritime Organisation (IMO) in 1990.[17] The OPRC Convention requires ships to have an 'oil pollution emergency plan' setting out reporting procedures in the event of an incident giving rise to oil pollution and the establishment of a response system to oil pollution incidents that includes a national contingency plan.[18] As such, the United Kingdom NCP is essentially the manner in which the country's obligations under the OPRC are discharged.[19]

The NCP is based on four aspects of intervention in the case of a threat of pollution, namely, search and rescue, the coordination and direction of salvage operations, clean-up operations at sea and shoreline clean-up activities.[20] In this regard, the NCP essentially reflects the earlier Donaldson review. The NCP clearly confirms the role played by salvors as well as the overall control of the SOSREP in salvage operations where there is a threat of pollution. In terms of control it provides that '[t]he SOSREP has the ultimate and decisive voice for maritime salvage, offshore containment and intervention'.[21]

Regarding the role of salvors in the network of parties involved in pollution response measures, the NCP provides that '[i]t is envisaged that many incidents will be handled entirely adequately by implementing local contingency plans and through the combined efforts of harbour masters, salvors, ship owners and crew, and MCA

[15] In this regard, in a response to a question directed at the Secretary of State for Transport on 20 January 2003 about the last review of the United Kingdom's coastal waters counter pollution practices, it was noted that the "National Contingency Plan for Marine Pollution from Shipping and Offshore Installations" was published in January 2000 by the Maritime and Coastguard Agency (MCA), "following the experiences gained during [the] SEA EMPRESS incident and from the recommendations in Lord Donaldson's review of salvage and intervention and their command and control. See publications and records of the UK Parliament at https://publications.parliament.uk/pa/cm200203/cmhansrd/vo030120/text/30120w10.htm> accessed, 19 February 2018. This represented an update of earlier NCP's, the first of which have been published in 1968 in response to the Torrey Canyon disaster. The first to be solely electronic version was published in 2014 and last updated on 17 August 2017. This latest version can be accessed at <https://www.gov.uk/government/publications/national-contingency-planncp> accessed, 3 August 2016.

[16] Merchant Shipping Act 1995 s.293(2)(za).

[17] Lord Donaldson's Review (n 1) 12 and OPRC Article 7.

[18] OPRC Articles 3, 4, 5 and 6.

[19] See Baughen S, *Maritime Pollution and State liability* in *Pollution at Sea: Law and Liability* (Informa 2012), ch 13. Accessible at <https://www.i-law.com/ilaw/doc/view.htm?id=316091> accessed 14 August 2016.

[20] ibid.

[21] See (n 11) para 5.5.2, 11.

staff'.[22] While the NCP clearly acknowledges the involvement of professional salvors appointed by shipowners, it nevertheless confers the power on the SOSREP 'to decide whether the salvor has the capability to carry out the necessary salvage actions, in terms of experience, personnel, and material'.[23] Moreover,

> if SOSREP intervenes and takes control of a salvage operation, all those involved must act on the Directions issued. In other cases, the salvors operate by agreement with, or with the tacit approval of the SOSREP, without the need to issue further Directions. SOSREP also considers what should happen if the current salvage plan goes wrong or the incident escalates in severity.[24]

The United Kingdom NCP, acknowledging the practical involvement of salvors in pollution response measures clearly reflects international sentiments expressed in the Diplomatic Conference leading up to the OPRC. The conference adopted certain resolutions to further the aims of the convention,[25] some of which were of direct relevance to the position of salvors and salvage services. One of the resolutions specifically related to the 'improving [of] salvage services and recognising the essential role of salvors in response to casualties causing or likely to cause marine pollution'.[26] Moreover, in furtherance of the recognition of the role of salvors in marine pollution prevention, Resolution 8 of the convention essentially enjoined states to 'ratify or accede to the [London salvage Convention 1989] as soon as possible' as well as 'review the salvage capacity available to them'.[27]

The clear recognition of available salvage services, as essential for efficiently responding to incidents threatening pollution,[28] is bolstered by the extent to which the United Kingdom Maritime and Coastguard Agency (MCA) enters into contracts with commercial salvors. This system was complementary to the use of emergency towing vessels (ETVs) funded and managed by the MCA.[29] The latter system has

---

[22] ibid. para 17.1, 43.
[23] ibid. para 17.5.
[24] ibid. para 17.7. See also s.137 of the Merchant Shipping Act 1995.
[25] See De La Rue and Anderson (n 5) 921ff.
[26] *Brice on Maritime law of Salvage* (n 10) 463.
[27] ibid.
[28] This was also an issue highlighted in the Donaldson review.
[29] House of Commons Transport Committee 'The Coastguard Emergency Towing Vessels and the Maritime Incident Response Group: Follow Up. Sixth report of session 2012-2013 (2012) Vol 1, 33, available at <http://www.parliament.uk/transcoms.

been scrapped except for the retention of one ETV in Scotland.[30] The scrapping of the system of ETVs followed a spending review by the Department of Transport and the subsequent announcement that the MCA would no longer provide ETVs as this 'does not represent a correct use of taxpayers money and that ship salvage should be a commercial matter between a ship's operator and the salvor'.[31] Of course, this sentiment appears not to be mindful of the fact that the service rendered by these ETVs is aimed at pollution prevention, an interest of both the taxpayer and the coastal state.

Nevertheless, the MCA has devised a standard contract, the Coastguard Agreement for Salvage and Towage (CAST) ensuring the availability of salvage services in the event of an incident threatening pollution. At the time of writing this dissertation, it was impossible to get insight into the latest iteration of the CAST agreement given the involvement of private interests unwilling to provide access to the agreement for this study.[32] Nevertheless, an earlier version drafted in the year 2002 was available and serves as the basis for the discussion to follow.

This agreement allows for a possible two-tier system of contracting by the owner of the tug in that the '[t]ugowner may at its option obtain from the Owner of any vessel or craft, which a tug may be directed by the MCA to assist, a separate contract for towage and/or salvage in substitution for the hiring of that Tug by the MCA'.[33] As such, the tugowner appears to have the option of performing operations on the basis of the CAST contract or to enter into a separate salvage agreement with the owner of a stricken vessel.

In the event of a separate salvage contract, the salvor would presumably be remunerated on the basis of the Salvage Convention's articles 13 and 14, or SCOPIC where it is incorporated. In this regard, the CAST provides that

> Where a salvage contract has been entered into between the Tugowner and the Owner of any vessel or other subject of salvage, the amount recovered by the

[30] Parliament Research Briefings, full copy of which is available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00186> last accessed 16 August 2016.
[31] Quoted in Parliament Research Briefings (n 27).
[32] The writer's attempts to get a copy of the latest iteration of the CAST agreement proved unsuccessful in that both the MCA and at least one major private salvage operator, whom the writer was advised to approach, were unwilling to release the standard contract.
[33] Clause 5.3 of the CAST 2002 agreement.

> Tugowner shall remain their property and no part of the amount shall be due or payable to the MCA.[34]

From the above, it appears that the MCA's primary interest is that of having salvage capacity and capability at their disposal. There appears to be an assumption that the commercial salvage arrangement would address any potential environmental protection concerns. In this regard, the oversight powers of the SOSREP would preclude the possibility of pollution prevention not being furthered. Of course, this does not fully address the concerns raised earlier regarding the remuneration of salvors by those upon whom a benefit has been conferred. The responsibility for the payment of such remuneration would simply be shifted to the owner of the stricken vessel, with all the limitations mentioned earlier.

However, the Tugowner is also allowed the opportunity to perform the services without entering into a separate salvage agreement with the owner of the salved property. In such a case, the CAST agreement and the payment mechanism provided thereunder will remain intact. In this regard clause 7.2 of the CAST provides,

> Where no salvage or towage contract has been entered into between the Tugowner and the Owner of any vessel or other subject of salvage which is benefitting from the service of a Tug, the Tugowner may, if it appears reasonable and practicable to do so, claim salvage from the subject being salved without prejudice to this Agreement and their right to receive hire hereunder.

Essentially, from its wording, this arrangement allows the salvor to possibly be remunerated on a very lucrative basis in that hire payable under the CAST agreement remains payable, while there would also be an entitlement to a salvage award proper. Nevertheless, one may presume that such hire received under the CAST would probably be a deductible under any potential Article 14 award, given that it reduces salvors' expenses. However, should SCOPIC be operational, the situation might potentially be different in that it allows for payment on a tariff basis without reference to any potential deductibles.

However, clause 7.3 of the CAST appears to take away the possibly of the tug owner being paid hire together with SCOPIC remuneration in that the salvor would

[34] ibid. Clause 7.1.

be required to 'reimburse the MCA for hire paid to the Tugowner during the period of the salvage services'. This mechanism implies that the salvor, while engaged in the salvage operation is not acting in terms of the CAST, or bestowing the benefit that is contemplated under CAST, despite CAST remaining intact. Essentially, the salvor has a choice of a salvage award with CAST potentially functioning as a deductible so to speak in that monies paid under the CAST hire will have to be reimbursed.

Legally speaking this is a curious mechanism. While the CAST arrangement clearly recognises the importance of the availability of salvage capability in the prevention of pollution, it treats the commercial salvage arrangement between the tugowner and the owner of salved property as suspending the former in relation to the remuneration of the salvor. At the same time, the salvors' services under the CAST is primarily although not exclusively 'that of emergency towage services to prevent pollution of the coastline of the United Kingdom'.[35]

This raises a pertinent question about the way the property salvage operation is categorised by the MCA. Is it assumed that the salvor's obtaining of a salvage award is not a service to prevent pollution and hence, that the MCA is to be reimbursed? Such a construction of the contract would, at least at the legal theoretical level, deny the possibility of the salvor's services being of a dual nature, even though, at a practical level, there is the conferring of a benefit. Moreover, while the benefit of pollution prevention is certainly conferred the conclusion of a separate commercial salvage arrangement simply shifts the responsibility for payment to the owner of the salved property. Essentially a salvor will have to engage in careful calculations to ascertain whether they wish to claim a salvage award or simply proceed on the basis of the CAST and hire payable thereunder. The nature of emergency salvage operations is such that the salvor would probably not have the time properly to make such calculations.

7.2.2 The United States of America

Following the *Exxon Valdez* incident, The United States enacted its own comprehensive legislation to deal with oil spill compensation and liability in the form of the Oil Pollution Act 1990 (OPA).[36] As such, the United States opted not to adopt

[35] Clause 4.1
[36] The Oil Pollution Act of 1990, (33 U.S.C. 2701-2761)

the International Convention on Civil Liability for Oil Pollution Damage.[37] With the OPA, the United States Congress consolidated existing federal oil spill laws under one programme.[38] The OPA has been described as 'a true success story for all those involved in its implementation; oil spills in this country have precipitously dropped in the decades since its passage'.[39] The OPA, following a number of expansions to the United States' National Contingency Plan over the years, represent the latest effort to expand the United States' NCP.[40] As such, the NCP reflects the oil spill provisions of the OPA,[41] providing for a 'multi-layered planning and response system to improve preparedness and response to spills in marine environments'.[42]

The OPA, in addition to several significant safety measures pertaining to ships' manning standards, vessel operations and construction, pertinently places the salvor within the framework of efforts directed at the prevention of pollution from ships. In this way, salvors are part and parcel of efforts directed at the prevention of pollution from ships. The Oil Pollution Act requires the development of a Vessel Response Plan (VRP) to minimize the impact of oil spills.[43] These VRP's are administered by the United States Coast Guard (USCG), the designated lead response agency in relation to oil spills in coastal waters.[44] A failure, to submit a VRP, and to receive approval of the VRP or authorization from the USCG to operate in accordance with the VRP submitted, will result in the prohibition of a vessel from

[37] See discussion below.
[38] Ramseur J, *Oil Spill in U.S. Coastal Waters: Background, Governance, and Issues for Congress* (Diane Publishing, 2010) 9.
[39] Marine Salvage: 'A Closer Look at OPA 90's Success' <http://www.americansalvage.org/marine-log/ML-Mar2014.pdf> accessed on 15 August, 2016.
[40] The United States' National Contingency Plan was developed and first published in 1968 making it the first comprehensive system of accident reporting, spill containment and cleanup. The original plan also established a response headquarters, a national reaction team and regional reaction teams, essentially pre-empting the later and current National Response Team and Regional Response Teams (information sourced from <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview>. accessed 14 August 2016.
[41] See the 'National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview' <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview> accessed on 15 August 2016.

[42] Ramsuer J (n 34).
[43] (n32). Sec 5006.
[44] Oil Spills Prevention and Preparedness Regulations <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations> accessed 13 August 2016.

the handling, storing, or transporting of oil.[45] The USCG has issued regulations for VRP's to be in place for both tankers and non-tanker vessels.

It is within the context of VRPs that the integral role played by salvors in pollution prevention and response measures is highlighted. In relation to non-tanker vessels, owners of such vessels with oil-carrying capacity of 2,500 barrels or greater are required to pre-contract with, amongst other, salvors.[46] The need for this requirement has been expressed as follows:

> This pre-planning will create vital linkages between the shipping industry and oil spill response service providers (such as oil spill removal organizations (OSROs), **salvage companies**, and marine firefighting companies), ensuring that mechanisms are in place to immediately respond to an emergency.[47]

One undeniable aspect of these pre-arranged salvage contracts is the fact that environmental protection is the primary purpose. This purpose is, of course, the direct result of the coastal state's interests, thus placing pre-existing salvage arrangements as a component in a network of measures directed at the prevention of pollution. In this manner, the property salvage aims of a shipowner with a VRP in place is rendered secondary to, the coastal state's needs for the prevention of environmental damage. Nevertheless, salvage is integral to the VRP, which has been described as the 'principal tool for prevention'.[48]

The DONJON-SMIT VRP salvage pre-arrangement provides an example of a contract entered into between the provider of salvage and lighter services and a shipowner.[49] A curious aspect of the contract is the fact that it is not a typical salvage contract, but a contract providing for the 'provision of and access to salvage, firefighting and lightering services for OWNER's vessels trading in U.S. waters as and when required'.[50] The agreement seems like a framework arrangement in terms of which the contractor may provide salvage, towage or wreck-removal services. As

---

[45] US Department of Transportation, USCG Commandant Instruction <https://www.uscg.mil/directives/ci/16000-16999/CI_16450_32A.pdf> accessed 14 August 2016.
[46] UK P&I Club Circular, October 2013, Ref14/13.
[47] Federal Register 2013, Vol 78 No 189 <http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Environmental/GMS%20Client%20Advisory%2015-13%20-%20NTVRP%20Final%20Rule%20Attachment.pdf (emphasis added).
[48] Marine Salvage: 'A Closer Look at OPA 90's, above n 27.
[49] DONJON-SMIT, LLC OIL POLLUTION ACT OF 1990 SALVAGE, FIREFIGHTING AND LIGHTERING CONTRACT AND FUNDING AGREEMENT < http://www.gard.no/webdocs/Donjon-Smit.pdf> accessed 16 August 2016.
[50] ibid. Recitals of the contract.

such, the contract makes provision for three categories of services ranging from category one only requiring towage services to category three situations, where salvage operations proper might be required and where there is a threat of environmental damage as envisaged under Article 14 of the Salvage Convention.[51]

Essentially, the agreement allows for the provision of services based on already existing industry standard contracts, with the ultimate choice of contract dependent on the services required. As such, salvage services could potentially be rendered on LOF 2011 with the possible incorporation of SCOPIC.[52] Essentially, the legal position of salvors relative to shipowners will remain the same as that noted in the discussion of SCOPIC in chapter 5 above. The legal relationship will be between the shipowner and DONJON-SMIT, with the limitations that imply in relation to the interests of the coastal state and the remuneration of salvors.

7.2.3 South Africa

The oversight responsibility regarding responses to the prevention and combating of pollution from ships and offshore installations rests on the South African Department of Transport (DOT) through the agency of the South African Maritime Safety Authority[53] (SAMSA). SAMSA, on behalf of the DOT is responsible for responding to pollution from ships, through its Centre for Sea Watch and Response.[54] SAMSA's mandate is to

- ensure safety of life and property at sea;
- to prevent and combat pollution from ships in the marine environment; and
- to promote the Republic's maritime interests.[55]

In terms of the South African Maritime Safety Authority Act,[56] SAMSA has the responsibility to administer, key legislative Acts relating to pollution prevention including amongst other, the Merchant Shipping Act,[57] the Marine Pollution (Control

[51] ibid. Article 2, definitions section.
[52] ibid. The contract has attached as annexures standard contract forms such as BIMCO TOWHIRE 2008, BIMCO WRECKHIRE 2010 and LOF 2011 with SCOPIC incorporated.
[53] SAMSA, established in 1989 in terms of the South African Maritime Safety Authority Act 5 of 1998.
[54] See <http://www.samsa.org.za/service/rescue-co-ordination> last accessed, 6 August 2016.
[55] SAMSA <http://www.samsa.org.za/about-us/samsa-mandate> last accessed, 6 August 2016.
[56] Act 5 of 1998.
[57] Act 57 of 1951

and Civil Liability) Act,[58] Marine Pollution (Prevention of Pollution from Ships) Act,[59] 1986, Marine Pollution (Intervention) Act,[60] 1987 and the Wreck and Salvage Act.[61]

The Marine Pollution (Control and Civil Liability) Act, does not expressly note the importance of salvors in pollution prevention measures, but it alludes to the involvement of salvors in incidents that may give rise to pollution measures. In this regard the Act, in conferring powers on SAMSA to direct the owner or master of a ship involved in a maritime casualty, 'with a view to preventing the pollution or further pollution of the sea by such substance',[62] extends the power to the direction of salvors, thus mirroring the United Kingdom SOSREP.

