Merchant shipping (1)

Valerie Carelse - Marine Pollution Bills

From: Edmund Greiner <greiner@wylie.co.za>
To: "'vcarelse@parliament.gov.za'" <vcarelse@parliament.gov.za>
Date: 8/8/2013 12:05 PM
Subject: Marine Pollution Bills
CC: "'dcooke@capebar.co.za'" <dcooke@capebar.co.za>, "'andrew.robinson@norto...
Attachments: Letter Parliamentary Portfolio Committee for Transport.pdf

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Dear Madam,

Please see attached letter for your kind attention.

Kind regards,

Edmund Greiner
Secretary of The Maritime Law Association of South Africa

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THE MARITIME LAW ASSOCIATION OF SOUTH AFRICA

Affiliated to the Association of Law Societies of SA
Member of the Comite Maritime International

Ms N.R Bengu
The Chairperson: Parliamentary Portfolio Committee for Transport
Care of:
Ms Valerie Carelse
vcarelse@parliament.gov.za

Dear Madam,

Merchant Shipping (Civil Liability Convention) Bill ("*the CLC bill*") & Merchant Shipping (International Oil Pollution Compensation Fund) Bill ("*the Fund Convention bill*") : Comments by the Maritime Law Association of South Africa

1. We refer to our email of Thursday, 1 August 2013. As set out therein, it only came to our attention during the course of last week that your committee had sought comment in relation to the above named bills, and that the deadline for such comment was last Friday. As you are aware, we sought an extension of that deadline, and were advised by Ms Carelse, that the Committee had seen fit to grant our request, and to allow us until today, being Thursday, 8 August 2013, to provide our comments. We are grateful for that indulgence.

2. As you will however no doubt appreciate, we have had limited time in which to consider the draft bills and to comment. We have in the circumstances not been able to give the bills the detailed consideration which they require, and are as a result neither in a position to deal with each and every aspect of the bills, nor to provide your committee with the kind of comprehensive comment we would have preferred. We apologise for that, and for not being in a

position to be of potentially greater assistance to your committee at this stage, but it is unfortunately simply not achievable in the limited time which has been available to us.

3. Furthermore, we are a body consisting primarily of maritime lawyers, and the involvement of our members in the field of marine pollution is generally on a case by case basis, as dictated by the circumstances of any given maritime casualty. Many of our members have considerable experience in the application in practice of the existing marine pollution control and liability regime, and in particular, the ***Marine Pollution (Control & Civil Liability) Act*** 6 of 1981 ("*the MPA*"). Although certain of our members may have some experience in the field of public law, or rather international public law, that is not their primary area of speciality or experience. Therefore whilst, as you will note, we touch upon one or two public law aspects in what follows, we record that we would expect the drafters of the two bills to possess considerably more relevant knowledge and experience in relation to that aspect. We are hopeful that in the event that you see fit to direct any of our relevant comments to the state law advisors, they should be able to clarify those without any or much difficulty or delay.

4. We preface the comments which follow by reiterating what we said in our previous email. We are great supporters of South Africa's accession to the ***Civil Liability Convention, 1992*** ("*CLC 1992*") and the ***Fund Convention*** of the same year ("*the Fund Convention*"), and relieved that following what has been a considerable delay since such accession, steps are now being taken to implement the relevant conventions – albeit that the money bill and administration bills for the Fund Convention have not yet been tabled. As matters stand we would be terribly exposed in the event of a major oil spill, given the low limits of liability contained in the MPA. It is simply imperative that both CLC 1992 and the Fund Convention are given force of law as soon as is reasonably possible so as to ensure that our limits of liability, at least in relation to pollution from tankers, are increased from the unacceptably low

levels contained in the MPA, and to ensure a claimant's access to the 1992 Fund.

The CLC bill

The harmonisation of the CLC bill with the existing marine pollution liability regime as contained in the MPA

5. Section 4 of the explanatory Memorandum on the Objects of the CLC bill attached to the draft records that the bill was published on 15 April 2009 in GG No. 321103 for comment and that the DOT did not receive any comments. It should however in this regard be noted that the version of the bill published during April 2009 ("*the 2009 version*") differs considerably from the one which has now been tabled before Parliament, and which is before your committee. It will, by way of example, be noted that the 2009 version was selective in regard to exactly which provisions of CLC 1992 it sought to enact into our domestic law, and further that the schedule to the 2009 version contained numerous proposed amendments to the MPA, and also proposed amendments to the ***Marine Pollution (Prevention of Pollution from Ships) Act*** 2 of 1986 and the **Shipping General Amendment** Act 23 of 1997. With regard to the MPA, the 2009 version sought *inter alia* to delete those provisions in the MPA governing liability and compensation under the 1969 CLC, thereby confining the MPA's liability provisions to non-CLC incidents, and expand the liability provisions in the MPA to include substances other than oil, and to introduce liability limits in line with those of the CLC.

