



THE FUTURE OF THE PRIVACY OF THE SALVAGE CONTRACT:  
CERTAIN POLICY CONSIDERATIONS IN SALVAGE OPERATIONS IN SOUTH  
AFRICA STUDIED COROLLARY WITH THE US

PORTIA NDLOVU<sup>1</sup>\* AND SOLOMZI TSHONA<sup>2</sup>

<sup>1</sup>Faculty in International Maritime Business, Massachusetts Maritime Academy, United State of America. <sup>2</sup>National Youth Development Agency, Nelson Mandela University Business School, Port Elizabeth, United State of America.

\*Corresponding author: [pndlovu@maritime.edu](mailto:pndlovu@maritime.edu)

ARTICLE INFO	ABSTRACT
<p><b>Article History:</b> <i>Received: 19 June 2024</i> <i>Accepted: 29 July 2024</i> <i>Published: 20 August 2024</i></p> <hr/> <p><b>Keywords:</b> <i>Salvage operations,</i> <i>maritime disasters,</i> <i>legalities,</i> <i>legal development.</i></p>	<p>Salvage operations as a maritime practice go beyond just a country’s national interests as they are constantly at the cusp of global ocean-wide interaction and disaster management. Maritime disasters invariably affect parties in various nations and their port State controls. Further, such disasters also directly affect insurers based in jurisdictions where there is sufficient liquidity to cover what are often very large claims. In local courts, these claims may be enforced by incola (Arnold v. United Insurance, 1893) against foreign parties. Therefore, this paper considers the multi-faceted policy aspects of South African salvage law and operations and some cutting-edge developments in the United States (US) salvage legal practice that may change how salvors are hired and fired. This paper will provide significant insight into the standards that modern salvors are expected to meet, using these two nations, which represent an African State and the West, with unique but related international perspectives. The South African salvage operations’ legal expanse historically and in modern times is sampled with the US, reflecting examples of nations that are IMO participants, this will add to knowledge and contribute to core discussions such as saving human life at sea, property, and the environment. Salvage operations have been approached through international law and other companywide modern contracts, technology, and amendments in law, which must be understood to ensure success. This academic discourse incorporates relevant sample salvage data and legal case studies, which ensures a critical and practical analysis that may assist salvage operations personnel and industry worldwide.</p>

© UMT Press

Introduction

Salvage operations play a pivotal role in mitigating maritime disasters the world over. Central to salvage operations is preserving life and the environment, and ensuring the safe navigation of vessels (Roberts, 2018). All coastal as well as landlocked States may be candidates for studying their salvage law and policies in this article; however, in order to support reasonable parameters for this work, this article will settle on considering salvage operations policy considerations and the law of the two sampled nations and that is, the United States (US) and South Africa. The significance

of sampling South African salvage law relates to showing an example of an African State with ports on the East and West connecting the rest of the world (Mthembu & Chasomeris, 2023). South Africa also represents the famous Southern historical shipping routes such as the Cape of Good Hope, which has seen many a historical voyage, such as the passing of fleets of Dutch fleets in colonial and pre-colonial times for trade (Van Riebeeck Society, 1949) and ultimately a salvage operation from time to time, including a recent ultra-bulk ship that was stricken in inhospitable waters of the west

coast of South Africa resulting in its capsizing (Tradewinds, 2024). The Cape of Good Hope continues to be a shipping route of focus as shipowners have used it as an alternative to the dangers in the Red Sea (Notteboom *et al.*, 2024). This article briefly also considers the core role of the South African Maritime Safety Authority (SAMSA) (Brown, 2017) as a demonstration of Port State control in South Africa. Furthermore, this paper provides a historical overview of significant salvage operations conducted by South African salvors, shedding light on their methods and challenges (Green, 2018).

This article also samples US salvage policy by examining some policy and legal developments in the area of salvage. The significance of this is to consider the question, “Will the privity of contract in salvage operations be respected in future or will the choice of salvor be at the hands of third parties and Port Authorities?” This and other policy considerations raised in this article must be considered with special scrutiny by the industry, especially because even though salvage operations are very traditional practice in maritime law, at the same time, much has changed in salvage operations, requiring policy changes that will continue to make sure that salvage services are of the highest quality. One of the changes, for example is the technology available to and for salvors’ methods of collecting data and evidence. For example, during the very uniquely executed, highly customised two billion dollars and above Parbuckling Project to move the Costa Concordia shipwreck, scientists were able to follow and document environmental impact elements such as running a two-year experiment to determine the presence of polycyclic aromatic hydrocarbons (PAHs) in the surrounding seawater surrounding the shipwreck. Fortunately, the study showed that the PAHs dissolved into the water were not disastrous and were below the 2013 water policy directive of the European Union (Schintu *et al.*, 2018).

Changes in salvage have also been necessitated by practical needs such as certain projects requiring a release of certain insurance payouts before the big projects can be run and thus, the traditional simple salvage contract has led to the development of newer types of salvage contracts, which will be explored in this article as policy developments. Other changes in salvage law involve communication systems and collaborations with other entities that may have solutions or receive great benefits from salvage operations in a disaster. For example, a State-owned cargo may only be subjected to arrest, detention and other remedies of the International Convention on Salvage, 1989 (Salvage Convention or Convention in the context of this article), only by consent; otherwise, no such rights and remedies apply to State-owned cargoes, for instance (Article 4, Article 25).

Further, it must be noted that the disasters are even more bizarre due to the modern capabilities and sizes of ships. Disasters such as the Francis Scott Key Bridge collapse in Baltimore, USA, due to a maritime disaster (Wen Zhe *et al.*, 2024), the blockage of the Suez Canal (Zheng Wan, 2023), the crashing of the Costa Concordia cruise ship off the island of Giglio in Italy, where deaths included a salvage member (Bartolucci *et al.*, 2021). This means the industry must scrutinise policies that may affect salvors’ hiring, firing, replacement, and collaboration in contracts. Further, parties must know that not all contracts are necessarily covered by the Salvage Convention.