> If any person performs salvage operations in connection with a ship or tanker, any requirement of the Authority [SAMSA] under subsection (1) in connection with such ship or tanker or its cargo or the harmful substances therein shall also be made known to such salvor, and any such requirement…also be binding upon such salvor and any such requirement that a specified act be performed shall, unless the Authority otherwise directs, also be construed as a requirement under that subsection and binding upon such salvor that no steps be taken by such salvor which would obstruct or be likely to obstruct the performance of the specified act.[63]

It appears also, although not expressed as such, as if the Act may potentially provide for the possibility of a salvor recovering its expenses from the state where its following of directions result in expenses. In this regard, section 4(3) of the Act provides:

> If the owner of a ship or a tanker, in complying with a requirement of the Authority in terms of subsection (1), incurs any expenses and—
>
> (a) the discharge or likelihood of a discharge of the harmful substance in question was due wholly to the fault of the State; or
>
> (b) the discharge or likelihood of a discharge of the harmful substance in question was due partly to the fault of the State,

[58] Act 6 of 1981
[59] Act 2 of 1986
[60] Act 94 of 1996
[61] See <http://www.samsa.org.za/legislation> last accessed, 6 August 2016.
[62] Act 6 of 1981, s.4(1).
[63] S.4(2)(c).

> the amount of such expenses, in the event contemplated in paragraph (a), or the applicable proportion of the amount of such expenses determined in accordance with the provisions of the Apportionment of Damages Act 1956 (Act 34 of 1956), in the event contemplated in paragraph (b), **shall become payable to the owner by the State**. (emphasis added)

The section appears to only allow for limited instances in which expenses could be recovered from the state. First, the incurring of expenses must be the result of complying with a direction of the Authority. Second the discharge or likelihood of a discharge of the harmful substance must, at least have been partly due to the fault of the State. In relation to fault of the state one may assume that this would be vicarious liability on the part of the state for the actions of the Authority. Nevertheless, it is not clear whether salvors would be covered by this subsection.

In accordance with the principle of *expressio unius est exclusio alterius*, the express mention of the owner of the ship or tanker suggests that salvors are not included under this subsection. This possibility is strengthened by the fact that the salvor is expressly mentioned under s.4(2)(c) as subject to the powers of the Authority to direct. As such, it would be logical to assume that the right of the owner to claim expenses would have been extended in similar fashion if it was to equally apply to salvors.

The Act, mindful of salvage operations, also provides that,

> [N]o provision of this Act shall be construed as derogating from any right to a salvage award, nor shall a salvor who would otherwise be entitled to a salvage award in respect of an act of salvage actually performed, cease to be so entitled merely on the ground that such act was carried out as a direct or indirect result of a requirement laid down or an order issued in terms of this Act.

The above provision, appears to simply confirm the legal entitlement of salvors to a property salvage award, essentially precluding the possibility of an argument that salvors acting under directions from SAMSA were not performing salvage operations. Of course, such an award might include special compensation to the extent that it exceeds an Article 13 award. Nevertheless, it is doubtful that the absence of this provision would have made a material difference to the salvor's right to a salvage award. This right of the salvor is also confirmed by Article 5 of the

Salvage Convention.[64] In confirming this right of salvors the Act, while empowering the Authority to direct salvors and recognising the involvement of salvors for the purpose of environmental protection, appears to emphasise the actions of salvors as traditional property salvage. The extent to which the Act links salvors and salvage activities to property appear to detract from the extent to which these services could be regarded as part and parcel of pollution prevention mechanisms. As such the legislative expression of the need for salvors' in a framework of environmental protection measures lacks the necessary clear articulation and appreciation of the inextricable link between property salvage and environmental protection.

At best, we have an indirect legislative appreciation of the importance of salvors and salvage services in the context of a broader environmental protection matrix. Nevertheless, as mentioned in the introduction to this study, the utility of salvors is obvious when looking at the extent to which salvors have been instrumental in responses to shipping incidents. In the *Seli 1* incident off the coast of South Africa, SAMSA instructed salvors involved in the operation to make the removal of fuel from the bulk carrier a priority. According to a media statement by the South African government,[65] '[t]he removal of the casualty's fuel [was] a proactive measure to ensure that risk to the environment from oil pollution is reduced and all relevant authorities have activated contingency plans so as to minimise impact should there be a spill'.[66]

Also, looking further at the wider network of arrangements that exist for the protection of the South African marine and coastal environment one can see how the involvement of salvors, considering their obvious utility value, ought to be and indeed is potentially promoted even if only indirectly so. Here one may consider a phrase contained in the long title of the Disaster Management Act, which asks for:[67]

> 'an integrated and co-ordinated disaster management policy that focusses on preventing or reducing the risk of disasters, mitigating the severity of disasters,

[64] See discussion above, ch 4, 145.
[65] Media Statement of the South African Government, 8 September, 2009 <http://www.gov.za/st/node/598664> accessed 16 August 2016.
[66] ibid.
[67] Act 57 of 2000.

> emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation',[68]

While the above phrase does not expressly name or ask for salvors, read together with the clear recognition of salvage efforts in environmental protection measures, it does provide for, at least an indirect promotion of salvage. The importance of salvage operations is also borne out by local based pollution response plans that expressly recognise the role of salvors in a network of pollution response measures. The Shipping Incident Disaster Risk Management Plan (DRMP), produced by the City of Cape Town's Disaster Risk Management Centre (DRMC),[69] and drawn up in terms of the National Disaster Management Act, provides that

> [a]ll hazards related to shipping and maritime operations at sea adjacent to the municipal area of the City of Cape Town are covered by this DRMP, viz. a major shipping incident, accident or any other type of emergency involving one or more vessels or marine structures and which has some effect on the City's community.

The above statement referring as it does to 'all hazzards' covers more than oil spills although it expressly provides that a 'coastal oil spill hazzard' would be dealt with under the National Coastal Oil Spill Contingency Plan.[70] Nevertheless, the DRMP expressly aims 'to establish long-term, on-going, clear and effective working relationships and build shared resources and capacity between the Parties relating to effective salvage operations that require reactions and assistance from the Parties'.[71] While there is no express mention of salvage operations as a preventive measure, effective salvage operations are nevertheless a goal within the DRMP. As such, salvage operations are, at least at a practical level, placed within pollution response measures.

In South Africa, like the United Kingdom, the importance of salvage operations in the prevention of pollution has also been reinforced through the use of certain contractual measures. As early as 1975, the South African Department of Transport entered into a contract with the then national carrier, SAFMARINE for the

---

[68] ibid. Long title of the Act.
[69] Accessible at, <https://www.capetown.gov.za/en/EnvironmentalResourceManagement/Coastal%20Management%20Programme%202014/Chapter%2012%20-%20Coastal%20Emergency%20Plans.pdf> accessed at 8 August 2016.
[70] ibid. Coastal Emergency Plans, ch 12, 5.
[71] ibid. 6.

latter to construct 2 ocean-going tugs and 5 oil pollution abatement vessels,[72] representing the first attempt internationally of a country entering into a salvage standby agreement with commercial salvors. This was a very clear statement of the importance, not only of salvage capability, but also of the role of salvors.[73]

The idea behind this initiative was to maintain salvage tugs in a state of readiness to provide prompt responses to marine casualties. This arrangement still subsists with a contract between the South African Department of Transport (DOT) and commercial salvage company Smit Amandla Marine (SMIT), the latter providing their ocean-going salvage tug the *Smit Amandla* for emergency callout and response to high risk maritime emergencies.[74] As was the case with the United Kingdom MCA CAST agreement, the South African authorities were similarly hesitant to allow the writer access to this contract given sensitive proprietary measures contained therein. Nevertheless, the writer has through a personal interview with the Business Unit Manager for Offshore Marine Services (the BUMOMS),[75] of SMIT obtained insight into the contractual arrangement. The key components of the agreement appear to be broadly similar to those of the MCA CAST agreement with a few important differences.

The 'SMIT DOT contract' is in the form of a long term daily charter contract, broadly based on a BIMCO Supplytime Charterparty for offshore vessels. In terms of the contract, SAMSA (as agent for the DOT) can mobilise the tug whenever needed with the tug available on twenty minutes' notice. Being a long term daily charter contract means that SMIT is remunerated on a time-based hire, thus providing for a payment mechanism broadly similar to that under the MCA CAST. The primary duty of SMIT is to protect the South African coast, primarily through keeping the oil in the vessel. In this regard, SMIT is a key component in the efforts directed at the prevention of pollution of the South African coast.

---

[72] Holloway, P 'South Africa's Practical Approach to Dealing with Oil Pollution Prevention and Ships in Need of Assistance' (2005) *China Oceans Law Review* Vol.2, 141, 142.

[73] This initiative was followed by a number of other countries, most notably, France following the *Amoco Cadiz* marine disaster, Germany, Spain and the Netherlands. Following the *Braer* incident and Lord Donaldson's Review (above n 1), the United Kingdom has also taken steps to retain tugs for oil pollution prevention.

[74] See Tugs Towing & Offshore Newsletter http://mastermarinersa.co.za/wp-content/uploads/2016/06/Special-Smit-Amandla.pdf> accessed 17 August 2016.

[75] Captain Dave Murray, Business Unit Manager for Offshore Marine Services. Telephonic interview, 26 August 2016.

The contract also allows SMIT, to secure commercial salvage or towage contracts, independent from the 'SMIT DOT contract', with third party clients. For such independent commercial contracts, presumably where there is no apparent environmental threat, SMIT must obtain an official release from SAMSA. Obtaining such release requires of SMIT to provide information including how they would continue to protect the coast while engaged in commercial operations. This is quite clearly in line with the primary duty owed under the contract. The third party commercial contracts are typically concluded on standard form such as the LOF, BIMCO Towhire or BIMCO Towcon. Presumably, from the SAMSA perspective, information provided on the continued protection of the South African coast means that commercial property salvage arrangements are secondary to the prevention of pollution.

Similarly, where SMIT is mobilised by SAMSA to assist in a marine casualty under the 'SMIT DOT contract', the former may enter into a commercial salvage contract. In a situation where SMIT enters into a commercial salvage operation with the owner of a casualty after mobilisation by SAMSA, the situation appears to be very different to that under the MCA CAST agreement. The 'SMIT DOT contract', unlike CAST, is not terminated by the commercial salvage contract and the DOT continues to pay the daily hire agreed in terms of the contract. The reasoning informing this arrangement was that, in return for a favourable daily charter rate, SMIT would retain all revenue earned under a separate salvage or towage intervention. This favourable charter rate involves a significant reduction of the charter rate. This replaced the previous arrangement, which included an element of profit share in relation to any potential salvage award or payment received under a towage contract.

As such, the difficulties noted in relation to the continuation of the primary duty owed to the MCA under the CAST contract, appear to be absent under the 'SMIT DOT contract'. Given the primary duty of SMIT, the DOT's primary interest under the contract remains served on the basis of hire payable albeit reduced. However, all the tug's consumables are for the account of SMIT thus not becoming a State expense. Essentially, SAMSA as agency for the DOT, from a legal perspective, continues to be responsible for the payment of the benefit they have contracted for. Unlike the CAST, the payment of remuneration for environmental services is not entirely shifted

to the owner of salved property, although the salvor may, presumably, claim a salvage award including special compensation.

In cases where commercial contracts are unachievable such as where a casualty is uninsured the South African State must pick up the costs of the operation. However, this does not result in increased remuneration on the part of SMIT as they will continue to be remunerated on the basis of the hire payable under the 'SMIT SAMSA contract'. This contract, unlike the CAST agreement, appears to recognise the importance of property salvage in the context of pollution prevention without denying the contractual right of SMIT to continue to be remunerated for continuing their original undertaking. Unlike the CAST agreement, the contract does not consider the obtaining of a commercial salvage agreement as a replacement of the coastal state's undertaking to pay for the provision of the tug. Therefore, there is better recognition of the dual nature of salvage, namely property-commercial and environmental with the appropriate appreciation of the continued liability of the state (via the agency of DOT) for services rendered in its interest.

According to Bishop, governments with vulnerable coastlines are increasingly likely to turn to salvage retainer arrangements.[76] These contractual arrangements quite clearly demonstrate the need for salvage services in the prevention of pollution emanating from ships. Nevertheless, while these contracts between coastal states via the agency of the relevant authorities and private commercial interests show a definite positive development in the integration of salvage services into environmental protection, the necessary legal theoretical framework remains murky. While coastal states are willing to incur costs in keeping tugs in a state of readiness, the payment of remuneration where salvors are engaged in salvage operations is, too often, shifted to the owner of the ship with the consequences and limitations that entail.

The focus, therefore, still appears to be more that of liability of salved property owners than the service rendered to the coastal state. This reluctance on the part of some coastal states to detach the question of property salvage and rights thereunder from the obvious environmental service rendered by salvors mean that the limitations

[76] Quoted in MarineLink.com Maritime Reporter and MarineNews Online accessable at <http://www.marinelink.com/article/salvage/environment-handa inhand-maritime-industry-864> accessed on 7 August 2016.

noted in relation to the payment of awards for such services remain. Nevertheless, the ‘SMIT DOT contract’ appears to provide a positive development in relation to the issue of the shifting of responsibility.

It should be noted that SAMSA does not preclude other tugs or salvors from performing oil pollution prevention or salvage operations on the coast. However, such other tugs or salvors performing operations will be subject to an approval by SAMSA of their salvage plans. As such, SMIT do not have the exclusive right to pollution prevention and salvage work on the South African coast.

While much can be said about levels of remuneration payable, the South African government through the agency of SAMSA appears to be paving the way for taking responsibility in a manner which could provide a viable way for remunerating salvors on the appropriate legal basis, namely contractual unencumbered by the legal technical limitations of property salvage. Moreover, the maintaining of environmental services despite a separate commercial property salvage contract provides better recognition of the obvious dual purpose of salvage and this should also become clearer in the discussion to follow. Moreover, the contractual integration of salvage into coastal state pollution response measures presents real possibilities for the remuneration of salvors’ environmental services on a basis that is not the law of salvage.

7.3 Salvors’ claims for environmental services under international instruments outside of the law of salvage.

The regulation of environmental services within the law of salvage and payment for these services on the basis of salvage become more questionable when considering the extent to which salvors can claim under certain international instruments outside of the law of salvage. Logically, there would be no need for redress outside of the law of salvage if salvors’ environmental services are properly accounted for in the law of salvage. At the same time, the possibility of claims outside of salvage law suggests a degree of fragmentation of an issue, i.e. the remuneration of salvors for environmental protection services, for which there is no immediately apparent legal justification.

This second part of the chapter will look at the extent to which salvors may avail themselves of remuneration opportunities outside of the law of salvage under

the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 Fund Conventions. How are salvors' interests, primarily regulated under the Salvage Convention or salvage contracts, served under these instruments? The extent to which these liability and compensation instruments interact with the Salvage Convention is expected to shed light on the manner in which the law of salvage could be developed to serve a wider marine environmental protection network that is more than an indirect recognition of the utility value of salvage but actually reflected in a sound legal theoretical manner.

7.3.1 The 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1992 Fund Convention.

Four Conventions have operated in the international system of compensation for oil pollution from ships.[77] These conventions are the Civil Liability Convention (CLC) 1969 establishing the tanker owners' liability for pollution damage, the Fund Convention (FC) 1971 providing supplementary compensation; and the CLC 1992 and FC 1992, which are revised versions of the initial CLC and FC.[78] The CLC (1969 and 1992),[79] and the Fund, together, provide a tiered approach to the economic compensation for oil spill damage.[80] Essentially, the 1992 Fund Convention, supplementary to the 1992 CLC, compensates victims in the situation where compensation under the 1992 CLC is not available or is considered to be inadequate. Under the 1992 CLC convention, the ship-owner or the shipowner's P&I Club is liable to provide the first tier of compensation. A second tier of compensation is provided under the Fund Convention, if the compensation available under the CLC is inadequate, from the International Oil Pollution Compensation Fund (IOPC) provided. The IOPC Fund is made up, largely, of levies made on oil companies.[81] In this manner it is apparent that, unlike the situation of special compensation under the Salvage Convention, cargo owners in the form of the oil industry are more involved in efforts directed at environmental protection.

---

[77] Chao Wu, 'Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System' (2002) *Spill Science & Technology Bulletin*, Vol. 7, 105–112.
[78] ibid.
[79] The CLC 1992 operates in most states party to the CLC system and it provides for higher compensation limits. See also De la Rue and Anderson (n 5) 137.
[80] See Mason M, 'Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime' (2003) *Marine Policy* 27 1.
[81] In proportion to the tonnage of oil they receive.

Being supplementary to the CLC, the fund pays out an amount less the amount paid by the ship-owner for damage incurred by Governments, local authorities, companies and private citizens because of oil spills. A third tier of compensation is also available in some countries provided by the Supplementary Fund Protocol.[82]

7.3.2 The CLC 1992

The 1992 CLC finds application in South Africa via the Merchant Shipping (Civil Liability Convention) Act,[83] with the latter providing that '[s]ubject to this Act, the 1992 Protocol has the force of law in the Republic'.[84] The 1992 Civil Liability Convention governs the liability of shipowners for oil pollution damage.[85] In this regard, the CLC operates on the basis of strict liability for shipowners, subject to a few exceptions.[86] The shipowner is also entitled to limit his liability to an amount which is linked to the tonnage of his ship,[87] except where

> pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.[88]

The CLC also creates a system of compulsory liability insurance in respect of ships carrying more than 2000 tons of oil in bulk.[89]

7.3.3 The International Oil Pollution Compensation (IOPC) Funds

The IOPC Funds are two intergovernmental organisations (the 1992 Fund and the Supplementary Fund) which provide compensation for oil pollution damage that occurs in Member States, resulting from spills of persistent oil from tankers.[90] As mentioned earlier, the limited compensation available under the CLC and the need

---

[82] Protocol of 2003 To The International Convention On The Establishment Of An International Fund For Compensation For Oil Pollution Damage, 1992. Article 4(1) of the Protocol provides that '[t]he Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention'. See also De La Rue and Anderson, (n 5) 82.
[83] Act 25 of 2013.
[84] Section 2(1)
[85] CLC Article III(1).
[86] CLC Article III(2).
[87] CLC Article V.
[88] CLC Article V(2).
[89] CLC Article VII(1).
[90] <http://www.iopcfunds.org/about-us/> last accessed 1 August 2016.

for this to be increased gave rise to the 1992 CLC and the 1993 Fund Convention.[91] In the wake of the *Erika and Prestige* incidents, a supplementary Fund Protocol was adopted in 2003, which provided for compensation over and above that of the 1992 Fund Convention, in States that are parties to the Protocol.[92] These IOPC Funds are funded by contributions paid by recipients of certain types of oil by sea transport, with contributions based on the volume of oil received in a relevant calendar year. In this way, the oil industry itself is taking some responsibility in relation to pollution damage. This is not reflected in the way the Salvage Convention allows for special compensation paid to salvors except for the extent to which cargo interests might contribute to an Article 13 award where presumably the 'skill and efforts of the salvors in preventing or minimizing damage to the environment'[93] has been taken into account.