6. The current version of the bill seeks to enact the CLC *holus bolus* into our domestic law, save for the proposed deletion of sections 13-15 of the MPA, which relate to compulsory insurance for oil tankers and direct rights of action against their liability insurers etc.

7. One of our former members, Mr Carl Briesch, who was a long time legal advisor to the DOT and as far as we understand produced the 2009 version of the CLC bill, has expressed the concern that wholesale transposition/enactment of the CLC into our domestic law, as opposed to only those provisions which have a domestic law dimension, has the effect of placing inappropriate and potentially problematic material on the statute book. The drafters of the CLC bill may well have given consideration to this and nevertheless inclined to the approach adopted, but we nevertheless felt it incumbent upon us to bring Mr Briesch's concern to your attention. We have not had time to give any further consideration to this aspect.

8. The enactment of the CLC bill in its current form will result in extensive overlap with the MPA in relation to the oil pollution liability regime applicable to tankers carrying the requisite quantities of oil as cargo. Whilst we appreciate that the courts will in line with the applicable principles of statutory interpretation no doubt regard the relevant provisions of the MPA as having been revoked to the extent that they are irreconcilably in conflict with those of the CLC bill, potential areas of uncertainty, and hence conflict, will inevitably remain. The current approach is in our view certainly not the preferred method of giving effect to the CLC, and if the CLC bill is to be enacted in its current form, which may be inevitable given the pressing need to enact the relevant conventions into law, it will be imperative for the DOT to give urgent consideration to the wider marine pollution liability and control regime.

Relevant sections

Section 2

9. It is in our view necessary to clarify that the CLC bill correctly describes the instrument to which it is purporting to give force of law. We note that section 2 of Part 1 purports to enact the 1992 Protocol, as defined, into law. Although

this may be the correct approach, we have a concern that what should be enacted into law is CLC 1992 itself, and not the 1992 Protocol. In other words, should we not be seeking to give effect to the 1992 Protocol by enacting the CLC 1992? We recommend that this aspect be clarified with the DOT and the state law advisors to avoid, at least potentially, not giving proper domestic effect to CLC 1992.

10. We are also concerned that the enactment as aforesaid may not be sufficient to give force of law to any amendments to the 1992 Protocol. The limits of liability set out in the 1992 Protocol were for example increased significantly pursuant to LEG.1(82) adopted by the legal committee on 18 October 2000, and we would certainly want to ensure that the increased limits, and not those contained in the 1992 Protocol (and hence CLC 1992 in its original form), have force of law locally.

11. Mr Briesch comments further that the mechanism for incorporating amendments to the 1992 Protocol is confusing, and that the CLC bill requires a clear, simple and responsive mechanism for incorporating amendments. We share this concern, as it is not clear to us that all amendments to CLC 1992, including future increases in limits, would have automatic force of law in South Africa pursuant to section 231 of the Constitution.

12. As we have stated earlier, we are not international public lawyers, and we accordingly recommend that these aspects also be clarified with the state law advisors and/or the DOT.

13. Mr Briesch has raised a concern regarding the reference to the 1992 Protocol having "*force of law in the Republic*" which he feels is inappropriate for enactments intended to have extra-territorial application (the same applies to section 2 of the Fund Convention bill).

Section 4

14. Mr Briesch queries why the application provisions in the CLC bill and Fund Convention bill differ. It is not clear to us why this should be the case.

Sections 7 and 8

15. Section 7 provides that the High Court, exercising its admiralty jurisdiction, shall have jurisdiction, including jurisdiction for all incidental purposes, to hear and determine claims for compensation under the 1992 CLC in respect of incidents (i) that have caused pollution damage in a place to which the CLC applies or (ii) in relation to which preventative measures have been taken to prevent or minimise pollution damage in a place to which the 1992 CLC applies.

16. Given that the CLC 1992 also has application outside territorial waters, but within the Exclusive Economic Zone ("*EEZ*"), it is not clear which High Court is intended to have jurisdiction in relation to relevant incidents in the EEZ. Presumably, on the basis of the draft, any High Court?