#### 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 vessel's owner. 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 minimise environmental damage.

Having introduced the important role of salvage operations in the maritime industry, the extent of the freedom of contract and natural privity (privacy) of contract between contracting parties, it is important to note that this freedom and privity of contract may be challenged looking at the latest legal bills, which will be considered in this article. After exploring the latest proposals in the sample nations to be considered here, this article will provide some key draft bills and policy developments that will change the retention of salvors in the US. Nations worldwide may consider these policy developments to see if they would also benefit their State or private salvage practices and interests.

### **Problem Statement**

This work is written to raise awareness about one of the most important voluntary contracts to save lives and property in maritime activities. Two nations were selected for a reflective balance comparison of applicable law, both national and international. South Africa, being an African State with much exposure to the world of salvage yet focusing on development goals and fighting poverty and dangerous levels of youth unemployment, studied together with the US, a nation with its challenges but focused more on maintaining its development. Therefore, considering that nations will have to deal with salvage contracts so long as there is maritime trade, the question is, is it proper for this contract to be overseen by the Port Authorities in terms of limiting contractual freedom between parties, parties who may need to make decisions quickly in what is often emergencies?

### **Objective**

The goal of this research is to make sure that parties affected by salvage operations can be aware of the legal environment, the historical as well as modern world in which salvage

operations are conducted and weigh whether or not some of the developments such as leaving the power of choice of salvors to the relevant Port State authority. The objective is to raise awareness on how critical the salvage operations skills and knowledge need to be understood and invested in, especially by coastal States, so that the marine environment is preserved to the utmost. Lastly, the objective is for nations to look at the policies of the nations considered in this paper and decide if some of these developments would work in their particular jurisdictions.

### **Methodology**

The research methods and methodology adopted in this paper reflect both quantitative and statistical data drawn from organisations such as the International Salvage Union (ISU), which presents statistics for salvage operation types, awards, and contracts. The qualitative approach already does this research to address the question, “What are some of the poignant salvage operations laws, developments and practices in South Africa and the United States in the modern era?” Secondly and most importantly, the second part of the question to be answered is, “Are those developments too stringent or are they helpful in creating confidence that salvors can do their best work in an environment that can protect their rights to awards, or will the future of salvage be so government-controlled and litigious that it may affect those who are in this business?”. To answer this question, a focus on South Africa’s history in salvage operations is explored to trace some of the theoretical and practical issues of managing maritime disasters that bring about the need for salvage operations.

### **Data Gathering and Analysis**

#### ***Quantitative***

The ISU provides this data that can illustrate the trends of the success of current salvage operation contracts and awards without interference from Port State controls the selection and retention of salvors. Further to quantitative data, this article draws statistical data from experiments done in salvage operations given in the case

studies mentioned in the body of the paper. For example, in the MV treasure oil spill and salvage operations, statistics have been provided by those who ran experiments to save the oiled colony of African penguins. Such data is used here to highlight the sensitivity of a salvage contract, which must be done by the appropriately prepared and equipped, committed people to ensure success, and they need the right contracts to support them. Further, data on financial contributions by the salvage industry in our sample country in the form of African Marine Solutions (AMSOL) is also presented in this research as the acknowledgement of AMSOL to show the reality of skills development and progress towards developmental goals, which a nation in its developmental phase needs to focus on. Again, AMSOLs' salvage operations have not been interfered with by any third parties.

### ***Qualitative***

In addition, international law that affects the nations selected for discussion in this article is also highlighted in the form of the Salvage Convention. The Convention itself forms the theoretical and practical international legal instrument that holds the rights of salvors to be entitled to compensation following successful salvage operations. The core concepts of the Salvage Convention are addressed in the paper without attempting to rewrite the Convention. There is also a commentary on the use of the Lloyd's Open Form salvage contract (LOF), which has been in use for over a hundred years but is wanted by the shipping industry and thus, more technologically conscious modern contracts for salvage have been used instead, as designed by salvage experts such as the ISU and the Baltic and International Maritime Council (BIMCO). These are discussed here to assist the industry in pointing to contracts that consider many modern practices and technology while operating within the true justice and equity of salvage laws. What is most important to capture in this qualitative discourse is the freedom and privity of contract, which the US law may change, this is a point of discussion on a qualitative basis for nations.

Using contracts other than the LOF does not change the fundamentals of salvage law, such as the "no cure, no pay" rule, except the Special Compensation Protection and Indemnity Clause (SCOPIC) is part of P&I insurance (shipowner club insurance), which also requires some level of cure by protecting the environment. See Article 14 of the Salvage Convention. This discussion will be relevant to the maritime industry and the International Maritime Organization (IMO) community as South Africa and the US are both signatory members of the Convention (IMO, Status 2024).

Some practical data of ship disasters are explored from both nations to establish the general industry approaches to salvage. Data from the ISU (ISU, 2024), as well as legal disputes on salvage are also used to provide further data on what constitutes modern developments in Salvage law in both countries, especially since the US is considering a bill that has passed the house and is under consideration which provides for restrictions in changing salvors while an operation is underway. This bill is the H.R.6865 - Coast Guard Authorization Act of 2022<sup>117th</sup> Congress (2021-2022). This bill, coupled with the legal battle against salvors in the MV Golden Ray case decided in the District Court for the Southern District Court of Georgia in Glynn County Board of Commissioners v. Shipping Inc., Hyundai Glovis Co., G-Marine Service Co., Ltd., Norton Lilly International, Inc., T&T Salvage LLC (September, 2023) is particularly impactful to salvage operations.