7.3.4 Salvors under the CLC and Fund Conventions

A salvor who has performed environmental services could potentially recover compensation under the CLC. A salvor might be interested in pursuing this avenue in the event of his inability to enforce a claim for special compensation under Article 14 of the Convention.[94] Article I(7) of the CLC provides for the costs of 'preventative' measures to be recovered defining this as 'any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage'. Also, the CLC defines pollution damage to the environment as follows:

> loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken

A salvor, in order to claim in respect of such damage, would probably have to show that he has gone beyond the narrow confines of the immediate salvage operation from which damage emanates. As shown, the pollution damage to which a salvor is directed under SCOPIC is narrowly defined and with reference to the salvage operation. The obvious conflict here is that a salvor is not required to go beyond the

[91] ibid.
[92] ibid.
[93] 1989 Salvage Convention Article 13(1)(b). See discussion above, ch 4.
[94] See De La Rue and Anderson (n 5) 588.

immediate vicinity of the salvage operation under salvage law while the CLC does not restrict the salvor in this manner. This creates an obvious tension between the salvor's private law duties in relation to the shipower under the Convention and SCOPIC and the possibility of pursuing a claim under the CLC. One may argue that a salvor could potentially be in breach of its duties in relation to the shipowner when performing environmental services beyond that as directed under the law of salvage. At the same time, however, the salvor would still be acting in the interests of the shipowner in the sense that the CLC imposes liability on a shipowner and potentially its P&I Club.

A key difference between a claim under the CLC and special compensation under the Convention and SCOPIC is the fact that the salvor, under the CLC, would have a 'direct action…against the shipowner's …P&I insurer'.[95] While this provides the salvor with an added enforcement pathway, its rights against the insurer will be no greater than that of the shipowner against its P&I insurer and any defences of the insurer against the shipowner can be raised against the salvor.[96]

7.3.5 Difficulties created by the Salvage Convention for claims under the CLC

While the Salvage Convention and SCOPIC further the indirect advancement of environmental protection concerns, both maintain the property bias of traditional salvage law. It has been argued that this trend is unlikely to be changed as it would involve a fundamental and unwarranted change to the law of salvage that would only result in uncertainty. However, this very bias of salvage law creates potential difficulties for a salvor's claims under the CLC. These difficulties relate to the purpose that informs salvage operations as well as the assessment of costs that a salvor could recover.[97]

7.3.5.1 The purpose of preventative measures and salvage

The CLC allows reasonable measures taken by 'any person',[98] but only where measures taken in the preventing or minimizing of pollution damage were specifically directed at this outcome. Environmental services in salvage operations are set out as incidental to salvage operations. This may raise questions about the extent to which

[95] ibid.
[96] UK Third Parties (Rights against Insurers) Act 1930. See also De La Rue and Anderson (n 5).
[97] See De La Rue and Anderson, (n 5) 589.
[98] CLC Article I(7).

a salvor's actions were directed at pollution prevention as opposed to the salvage of property. This situation is exacerbated by the situation under SCOPIC, where even the salvor's potential compensation for environmental services are restricted by the extent to which they are necessary for the proper performance of the salvage operation.[99] As noted in relation to pollution response measures, this notion of failing to distinguish property salvage operations from salvors' environmental services might potentially have the same impact.

In this respect it might be difficult for salvors to clearly show that the purpose of their actions were to prevent pollution damage. Nevertheless, in spite of difficulties created by definitions employed, it has been shown that salvage could potentially be viewed as a dual purpose activity. In this regard mention has also been made of outside interests indirectly being advanced by the manner in which salvors' actions are circumscribed under the Salvage Convention and SCOPIC. How does what essentially amount to a twofold effect[100] impact on the requirement of the CLC that the purpose of measures taken must be pollution prevention?

The above question raises difficulties that are well identified by De La Rue and Anderson. The authors, commenting on the various parties that may be involved in salvage operations where there is a threat to the environment (owners, salvors, insurers and public authorities monitoring salvage operations), note how these parties may differ in relation to the priority attached to outcomes.[101] Aside from the duties imposed on salvors, motives could potentially be driven by a calculation of the value of property at risk and the prospect of success as opposed to the extent of possible pollution that may give rise to remuneration in excess of a property salvage award.[102] This is also a calculation that could change over the time of the salvage operation. This suggest a rather murky situation of changing motives and potentially divergent interests. Nevertheless, a few cases may shed light on the way these issues have been approached.

[99] See discussion of SCOPIC, above, ch 5
[100] See De La Rue and Anderson, (n 5) 394.
[101] ibid.
[102] ibid.

An Italian case, the *Patmos* (Italy, 1985),[103] considered whether salvage operations were covered by the definition of pollution damage under the CLC 1969. Essentially, the court had to consider whether salvage operations constituted preventive measures for the purpose of the convention. The Italian Court of first instance confirmed that salvage operations were not preventive measures due to the fact that salvage was primarily directed at the rescue of property, namely ship and cargo. The court essentially confirmed the observations in earlier chapters that the aim of salvage, even providing for the possibility of a secondary purpose to salvage, was to save property. The court went as far as acknowledging the fact that such operations might have the effect of preventing pollution, but that this was not enough to trump the primary purpose of salvage. Essentially, the court was less concerned with the practical outcome of salvage than the motives with which the salvors operated.

Of course, this case was decided prior to the Salvage Convention 1989 and one can only speculate on the effect that the environmental provisions in the instruments might have had on the court's conclusion in relation to the purpose of the salvage operation. Nevertheless, assuming that the decision was informed by the nature of salvage operations rather than an actual investigation of the salvors' motives, one may logically conclude that the court could reasonably have maintained this outcome. In this regard, it has been demonstrated how the Salvage Convention has maintained the traditional definition of salvage operations.

In the *Rio Orinoco* case (Canada, 16 October 1990),[104] the question of the relationship between salvage and preventive measures as well as the question of claimant's motives under the CLC also came to the fore.[105] Here it was decided that the attempts made to remove the RIO ORINOCO and her cargo were within the definitions of 'pollution damage' and 'preventive measures' provided in Articles I(6) and I(7) of the CLC, because the primary purpose of these operations were to prevent pollution.[106] Interestingly also, the Fund accepted that these operations, during certain periods, had a dual purpose to prevent and minimise pollution and to

[103] See the Oil Pollution Compensation Fund Annual Report 1988 60, where the case is discussed.
[104] See the Oil Pollution Compensation Fund Annual Report 1990 45. Accessible at <http://www.iopcfunds.org/uploads/tx_iopcpublications/1991_ENGLISH_ANNUAL_REPORT.pdf> last accessed 1 August 2016.
[105] ibid. 48.
[106] ibid. 50.

salve the vessel and the cargo.[107] The key, however, was to distinguish between those aspects of the operation directed at pollution prevention and those directed at the saving of property. Therefore, as in the *Patmos,* it remained essential, for a claim under the CLC, that the primary purpose must have been to prevent or minimise pollution.

While the Fund highlighted the issue of motive, it could be argued that the essential difference between the *Rio Orinoco* and the *Patmos* cases was the prominent involvement of the Canadian government as claimant in the former. Essentially, while the relationship between salvage and preventive measures under the CLC was an issue, the motive of the salvors was subsumed under that of the coastal authority (acting for the Canadian government), and it was the latter's motive that became relevant. As noted by De La Rue and Anderson,[108] 'the active involvement of the Canadian Government, and its controlling influence over the operations, left no room for doubt that pollution avoidance was the overriding purpose'.

According to De La Rue and Anderson, in the ascertainment of purpose in the *Patmos* and *Rio Orinoco* cases, the purpose of the claimants was clear and outweighed other possible purposes.[109] Nevertheless, while it would be difficult to argue against the idea that any governmental involvement is driven by environmental protection concerns, motive might not necessarily be the best basis upon which to determine entitlement to compensation under the CLC and Fund Conventions. In this regard, it has already been mentioned that motives can change during salvage operations, while different parties might actually have different primary outcomes in mind. When, for example, would a shipowner's purpose be to prevent or minimise the environment as opposed to minimising its own liabilities, especially given the direct relationship between these two issues? Is it enough to suggest that the mere intention to minimise liability is subsumed under the practical outcome of environmental protection, to the extent that liability is indeed prevented or minimised?

---

[107] ibid.
[108] De La Rue and Anderson, (n 5) 398.
[109] ibid.

Clear from the above, is the fact that an unclear purpose might result in significant difficulties in ascertaining the validity of a claim under the CLC. Added to the above complications is the idea that costs to be recovered might have to be apportioned, between different measures potentially directed at different aspects of the salvage operations.[110] De La Rue and Anderson, referring to the *Tarpenbek* incident suggests that instead of looking at operations as a whole, a segmental approach might be more appropriate.[111]

> where the primary purpose of an operation is to avoid pollution, a deduction may nevertheless be made for the cost of specific measures serving a different purpose, such as recovery of the wreck of the ship after the oil has been removed.

Nevertheless, as noted by the authors, this approach has its limitations in that it might be difficult to ascertain the actual purpose of a specific measure.[112] This approach might also not consider that a single measure could have a dual purpose, in that the saving of property could be necessary for the prevention or minimising of pollution. It is submitted that an overemphasis on motive or purpose in such a situation creates unnecessary difficulties, by ignoring the fact that decisions often have to be made in difficult circumstances and quickly. Moreover, the decision in the *Patmos* might present a further difficulty. While, difficulties aside, one could logically sever salvage specific measures from operations directed primarily at pollution prevention, the converse might not necessarily be true. The very fact that one directs attention to the prevention of pollution presupposes a successful property salvage operation. The *Patmos* decision appears to preclude the possibility of a recovery under the CLC where an operation is primarily directed at salvage. In this regard, the possibility of pollution prevention as a by-product of salvage was clearly not recognised as amenable to compensation under the CLC.

Nevertheless, the *Portfield* incident suggests that salvage operations that are prolonged due to environmental protection concerns, may contain elements that could be compensated as preventive measures.[113] The Portfield sank with a cargo of

---

[110] ibid. 399.

[111] ibid. *The authors refer to the Tarpenbek incident where the 1971 fund took the position that while the primary purpose of the contract was to avoid pollution, the threat of pollution ceased when the oil was removed from the tanker and that subsequent costs were not recoverable under the CLC.*

[112] ibid.

[113] IOPC Fund Annual Report 1991 51.

diesel and medium fuel oil while at berth in Pembroke Dock, Wales,[114] and salvage operations were prolonged and more expensive because of additional efforts to prevent oil pollution.[115] De La Rue and Anderson suggest that the starting point for the analysis in this case was the fact 'that the operations had salvage as their primary purpose'.[116] However, while salvage operations were clearly taking place the key issue was that the shipowner, claiming compensation for preventive measures, maintained that the primary purpose of the operations was to prevent oil pollution.[117]

As such, the incident is different to that of the *Patmos* and consistent with the earlier mentioned idea that salvage accompanied by environmental benefits would probably not easily find compensation under the CLC for preventive measures. The shipowner's contention, that operations were primarily directed at environmental protection, was based on the argument that salvage operations would have been completed within hours and at a much lower cost. This established the purpose of the salvor as one that was specifically directed at environmental protection as a primary purpose of operations.

As such, this cannot be regarded, as suggested by De La Rue and Anderson, as an instance where salvage was the primary purpose with added preventive measures. It might be argued that, in a case like this, it would be essential for a claimant salvor to be able to show how added measures could have been omitted in the salvaging of property. Showing this would then raise the very real presumption that added measures must have been directed at something other than property salvage, perhaps environmental protection.

However, once again, a salvor might potentially be trumped by restrictive environmental duties and the very real possibility of an argument that such added measures were nevertheless part and parcel of salvage operations. As noted in respect of SCOPIC, the environmental duties of the salvor are very narrowly circumscribed by salvage operations. In this regard it has also been noted by De La Rue and Anderson that payments under SCOPIC 'are less easily characterized as

[114] ibid.
[115] ibid.
[116] De La Rue and Anderson, (n 5) 400.
[117] IOPC Fund Annual Report 1991 51.

relating to avoidance of pollution than is the case with special compensation'.[118] Under SCOPIC, the salvor is encouraged to undertake pollution clean-up in the immediate vicinity of the vessel, while the duty to prevent or minimise environmental damage is imposed insofar as it is necessary to effect salvage operations. This might, logically, lead to a conclusion that preventative measures were not in relation to the environment but in furtherance of property salvage operations.

At the same time, it could be argued that any clean-up measures beyond the immediate vicinity of the salvage operations would not be directed at property salvage but constitute preventive measures under the CLC. While, practically speaking, one could imagine a conscientious salvor going beyond contractual duties to prevent or minimise environmental damage, this might from a legal theoretical perspective constitute a breach of the SCOPIC contract. Therefore, what we have is a very curious tension created by private and public interests being at odds, possibly because of restrictive definitions employed in different areas of law that both seek to further environmental values. The way the law of salvage appears to almost function at odds with the extent to which salvors could potentially find redress in other areas of the law is well encapsulated by the observations of Wang[119] that

> A salvage operation is an event which can precede, accompany and follow an oil spill, and hence, is likely to constitute a complicating factor in an analysis of compensation claims.[120]

However, it is apparent that services rendered under the MCA CAST agreement and indeed the 'SMIT DOT contract' might not pose the same difficulties as a claim under the Salvage Convention and SCOPIC given the fact that environmental protection is a primary purpose of the contract. However, under the former two contracts, it is more than likely that the claimant under the CLC would be the United Kingdom or South Africa as hire paid to the tugowner will be costs potentially recoverable. The difficulties observed in respect of the Salvage Convention and SCOPIC will, however, be reintroduced where the owner of a tug chooses to enter into a salvage

[118] De La Rue and Anderson, (n 5) 404.
[119] Wang Hui, Civil Liability for Marine Oil Pollution Damage: A Comparative and Economic Study of the International, US and Chinese Compensation Regime (Energy and Environmental Law and Policy Series) (Wolters Kluwer Alphen aan den Rijn, 2011)
[120] ibid. 271.

contract, thus terminating the CAST agreement or in the case of the 'SMIT DOT contract' partially superseding the contract.

7.3.5.2 The assessment of costs that a salvor may recover

Aside from issues in relation to the purpose of actions undertaken in the context of salvage operations where there is a threat to the environment, the costs claimable by salvors could also prove to be problematic.[121] Essentially, recoverable costs under the CLC might be more restrictive than that under Article 14 of the Salvage Convention and SCOPIC.[122] The key issue is that the shipowner might potentially be a claimant under the CLC, where it has already paid a salvor for salvage services. In such a situation the compensation will be assessed with reference to the costs of the shipowner in relation to measures undertaken rather than the costs of the salvor.[123]

This issue is exacerbated by the fact that the costs of the shipowner is probably restricted by the way environmental services under the SCOPIC and the Salvage Convention is linked to the property salvage operation. This would certainly explain the contention that recoverable costs of the salvor might be more restrictive. The situation would probably be the same where salvors act under the direction of coastal authorities, where the latter would likely be the claimant under the CLC as demonstrated in the *Rio Orinoco* case. One may assume that any payment received by a salvor would be off-set against a potential claim under the CLC. In this regard, De la Rue and Anderson appear to doubt the extent to which the IOPC fund would be prepared to take into account costs over and above those immediately relevant to the operations.[124] For example, the IOPC Fund might not be as concerned with the question of the maintenance of salvage capabilities, which under the Salvage Convention influenced the idea of salvors' overhead charges also being taken into account in the payment of special compensation.[125] Nevertheless, one might argue that actions beyond those owed to the shipowner under SCOPIC ought, in principle, to be recoverable under the CLC.

[121] De La Rue and Anderson, (n 5) 590.
[122] ibid.
[123] ibid.
[124] De La Rue and Anderson, (n 5) 590.
[125] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 322 HL.

From the above discussion in relation to purpose and recoverable costs, it is apparent that a salvor would essentially have to go beyond its duties under the Salvage Convention and SCOPIC to make out a case that preventive measures taken should be compensated. Nevertheless, as mentioned earlier, this might potentially be at the risk of not properly performing duties imposed under these instruments. Both the Salvage Convention and SCOPIC regulate the relationship between salvor and shipowner and, while practically relevant to the furthering of third party interests, they do not account for the interests of coastal states in a direct fashion that is in any way underpinned by sound legal principle.

Under contracts like 'SMIT DOT' and the MCA CAST, the situation might be better given that the primary duty of the tugowner would be to prevent pollution. However, it is apparent under the CAST that the possibility of the tugowner entering into a salvage agreement resulting in the termination of CAST reintroduces the limitations posed by the Salvage Convention and SCOPIC. The extent to which the 'SMIT DOT agreement partially allows for the salvage contract to supersede the ETV contract similarly introduces property salvage operations into the equation that might complicate potential claims under the CLC. One may go as far as suggesting that this may potentially be an indication of the primary purpose of the operation changing from pollution prevention to traditional property salvage, which may cause difficulties for recovery under the CLC.