17. Furthermore, on a literal reading the draft vests the High Court with jurisdiction to determine claims for compensation in relation to any place in which CLC 1992 applies ie. in any country. We refer to the provisions of Article IX of CLC 1992 which provides that where an incident has caused pollution damage in the territory of one or more contracting states, or preventative measures have been taken in such territory, actions for compensation may only be brought in the courts of any such contracting state or states. Contracting states are required to ensure that their courts are possessed of the requisite jurisdiction. As such, whilst the relevant South African Courts require jurisdiction to determine claims for compensation

arising in more than just our own territory or EEZ, there is no basis for the jurisdiction to be any wider, if indeed that it what was intended, which seems unlikely. In our view section 7 should ideally be more specific in relation to exactly what jurisdiction the admiralty Court has in regard to claims for compensation.

18. Section 8 governs applications commenced by an owner or insurer etc. to limit liability. The draft provides that such applications may be made to the division of the High Court in which a claim for compensation has been commenced, or in any other case, to the division of the High Court having jurisdiction. Our concern is that if the incident to which the application relates occurred in the EEZ, rather than the territorial waters, it is arguable that no High Court will have the requisite residual jurisdiction.

19. As will be apparent, section 7 purports to vest the High Court with the requisite jurisdiction in regard to claims for compensation, including jurisdiction for all incidental purposes, and section 8 in regard to claims for limitation, and in the event of the High Court determining that a person's liability may be so limited, to make any order which the Court thinks fit in respect of apportionment and distribution, of a Fund for the payment of those claims. There is no express reference in the CLC bill to any jurisdiction to deal with the constitution of a Fund (see Article V(3) and (11) of CLC 1992) and although this may, arguably, be implied, we consider it to be advisable to deal with this aspect in the draft.

Sections 15 and 16

20. These sections appear in Part 4 of the CLC bill under the heading "***EXPENSES OF STATE UNDER MARINE POLLUTION (CONTROL AND CIVIL LIABILITY) ACT, 1981***", which act it will be recalled is intended to remain in force following the enactment of the CLC bill.

21. Section 15 provides, *inter alia*, that any amount which the owner of a ship is liable under CLC 1992 to our Government[1] by way of compensation for any expense or other liabilities incurred by the Government in or because of the exercise of their powers under the MPA constitutes a charge on the ship. Section 16 provides, *inter alia*, that if such an amount is a charge on a ship the ship may be detained by SAMSA (ie. the Authority) until the amount is paid or security for the payment of the amount is provided to the satisfaction of SAMSA.

22. Given that the CLC bill is expressly intended to bind the state, and any organ of state, and that "person" as defined in CLC 1992 includes a state, we must confess to being at somewhat of a loss to properly understand exactly how these provisions are intended to operate given the provisions in the CLC 1992 governing liability, enforcement, the establishment of a Fund, and last but not least, Article VI. We recommend that this be clarified.

The Fund Convention bill

23. We refer you to the comments already made above in relation to the CLC bill which were expressly stated also apply to the Fund Convention bill.

Section 2

24. We have similar concerns, as set out above in relation to the CLC bill, that the Fund Convention bill seeks to give effect to the correct international instrument ie. the Fund Convention 1992 as opposed to the 1992 Protocol to the 1971 Fund Convention (which no longer exists).

[1] Including an organ of state as defined in the CLC bill (see section 239 of the Constitution).

25. We have similar concerns to those expressed above in relation to existing and future amendments to the Fund Convention 1992, including those in relation to increases in limits.

26. As set out above, the money bill and administration bill necessary to implement and give proper effect to the Fund Convention 1992 have not yet been tabled in Parliament. We query whether it is in fact proper or indeed possible to seek to enact and give effect to the Fund Convention 1992 in circumstances where certain critical components of the enabling legislation are outstanding. The state law advisors will no doubt be in a position to comment further in this regard.

27. We recommend that clarification be sought in regard to these aspects from the state law advisors.

Conclusion

28. We trust that these comments will at least be of some assistance to you, and invite you to contact us in the event that you require any further input from us.

Yours faithfully,

Adv. J.D. Mackenzie (Cape Bar)

Mr P. M. Holloway (Webber Wentzel Attorneys)

Mr E.C Greiner (Shepstone & Wylie Attorneys)

On behalf of the Maritime Law Association of South Africa