Providing a legal analysis of the data and literature in this paper's methodology, as outlined above will assist the maritime community in gauging whether or not the developments in salvage law still support international trade and the proper execution of sometimes life-threatening tasks in salvage operations. This paper's salvage law analysis will also allow the maritime community to gauge whether or not there is still respect for the sui generis nature of the salvage contract. For instance, a salvor may begin with appropriate qualifications, workforce, and equipment, then

suddenly, because of the changes in the risk and circumstances of the case, require additional equipment and workforce that another salvage outfit may possess. Thus, restrictions to change salvors may not be the best cause of action on a practical level.

This article will emphasise the need to enforce, despite all the very welcome modern developments, the traditional principles of salvage, and that is to encourage an environment in maritime disasters that is “intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts”, as stated in the age-old case of the *Akaba*, the city of Birmingham. *Wood v. Burg et al.* Boston Towboat Co. v. Wood. United States Court of Appeals, Fourth Circuit. No 36. February 7, 1893. The fact that marine insurance contracts provide clauses related to salvage is a sign of ensuring that those who successfully provide salvage services and protect the environment are rewarded accordingly, especially since the salvors put themselves in great physical and financial peril to provide such services. (American Institute Hull Clauses, 2009).

The research methods and methodology adopted in this article reflect quantitative and qualitative approaches to address the question, “What are some of the poignant salvage operations laws, developments, and practices in South Africa and the United States in the modern era?”. Secondly and most importantly, the second part of the question to be answered is, “Are those developments too stringent or are they helpful in creating confidence that salvors can do their best work in an environment that can protect their rights to awards or will the future of salvage be so government-controlled and litigious that it may affect those who are in this business?”. To answer this question, a focus on South Africa’s history in salvage operations is explored to trace some of the theoretical and practical issues of managing maritime disasters that bring about the need for salvage operations.

## **Salvage Law in the US and South Africa: The National and International Framework**

In a similar fashion to the US, South Africa has a national regime on salvage rules, which is applied together with international law, which must, of course, be read together under the spirit of the Constitution of the Republic of South Africa, 1996. Similar to US law on salvage, which is also a signatory to the International Salvage Convention, salvage operation is defined in a manner that, in principle, also contains the definition of salvage as contained in the Salvage Convention. South Africa’s Wreck and Salvage Act 96 1996 ratifies the Salvage Convention. International maritime law is a complex web of conventions and agreements governing various maritime activities, including salvage operations (IMO, 2015). This convention provides a comprehensive framework for salvage operations, addressing issues such as remuneration, liability, and the role of salvors.

As a signatory to the International Salvage Convention, South Africa is bound by its provisions. The South African Maritime Safety Authority (SAMSA, 2020) is the guardian of South African maritime interests. This commitment ensures that South African salvage operations align with international norms, fostering cooperation with salvage operations worldwide (Brown, 2017). SAMSA is a central regulatory body overseeing various aspects of maritime safety, including salvage operations (Van der Merwe, 2016). SAMSA’s role encompasses formulating policies and regulations about admiralty law. This organisation plays a pivotal role in ensuring that salvage operations in South African waters adhere to international standards and guidelines and must see to the application of the Salvage Convention.

The Convention prioritises the saving of human life; salvors may exercise liens over wrecks until they are paid. The Convention in South African law includes aircraft according to part 4 of the application section of the South African Wreck and Salvage Act 94 of 1996. Both nations’ laws on salvage must be read



together with other laws. For example, in the US, Title 19 of the Code of Federal Regulations (CFR) subsection 4.97 (a) strictly excludes foreign vessels from acting as salvage vessels, whereas Title 32 of the CFR subsection 752.5 deals with the enforcement of salvage claims in the US. Further, the US law under Title 32, National Defense CFR, specific law in US § 752.5 provides for the rights of the regulation of claims for or against the navy for towage and salvage services. This law must be read together with the Public Vessels Act under the shipping Title 46 of the CFR. Most importantly, the Salvage Convention is a treaty ratified by the US Congress and was signed and received by the President on 11<sup>th</sup> September 1991 (US Congress, 1991).

### ***The Salvage Convention's Key Salvors' Rights***

The Salvage Convention provides these key provisions of the convention include:

1. **Salvage Agreements:** The Convention allows for agreements between salvors and shipowners or cargo owners. These agreements, including the amount of salvage remuneration should be mutually agreed upon in writing (Article 6, 7).
2. **Salvors' Lien:** Salvors are entitled to retain possession of the property they have salvaged until they receive their agreed-upon remuneration. This right to retain the property creates a "salvors' lien". (Article 20, claims and actions).
3. **Limitation of Liability:** The Convention limits salvors' liability in cases where the salvage operation causes damage to the environment or other property. Salvors' liability is generally limited to the market value of the property that has been saved (Article 23).
4. **Environmental Protection:** The Convention significantly emphasises environmental protection during salvage operations. Salvage companies are required to take all necessary measures to safeguard the environment while

conducting salvage operations, and they may be held accountable for any environmental damage that occurs during the salvage process (Salvage Convention Preamble, Article 6(3), Article 8(1), Article 8(2)(b), Article 11, Article 13(1)(b) which guides parties on fixing the salvage award based on skilful protection of the environment, Article 14(1) Special Compensation for Environmental Protection, and Article 14(5), sanctions for negligent handling of the environment, Article 16(2).

### **Some Policy Considerations in South African Salvage Operations**

Salvaging vessels in South African waters presents unique challenges due to the country's rugged coastline and ever-changing weather conditions (South African Weather Service, 2019). Salvors in South Africa employ a range of methodologies, including wreck removal, patching and sealing, and refloating. However, each salvage operation is distinct and requires tailored approaches.

### ***General Challenges***

Adverse weather conditions, limited resources, and environmental concerns challenge South African salvage operations. Moreover, the legal complexities surrounding salvage operations such as determining salvage awards and liability or whether an award is payable at all, add additional complexity (Van der Merwe, 2016).