7.4 The position of commercial salvors outside of retainer agreements

A problem with retainer agreements such as the 'SMIT DOT contract' is the fact that they do not cover those instances where a commercial salvor, not a party to a retainer contract, render environmental services. Especially, where such a commercial salvor acts under the directions of SAMSA, the very purpose of the activity might be significantly changed. Referring once again to the *Atlantic Empress* and the *Aegean King* incident, salvors rendered a service consequential upon specific instructions by Carribbean states. Of course, in so instructing salvors, these coastal states acted in terms of powers conferred under international law. If it was a case of salvors acting under an agreement such as the 'SMIT DOT contract', the clear contractual link between the salvors and the coastal state could have allowed for the appropriate claims under the CLC and Fund Conventions. However, in the

absence of such a contract, one would again be cast within the framework of the Salvage Convention and special compensation and the problems created for claims under the CLC and Fund conventions.

In the absence of powers exercised under the relevant international law instruments, a South African court would likely have recourse to the common-law mechanisms such as *negotiorum gestio* and unjustified enrichment. However, as demonstrated these two common law mechanisms developed in a manner that does not easily account for the situation where a salvor performs environmental services. While nothing would prevent the state from entering into an independent contract with a salvor, it is highly unlikely because the situation in which such a contract has to be negotiated does not lend itself to protracted negotiations.

Of course, nothing prevents the State from simply exercising its powers in terms of the relevant international instruments. However, this is exactly the situation that the State needs to engage with a different kind of mindset, especially should we aim at providing the appropriate incentives for salvors. Here, the appropriate contractual link between the State and commercial salvors will provide a good basis for properly linking salvage operations with international instruments such as the CLC and Fund Conventions. Moreover, the obvious inequities of a system which channel all liabilities to the shipowner thus not allowing for an equitable spread of costs over the industry will be negated. This would be attained by the clear basis upon which the State would be able to pursue claims under the CLC and Fund Conventions without the need to disentangle environmental services from property salvage operations. As such, recipients of oil paying into the IOPC funds will make a fair contribution with the added positive element of not unnecessarily interfering with the established system of salvage law.

Given these positive aspects of a direct contractual link between the State and a commercial salvor it becomes imperative to develop this link in a legally sound manner. Should one look at a scenario such as the *Atlantic Empress* and *Aegean Captain* where the State involved itself in a salvage operation, it is apparent that the salvors' actions were, ultimately, performed in the interests of the coastal states. As such, the very purpose with which the salvors commenced operations were

frustrated. Their actions were not actions performed on behalf of the owners of ship and cargo anymore or even themselves with an aim of obtaining an award.

Their actions were at the behest of the interfering coastal state and the whole operation, should there have been the necessary contractual consensus, might have constituted a contract for particular services or in the South African context a contract of *mandatus.*[126] Nevertheless, as said, the notion of having to enter into protracted negotiations will probably result in the State simply exercising the powers conferred upon it under the relevant international law instruments. The best approach, therefore, also taking into account the limitations of the common-law mechanisms discussed in chapter 3, would be the appropriate statutory enactment, or amendment of existing legislation to provide for the necessary contractual link.[127]

7.5 Conclusions

This chapter demonstrated the significance of salvage operations in a wider framework of measures directed at the prevention of pollution from ships. Nevertheless, this practical role, being acknowledged, has not resulted in law being properly reflective of this reality. In the United States' integration of salvage contracts into their VRPs, one still has the situation that the coastal state's interests are promoted, with the owner of salved property still responsible for the remuneration of salvors. Essentially, the United States' approach sees any possibility of the remuneration of salvors for the benefit conferred on the State simply being shifted to the owner of salved property with the limitations regarding salvage as noted.

The United Kingdom approach certainly appears to provide more of a possibility for direct remuneration of the salvor by the recipient of the benefit conferred, but this is primarily dependent on the salvor not claiming a salvage award from the owner of salved property. Where a separate contract for towage or salvage is entered into, the CAST is terminated, which legally speaking, may change the very purpose of the activities undertaken by the salvor.

---

[126] See Joubert DJ and Van Zyl DH *Mandate and Negotiorum Gestio* in LAWSA 2nd ed Vol 17(1) para 1. A contract of mandate is a contract between a mandator (the State) and a mandatary (the commercial salvor) in terms of which the mandatary undertakes to do something at the request or on the instruction of the mandator. Although a mandate is usually performed gratuitously, provision can be made for the payment of a reward or remuneration.

[127] See discussion below, ch 8.

Compared to the above two situations the current arrangement between the South African government and commercial salvor SMIT represents a commendable stance on the part of the government to ensure salvage capability. It certainly places commercial salvage operations as an important cog in the wheel of pollution prevention while the state retains a direct contractual link to the salvor for the provision of environmental services. The contract appears not to treat property salvage operations as a replacement for the duty on the part of the coastal state via the agency of SAMSA to pay for services that benefit it. This certainly, allows for the opening up of possibilities in relation to the remuneration of salvors for environmental services.

The 'SMIT DOT contract' also allows for more clarity in relation to potential claims under the CLC and Fund conventions. The key problem with salvors' claims under the CLC and Fund conventions is the fact that salvage operations are directed, primarily, at the rescue of property. This intention, as shown, will prove fatal to a claim under the CLC and Fund Conventions although exceptions, such as where operations can be said to have a dual purpose, exist. The remuneration of salvors under contractual arrangements such as the 'SMIT DOT contract', especially given the primary duty under these contracts to safeguard coastlines against pollution, would provide evidence that salvage operations were directed at environmental protection, with property salvage a secondary concern. This however, presupposes the situation where the state brings a claim under the CLC and Fund Conventions as opposed to the salvor, who would have been remunerated for its services because of the contact with the coastal state. This means that the remuneration of the salvor, based as it is on the provision of environmental protection services, can by recouped by the state. There would simply be no reason for salvors to claim under these instruments with the added difficulties in having to distinguish between actions primarily directed at environmental protection and those directed at property salvage.

In relation to commercial salvors that may become involved in an operation where there is a threat to the environment, the situation is different. Here, one would ideally see the State enter into the appropriate contractual relationship with the salvors, independent of ordinary property salvage. However, as noted, this might involve protracted negotiations that is not ideal in a situation where quick actions are of the essence. Given the limitations of the common law in the absence of contract, a

good solution would be the necessary statutory enactment or amendment that would create the necessary link between the State and the commercial salvor.

Chapter VIII Conclusions and Recommendations – Does the law of salvage provide the appropriate basis for the remuneration of salvors' environmental services?

8.1 Summary of the issues

8.1.1 Environmental values and the law

Chapter I provided an overview and analysis of the interaction between values, informal social norms and law. In this regard it has been demonstrated that informal social norms and formal norms (law) are generally underpinned by the prevalent values of a society.[1] Where a critical mass of values exist this may lead to 'norm activation', social or formal through the enactment of law.[2] It is this phenomenon that also explains the 'greening of salvage law', as coined by Redgwell.[3]

The 1989 Salvage Convention and the South African Wreck and Salvage Act are the result of a growing concern with, and the value attached to, environmental protection.[4] In relation to salvage, disasters such as those involving the *Amoco Cadiz* and, in the South African context, the *Apollo Sea* highlighted the vulnerability of the marine environment in salvage operations where there is a threat to the environment. In this regard, the draftsman of the South African Wreck and Salvage Act specifically identified the *Apollo Sea* disaster as a trigger for the re-evaluation of environmental protection values in South Africa and, consequential thereto, the enactment of the Act.[5] The central involvement of salvors in marine casualties threatening the environment and the value attached to environmental protection would also explain why the law of salvage has come to be seen as the vehicle for the remuneration of salvors' efforts to protect the environment in shipping disasters.

This chapter also demonstrated how a functional approach to an understanding of the nature of law, including the law of salvage, should be adopted. This approach demands that we look at aims or outcomes and values when formulating law. Given the value attached to marine environmental protection and the central role played by marine salvors, the development of an environmental dimension to the law of salvage was to be expected.

---

[1] See above ch I, p15ff.
[2] ibid. 12.
[3] See discussion above ch 4, n8 and text thereto.
[4] See discussion in chs I and IV.
[5] See discussion above, ch 1 pp17-20 and ch 4, p158.

8.1.2 Historical overview of salvage

Chapter II provided an historical overview of the law of salvage, which highlighted, in line with the findings in Chapter I, the extent to which the development of early salvage law was often incidental to the achievement of wider social aims. In this respect, dealing with prevalent mischiefs or the attainment of specific goals were identified as developmental triggers in early salvage law. For this reason, environmental protection concerns and the utility of salvage operations in marine casualties posing a threat to the environment provide some explanation for the development of an environmental dimension to salvage. However, history shows that the safeguarding of maritime property was at the heart of salvage law from its earliest incarnations.

Salvage law has proven itself adaptable to technological and other changes, which made assumptions that this system could adjust to the relatively new challenge of environmental protection understandable. However, from the historical analysis it is also clear that the environmental dimension to salvage represent a significant departure from the core concern of salvage, namely, the safeguarding of ship and cargo. The legal theoretical nature and definitions employed in salvage took shape within the context of a jurisdictional battle and the establishing of jurisdictional boundaries between admiralty and common law courts in England. This resulted in a law of salvage that was historically limited to services to property at sea, unconcerned with the environment. This was also the system, including its property bias, that was introduced into the Republic of South Africa.

8.1.3 The Law of Salvage: The facilitation and remuneration of salvors' environmental services.

Chapter III investigated the legal theoretical nature of the law of salvage and possibilities offered in the common law of South Africa to develop salvage law in line with growing environmental protection concerns. It was illustrated that policy outcomes pertaining to the encouragement of salvors, the rescue of maritime property and the equity of rewarding salvors for benefits conferred upon the owners of maritime property provided the legal theoretical underpinnings for the law of salvage. The policy component of salvage also explains the notion of liberal salvage awards for the safeguarding and rescuing of property. However, this property rescue bias of salvage law also meant that the law was not geared towards

environmental protection services performed during salvage operations unless standard definitions were altered significantly.

In the South African context, some have suggested that salvage is related to the civil law *negotiorum gestio* as this was also the basis for salvage in early Roman-Dutch law. However, this was never the basis for its development in South African law. While salvage and environmental services in the context of salvage can conceivably be explained with reference to *negotiorum gestio*, it offers no more to the question of the remuneration of salvors than the law of salvage. Neither property salvage nor environmental services (even if divorced from salvage) fit the requirements of *negotiorum gestio* for the purpose of salvors' remuneration. This is primarily due to the restricted way in which *negotiorum gestio* was developed by South African courts. Moreover, as mentioned, any attempt by a South African court sitting as a common-law court to develop *negotiorum gestio* to give a salvor a reward for saving property or environmental services would amount to inappropriate judicial law making. Consequently, any changes to the law of salvage will have to be via the necessary statutory enactments or amendments.

Chapter IV provided an analysis of the South African Wreck and Salvage Act and the Salvage Convention. The Salvage Convention, despite its stated aims, remained a decidedly conservative instrument. While idealistic in its statement of purpose, the Convention represents an attempt to steer a course between the maintenance of the traditional law of salvage and the recognised concern with environmental protection. The Convention, to the extent that it encourages environmental services by means of special compensation, appears limited in that it is premised upon shipowner liability. As such, any benefits conferred on coastal states as well as the furthering of a public interest in environmental protection is at best indirect and incidental to the performance of property salvage operations in accordance with the Convention.

While coastal states undoubtedly benefit from salvors' environmental services, they do not contribute to the reward that salvors are entitled to, which runs contrary to one of the central tenets of salvage that savors are 'rewarded for the benefits they confer',[6] and that 'each and every interest which has received a benefit from the salvage service must contribute'.[7] However, this very tenet is limited by the

[6] See discussion above ch3 105.
[7] *Ibid.*

fact that salvage operations are viewed as a service owed to the owners of specially recognised categories of property, which do not include the marine and coastal environment. This precludes the proper recognition of benefits conferred that go beyond maritime property interests and shipowners' liability, thus resulting in a system of remuneration that is not equitable.

The Convention represents an attempt to further the public concern with environmental protection through the private law of salvage. As such, there is a clear reflection of environmental values and informal norms in the Convention. Nevertheless, the legal theoretical challenges posed by the significant public dimension added to the law of salvage are not appropriately dealt with. While the concern with environmental protection informs the salvage convention, the necessary synergies in relation to the remuneration of salvors, appear to take a backseat because of compromise and the maintenance of traditional notions of salvage. This also significantly detracts from the extent to which the policy concerns underpinning salvage can account for interests that go beyond that of the owners of salved property. In this regard, despite the clear environmental protection purpose that informed its drafting, the convention has not removed the inherent limitations of salvage law.

The South African Wreck and Salvage Act, although drafted as an answer to the perceived inadequacies of the Salvage Convention, amounts to no more than a tweaking of definitions. The act extends the subjects of salvage, broadens the definition of damage to the environment, appears to include a profit margin in the calculation of a fair rate for equipment and personnel actually used in salvage operations and gives a maritime lien to the provider of environmental services. Nevertheless, problems remain.

While subjects of salvage are indeed extended, this is still limited to property at sea, with the benefits accruing to coastal states indirect at best. Should one look at the arguments informing Article 3 of the Salvage Convention, which excludes platforms and drilling units as subjects of salvage,[8] it is apparent that there was no real consensus on the environmental benefits of this exclusion. Nevertheless, the Wreck and Salvage Act includes such property, therefore widening the scope of application of the Act compared to the Convention in relation to damage to the environment. Nevertheless, this inclusion appears to be a response to difficulties

[8] See discussion ch IV, 159-161.

encountered with the meaning of ‘substantial damage’ to the environment. Regarding the Act’s provision of a profit element in the calculation of special compensation, it is certainly an improvement from the perspective of salvors. Nevertheless, as argued, it is not clear how a court might apply this in practice. Also, this does not address the inequities inherent in making the shipowner pays even where benefits are bestowed outside of the salvage matrix. While there is this possibility of higher amounts of special compensation, the salvage fund remains tied to property saved.

The addition of a maritime lien similarly, ties the provision of environmental services to the ship salved. While the Wreck and Salvage Act was intended to address the perceived inadequacies of the Salvage Convention, it followed the same basic course as the latter with no attempt to include the environment as a subject of salvage. However, given the narrow focus of salvage, this was probably to be expected. While the Act, undoubtedly, provides a less restricted approach to the question of environmental services rendered by salvors, it still represents an approach where property salvage is the primary concern.

The apparent improvements on the Salvage Convention are at best cosmetic with no legal basis provided for the direct recognition of interests outside of the traditional salvage relationship. There has been no attempt in terms of legislative efforts to address the provision of and remuneration of services to interests outside of the traditional salvage matrix, which, considering the changes over the years to the law of salvage and what appears to be a clear hesitance to expand upon the basic understanding of salvage law is understandable. Both instruments maintain the essence of salvage law with added provisions ostensibly directed at environmental protection and the remuneration of salvors for such services. However, this system is simply not geared towards awards for environmental services that go beyond the linking of such services to the potential liability of the shipowner for environmental damage caused.

8.1.4 Contractual responses to the perceived difficulties under the Salvage Convention

Chapter V investigated contractual arrangements that have been devised to counter the perceived difficulties presented by the calculation of special compensation under the Salvage Convention. While salvors are of the believe that LOF and SCOPIC prioritise environmental protection this is not borne out by provisions ostensibly

aimed at environmental outcomes.[9] Traditional salvage operations are expressed as the trigger for what appears to be an independent environmental duty under both the LOF and SCOPIC. The traditional salvage operation is regarded as the salvor's basic obligation under LOF, which suggest the priority that is the traditional property salvage operation. Also, SCOPIC takes this matter no further, simply setting out the main duties of the salvor with reference to the main agreement that is LOF. Both LOF and the SCOPIC clause, where incorporated, treat any environmental responsibility of the salvor as secondary to traditional property salvage operations. While salvors clearly confer benefits on interests outside of the traditional salvage matrix under LOF and SCOPIC, these contracts, from a legal theoretical perspective, do not provide more in relation to environmental concerns than the Convention or the Wreck and Salvage Act. The main improvement regarding the remuneration of salvors, aside from the conferring of a maritime lien for environmental services and the provision of security where SCOPIC is incorporated, would be the likelihood of better financial gains under LOF and SCOPIC compared to special compensation under the Convention. This, arguably, provides the necessary encouragement to salvors to further environmental protection.

However, while both LOF and SCOPIC undoubtedly provide a *de facto* furthering of third party interests in the environment, they are still agreements between salvors and the owners of salved property. As such, property salvage operations provide the backdrop with its potentially limiting impact on the environmental protection dimension of these contracts. The environmental protection duty of the salvor is owed to the shipowner and, like the Convention, predicated upon shipowner liability. The shipowner is liable for the payment of SCOPIC remuneration, which is devised to replace special compensation under Article 14 of the Convention. As such, there is nothing to account for benefits conferred outside of this contract or benefits beyond the property and liability interests of the shipowner. Here the situation is exacerbated by the very nature of a contract, which typically afford rights and duties to only the parties thereto.

Nevertheless, it was demonstrated that the principle of the *stipulatio alteri* could provide a real and direct basis upon which salvors can be remunerated for the furthering of third party interests. This mechanism has seen liberal usage in the South African context in different areas of law and it can, in principle, be used in the

[9] See discussion above, ch 5, 171.

context of contracts such as LOF and SCOPIC. Of course, this would involve a redrafting of the basic provisions of SCOPIC and LOF that might not be viable from a South African perspective given that these contracts are subject to English law. The English law might not be as amenable to such as device as South African law.

Using the *stipulatio alteri* for the remuneration of salvors, where they have performed environmental services, means that a coastal state such as South Africa must accept the *stipulatio alteri* contained in the salvage contract and SCOPIC. This, depending on the formulation of the clause, might entail the duty to remunerate salvors. From a legal theoretical perspective, this would provide a sound basis for the remuneration of salvors in relation to benefits conferred alongside the traditional property salvage operations. However, even if the *stipupation alteri* is used as the basis for a direct and enforceable benefit to the coastal state, there would be no real incentive for a state to accept such a benefit with its concomitant duties of remuneration. It would simply not be necessary for a state to rely on such a benefit given the significant powers awarded to coastal states in terms of public international law.

8.1.5 Salvors' environmental services and Environmental law

Chapter VI explored the relationship between salvors' environmental services, salvage law and environmental law. As shown, to the extent that salvors' services relate to the environment, norms regulating these services would be regarded by environmental scholars as falling within the purview of environmental law. Environmental scholars also accept that such norms may be contained in other, distinct, areas of the law, salvage law being no exception. In terms of the categorisation of such norms, perspective and policy considerations would be paramount. Here, the question would involve the recognition of the utility role of environmental services within salvage operations, the need to promote environmental protection outcomes in a consistent manner and the unavoidable limitations on these concerns where addressed within the framework of salvage.

While salvor's environmental services and the remuneration thereof are regulated under the law of salvage, these could conceivably be repositioned somewhere else, albeit still within a wider framework of environmental law. From a legal theoretical perspective, this would make sense given that we are dealing with a concern that, as shown in chapters 3 and 4, have found a strained and unduly limited placement within the law of salvage. The extent to which environmental law

straddles different areas of law means that environmental norms contained in salvage ought not to be viewed in isolation from a wider environmental protection framework. However, the choice to address environmental outcomes within a distinct area of law should not render this distinct area uncertain as to its traditional reach, while it would also be counterproductive to insist on the inclusion of such norms in an area of the law theoretically not suited to such norms.

8.1.6 The integration of salvage capabilities into pollution response measures and the operation of other instruments directed at environmental protection

Chapter VII investigated the practical and legal placement of salvors within coastal state pollution response measures and the extent to which salvors can avail themselves of remuneration possibilities outside of salvage law. The latter investigation focussed on the CLC and Fund Conventions. Coastal state pollution prevention measures in the form of National Contingency Plans typically include salvage as part of pollution response measures. Salvage is integrated in these measures based on contracts, often in the form of retainer agreements, for tug owners to provide environmental services. In this regard, the basis for the salvors' environmental services, as part of national response measures, is the agreement with the responsible coastal state agency.

In the United States' integration of salvage contracts into Vessel Response Plans, one has the situation that the coastal state's interests are promoted, with the owner of salved property still responsible for the remuneration of salvors. Essentially, the United States' approach sees any possibility of the remuneration of salvors for the benefit conferred on the State simply being shifted to the owner of salved property with the limitations regarding salvage as noted.

The United Kingdom approach appears to provide more of a possibility for direct remuneration of the salvor by the recipient of the benefit conferred, but this is primarily dependent on the salvor not claiming a salvage award from the owner of salved property. Where a separate contract for towage or salvage is concluded, the UK Marine and Coastguard Agency contract with salvors is terminated, which legally changes the contractual relationship from that between salvor and Coast Guard, to salvor and the owner of ship and cargo. This results in a shifting of responsibility for the remuneration of salvors to the shipowner.

The current contractual arrangement between the South African, Department of Transport via the agency of SAMSA and commercial salvor Smit Amandla Marine

is different. While this contract places commercial salvors within pollution prevention measures, the state retains a direct contractual link to the salvor for the provision of environmental services. The contract does not treat property salvage operations as a replacement for the duty on the part of the coastal state via the agency of SAMSA to pay for services that benefit it. This certainly, allows for alternative possibilities in relation to the remuneration of salvors for environmental services.

It has been noted that the contractual arrangement between the DOT and Smit Amandla Marine also addresses a concern in relation to salvors' claims under the CLC and Fund Conventions that salvage operations are primarily aimed at the rescue of property. Even where salvage operations can be said to have a dual purpose, the situation in relation to salvors' claims under the CLC and Fund Conventions remain murky with difficulties in relation to the establishing of salvors' intentions.

The proper remuneration of salvors under contractual arrangements such as the 'SMIT DOT contract', especially given the primary duty under these contracts to safeguard coastlines against pollution, would provide very clear evidence that salvage services rendered were directed at environmental protection, with property salvage a secondary concern. This however, presupposes the situation where the state brings a claim under the CLC and Fund Conventions as opposed to the salvor, who would have been remunerated for its services on the basis of the contact with the coastal state. This means that the remuneration of the salvor, based as it is on the provision of environmental protection services, can by recouped by the state. There would simply be no reason for salvors to claim under these instruments with the added difficulties in having to distinguish between actions primarily directed at environmental protection and those directed at property salvage. Given the availability of such a possibility, there would appear to be no need to address the issue of remuneration for environmental services within the law of salvage.

8.2 The way forward: Reconciling the Wreck and Salvage Act 96 of 1994 with wider environmental law and environmental Instruments aimed at the prevention of pollution.

Salvage operations form an integral part of a network of mechanisms (legal, social and practical) aimed at environmental protection and pollution prevention. This appears to be underpinned by the idea that 'it is only commercial salvors who have

the equipment and expertise to prevent environmental catastrophe'.[10] This development has resulted in value driven demands for changes to the law of salvage that traditionally had the safeguarding of property at sea as a primary concern. In terms of the remuneration of salvor's environmental services in the law of salvage, we have a system that is constrained by the property bias of traditional salvage law. Moreover, we have a system of remuneration that appears fragmented between the private law of salvage and public instruments that provide avenues of remuneration to salvors. In relation to the remuneration of salvors the Convention and the South African Wreck and Salvage Act have taken developments as far as they can go unless fundamental changes to the law of salvage are introduced. This will necessarily involve an expansion of and reassessment of the nature, central tenets and definitions employed in salvage. However, while the addition of environmental outcomes might be in line with a value and policy driven functional approach to law, this should not be at the expense of the certainty provided by a settled system of law with a well-defined reach that has crystallised over many years.

As such, a new approach is needed in relation to the remuneration of salvors for environmental services in shipping incidents. This approach should be mindful of a wider environmental protection context to salvage operations, the need for certainty and the avoidance of unnecessary fragmentation in law. This approach should facilitate environmental protection and pollution prevention via a legal framework that spans public and private instruments in a manner that sees the different components of this framework function together. Moreover, it should address the inequities observed in relation to shipowners solely being responsible for the remuneration of benefits conferred outside of the salvage relationship.

It is submitted that the remuneration of salvors for performing environmental services would best be served outside of the salvage law framework. While the remuneration for environmental services can and ought to be excised from the law of salvage, the implementation of this must be premised on the above considerations and mindful of the utility of salvage operations within a wider environmental protection framework.

[10] Tsavliris A, 'Pollution prevention and unfair treatment of contractors' <http://www.marine-salvage.com/media-information/articles/recent/pollution-prevention-and-unfair-treatment-of-contractors/> accessed 20 August 2016

8.2.1 An award for environmental salvage?

The argument typically employed in relation to the remuneration of salvors for environmental services, is to expand upon the traditional reach of salvage.[11] In this regard, King has proposed a definition of salvage operations that include property salvage operations as currently defined and environmental salvage with its own distinct fund.[12] However, any amendment to the Salvage Convention to provide for separate environmental salvage with its own distinct fund would amount to a fundamental and radical change to the law of salvage. It would take the law of salvage beyond anything it has ever been contemplated to be, thus introducing uncertainties that are unnecessary and best avoided.

A distinct environmental salvage award with its own requirements, as suggested by King, would create similar, if not the same, difficulties as encountered in respect of salvors' claims under the CLC and Fund conventions. Where the salvor manages to keep the oil in the ship would he have a choice to claim for an environmental award or would it be a property salvage operation? A single salvage operation might confer public and private benefits, which will result in unnecessary litigation on the appropriate categorisation of the salvors' claim as environmental or property. As such, the same uncertainties in relation to claims brought under the CLC and Fund conventions will be encountered with the introduction of a distinct environmental salvage operation. Essentially, these uncertainties will simply be transplanted from claims brought under the CLC and Fund Conventions to claims under the Salvage Convention.

This thesis proposes a different approach to the question of salvage and environmental protection. This approach is not only novel in relation to the remuneration of salvors for providing environmental services but also allows for the effective integration of salvors' actions into the existing wider environmental legal framework. This framework consists of the Wreck and Salvage Act, the provisions of the Salvage Convention included as a schedule thereto, environmental specific instruments such as the CLC and Fund Conventions and the flexible device that is contract law. This approach will further the interest of the Republic of South Africa and the public in the protection of the environment with minimal impact upon an

[11] King J, Salvage: Bringing the Environment on Boad *Unpublished LLM Thesis* (University of Cape Town).
[12] ibid.

area of law that has developed over centuries, thus maintaining its integrity. Moreover, in relation to the remuneration of salvors, we will have a system less fragmented and where the ones receiving the benefits bestowed by salvors will pay for such benefits.

8.2.2 A contractual basis for salvors' environmental services

It submitted that the creation of a direct contractual relationship between commercial salvors and coastal states can address the shortcomings noted in relation to the remuneration of environmental services in the law of salvage. It would provide a viable legal basis for the remuneration of environmental services. Current attempts to remunerate environmental services in the law of salvage represent at best a situation of commercial compromises with insurers central to it and unnecessary strains on the established law of salvage.

A direct contractual relationship between the State and salvors would lead to a much better integration of salvage services into the system comprised of private and public instruments directed at environmental protection. It will, certainly due to the real basis provided by contract, avoid the uncertainties noted in relation to claims under the CLC and Fund Conventions. Where environmental services are rendered under a contractual obligation distinct from any existing salvage agreement this will provide better linkage between the actions of salvors and potential claims under the CLC and Fund Conventions. It will settle the question of salvors' intentions when performing salvage operations because of the separate contract for these services and the relevant intention being that of the state.

Where the State pays because of a contract between itself and the salvor, it will be the claimant under the CLC and Fund Conventions on the basis of having paid for preventive measures in relation to pollution. There could be no doubt that the coastal state's actions would be preventive in nature, while the salvor would have been remunerated. A further positive would be that cargo owners, via the operation of the Fund Conventions will be contributing to the system of remuneration, which would represent a fairer spreading of costs across the industry.

This approach demands an understanding on the part of the State (South Africa), that a mere exercise of power in relation to the right of intervention and the right to direct salvage operations will simply resolve into a situation of shipowners having to pay for benefits conferred somewhere else. In 1975, with the concluding

of salvage retainer agreements, the South African government has demonstrated a willingness to be proactive in relation to the protection of the South African coast. This was a commendable development that has since been followed by others. Once again, the South African government can engage in such proactive steps by a willingness to create direct contractual relationships with commercial salvors.

8.2.2.1 Where there is a threat to the environment and no contract in place?

It has been noted that the South African DOT's contract with SMIT is not an exclusive arrangement. As such, it is conceivable that other providers of salvage services might be involved in providing salvage services in a context where there might be a threat to the environment. Here one would not have any pre-arranged contractual relationship. Nevertheless, this would not present an insurmountable problem in that the necessary statutory enactment can provide for such a contractual link. Such direct link would be triggered at the point where SAMSA issue directions to the salvors involved. At this point, the salvor acting under the instructions of SAMSA, would be acting in the interests of the State and property salvage operations will be secondary to the prevention of pollution, thus also allowing for recourse under the CLC and Fund Conventions.

As for levels of remuneration, this will have to ensure that salvors are, in fact, encouraged to go to the assistance of vessels where there might be a threat to the environment. In this regard, there would be no difficulty in basing the appropriate remuneration on a scheme similar to SCOPIC, i.e. based on tariffs to be determined. However, in the absence of state intervention, services performed would still be in the interests of salved property and to the extent that the South African Wreck and Salvage Act does not restrict the threat of environmental damage to coastal waters, SCOPIC or Article 14 of the Salvage Convention should remain available (although, as mentioned before, this aspect of the Wreck and Salvage Act has never been tested in a court of law). An obvious point to make is the fact that the non-intervention of the State would suggest a situation where the environmental threat is simply not an issue because its coastline is not at risk. This, once again, suggests that the Wreck and Salvage Act's expanding of the definition of the environment might not have any practical significance.

8.2.2.2 Amending the Wreck and Salvage Act

As mentioned, the appropriate contractual link between the State and commercial salvors will reduce the current fragmentation between public and private instruments directed at the protection of the environment. To avoid protracted contractual negotiations in the absence of a retainer agreement, the appropriate amendment to the Wreck and Salvage Act can provide for such a direct contractual link between the state and a commercial salvor. While there might be an increase in retainer agreements as suggested by Bishop, this is by no means a universal phenomenon. As such, it might prove premature to simply excise the special compensation provisions from the Convention, which functions as a schedule to the Wreck and Salvage Act. Article 14 of the Convention or SCOPIC will have to be the proverbial stopgap in the absence of the relevant contract or in situations where there is no government involvement in a salvage operation.

Any amendment to the Wreck and Salvage Act also needs to proceed from the assumption that the Wreck and Salvage Act is one instrument that potentially operates within a wider environmental protection framework consisting of the relevant public international instruments. There should be an acknowledgement of the limitations of Article 14 of the Convention and even SCOPIC, which are both predicated upon the traditional salvage operation and both of which provide for a method of remuneration that fail to equitably spread costs, being tied to shipowner liability. The appropriate amendment would allow for better synergies between the actions of salvors and potential claims under the CLC and Fund Conventions. As such, the following amendments are suggested for the South African Wreck and Salvage Act:

Long title of the Act

To provide for the salvage of certain vessels and for the application in the Republic of the International Convention of Salvage 1989 **and, in the context of the aforesaid, to provide for salvors' providing environmental services to the Republic of South Africa as a coastal state and trustee of the public's interest in the protection of the marine environment thus recognizing such services as being of benefit to the Republic**; and to provide for the repeal or amendment of certain provisions of the Merchant Shipping Act, 1951, and the amendment of the Admiralty Jurisdiction Regulation Act, 1983; and to provide for matters connected therewith,

Definitions

S1. In this Act, unless the context indicates otherwise-

(i)…;

(ii)….;

….;

*(xiii) '**environmental services' mean any actions performed, within the context of salvage operations as defined under the 1989 Salvage Convention, that are directed at the prevention of, or minimization of pollution damage as defined under the CLC convention including, but not limited to, damage for which an owner of a polluting vessel may be liable under relevant and applicable laws. Such services include those rendered under relevant salvage retainer contracts between the Republic, via the appropriate agencies, and tug owners or, in the absence of retainer contracts, pursuant to section 21(2) of this Act.***

New s21

This section shall, in the circumstances under subsections (1) and (2) be substituted for the application of Articles 13(1)(b) and 14 of the Convention. Where neither of the situations contemplated under subsections (1) and (2) exists, Articles 13(1)(b) and 14 of the Convention shall apply.

(1) Where any contracted commercial tug owner under a duly concluded retainer contract, or in terms of subsection 2, attend to a marine casualty posing an environmental threat, the salvage of property shall, for the purpose of this Act and the Convention, be regarded as secondary to the prevention of marine environmental damage.

(2) Where, in the absence of a prior salvage retainer contract, the Republic intervenes in salvage operations posing a threat to the marine environment, including but not limited to the issuing of instructions to commercial salvors, said salvors shall be regarded as mandatories of the Republic in relation to the provision of environmental services, with the relationship between said salvors and the Republic being that of a contract of mandate.

(3) Where services are rendered under subsections (1) and (2) these shall be regarded as services distinct from traditional salvage operations as

defined under the Convention and such services shall be for the account of the Republic.

(4) The remuneration of salvors for environmental services, where not provided for in any applicable contract, or where the salvor act as mandatory of the Republic under subsection 2, is to be determined with a view to encourage salvors to perform said services taking into account the following factors:

(a) The extent to which such intervention and instructions may negatively impact on a potential property salvage award;

(b) The extent to which a successful salvage of property and the retention of a potentially polluting cargo in the ship has positively contributed to the protection of the marine environment.

(c) The remuneration of environmental services shall not be reduced by virtue of the fact that the salvor is entitled to a property salvage award under Article 13 of the Convention.

(d) Any remuneration payable under this section shall take into account what a salvor might have received under Article 14 of the Convention and/or SCOPIC and should, therefore, aim at remuneration, at least, equal to any remuneration that a salvor would have been entitled to under Article 14 or SCOPIC.

Consequential to the inclusion of the new s21, the current ss21-29 will become ss22-30.

BIBLIOGRAPHY

BOOKS

Anghie A and Sturgess G (eds), *Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, The Hague, London, Boston, 1998)

Ashburner W (seminal work), *The Rhodian Sea-Law edited from the manuscripts,* (The Clarendon Press, Oxford, 1909)

Austin J, 'The Province of Jurisprudence Determined', (*Library of Ideas ed* 1954)

Basu K, '*Social Norms and the Law*' in Newman P (ed)', *The New Palgrave Dictionary of Economics and Law* (Macmillan 1997).

Baughen S, *Pollution at Sea* (Informa 2012)

Bell S and McGillivray D, *Environmental Law*, (7th edn, Oxford University Press, 2008)

Bell S, *Ball and Bell, Environmental Law, The Law and Policy Relating to the Environment*, (4th edn, Blackstone Press Limited, London, 1997)

Bentham 'A Fragment on Government', (1859) 1 Works 221 Bowring Ed.

Birks P, *Introduction to the Law of Restitution,* (Oxford University Press, 1985)

Birnie P Boyle A and Redgwell C *International Law & the Environment* (3rd edn Oxford University Press, New York, 2009)

Bradfield G, *'Shipping'*, in Joubert WA *The Law of South Africa (LAWSA) Vol 25(2) (2nd edn, Butterworths* 2012*),*

Burrows A *The Law of Restitution* (3rd edn Oxford University Press, Oxford, 2011)

De La Rue C & Anderson C, *Shipping and the Environment,* (2nd edn, Informa, London, 2009)

De Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules,* (Oxford University Press, Oxford, 2002)

De Vos W, *Roman-Dutch Law in South Africa at the End of the Century – And Thereafter* in Legal Visions of the 21st Century in Anghie A and Sturgess G (eds) Essays in Honour of Judge Christopher Weeramantry (Kluwer Law International, The Hague, London, Boston, 1998).