For example, *Transnet Limited T/A National Ports Authority v. the MV Cleopatra Dream*, the Cargo Laden on Board the MV Cleopatra Dream, Durban High Court Case No. AC 54/2004, as unsuccessfully appealed on *Transnet Ltd. t/a National Ports Authority v. the MV Cleopatra Dream and Another* (163/10) [2011] ZASCA 12; [2011] 3 All SA 279 (SCA); 2011 (5) SA 613 (SCA) (11<sup>th</sup> March 2011), the port authority, Transnet was claiming entitlement to a salvage award of which both the court a quo and the Supreme Court refused after interpreting the salvage laws and finding

that the services rendered did not qualify as a pure salvage operation in the purest form, it was a pilotage situation that was within ordinary circumstances that turned into what looked like a salvage. However this was not within the ambit of the Salvage Convention or any South African law.

However, South African waters would seem to be an ideal training ground, especially after producing top salvors such as the leader of the parbuckling operation of the *Costa Concordia*, Nick Sloane and his team from all over the world (GCaptain, 2021).

### ***Historic Disasters, an Unsolved Mystery and Salvage Operations in South Africa***

It is important to briefly consider some of the key historical, factual maritime disaster losses present in the history of salvage operations in South Africa so that the special contribution of this Southern African State can demonstrate some of the background and environmental challenges the nation had to develop. The two historical wrecks selected for discussion are some of the most documented losses in the region's history. However, many disasters are for salvage consciousness and the nation's development. What is clear from these two historical examples of salvage is that there will always be a need for sound scientific data collection in order to dispel some of the mystery that shrouds these disasters. In the modern world, we should aim to dispel mystery with proven scientific facts.

#### ***The SS Waratah (1909)***

The SS Waratah remains one of South African history's most infamous maritime mysteries. This Australian passenger and cargo ship disappeared without a trace during its voyage from Durban to Cape Town in 1909. The salvage operation, spanning several decades, involved various attempts to locate the wreck and its valuable cargo. Despite extensive efforts, the SS Waratah remains undiscovered, highlighting the challenges posed by South Africa's treacherous waters, although there have been claims that this mystery has been recently solved (SAHO, 2024).

#### ***The MV Treasure (2000)***

In 2000, the MV Treasure, a bulk ore carrier, ran aground off the coast of Cape Town, resulting in a significant environmental disaster. The salvage operation was a collaborative effort between South African authorities, international salvors, and environmental agencies. The operation involved the removal of oil and cargo, as well as the eventual refloating of the vessel. This operation underscored the importance of timely and effective salvage responses in safeguarding South Africa's pristine coastline. (Wolfaardt *et al.*, 2008). If successful collaboration could limit a disaster effectively in 2008, how much more in the present day with better Artificial Intelligence (AI) and monitoring (Lamor Bow Collector Technology, Sweden, 2023)?

Here are some crucial statistical data aspects of this disaster that we could learn from: The MV Treasure sank off the west coast of South Africa and threatened an area home to the largest population of African penguins. The vessel spilt 1344 tons of Heavy Fuel Oil (HFO), 56 tons of diesel, and 64 tons of lubricant. Only 205 tons of HFO remained on the wreck. This resulted in the oiling of thousands of African penguins and other sea birds, many of which were orphaned, died, or had to be relocated. However, collaboration with SA Cargo and other partners resulted in the cleaning and saving over 22,000 African penguins (Crawford *et al.*, 2000). The ultimate win in maritime operations is an altogether prevented disaster; however, a successful salvage operation is the next best outcome.

The most important aspect of preparing for the inherently risky business of maritime and shipping operations requires parties to be safety conscious, to train staff on emergency preparedness, to carry the appropriate insurance, including Protection and Indemnity Insurance (P&I) club insurance, which may also have Freight, Demurrage and Defense (FD&D) insurance to help with legal costs and such related maritime claim enforcements, other hull and cargo insurance. American Institute of Marine Underwriters, (AIMU) for example, for

sample contract forms, which also has a salvage as part of the risk management portfolio of those involved in the maritime industry.

### *The Impact of Salvage on South Africa's Economy*

Salvage operations reveal a significant contribution to the nation's economy. Salvage operations generate revenue through salvage awards and stimulate local industries such as ship repair and marine services. Additionally,

salvage operations contribute to job creation and skill development, further enhancing South Africa's maritime sector. Using statistics and a report from one of the biggest salvage companies in South Africa and their sustainability goals and economic empowerment focus based on ethical business, despite challenges and legal battles, it is clear that this marine solutions outfit is a sustainable economic contributor to South Africa and there is room for more development of this nature (AMSOL, Sustainability Report, 2024) (Figure 1).