Du Plessis J, *The South African Law of Unjustified Enrichment,* (Juta, Cape Town, 2012)

Finnis J, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980)

Fisher E, Lange B and Scotford E, *Environmental Law, Text, Cases and Materials* (Oxford University Press, Oxford, 2013)

Frankot E 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea' in Montojo JP and Pedersen F (eds) Communities in European History: Representations, Jurisdictions, Conflicts (Pisa University Press, Pisa 2007)

Freeman MDA, *Lloyd's Introduction to Jurisprudence,* (8th edn, Thomson Reuters, London, 2008)

Fuggle R and Rabie A, *Environmental Concerns in South Africa: Technical and Legal Perspectives,* (Juta & Co Ltd, Cape Town, Wetton, Johannesburg, 1983)

Fuggle RF and Rabie MA, *Environmental Management in South Africa,* (Juta, Cape Town, 1996)

Fuller L, *The Morality of Law,* (Yale University Press, New Haven, London, 1964)

Gillespie A, *International Environmental Law Policy and Ethics,* (Oxford University Press, New York, 1997)

Gilman J and Merkin R, *Arnould's Law of Marine Insurance and Average*, (17th edn, Sweet & Maxwell, London, 2008)

Goff R and Jones G, *The Law of Restitution,* (London, 1966)

Hare J, *Shipping and Admiralty Jurisdiction in South Africa,* (2nd edn, Juta, Cape Town, 2009)

Hart HLA, *The Concept of Law,* (2nd edn, Clarendon Press, 1997)

Hofmeyer G, *Admiralty Jurisdiction Law and Practice in South Africa*, (2nd edn, Juta, Cape Town, 2012)

Holdsworth WS, *A History of English Law*, (Volumes I to III, Methuen & Co. Ltd., London, 1903)

——*A History of English Law*, (Volumes IV and V, Methuen & Co. Ltd., London, 1924)

Joubert DJ and Van Zyl DH, 'Mandate and Negotiorum Gestio', in Joubert WA (ed) *LAWSA 2nd edn Vol 17(1)* (Butterworths 1983)

Khee-Jin Tan A, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation,* (Oxford University Press, Cambridge, 2006)

Kidd M, *Environmental Law,* (Juta, Cape Town, 2008)

Klippert G, *Unjust Enrichment,* (Butterworth, Toronto, 1983)

Kortmann, *Altruism in Private Law-Liability for Non-Feasance and Negotiorum Gestio,* (Oxford University Press, 2005)

Lee RW, (trans. 'Grotius'), *Jurisprudence of Holland Vol. 1* (the Clarendon Press, Oxford, 1926)

Lord Wright, *Legal Essays and Addresses,* (Cambridge, 1939)

Merkin R (ed), Privitiy of Contract (Routledge, 2000).

Ramseur J, *Oil Spill in U.S. Coastal Waters: Background, Governance, and Issues for Congress,* (Diane Publishing, 2010)

Reeder J, *Brice on Maritime Law of Salvage,* (4th ed, Sweet & Maxwell, London 2003)

——*Brice on Maritime Law of Salvage*, (5th edn, Sweet & Maxwell, London, 2011)

Rose FD, *Kennedy and Rose on Salvage,* (7th edn, Thomson Reuters (Legal) Limited, London, 2010)

——*Kennedy and Rose, the law of Salvage,* (6th edn, Sweet & Maxwell, 2002)

Sanborn, *Origins of the Early English Maritime and Commercial Law,* (The Century Co., New York, London, 1930)

Sands P, *Principles of International Environmental Law*, (2nd edn, Cambridge University Press, Cambridge, 2003)

Sands P, Peel J, Fabra A and MacKenzie R, *Principles of International Environmental Law*, (3rd edn, Cambridge University Press, Cambridge, 2013)

Staniland H, 'Shipping' in Joubert, W.A. and Faris, J. (eds.), *LAWSA Vol. 25(2) reissue 1* (Butterworths 2006)

Stoljar S, *The Law of Quasi- Contract,* (Law Book Co. for New South Wales Bar Association, 1964)

Stookes P, *A Practical Approach to Environmental Law,* (Oxford University Press, New York, 2005)

The Committee on Marine Salvage Issues, *National Research Council's A reassessment of the marine salvage posture in the United States of America*, (National Academy Press, Washington, D.C., 1994)

The National Contingency Plan, *A Strategic Overview for Responses to Marine Pollution from Shipping and Offshore Installations*, (Maritime and Coastguard Agency, 2015)

Van der Linde (ed), *Compendium of South African Environmental Legislation,* (Pretoria University Law Press, Pretoria, 2007)

Van der Linde M, *A Compendium of South African Environmental Legislation* (2nd edn, Pretoria University Law Press, Pretoria, 2010)

Van der Merwe CG, Du Plessis J, De Waal M and Zimmermann R, *The Republic of South Africa'* in Valentine *Mixed Jurisdictions Worldwide The Third Legal Family,* (2nd edn, Cambridge University Press, 2012)

Van Rensburg A, Lotz JG and Van Rhijn TAR, 'Contract' in Joubert WA (ed) *LAWSA* Vol 9 3rd edn (2014),

Virgo G, *The Principles of the Law of Restitution,* (Oxford University Press, Oxford, 1999)

Waddams S, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning,* (Cambridge University Press, 2003)

Wang Hui, 'Civil Liability for Marine Oil Pollution Damage: A Comparative and Economic Study of the International, US and Chinese Compensation Regime (Energy and Environmental Law and Policy Series)', (*Wolters Kluwer Alphen aan den Rijn* 2011)

Wilkinson D, *Environment and Law*, (Routledge, 2002)

Wiswall FL, *The Development of Admiralty Jurisdiction and Practice since 1800*, (Cambridge University Press, London, 1970)

Zimmermann R and Visser D (eds), *Southern Cross-Civil Law and Common Law in South Africa*, (Clarendon Press, 1996)

Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition,* (Juta & Co., Cape Town, South Africa and Kluwer, Boston, 1990)

JOURNAL ARTICLES

Aitken, 'Negotiorum Gestio and the Common Law: A Jurisdictional Approach', (1986-1988), *Sydney Law Review* Vol. 11, 566

Allot P, 'The True Function of Law in the International Community', (1997-199), *J. Global Legal Study 5 Ind.,* 391

Axelrod R, 'An Evolutionary Approach to Norms', (1986), *American Political Science Review* Vol. 80 No 4, 1095

Beinart, 'The English Legal Contribution in South Africa: The Interaction of Civil and Common Law', (1981), *Acta Juridica,* 7

Bishop A, 'The Development of Environmental Salvage and Review of the London Salvage Convention', (2012-2013),*Tul. Mar. L.J.,* 65

Blommaert AK, 'Negotiorum Gestio and the Life-Rescuer', (1981), *J. S. Afr. L.*, 123

Chen L, 'Recent developments in the Law of Salvage of the Marine Environment', (2001), *16 Int'l J. Marine & Coastal L.,* 686

Chao W, *'Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System'* (2002) *Spill Science & Technology Bulletin*, Vol. 7, 105

Clift R and Gay R, 'The Shifting Nature of Salvage Law: A View from a Distance', (2004-2005) 79 *Tul. L. Rev*, 1355

Cooter, 'Three Effects of Social Norms on Law: Expression, Deterrence and Internalization' (*2007) Or. L. Rev. 1*

Couzens W, 'The Incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005), *S. Afr. Y.B. Int'l L*, Vol. 7, 128

Cowen D, 'Towards Distinctive Principles of South African Environmental law: Some Jurisprudential Perspectives and a Role for Legislation' (1989), *52 THRHR* 3, 7

Cumming CS, 'The English High Court of Admiralty' (1993), 17 *Tul. Mar. L.J.*, 209

Cupido D and Sutherland P, 'Insurance Law' (2004), *Annual Survey of South African Law*, 558

Doremus H, 'Shaping the Future: The Dialectic of Law and Environmental Values' *(2003 – 2004),* 27 *Environs Envtl L. 7 Pol'y J. 233*

Dunoff JL, 'From Green to Global: Toward the Transformation of International Environmental Law' (1995), *19 Harv. Envtl. L. Rev.,* 241

Ellickson R, 'Law and Economics Discover Social Norms', (*1998)*, *27 J. Legal Stud., 537*

Field T, 'Sustainable Development versus Environmentalism: Competing Paradigms for the South African EIA Regime', (2006)*, 123 S. African L.J., 409*

Fowler R, 'Environmental law and its administration in Australia', (1984) *Environmental and Planning Law Journal,* 10

Gaskell N, 'The Lloyd's Open Form and Contractual Remedies', (1986), *Lloyd's Maritime and Commercial Law Quarterly,* 306

——‘The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990’ (1991-1992), *16 Tul. Mar. L.J. 1, 63*

Gold E, ‘Marine Salvage: Towards a new regime’, (1989), *20 J. Mar.L. & Com.,* 487

Hart HLA, ‘Positivism and the Separation of Law and Morals’, (1957), 71 *Harv. L. Rev.,* 593

Hedman S, ‘Expressive Functions of Criminal Sanctions in Environmental Law’, (1990-1991), *59 Geo. Wash. L. Rev.,* 889

Henderson PGW, ‘Some thoughts on distinctive principles of South African environmental law’, (2001), *8 SAJELP,* 139

Hofmeyer G, ‘Admiralty Jurisdiction in South Africa’, (1982), *Acta Juridica,* 30

Holloway P, ‘South Africa’s Practical Approach to Dealing with Oil Pollution Prevention and Ships in Need of Assistance’, (2005), *China Oceans Law Review Vol.2,* 141

Hutton N, ‘The Origin, Development and Future of Maritime Liens and the Action in Rem’ (2003), 28 *Tul. Mar. L.J.,* 81

Kelsen H, ‘What is the Pure Theory of Law’, (1959-1960), *24 Tul. L. Rev,* 270

Kerr M, ‘The International Convention on Salvage 1989-How It Came To Be’, (1990), 39 *I.C.L.Q ,* 530

Kheng-Boon Tan E, ‘Law and Values in Governance: The Singapore Way’, (2000), *30 Hong Kong L.J*., 91

Mangone G, ‘Commerce by water All Cases of Admiralty and Maritime Jurisdiction’ (1993), 11 *Del. Law*.

Mohr E, ‘Environmental norms, society and economics’, (1994), *Ecological Economics,* 229.

Mason M, ‘Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime’ (2003), *Marine Policy*, 27

Melikan R, ‘Shippers, salvors, and sovereigns: Competing interests in the mediaeval law of Shipwreck’, (1990), *The Journal of Legal History 11.2*, 163

Michael Kerr, ‘The International Convention on Salvage 1989 – How it came to be’, (1990), *39 International and Comparative Law Quarterly,* 530

Miller A, ‘Lloyd’s Standard Form of Salvage Agreement – LOF 80: A Commentary’, (1981), *12(2) J. Mar. L. & Com,* 243

Morris RT, ‘A Typology of Norms’, (1956), *American Sociological Review* Vol. 21 No 5, 610

Mulligan G, '*Bellum Juridicum* (3): Purists, Pollutionists and Pragmatists', (1952), *69 SALJ 25*

Paulsen GW, 'An Historical Overview of the Development of Uniformity in International Maritime Law', (1983), 57 *Tul. L. Rev.,* 1065

Pelaez AS, 'Salvage-a New Look at an Old Concept', (1975-1976), *7 J. Mar. L. & Com,* 505

Plant G, 'Safer Ships, Cleaner Seas: Lord Donaldson's Inquiry, the UK Government's Response and International Law', (1995), *The International and Comparative Law Quarterly* Vol 44, 939

Plater Z, 'Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution', (1995-1996), *23 B.C. Envtl. Aff. L. Rev*., 733

——'Environmental law and three economies: Navigating a sprawling field of study, practice, and societal governance in which everything is connected to everything else', (1999), *23 Harv. Envtl. L. Rev.,* 359

Rabie A, 'Environmental Law in Search of An Identity', (1991), *2 Stellenbosch L. Rev.*, 202

Redgwell C, 'The Greening of Salvage Law', (1990), *Marine Policy,* 142

Rose FD, 'Restitution for the Rescuer', (1989), *9 Oxford J. Legal Stud*., 167

Runyan TJ, 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England', (1975), *The American Journal of Legal History Vol 19 No 2,* 95

Scholtens JE, 'The General Enrichment Action that was', (1966), 83 *SALJ,* 391

Scott R, 'The Limits of Behavioural Theories of Law and Social Norms', (2000), *86 VA. L. Rev.*, 1603

Shaw R, 'The 1989 Salvage Convention and English Law', (1989), *L.M.C.L.Q,* 202

Staniland H, 'Should the 1989 International Convention on Salvage Be Enacted in South Africa', (1993), *110 S. African L.J,* 292

Stiebel M, 'Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – An Analysis, Comparison and Examination of the Case Law: Part 1', (2001), *S. Afr. Mercantile L.J,* 226

Sunstein C, 'On the Expressive Function of Law', (1995-1996), 144 *U. Pa. L. Rev*., 2021

Swan C, 'The Restitutionary and Economic Analysis of Salvage Law', (2009), 23 *A&NZ Mar LJ,* 99

Van Niekerk B, 'The Ecological Norm in law or the Jurisprudence of the Fight Against Pollution', (1975), *SALJ,* 78

Van Niekerk JP, 'Salvage and Negotiorum Gestio: Exploratory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage' (1992), *Acta Juridica,* 148.

——'Of Ships' Masters, Maritime Salvors, agents of Necessity and *Negotiorum Gestores*', (2002), 14 *S. Afr. Mercantile L.J.,* 626

Van Reenen TJ, 'Reflections on the Codification of South African Environmental Law (2): A Suggested Normative Structure and Content of a Codification', (1994), 5 *Stellenbosch L. Rev.,* 331

Van Zyl DH, 'The General Enrichment Action is Alive and Well', (1992), *Acta Juridica,* 115

ONLINE RESOURCES

Remarks of the Tauranga Mayor Stuart Crosby, following the conviction of the Captain and Navigation officer of the *Rena K* <http://www.stuff.co.nz/national/crime/6984980/Rena-captain-and-officer-sent-to-jail>

International Salvage Union website <http://www.marine-salvage.com>

Archie Bishop "The development of Environmental Salvage and Review of the Salvage Convention1989"<http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html>

Discussion documents of the Comite Maritime International (CMI) Argentine MLA Colloquium held in October 2010, <http://www.comitemaritime.org/Salvage-Convention-1989/0,2746,14632,00.html>

Cooter, 'Law from Order: Economic Development and the Jurisprudence of Social Norms' (1997), *The Selected Works of Robert Cooter*, 537 <http://works.bepress.com/robert_cooter/61>

The Travaux Preparatoires of the Convention on Salvage 1989, *Comite Maritime International,295.*<http://www.comitemaritime.org/Travaux-Pr%C3%A9paratoires/0,27126,112632,00.html>

Tsavliris A, ‘Pollution prevention and unfair treatment of contractors’ <http://www.marine-salvage.com/media-information/articles/recent/pollution-prevention-and-unfair-treatment-of-contractors/>

House of Commons Transport Committee ‘The Coastguard Emergency Towing Vessels and the Maritime Incident Response Group: Follow Up. Sixth report of session 2012-2013 (2012) Vol 1, 33, <http://www.parliament.uk/transcoms.

Witte A, LOF and defence of the marine environment <https://www.marine-salvage.com /media-information/conference-papers/isus-associate-members-day-april-2008/>

LOF 2011 <http://www.lloyds.com/~/media/files/the%20market/tools%20and%20resources/agency/salvage%20arbitration%20branch/agency_lof_2011.pdf>

The ISU News Release 2011 <http://www.marine-salvage.com/media_information/Press/ISU%20LoF%202011%20Press%20Release.pdf>

The ISU – No cure no pay <http://www.marine-salvage.com/overview/no-cure-no-pay/>

World Commission on Environment and Development report “Our Common Future” (1987)<http://www.un-documents.net/our-common-future.pdf>

Horn S and Neil P (Capt), ‘The Atlantic Empress Sinking—A Large Spill Without Environmental Disaster’ <http://www.shipwrecklog.com/log/wp-content/uploads/2014/10/mobil-atlanticempress.pdf>

Command and Control, **‘**Report of Lord Donaldson's Review of Salvage and Intervention and Their Command and Control’ <https://core.ac.uk/display/84374>

The National Contingency Plan, A Strategic Overview for Responses to Marine Pollution from Shipping and Offshore Installations, *Maritime and Coastguard Agency (*2015). <https://www.gov.uk/government/publications/national-contingency-planncp>

The Department of Transport, *White Paper on National Maritime Transport*, September 2006, 30 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070912wpmt.pdf

Baughen S, *Maritime Pollution and State liability* in *Pollution at Sea: Law and Liability* (Informa 2012)<https://www.i-law.com/ilaw/doc/view.htm?id=316091>

UK Parliament Research briefings <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00186>

Marine Salvage: 'A Closer Look at OPA 90's Success'<http://www.americansalvage.org/marine-log/ML-Mar2014.pdf>

The United States' National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview>

United States' Oil Spills Prevention and Preparedness Regulations <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations>

US Department of Transportation, USCG Commandant Instruction <https://www.uscg.mil/directives/ci/16000-16999/CI_16450_32A.pdf>

United States' Federal Register 2013, Vol 78 No 189 <http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Environmental/GMS%20Client%20Advisory%2015-13%20-%20NTVRP%20Final%20Rule%20Attachment.pdf

DONJON-SMIT, LLC OIL POLLUTION ACT OF 1990 SALVAGE, FIREFIGHTING AND LIGHTERING CONTRACT AND FUNDING AGREEMENT <http://www.gard.no/webdocs/Donjon-Smit.pdf>

SAMSA Centre for Sea Watch and Response <http://www.samsa.org.za/service/rescue-co-ordination>

SAMSA legislation administration responsibilities <http://www.samsa.org.za/legislation>

Media Statement of the South African Government, 8 September, 2009 <http://www.gov.za/st/node/598664>

Tugs Towing & Offshore Newsletter <http://mastermarinersa.co.za/wp-content/uploads/2016/06/Special-Smit-Amandla.pdf>

City of Cape Town's Disaster Risk Management Centre <https://www.capetown.gov.za/en/EnvironmentalResourceManagement/Coastal%20Management%20Programme%202014/Chapter%2012%20-%20Coastal%20Emergency%20Plans.pdf>

MarineLink.com Maritime Reporter and MarineNews Online <http://www.marinelink.com/article/salvage/environment-handa inhand-maritime-industry-864>

The International Oil Pollution Compensation Funds <http://www.iopcfunds.org/about-us/>

The Rio Orinoco Case <http://www.iopcfunds.org/uploads/tx_iopcpublications/1991_ENGLISH_ANNUAL_REPORT.pdf>

DISSERTATIONS AND THESES

King J, *Salvage: Bringing the Environment on Board (*Unpublished LLM Thesis, University of Cape Town)

Appendix I

Wreck and Salvage Act, 1996 [No. 94 of 1996] - G 17604

NO. 94 OF 1996: WRECK AND SALVAGE ACT, 1996.

PRESIDENT'S OFFICE No. 1893.

22 November 1996

NO. 94 OF 1996: WRECK AND SALVAGE ACT, 1996.

It is hereby notified that the President has assented to the following Act which is hereby published for general information-

GENERAL EXPLANATORY NOTE:

Words in bold type indicate omissions from existing enactments. Words in italics indicate insertions in existing enactments.

ACT

To provide for the salvage of certain vessels and for the application in the Republic of the International Convention of Salvage, 1989; and to provide for the repeal or amendment of certain provisions of the Merchant Shipping Act, 1951, and the amendment of the Admiralty Jurisdiction Regulation Act, 1983; and to provide for matters connected therewith.

(English text signed by the President.)

(Assented to 12 November 1996.)

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context indicates otherwise-

(i) "Convention" means the International Convention on Salvage, 1989, contained in the Schedule;

(ii) "master", in relation to a ship, means any person, other than a pilot, having charge or command of such ship;

(iii) "Minister" means the Minister of Transport;

(iv) "owner of a ship" means any person to whom a ship or a share in a ship belongs;

(v) "port" means a place, whether proclaimed a public harbour or not, and whether natural or artificial, to which ships may resort for shelter or to load or discharge goods or persons;

(vi) "prescribe" means prescribe by regulation under section 21; (vii) "Republic" includes the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948);

(viii) "salvage officer" means a salvage officer appointed in terms of section 8;

(ix) "seaman" means any person, except a master or a pilot, employed or engaged in any capacity on a ship; waters, rig,

(x) "ship" means any vessel used or capable of being used on any and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, crane, dock, oil or other mooring installation or similar installation, whether floating or fixed to the sea-bed and whether self-propelled or not;

(xi) "South African ship" means a ship registered in the Republic in terms of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), or deemed to be so registered;

(xii) "wreck" includes any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress.

Application and interpretation of Convention

2. (1) The Convention shall, subject to the provisions of this Act, have force of law and apply in the Republic.

(2) The provisions of Attachment 1 to the Convention shall have effect in connection with the application and interpretation of the Convention.

(3) This Act shall not affect any rights or liabilities arising out of any salvage operations or other acts started before the commencement of this Act.

(4) Any reference in the Convention to a State Party shall be construed as, or as including, a reference to the Republic.

(5) Notwithstanding anything to the contrary in any other law or the common law contained, a court of law or any tribunal may, in the interpretation of the Convention, consider the preparatory texts to the Convention, decisions of foreign courts and any publication.

(6) Notwithstanding anything to the contrary in article 3 or any other article of the Convention, a subject of salvage shall include any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of sea-bed mineral resources.

(7) "Damage to the environment" as defined in article I of the Convention shall for purposes of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.

(8) Notwithstanding the provisions of article 14(3) of the Convention, for the purposes of this Act, the expression "fair rate" means a rate of remuneration which is fair having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature.

(9) In the case of any conflict between the Afrikaans and English texts of this Act and the Convention the English text shall be decisive.

(10) Any claimant under this Act shall be entitled to enforce a maritime lien.

Court trying salvage claim may be assisted by assessors

3. The court in which proceedings for a claim relating to salvage have been instituted may, in its discretion, appoint one or more assessors acting only in an advisory capacity, and those assessors shall be impartial persons who are conversant with maritime affairs.

Application to aircraft

4. The provisions of this Act relating to wreck and to salvage of life or property and to the duty to render assistance to ships in distress shall apply to aircraft as they

apply to ships, and the owner of an aircraft shall be entitled to the award of a sum for salvage services rendered by the aircraft and be liable to pay a sum of salvage in respect of services rendered in saving life from the aircraft or in saving the aircraft or any wreck from the aircraft in any case where the owner of the aircraft would have been so entitled or liable had it been a ship.

Obligation to assist ships in distress

5. (1) The master of a South African ship, on receiving at sea a signal of distress or information from any source that a ship is in distress, shall proceed with all speed to the assistance of the persons in distress, informing them if possible that he or she is doing so, unless he or she is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to do so, or unless he or she is released under the provisions of subsection (3) or (4) from the obligation imposed by this subsection.

(2) Where the master of any ship in distress has requisitioned any South African ship that has answered his or her call for assistance, it shall be the duty of the master of the South African ship to comply with the requisition by continuing to proceed with all speed to the assistance of the person in distress unless he or she is released under the provisions of subsection (4) from the obligation imposed by this subsection.

(3) A master shall be released from the obligation imposed by subsection as soon as he or she is informed of the requisition of one or more ships other than his or her own and that the requisition is being complied with by the ship or ships requisitioned.

(4) A master shall be released from the obligation imposed by subsection (1), and if his or her ship has been requisitioned, from the obligation imposed by subsection (2), if he or she is informed by the person in distress, or by the master of any ship that has reached the person in distress, that assistance is no longer required.

(5) If the master of a South African ship, on receiving at sea a signal of distress or information from any source that a ship is in distress, is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to go to the assistance of the person in distress, he or she shall forthwith cause

a statement to be entered in the official logbook, of his or her reasons for not going to the assistance of that person.

(6) Compliance by the master of a ship with the provisions of this section shall not affect his or her right, or the right of any other person, to salvage.

(7) In the application of this section every reference to a ship in distress shall be interpreted so as to include a reference to an aircraft or a survival craft from a vessel or an aircraft in distress.

Duty to render assistance to persons in danger at sea

6. (1) The master of a ship shall, so far as he or she can do so without serious danger to his or her ship or to any person on the ship, render assistance to every person who is found at sea in danger of being lost, even if that person is a citizen of a country at war with the Republic or with the country in which the ship is registered.

(2) Compliance by the master of a ship with the provisions of subsection shall not affect his or her right, or the right of any other person, to salvage.

(3) This section shall apply to all ships, wherever they may be registered.

Duty of masters of ships in collision to render assistance

7. (1) In every case of collision between two or more ships, it shall be duty of the master of each ship, if and in so far as he or she can do so without danger to any person on the ship-

(a) to render to the other ship and every person thereon such assistance as may be practicable and necessary to save them from any danger caused by the collision and to stay by the other ship until he or she has ascertained that there is no need for further assistance; and

(b) to give to the master of the other ship, the name of his or her ship of its port of registry and the name of the port from which it has come and to which it is bound.

(2) Compliance by the master of a ship with the provisions of subsection shall not affect his or her right, or the right of any other person, to salvage.

(3) This section shall apply to all ships, wherever they may be registered

Salvage officers

8. (1) The Minister may appoint suitably qualified persons to be salvage officers at ports or other places in the Republic in respect of any defined area.

(2) Such officers shall be appointed for the period and under the conditions as the Minister may deem fit.

(3) The powers, duties and functions of salvage officers appointed under this section shall be as prescribed.

Payment of allowances to salvage officers

9. Any person appointed under this Act as a salvage officer and who is not in the employ of the Government shall be paid such remuneration and allowances towards subsistence and transport as the Minister with the concurrence of the Minister of Finance may determine.

Exercise of powers in absence of salvage officer

10. (1) If a salvage officer or his or her authorised representative is not present-

(a) a suitable qualified officer in the South African Police Service; or

(b) in the absence of an officer referred to in paragraph (a), a suitably qualified commissioned officer in the South African National Defence Force, may do anything he or she is authorised to do by the salvage officer.

(2) Any person acting for a salvage officer in terms of subsection (1) shall in respect of any wreck be considered to be the agent of the salvage officer and shall comply with the provisions of section 112(2) of the Custom and Excise Act, 1964 (Act No. 91 of 1964), but shall not be deprived, by reason of his or her so acting, of any right to salvage to which he or she would otherwise be entitled.

(3) Any salvage officer or any person acting for a salvage officer shall interfere with the lawful performance of a salvage service by a salvor.

Investigation concerning ships wrecked, stranded or in distress

11. If a ship is wrecked, stranded or in distress, a salvage officer or person authorised by him or her, may conduct an investigation into any or all of the following matters:

(a) The name and description of the ship;

(b) the names of the master and of the owners;

(c) the names of the owners of the cargo;

(d) the port from and to which the ship was bound;

(e) the cause of the wrecking, stranding or distress of the ship;

(f) the services rendered; and

(g) such other relevant matters or circumstances as he or she deems fit.

Powers to pass over adjoining lands

12. (1) Whenever a ship is wrecked, stranded or in distress all persons may, for the purpose of rendering assistance to the ship or of saving the lives of any shipwrecked persons or of saving any wreck, unless there is some public road or camping site equally convenient, pass and repass either with or without vehicles or animals over any lands and camp on such lands, without being subject to interruption by the owner or occupier, if they do so with as little damage as possible, and may also, on the same condition, deposit on such lands any goods required for the construction of a camp and their stay thereat, and any wreck recovered from the ship.

(2) Any damage sustained by an owner or occupier in consequence of the exercise of the rights granted by this section shall be a charge on the ship or wreck in respect of or by which the damage is caused.

(3) The amount payable in respect of the damage referred to in subsection (2) shall, in the event of a dispute, be determined in the same manner as salvage is determined in terms of this Act, and shall, in default of payment, be recoverable in the same manner as salvage is recoverable under this Act.

Power of salvage officer to suppress plunder and disorder

13. No person shall, when a ship is wrecked, stranded or in distress, plunder, create disorder or obstruct the preservation of the ship or shipwrecked persons or the wreck, and the salvage officer or his or her authorised representative may cause any person contravening the provisions of this section to be detained.

Interfering with wrecked ship or aircraft

14. (1) No unauthorised person shall board any ship or aircraft wrecked, stranded or in distress without the leave of the person in charge of such ship or aircraft, and any person boarding such ship or aircraft without permission may be repelled by reasonable force.

(2) No person shall-

(a) impede or hinder the saving of any ship stranded or in danger of being stranded, or otherwise in distress, or of any life from any such ship, or of any wreck;

(b) secrete any wreck, or deface or obliterate any marks thereon; or

(c) wrongfully carry away or remove any wreck.

Salvage payable for saving life

15. (1) Salvage shall be payable to the salvor by the owner of the ship or the owner of any wreck, whether or not such ship or wreck has been saved, when services are rendered in saving life from any ship.

(2) Notwithstanding anything to the contrary contained in the Convention, the payment of salvage in respect of the preservation of life shall have priority over all other claims for salvage.

(3) When the ship or wreck is lost or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister may, in his or her discretion, award to the salvor, out of moneys made available by Parliament for the purpose, such sum as he or she thinks fit, in whole or part satisfaction of any amount of salvage so left unpaid.

Salvage payable by Commissioner for Customs and Excise

16. When any ship is wrecked, stranded, abandoned or in distress or any wreck is found and services are rendered in saving such ship or wreck, salvage shall, subject to the provisions of section 15(2), be paid to the person who rendered the services

by the Commissioner for Customs and Excise if the ship or wreck is disposed of by him or her in terms of section 112(3) of the Customs and Excise Act, 1964.

Detention of wreck until salvage is paid

17. (1) If the salvage officer is satisfied that salvage is due to any person under this Act, he or she shall detain the ship or wreck saved or assisted or from which life was saved until payment is made for the salvage due, or until process for the arrest or detention of such ship or wreck by a competent court is served.

(2) The salvage officer may release any ship or wreck detained by him or under subsection (1) if security to his or her satisfaction is given for the payment of the salvage due.

Powers of Minister in respect of certain wrecks and ships

18. (1) (a) When a ship is wrecked, stranded or in distress, the Minister may direct the master or owner of such ship, or both such master and such owner, either orally or in writing to move such ship to a place specified by the Minister or to perform such acts in respect of such ship as may be specified by the Minister.

(b) If the master or owner of a ship referred to in paragraph (a) fails to perform within the time specified by the Minister any act which he or she has in terms of that paragraph been required to perform, the Minister may cause such act to be performed.

(2) The Minister may, notwithstanding the provisions of subsection (1), cause any wreck or any wrecked, stranded or abandoned ship or any part thereof to be raised, removed or destroyed or dealt with in such a manner as he or she may deem fit, if he or she has not been able to contact the master or the owner of the said wreck, ship or part thereof.

(3) If the Minister incurs any expenses in connection with the exercise of any power in terms of subsection (1)(b) or (2), he or she may recover such expenses from the owner of the wreck or ship in question or, in the case of an abandoned wreck or ship, from the person who was the owner thereof at the time of the abandonment.

(4) If the Minister incurred or will incur any expenses in connection with the exercise of any power in terms of subsection (1)(b) or (2) in respect of any wreck or ship, he or she may cause any goods to be removed from such wreck or ship.

(5) The Minister may-

(a) sell any wreck or ship in respect of which any power has been exercised in terms of subsection (1)(b) or (2), any part of such wreck or ship any goods removed therefrom in terms of subsection (4) and apply the proceeds of the sale towards the defrayal of any expenses incurred in connection with the exercise of such power; or

(b) cause any such wreck, ship or goods to be detained until security to satisfaction of the Minister has been given for the payment of such expenses.

(6) If any wreck, ship or goods are sold in terms of subsection (5) and the proceeds of the sale exceed the amount of the expenses referred to in that subsection, the surplus shall be paid to the owner of the wreck, ship or goods in question after deducting therefrom the amount of any duty payable in respect of such wreck, ship or goods in terms of the Customs and Excise Act, 1964.

(7) The Minister, or any person acting under the authority of the Minister, shall not be liable in respect of anything done in good faith in terms of the provisions of this section.

Agreement to forfeit right to salvage is void

19. (1) A seaman of a South African ship shall not by agreement abandon right that he or she may have or obtain in the nature of salvage, and any provision in any agreement with him or her inconsistent with the provisions of this section shall be void.

(2) The provisions of subsection (1) shall not apply to any provision made by a seaman belonging to a ship engaged in salvage service regarding the remuneration to be paid to him or her for salvage services to be rendered by that ship to any other ship.

Restrictions on assignment of salvage

20. The following provisions shall apply to salvage due or to become due to a seaman of a South African ship:

(a) Such salvage shall not be liable to attachment or subject to any form of execution under a judgment or order of any court;

(b) an assignment or hypothecation thereof shall not bind the person making the same;

(c) a power of attorney or authority for the receipt thereof shall not be irrevocable; and

(d) a payment of salvage to a seaman shall be valid in law, notwithstanding any previous assignment or hypothecation of salvage, or any attachment of or execution upon that salvage.

Regulations

21. (1) The Minister may make regulations to prescribe any matter which in terms of this Act may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

(2) Any regulation contemplated in subsection (1) may for any contravention of or failure to comply with its provisions, provide for penalties of a fine or imprisonment for a period not exceeding three months.

Offences and penalties

22. Any person who contravenes or fails to comply with the provisions of section 5(1) or (2), 6(1), 7(1), 13 or 14(1) or (2) shall be guilty of an offence, and shall on conviction be liable-

(a) in the case of an offence mentioned in section 13 or 14(1) or (2) to a fine or imprisonment for a period not exceeding two years; and

(b) in the case of an offence mentioned in section 5 (1) or (2), 6(1) or 7(1)to a fine or to imprisonment for a period not exceeding one year.

Declaration of wreck to be a monument

23. This Act shall not derogate from the operation of the National Monuments Act, 1969 (Act No. 28 of 1969).

Act to bind State

24. This Act shall bind the State.

Amendment of section 1 of Act 105 of 1983, as amended by section 1 of Act 87 of 1992

25. Section 1 of the Admiralty Jurisdiction Regulation Act, 1983, is hereby amended by the substitution for paragraph (k) of subsection (1) of the definition of "maritime claim" of the following paragraph:

"(k) salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salved or which would, but for the negligence or default of the salvor or a person who attempted to salve it, have been salved, and any claim arising out of the Wreck and Salvage Act, 1996;".

Amendment of section 134 of Act 57 of 1951

26. Section 134 of the Merchant Shipping Act, 1951, is hereby amended-

(a) by the substitution for subsection (1) of the following subsection:

"(1) A seaman of a South African ship shall not by agreement forfeit his or her lien on the ship for his or her wages, or be deprived of any remedy for the recovery of wages to which in the absence of the agreement he or she would be entitled, or abandon his or her right to wages in the case of the loss of the ship or abandon any right that he may have or obtain in the nature of salvage and every stipulation in any agreement with the crew inconsistent with the provisions of this section shall be void."; and

(b) by the deletion of subsection (2).

Amendment of section 135 of Act No. 57 of 1951, as amended by section 6 of Act No. 18 of 1992

27. Section 135 of the Merchant Shipping Act, 1951, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The following provisions shall apply to wagesand salvagedue to or to become due to a seaman or apprentice-officer of a South African ship:

(a) They shall not be liable to attachment or subjected to any form of execution under a judgment or order of any court;

(b) an assignment or hypothecation thereof shall not bind the person making the same;

(c) a power of attorney or authority for the receipt thereof shall not be irrevocable; and

(d) [a] the payment of wages or salvage to a seaman or apprentice-officer shall be valid in law, notwithstanding any previous assignment or hypothecation of those wages or salvage, or any attachment of or execution upon those wages or salvage.".