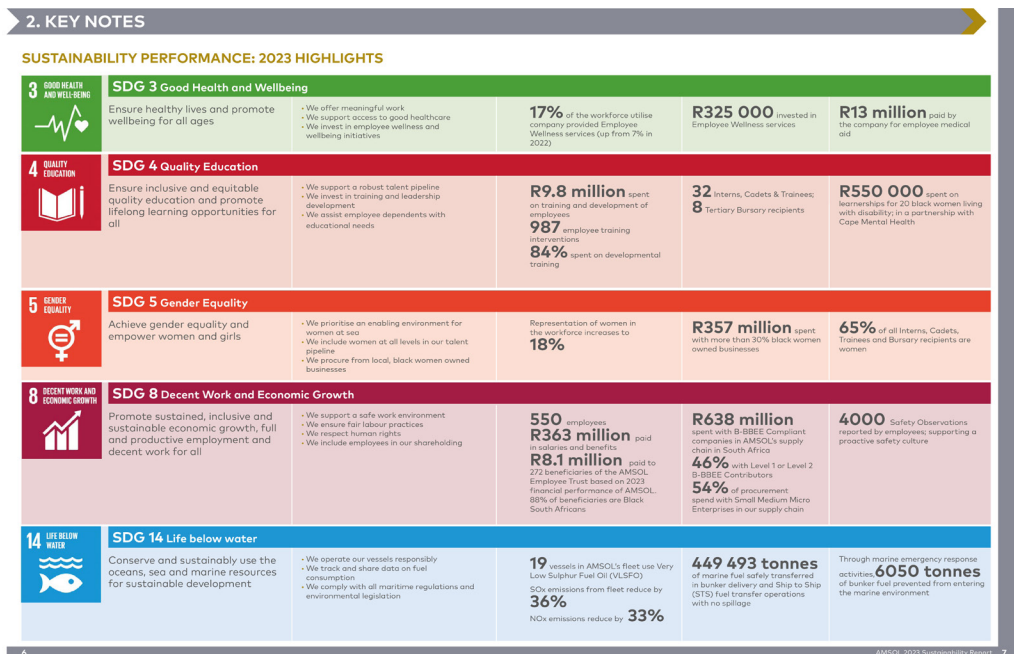


Figure 1: AMSOL 2023 Sustainability Report 7

Source: AMSOL, Sustainability Report Statistic (2024)

### **International Statistics on Salvage Activities and Awards**

It is important now to consider the international statistics regarding earnings generated by salvage operations. The ISU represents many salvage operators worldwide; they have full associate and affiliate members and report their earnings publicly. In their 2021 and 2022 reports, ISU members reported \$241 million (ISU, Annual Review, 2021-2022) (Figure 2). Clearly, salvage operations affect national and international economies. Below is the source of the revenues.

### **SAMSA and Its Role in South African Maritime Governance**

The South African Maritime Safety Authority (SAMSA) plays a central role in ensuring the safety and regulation of maritime activities within South Africa's territorial waters. Established in accordance with the South African Maritime Safety Authority Act, SAMSA is responsible for a wide range of functions related to maritime safety, environmental protection, and maritime law enforcement.



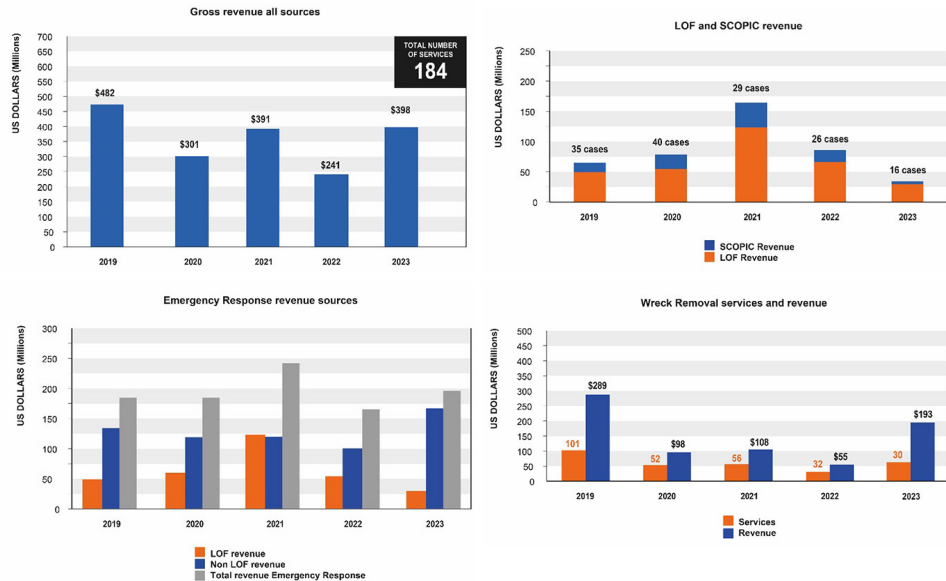


Figure 2: ISU publishes salvage industry statistics for 2023

Source: International Salvage Union (ISU) 2021-2022

One of SAMSA's primary responsibilities is the provision of port infrastructure and maritime services. These services encompass critical aspects of maritime operations, including dredging, aids to navigation, ship repairs, and marine operations. These functions are integral to maintain the efficiency and safety of South Africa's ports and coastal areas.

SAMSA's mandate also extends to the oversight of national entities related to marine activities, particularly concerning salvage and environmental factors at sea. This oversight ensures that salvage operations and environmental protection measures are conducted under national and international regulations.

### ***SAMSA's Role in Salvage Law Development in South Africa***

As the regulatory body responsible for maritime safety and environmental protection in South Africa, SAMSA plays a pivotal role in developing and implementing salvage regulations and guidelines. SAMSA may formulate and enforce regulations that govern salvage operations within South Africa's maritime jurisdiction.

One of SAMSA's key responsibilities is ensuring that salvage operations in South Africa adhere to national laws and international maritime safety and environmental protection conventions. This includes compliance with international salvage standards such as those outlined in the Salvage Convention. The Convention sets forth principles for the fair and effective conduct of salvage operations, including provisions related to remuneration, liability, and salvor responsibilities.

SAMSA's regulatory functions encompass licensing and regulating salvors, approving contracts, monitoring activities, and investigating incidents. These measures are essential to ensure that salvage operations are conducted safely, professionally, and in compliance with established standards.

### ***AMSOL's Role in South African Salvage Operations***

AMSOL, as a South African marine solutions provider, contributes significantly to the maritime industry, including salvage operations. While AMSOL is not a regulatory authority like SAMSA, providing essential resources and expertise for salvage operations is vital.

AMSOL offers a range of services in the maritime sector, including salvage, offshore support, and maritime logistics. AMSOL may collaborate with SAMSA, vessel owners, and other stakeholders in salvage operations to provide salvors, vessels, equipment, and logistical support.

AMSOL's involvement in salvage operations may include participation in contracts and agreements, subject to SAMSA's approval. While SAMSA sets the regulatory framework for salvage activities, AMSOL contributes valuable operational support to ensure the successful execution of salvage missions (AMSOL, Annual Report 2024).