Repeal of sections 234, 258, 293 to 306, 330 and 331 of Act No. 57 of 1951

28. Sections 234, 258, 293 to 306, 330 and 331 of the Merchant Shipping Act, 1951, are hereby repealed.

Amendment of section 344 of Act No. 57 of 1951

29. Section 344 of the Merchant Shipping Act, 1951, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or [her] its owners in respect of any damage to or loss of another ship, [her] its cargo or freight, or any goods on board her such other ship, or damage for loss of life or personal injury suffered by any person on board her such other ship, cause the fault of the former ship, whether such ship be wholly or partly at fault, or in respect of any salvage Services shall be two years and shall begin to run on the date when the damage or loss or injury was caused or the salvage services were rendered.".

Substitution of section 345 of Act No. 57 of 1951, as amended by section 57 of Act No. 40 of 1963

30. The following section is hereby substituted for section 345 of the Merchant Shipping Act, 1951:

"**Payment of allowances to persons appointed to make preliminary inquiries into shipping casualties, to members of courts of marine enquiry, maritime courts or courts of survey and assessors**

345. Any person appointed under section two hundred and sixty four, any member of a court of marine enquiry, maritime court or court of survey, any expert to whom an appeal has been referred under section two hundred and eighty two or any assessors summoned under subsection (2) of section two hundred and ninety two or section three hundred and thirty one and any salvage officer shall, if he or she is in the employ of the Government of the Republic, be paid such allowances towards subsistence and transport as may be prescribed (otherwise than under this Act) for Government employees of his or her class, and if he or she is not in the employ of the Government of the Republic, or if no such allowances have been prescribed for Government employees of his or her class, he or she shall be paid such allowances towards subsistence and transport as may be prescribed by the regulations made under this Act.".

Short title and commencement

31. This Act shall be called the Wreck and Salvage Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE

PART 1

INTERNATIONAL CONVENTION ON SALVAGE, 1989

THE STATES PARTIES TO THE PRESENT CONVENTION,

RECOGNIZING the desirability of determining by agreement uniform international rules regarding salvage operations,

NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,

CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger,

HAVE AGREED as follows:

CHAPTER 1-GENERAL PROVISIONS

ARTICLE 1

Definitions

For the purpose of this Convention:

(a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

(b) Vessel means any ship or craft, or any structure capable of navigation.

(c) Property means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

(d) Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

(e) Payment means any reward, remuneration or compensation due under this Convention.

(f) Organization means the International Maritime Organization.

(g) Secretary-General means the Secretary-General of the Organization.

ARTICLE 2

Application of the Convention

This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

ARTICLE 3

Platforms and drilling units

This Convention shall not apply to fixed or floating platforms or to 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 4

State-owned vessels

(1) Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.

(2) Where a State Party decides to apply the Convention to its warships or other vessels described in paragraph (1), it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

ARTICLE 5

Salvage operations controlled by public authorities

(1) This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

(2) Nevertheless, 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.

(3) The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

ARTICLE 6

Salvage contracts

(1) This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.

(2) 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.

(3) Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.

ARTICLE 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.

CHAPTER II

PERFORMANCE OF SALVAGE OPERATIONS

ARTICLE 8

Duties of the salvor and of the owner and master

(1) The salvor shall owe a duty to the owner of the vessel or other property in danger-

(a) to carry out the salvage operations with due care;

(b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment;

(c) whenever circumstances reasonably require, to seek assistance from other salvors; and

(d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

(2) The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:

(a) to co-operate fully with him during the course of the salvage operations;

(b) in so doing, to exercise due care to prevent or minimize damage to the environment; and

(c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

ARTICLE 9

Rights of coastal States

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may

reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

ARTICLE 10

Duty to render assistance

(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

(2) The State Parties shall adopt the measures necessary to enforce the duty set out in paragraph (1).

(3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph (1).

ARTICLE 11

Co-operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the$ purpose of saving life or property in danger as well as preventing damage to the environment in general.

CHAPTER III RIGHTS OF SALVORS

ARTICLE 12

Conditions for reward

(1) Salvage operations which have had a useful result give right to a reward.

(2) Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.

(3) This chapter shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner.

ARTICLE 13

Criteria for fixing the reward

(1) The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

(c) the measure of success obtained by the salvor; (d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

(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 salved values. However, 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. Nothing in this article shall prevent any right of defence.

(3) The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved values of the vessel and other property.

ARTICLE 14

Special compensation

(1) If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

(2) If, in the circumstances set out in paragraph (1), the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph (1) may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph (1), may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

(3) Salvor's expenses for the purpose of paragraphs (1) and (2) means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

(4) The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

(5) If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.

(6) Nothing in this article shall effect any right of recourse on the part of the owner of the vessel.

ARTICLE 15

Apportionment between salvors

(1) The apportionment of a reward under article 13 between salvors shall be made on the basis of the criteria contained in that article.

(2) The apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel, the apportionment shall be determined by the law governing the contract between the salvor and his servants.

ARTICLE 16

Salvage of persons

(1) No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.

(2) A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.

ARTICLE 17

Services rendered under existing contracts

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

ARTICLE 18

The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

ARTICLE 19

Prohibition of salvage operations

Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel shall not give rise to payment under this Convention.

CHAPTER IV

CLAIMS AND ACTIONS

ARTICLE 20

Maritime lien

(1) Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

(2) The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

ARTICLE 21

Duty to provide security

(1) Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

(2) Without prejudice to paragraph (1), the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

(3) The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive 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.

ARTICLE 22

Interim payment

(1) The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms including terms as to security where appropriate, as may be fair and just according to the circumstances of the case.

(2) In the event of an interim payment under this article the security provided under article 21 shall be reduced accordingly.

ARTICLE 23

Limitation of actions

(1) Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.

(2) The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. The period may in the like manner be further extended.

(3) An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

ARTICLE 24

Interest

The right of the salvor to interest on any payment due under this Convention shall be determined according to the law of the State in which the tribunal seized of the case is situated.

ARTICLE 25

State-owned cargoes

Unless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings in rem against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognized principles of international law.

ARTICLE 26

Humanitarian cargoes

No provision of this Convention shall be used as a basis for the seizure, arrest or detention of humanitarian cargoes donated by a State, if such State has agreed to pay for salvage services rendered in respect of such humanitarian cargoes.

ATTACHMENT 1

COMMON UNDERSTANDING CONCERNING ARTICLES 13 AND 14 OF THE INTERNATIONAL CONVENTION ON SALVAGE 1989

It is the common understanding of the Conference that, in fixing a reward under article 13 and assessing special compensation under article 14 of the International Convention on Salvage, 1989 the tribunal is under no duty to fix a reward under article 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under article 14.

Appendix II

LOF 2011

LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(Approved and Published by the Council of Lloyd's)

NO CURE - NO PAY

---

1. Name of the salvage Contractors: (referred to in this agreement as "the Contractors")	2. Property to be salved: The vessel: her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew (referred to in this agreement as "the property")
3. Agreed place of safety:	4. Agreed currency of any arbitral award and security (if other than United States dollars)
5. Date of this agreement	6. Place of agreement
7. Is the Scopic Clause incorporated into this agreement? State alternative : Yes/No	
8. Person signing for and on behalf of the Contractors Signature:	9. Captain or other person signing for and on behalf of the property Signature:

A Contractors' basic obligation: The Contractors identified in Box 1 hereby agree to use their best endeavours to salve the property specified in Box 2 and to take the property to the place stated in Box 3 or to such other place as

may hereafter be agreed. If no place is inserted in Box 3 and in the absence of any subsequent agreement as to the place where the property is to be taken the Contractors shall take the property to a place of safety.

B Environmental protection: While performing the salvage services the Contractors shall also use their best endeavours to prevent or minimise damage to the environment.

C Scopic Clause: Unless the word “No” in Box 7 has been deleted this agreement shall be deemed to have been made on the basis that the Scopic Clause is not incorporated and forms no part of this agreement. If the word “No” is deleted in Box 7 this shall not of itself be construed as a notice invoking the Scopic Clause within the meaning of sub-clause 2 thereof.

D Effect of other remedies: Subject to the provisions of the International Convention on Salvage 1989 as incorporated into English law (“the Convention”) relating to special compensation and to the Scopic Clause if incorporated the Contractors services shall be rendered and accepted as salvage services upon the principle of “no cure - no pay” and any salvage remuneration to which the Contractors become entitled shall not be diminished by reason of the exception to the principle of “no cure - no pay” in the form of special compensation or remuneration payable to the Contractors under a Scopic Clause.

E Prior services: Any salvage services rendered by the Contractors to the property before and up to the date of this agreement shall be deemed to be covered by this agreement.

F Duties of property owners: Each of the owners of the property shall cooperate fully with the Contractors.

In particular

(i) the Contractors may make reasonable use of the vessel's machinery gear and equipment free of expense provided that the Contractors shall not unnecessarily damage abandon or sacrifice any property on board;

(ii) the Contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;

(iii) the owners of the property shall co-operate fully with the Contractors in obtaining entry to the place of safety stated in Box 3 or agreed or determined in accordance with Clause A.

G Rights of termination: When there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Convention Articles 12 and/or 13 either the owners of the vessel or the Contractors shall be entitled to terminate the services hereunder by giving reasonable prior written notice to the other.

H Deemed performance: The Contractors' services shall be deemed to have been

performed when the property is in a safe condition in the place of safety stated in Box 3 or agreed or determined in accordance with clause A. For the purpose of this provision the property shall be regarded as being in safe condition notwithstanding that the property (or part thereof) is damaged or in need of maintenance if (i) the Contractors are not obliged to remain in attendance to satisfy the requirements of any port or habour authority, governmental agency or similar authority and (ii) the continuation of skilled salvage services from the Contractors or other salvors is no longer necessary to avoid the property becoming lost or significantly further damaged or delayed.

I Arbitration and the LSSA Clauses: The Contractors' remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses ("the LSSA Clauses") and Lloyd's Procedural Rules in force at the date of this agreement. The provisions of the said LSSA Clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.

J Governing law: This agreement and any arbitration hereunder shall be governed by English law.

K Scope of authority: The Master or other person signing this agreement on behalf of the property identified in Box 2 enters into this agreement as agent for the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

L Inducements prohibited: No person signing this agreement or any party on whose behalf it is signed shall at any time or in any manner whatsoever offer provide make give or promise to provide or demand or take any form of inducement for entering into this agreement.

IMPORTANT NOTICES

1 Salvage security. As soon as possible the owners of the vessel should notify the owners of other property on board that this agreement has been made. If the Contractors are successful the owners of such property should note that it will become necessary to provide the Contractors with salvage security promptly in accordance with Clause 4 of the LSSA Clauses referred to in Clause I. The provision of General Average security does not relieve the salved interests of their separate obligation to provide salvage security to the Contractors.

2 Incorporated provisions. Copies of the applicable Scopic Clause, the LSSA Clauses and Lloyd's Procedural Rules in force at the date of this agreement may be obtained from (i) the Contractors or (ii) the Salvage Arbitration Branch at Lloyd's, One Lime Street, London EC3M 7HA.

3 Awards. The Council of Lloyd's is entitled to make available the Award, Appeal Award and Reasons on www.lloydsagency.com (the website) subject to the conditions set out in Clause 12 of the LSSA Clauses.

4 Notification to Lloyd's. The Contractors shall within 14 days of their engagement to render services under this agreement notify the Council of Lloyd's of their engagement and forward the signed agreement or a true copy

thereof to the Council as soon as possible. The Council will not charge for such notification.

Appendix III

SCOPIC 2014

SCOPIC CLAUSE

1. General

This SCOPIC clause is supplementary to any Lloyd's Form Salvage Agreement "No Cure - No Pay" ("Main Agreement") which incorporates the provisions of Article 14 of the International Convention on Salvage 1989 ("Article 14"). The definitions in the Main Agreement are incorporated into this SCOPIC clause. If the SCOPIC clause is inconsistent with any provisions of the Main Agreement or inconsistent with the law applicable hereto, the SCOPIC clause, once invoked under sub-clause 2 hereof, shall override such other provisions to the extent necessary to give business efficacy to the agreement. Subject to the provisions of sub-clause 4 hereof, the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive shall be substituted by the method of assessment set out hereinafter. If this SCOPIC clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14 except in the circumstances described in sub-clause 4 hereof. For the purposes of liens and time limits the services hereunder will be treated in the same manner as salvage.

2. Invoking the SCOPIC Clause

The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a "threat of damage to the environment". The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement ("Article 13").

3. Security for SCOPIC Remuneration

(i) The owners of the vessel shall provide to the Contractor within 2 working days (excluding Saturdays and Sundays and holidays usually observed at Lloyd's) after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P&I Club letter (hereinafter called "the Initial Security") in a form reasonably satisfactory to the Contractor providing security for his claim for SCOPIC remuneration in the sum of US$3 million, inclusive of interest and costs.

(ii) If, at any time after the provision of the Initial Security the owners of the vessel reasonably assess the SCOPIC remuneration plus interest and costs due hereunder to be less than the security in place, the owners of the vessel shall be entitled to require the Contractor to reduce the security to a reasonable sum and the Contractor shall be obliged to do so once a reasonable sum has been agreed.

(iii) If at any time after the provision of the Initial Security the Contractor reasonably assesses the SCOPIC remuneration plus interest and costs due hereunder to be greater than the security in place, the Contractor shall be entitled to require the owners of the vessel to increase the security to a reasonable sum and the owners of the vessel shall be obliged to do so once a reasonable sum has been agreed.

(iv) In the absence of agreement, any dispute concerning the proposed Guarantor, the form of the security or the amount of any reduction or increase in the security in place shall be resolved by the Arbitrator.

4. Withdrawal

If the owners of the vessel do not provide the Initial Security within the said 2 working days, the Contractor, at his option, and on giving notice to the owners of the vessel, shall be entitled to withdraw from all the provisions of the SCOPIC clause and revert to his rights under the Main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed. PROVIDED THAT this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initial Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.

5. Tariff Rates

(i) SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.

(ii) 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”. This tariff will apply until reviewed and amended by the SCOPIC Committee in accordance with Appendix B(1)(b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.

(iii) “Out of pocket” expenses shall mean all those monies reasonably paid by or for and on behalf of the Contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used

and other expenses reasonably necessary for the operation. They will be agreed at cost, PROVIDED THAT:

(a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate(s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost.

(b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Special Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all in the circumstances.

(c) Any out of pocket expense incurred during the course of the service in a currency other than US dollars shall for the purpose of the SCOPIC clause be converted to US dollars at the rate prevailing at the termination of the services.

(iv) In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates except that if the out of pocket expenses described in sub-paragraph 5(iii)(b) exceed the applicable tariff rates in Appendix "A" the Contractor shall be entitled to a bonus such that he shall receive in total

(a) The actual cost of such men, tugs, other craft and equipment plus 10% of the cost, or

(b) The tariff rate for such men, tugs, other craft and equipment plus 25% of the tariff rate whichever is the greater.

6. Article 13 Award

(i) The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the owners of the vessel and only to the extent that it exceeds the total Article 13 Award (or, if none, any potential Article 13 Award) payable by all salved interests (including cargo, bunkers, lubricating oil and stores) before currency adjustment and before interest and costs even if the Article 13 Award or any part of it is not recovered.

(ii) In the event of the Article 13 Award or settlement being in a currency other than United States dollars it shall, for the purposes of the SCOPIC

clause, be exchanged at the rate of exchange prevailing at the termination of the services under the Main Agreement. The salvage Award under Article 13 shall not be diminished by reason of the exception to the principle of “No Cure - No Pay” in the form of SCOPIC remuneration.

7. Discount

If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.

8. Payment of SCOPIC Remuneration

(i) The date for payment of any SCOPIC remuneration which may be due hereunder will vary according to the circumstances.

(a) If there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim. Interest on sums due will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(b) If there is a claim for an Article 13 salvage award as well as a claim for SCOPIC remuneration, subject to Appendix B(5)(c)(iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due. Interest will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(ii) The Contractor hereby agrees to give an indemnity in a form acceptable to the owners of the vessel in respect of any overpayment in the event that the SCOPIC remuneration due ultimately proves to be less than the sum paid on account.

9. Termination

(i) The Contractor shall be entitled to terminate the services under the SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before the bonus conferred by sub-clause 5(iii) hereof) will exceed the sum of:

(a) The value of the property capable of being salved; and

(b) All sums to which he will be entitled as SCOPIC remuneration

(ii) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including time for demobilisation to the extent that such time did reasonably exceed the 5 days' notice of termination.

(iii) The termination provisions contained in sub-clause 9(i) and 9(ii) above shall only apply if the Contractor is not restrained from demobilising his equipment by Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered.

10. Duties of Contractor

The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment.

11. Article 18 – 1989 Salvage Convention

The Contractor may be deprived of the whole or part of the payment due under the SCOPIC clause to the extent that the salvage operations thereunder have become necessary or more difficult or more prolonged or the salved fund has been reduced or extinguished because of fault or neglect on its part or if the Contractor has been guilty of fraud or other dishonest conduct.

12. Special Casualty Representative ("SCR")

Once this SCOPIC clause has been invoked in accordance with sub-clause 2 hereof the owners of the vessel may at their sole option appoint an SCR to attend the salvage operation in accordance with the terms and conditions set out in Appendix

B. Any SCR so appointed shall not be called upon by any of the parties hereto to give evidence relating to non-salvage issues.

13. Special Representatives

At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the “Special Hull Representative” and the “Special Cargo Representative” and collectively called the “Special Representatives”) at the sole expense of the appointor to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practising lawyers.

14. Pollution Prevention

The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.

15. General Average

SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel’s Hull and Machinery Policy by the owners of the vessel.

16. Any dispute arising out of this SCOPIC clause or the operations thereunder shall be referred to Arbitration as provided for under the Main Agreement.