### ***Collaboration between SAMSA and AMSOL***

SAMSA and AMSOL may have distinct roles and responsibilities in salvage operations but collaboration is essential to achieve successful salvage outcomes. SAMSA's regulatory oversight and adherence to international standards complement AMSOL's operational capabilities, resulting in efficient and compliant salvage operations. This collaborative approach ensures that salvage operations are conducted safely and professionally under applicable laws and regulations. SAMSA's role in setting and enforcing salvage standards aligns with AMSOL's expertise in providing the resources and services needed for effective salvage missions (AMSOL, in partnership with the Department of Transportation and SAMSA 2019).

### ***Media Attention on Salvage Cases in South Africa***

Salvage cases involving shipwrecks in South Africa have not gained widespread international attention in recent times, as such cases are relatively rare and often receive significant media coverage and attention in the maritime community. However, notable salvage cases provide insights into the challenges and successes of salvage operations in South African waters. This is the opposite of the recent experience in the USA with the collapse of a key bridge into a port that is so significant to

the US (McLaughlin, 2024). Industry solutions and modern technology remain at the forefront of rebuilding after a harrowing disaster. Media attention is most welcome, especially when it will attract international expertise; however, salvage operations are not about waiting for the limelight; it is the men and women who commit themselves to react in maritime peril, who deserve all the legal and financial support while making sure that the inherent risks in the industry are mitigated and prevented at every turn.

## **US Legal Developments Challenging the Privy of the Salvage Contract**

### ***Restrictions in Changing Salvors***

In the United States, a House Bill is under consideration in the form of the H.R.6865 - Coast Guard Authorization Act of 2022. Of particular focus in this paper is Section 501, which deals with the restriction on changing salvors during the salvage process. Salvage contracts are unique and have countless consequences for the parties involved, depending on the special circumstances of each situation. It is, therefore, important to consider the impact of a restrictive law in salvage operations. In salvage operations, each ship is unique and each accident and scale of potential loss varies, requiring unique and sometimes creative marine solutions, which may be beyond the scope of some salvors because of the business model they may have or access to the relevant resources. Salvage law must stand the test of prioritising saving life, property, and the marine environment. Therefore, what will the future of the following law be in the US?

### **SEC. 501. RESTRICTION ON CHANGING SALVORS.**

Section 311(c) (3) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c) (3)) is amended by adding at the end of the following:

“(C) An owner or operator may not change salvors as part of a deviation under subparagraph

(B) in cases in which the original salvor satisfies the coast guard requirements under the National Contingency Plan and the applicable response plan required under subsection (j)”.

“(D) In any case in which the Coast Guard authorises a deviation from the salvor as part of a deviation under subparagraph (B) from the applicable response plan required under subsection (j), the Commandant shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report describing the deviation and the reasons for such deviation”.

The draft bill has an inherent quality control intended within how it is drafted by giving the United States Coast Guard (USCG) the final voice on determining the suitability of a salvor for a particular job. Further, once an experienced salvor has already spent the money, signed the contracts, and taken over the project management of a salvage operation, why should such a competent salvor be arbitrarily taken off the operation?

This bill is there to protect the success of the project. However, this law-based restriction is concerning as it forces salvage operations to continue between parties who may prefer to end the contract on their own. It may also be concerning that this proposed change to the US Federal Water Pollution Control Act 1948 [33 U.S.C. 1321(c) (3)] may result in third parties having the final say on contracts that should be binding already privately between parties. At the same time, it must be remembered that just like the case of *Alder v. Dickson* 1955 1 QB 158, which resulted in a maritime industry-wide application of what is known as the Himalaya clause, it is not unusual for the industry to adopt

a stance that does not strictly observe privity of contract to make the industry work more efficiently. In the *Alder v. Dickson* case, it was settled that it is possible in the maritime industry and other industries to create contracts to benefit third parties that may not have been part of the contract. Perhaps if the changes in the bill are looked at in the same manner, they will be even better received by the US and perhaps the rest of the maritime community.

### ***The Golden Ray Decision***

The MV *Golden Ray* involves a Ro-Ro vessel that capsized off the coast of the USA in the St. Simons Sound by the port of Brunswick, Georgia. Glynn County approached the courts on several Federal Oil Pollution Act, 1990 (OPA) claims and the state claims to USD98 million. The County argued that there was negligence during the raising and cleanup operations, and the defendants, including several salvage operators, created a serious oil pollution incident and violated several codes during clean up. In making the order, the judge upheld the State law claims against the defendants, including claims for being a private and public nuisance and trespassing on State property.

Other than those claims, the OPA claims were dismissed as they were already accounted for as part of the responsibility of the polluting party. The *Golden Ray* decision clarifies that parties in disaster areas will be increasingly litigious on environmental protection matters (*Golden Ray Order*, 2023). If awards go against salvors, it will be important that such salvors prepare themselves for cuts into their awards. However, the US wants to incentivise those in emergency response and disaster management.

### **Results**

As demonstrated in this article, exploring the policy development question in salvage contracts gives us the following results to ponder.

1. The current international and national frameworks surrounding salvage contracts are efficient.

2. The current rules help parties have very clear parameters to make, enforce, issue, or defend actions in courts over salvage claims. Parties cannot claim in defence that they were forced to have a particular salvor because the current legal systems highly support the freedom of contract and privity of contract.
3. Should the US bill on restricting the appointment of salvors become full law, further study and testing of that law in courts will provide future data that must be collected and analysed to see if the law supports salvage operations.
4. The stance of this article is that taking away freedom of contract and breaking traditional freedom of contracts in salvage matters may open up questions of liability to the USCG that are not ideal considering the litigious nature of parties, particularly regarding environmental protection. These considerations should be weighed carefully.

### Conclusions and Implication

South Africa's extensive coastline, strategic location, and robust maritime industry make it a key player in the realm of salvage operations; like the US, which is also a nation with a protected and highly active maritime industry, salvage operations will continue to be a worldwide life and property saving activity that should be supported, incentivised, and encouraged. State control authorities such as SAMSA in South Africa and the USCG in the US, among other involved stakeholders must continue to play a developmental role as the regulatory authority responsible for maritime safety and environmental protection.

Salvage operations should not be developed with rules that are too restrictive to discourage good and prepared salvors from playing a vital role in ensuring that salvage operations adhere to national and international standards. The Salvage Convention provides a comprehensive framework for salvage activities, emphasising fair compensation, salvors' liability, and

environmental protection. Of course, the appropriate force of law should deal with deviations from these standards.

Courts should continue to hear cases where salvors' methods should be challenged if they do not meet international standards; however, it is recommended that parties explore the modern-day salvage contracts such as those developed by the ISU and BIMCO, so that potential problems that may lead to legal cases may be prevented at the contractual level while making sure that sufficient lifesaving speed is applied when such commitments are made.

The ISU encourages the use of the LOF unamended, which means that it still serves the purpose; however, new generation salvage contracts such as WRECKFIXED 99 by BIMCO, for example, include some contracts that can be built by parties themselves so they can discuss terms that will help them protect the environment and agree on what modern technologies and monitoring to use may be selected and recorded in the contract to avoid confusion, ambiguity, and legal disputes later. Other recommended contracts include, for instance, the BIMCO's WRECKSTAGE, which involves a lump sum payment in stages as one would do in an Escrow building account, for example. Technology is also available to monitor and report on progress remotely. As a final word, this paper has considered the perspective of two nations and their salvage systems and what is clear is this: When it comes to saving life and property at sea, this is a national and international mandate that both nations considered in this discourse have put great efforts into, this is the main essence of the Salvage Convention, a multinational instrument that all member States well receives in unison.

### Acknowledgements

We would like to appreciate the Massachusetts Maritime Academy, the International Maritime Business Department Chair, and Dr. Bani Ghosh who continues to inspire excellence maritime scholarship, partnerships with national and global interests being paramount and balanced.

We also acknowledge the Nelson Mandela University, Business School in Gqeberha for the input of some of their Master in Maritime Management (MMM) students who may not have finally authored but were part of the research for this treatise. A special thanks to the salvage community all over the world for being the backbone of maritime operations the world over.

### Conflict of Interest Statement

The authors declare that they have no conflict of interest.

### References

- African Marine Solutions (AMSOL). (2019, June 4). *Busy start to 2019 for ETV 'S.A. Amandla* <https://www.amsol.co.za/busy-start-to-2019-for-etv-s-a-amandla/#:~:text=January%3A%202019%20began%20with%20the,which%20had%20anchored%20close%20inshore>
- African Marine Solutions (AMSOL). (2024). *African marine solutions*. <https://www.amsol.co.za/>.
- African Marine Solutions (AMSOL). (2024). *Sustainability*. <https://www.amsol.co.za/sustainability/#industry-development>.
- Adler v. Dickson* (1955) 1 QB 158. <https://www.scribd.com/document/463464423/Adler-v-Dickson-and-Another-1955-1-Q-B-158>
- American Institute of Marine Underwriters (IAMU). (2024). *American institute hull clauses (September 29, 2009)*. <https://www.aimu.org/forms/HullClauses2009.pdf>
- American Institute of Marine Underwriters (IAMU). (2024). *AIMU celebrated a milestone 125<sup>th</sup> Anniversary last year!* <https://aimu.org/#:~:text=AIMU%20celebrated%20a%20milestone%20125th,advocate%2C%20educator%20and%20information%20resource>
- Arnold v. United Ins. Co.*, 1 Johns. Cas. (n. d.) 303, 366.
- Baltic International Maritime Council (BIMCO). (2024). *Salvage contracts*. <https://www.bimco.org/contracts-and-clauses/bimco-contracts/wreckfixed-99#>.
- Boonzaier Jonathan. (2024, July 11). Stricken ultra-bulk ship runs aground on inhospitable African coast and capsizes. *Tradewinds*. <https://www.tradewindsnews.com/casualties/stricken-ultrabulk-ship-runs-aground-on-inhospitable-african-coast-and-capsizes/2-1-1675829>
- Brown, M. R. (2017). The role of salvage operations in maritime safety: A South African perspective. *South African Journal of Maritime Studies*, 32(2), 189-204.
- Crawford, R. J. M., Davis, S. A., Harding, R. T., Jackson, L. F., Leshoro, T. M., Meyer, M. A., Randall, R. M., Underhill, L. G., Upfold, L., Van Dalsen, A. P., Van Der Merwe, E., Whittington, P. A., Willams, A. J., & Wolfaardt, A. C. (2000). Initial impact of the treasure oil spill on seabirds off western South Africa. *South African Journal of Marine Science*, 22(1), 157-176. <https://doi.org/10.2989/025776100784125645>
- European Union. (2013). *Regulation (EU) No 751/2013 of the European Parliament and of the Council of 2 August 2013 establishing technical standards for the provision of road safety infrastructure services*. Official Journal of the European Union. Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:226:0001:0017:en:PDF>
- Federal Water Pollution Control Act of 1948* (n. d.) (33 U.S.C. § 1321(c)(3)). U.S. code of federal regulations, Title 33.
- Glynn County, Georgia v. GL NV24 Shipping Inc. et al*, No. 2:2022cv00028 - Document 125 (S.D. Ga. 2023). (n.d.). Justia Law. <https://law.justia.com/cases/federal/district-courts/georgia/gasdcce/2:2022>



- cv00028/86646/125/
- Green, T. (2018). Salvage in South African waters: Challenges and strategies. *Maritime Policy & Management*, 45(6), 679-694. <https://doi.org/10.1080/03088839.2018.1438372>
- Green, S. (2018). Salvage in South African waters: Challenges and strategies. *Maritime Policy and Management*, 45(5), 607-623.
- International Maritime Organization (IMO). (2015). *International convention on salvage, 1989*. International Maritime Organization.
- International Maritime Organization (IMO). (2024). *Status of conventions*. International Maritime Organization.
- International Salvage Union (ISU). (2023). *ISU annual review 2022*. <https://www.marine-salvage.com/wp-content/uploads/2023/07/ISU-Annual-Review-2022.pdf>
- International Salvage Union (ISU). (2023). *ISU annual review 2021-2022*. <https://www.marine-salvage.com/wp-content/uploads/2023/07/ISU-Annual-Review-2022.pdf>
- International Salvage Union (ISU). (2024). *Homepage*. <https://www.marine-salvage.com/>
- Konrad, J., & Mercogliano, S. (2021, March 27). *Captain Nick Sloane, the salvage master who raised the Costa Concordia, discusses what it will take to refloat the ever given*. gCaptain. <https://gcaptain.com/salvage-master-nick-sloane-ever-given-interview/>
- Lamor Bow Collector Tech. (2023). *Lamor's innovative environmental protection technology saving Sweden's sensitive coastline*. Lamor. <https://www.lamor.com/articles/lamors-innovative-environmental-protection-technology-saving-swedens-sensitive-coastline>
- McLaughlin, E. (2024). *Francis Scott Key Bridge collapse: Economic and infrastructure consequences*. The Conference Board. <https://www.conference-board.org/publications/francis-scott-key-bridge-collapse>
- Mthembu, S. E., & Chasomeris, M. G. (2023). An assessment of the capacity and performance of marine services in South Africa's ports. *Journal of Transport and Supply Chain Management*, 17(a), 879.
- Notteboom, T., Haralambides, H., & Cullinane, K. (2024). The Red Sea crisis: Ramifications for vessel operations, shipping networks, and maritime supply chains. *Maritime Economics & Logistics*, 26, 1-20. <https://doi.org/10.1057/s41278-024-00287-z>
- OASIS Open Journals. (1996). *Journals of Andrew Geddes Bain: Trader, explorer, soldier, road engineer and geologist*. Cape Town: Van Riebeeck Society.
- Smith, J. A. (2019). Maritime salvage: Challenges and opportunities in South Africa. *Journal of Maritime Law and Policy*, 45(3), 297-314.
- South African Government (n. d.). *Constitution of the Republic of South Africa, 1996*. <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-04-feb-1997>
- South African History Online (SAHO). (1999, July 14). *Discovery of the wreck of passenger liner SS Waratah*. <https://www.sahistory.org.za/dated-event/discovery-wreck-passenger-liner-ss-waratah>
- South African Maritime Safety Authority. (2020). *Annual report*. SAMSA. <https://www.samsa.org.za/Annual%20Report/SAMSA%20Annual%20Report%202020-21/SAMSA%20ANNUAL%20REPORT%202020%2021%204%20FEB.pdf>

- South African Weather Service. (2019). *South African weather service: Annual report 2018/2019*. SAWS. [https://www.weathersa.co.za/Documents/AnnualReports/SAWS%20Annual%20Report%202018\\_19%20Web%20Final%20\(1\).pdf](https://www.weathersa.co.za/Documents/AnnualReports/SAWS%20Annual%20Report%202018_19%20Web%20Final%20(1).pdf)
- The Akaba. The City of Birmingham. Wood v. Burg et al. Boston Towboat Co. v. Wood.* (February 7, 1893). <https://m.openjurist.org/54/fl1d/197>
- Transnet Limited T/A National Ports Authority v. the MV Cleopatra Dream, the cargo laden on board the MV Cleopatra Dream* (2010, January 22). <https://www.saflii.org/za/cases/ZAWCHC/2010/4.pdf>
- Transnet Ltd t/a National Ports Authority v. the MV Cleopatra Dream and Another* (163/10) [2011] ZASCA 12; [2011] 3 All SA 279 (SCA); 2011 (5) SA 613 (SCA) (2011, March 11). <https://www.saflii.org/za/cases/ZASCA/2011/12.html>
- U.S. Code of Federal Regulations. (n.d.). *Title 19 – Customs and duties: Part 4, Vessels in foreign and domestic trades § 4.97 – Salvage Vessels*. <https://www.law.cornell.edu/cfr/text/19/4.97>
- U.S. Code of Federal Regulations. (n.d.). *Title 32 – National defense: § 752.5 Salvage*. <https://www.law.cornell.edu/cfr/text/32/part-752>
- U.S. Congress. (2022). *H.R. 6865 Coast guard authorization Act of 2022*. 117<sup>th</sup> Congress (2021-2022).
- U.S. Senate. (1991). *Consideration of treaty document 102-12US: The international convention on salvage, 1989 (Salvage Convention), done at London April 28, 1989*. <https://www.congress.gov/treaty-document/102nd-congress/12/more-info>
- Wolfaardt, A. C., Underhill, L. G., Altwegg, R., Visagie, J., & Williams, A. J. (2008). Impact of the treasure oil spill on African penguins (*Spheniscus demersus*) at Dassen Island: Case study of a rescue operation. *African Journal of Marine Science*, 30(2), 405-419. <https://doi.org/10.2989/AJMS.2008.30.2.13.563>
- Wan, Z., Su, Y., Li, Z., Zhang, X., Zhang, Q., & Chen, J. (2023). Analysis of the impact of Suez Canal blockage on the global shipping network. *Ocean & Coastal Management*, 245, Article 106868. <https://doi.org/10.1016/j.ocecoaman.2023.106868>
- Zhang, W. Z., Pan, J., Sanchez, J. C., Li, X. B., & Xu, M. C. (2024). Review on the protective technologies of bridge against vessel collision. *Thin-Walled Structures*, 201(Part B), Article 112013. <https://doi.org/10.1016/j.tws.2024.112013>