Limitation of liability for Maritime Claims: a South African perspective

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LIMITATION OF LIABILITY FOR MARITIME CLAIMS

A South African Perspective

By

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South Africa

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DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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(Date): 15/09/2016

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**ABSTRACT**

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The dissertation is a study of the South African limitation of liability for maritime claims regime in relation to the International conventions on the subject. South Africa is not a party to the limitation of liability international conventions. South African limitation legislation is considered and compared to the International conventions on certain aspects.

Judicial perspectives of certain aspects in relation to the concept of limitation of liability, like, *inter alia*, onus of proof, conduct barring limitation and forum shopping are discussed. In the South African limitation regime, shipowners can discharge the onus by proving an absence of fault or privity. Certain untested features of the South African limitation regime are identified.

**KEYWORDS:** Limitation, liability, conduct, fault, privity, forum, untested
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<tr>
<td>AJRA</td>
<td>Admiralty Jurisdiction Regulation Act</td>
</tr>
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<td>CLC</td>
<td>International Convention on Civil Liability for Oil Pollution Damage</td>
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<td>CMI</td>
<td>Comite Maritime International</td>
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<tr>
<td>COGSA</td>
<td>Carriage of Goods by Sea Act</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>ISM</td>
<td>International Safety Management</td>
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<td>LLMC</td>
<td>Limitation of Liability for Maritime Claims Convention</td>
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<td>MPCC</td>
<td>Marine Pollution (Control and Civil Liability) Act</td>
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<td>MSA</td>
<td>Merchant Shipping Act</td>
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<td>SA</td>
<td>South Africa</td>
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<td>SDR</td>
<td>Special Drawing Rights</td>
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CHAPTER ONE

Introduction

In view of South Africa in terms of its Admiralty Jurisdiction Regulation Act 105 of 1983 having one of the most arrest friendly jurisdictions in the world for maritime claims, the issue of limitation of liability for such claims is interesting to look at. South Africa is party neither to the 1957 International Convention relating to the Limitation of Liability of Owners of Seagoing Ships, the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC) nor the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention). South Africa does however have provisions in its own Merchant Shipping Act 57 of 1951 modelled closely on the 1957 Convention and Section 503 of the English Merchant Shipping Act, 1894. In terms of limitation of liability, in South Africa shipowners can discharge the onus by proving an absence of fault or privity. (Atlantic Harvesters of Namibia Ltd v Unterwesser Reederei GMBH of Bremen, 1986). If the onus is discharged successfully, the amounts to which a shipowner or other party is entitled to limit his liability are considerably lower in South Africa than in countries in which the 1976 Convention applies. (Dyason, 2001, p495). What are the implications of the differences between the South African legislation on limitation of liability for maritime claims and international conventions on same?

The purpose of this study is to examine certain legal issues pertaining to the limitation of liability for maritime claims in South Africa. A comparison will be made with relevant provisions of international maritime conventions as these relate
to such issues. With this comparison, the implications of any differences between the international conventions on the limitation of liability for maritime claims and the South African legislation on same will become apparent. It is also recognised that the International Safety Management Code (ISM Code) will have a bearing on evaluating the conduct of the shipowner in terms of actual fault and privity and also on the alter ego of the company considering that there is a ‘designated person’ required in terms of the Code. (2015, ISM Code, para 4).

The origins of the limitation concept and the modern day limitation regimes will be covered in this dissertation. This paper will also examine several aspects of the limitation concept in a South African perspective in general, including which claims are subject to limitation, whether the limitation right can be lost once it has arisen, conduct barring limitation, onus of proof in limitation matters, and the test for breaking limitation. The judicial decisions in relation to these aspects will also be discussed. Certain possible issues will also be pointed out with regards to the concept in South Africa as a few features appear yet to be tested by South African courts. Different kinds of limitation will be discussed, including tonnage and package limitation, but the primary focus of the paper will be limitation for maritime claims provided under the 1976 LLMC and the South African Merchant Shipping Act.
CHAPTER TWO

Historical Overview of the Limitation of liability concept

The right of limitation of liability is one that is special to Maritime Law. Despite the countless risks that could materialize during a shipping voyage, it was necessary to keep the industry alive because of its importance to world trade. Encouraging new potential shipowners and investors into the industry was one way of keeping the shipping industry progressing. Reducing shipowners’ potential liability in maritime claims is a way to keep some shipowners from being discouraged from being in the industry by potentially high liability claims should an incident occur. Hence it could be said that the right to limit liability was originally based on the notion of *navigare necesse est* despite the perils of the sea. (Rein, 1979, p1259). The right to limit liability has had longevity even though it may vary in the law of different maritime countries. Despite the varying forms of the right, the one thing in common in past and present regimes is that the right is reserved for operators and owners of ships, often charterers, and their servants. (Rein, 1979, p1259). The main characteristic of the right is that while the owner may in principle be liable, the extent of his liability is lessened by placing a cap on his total exposure. Traditionally the general rule of law dictated that a successful claimant should be entitled to compensation from the transgressor for the entire amount of damage, loss or injury incurred by him. Therefore the right to limit liability was thought of as a privilege as it was an exception to this rule. (Mukherjee, 2002, p197).

2.1 Limitation of Liability concept origins
The idea that the shipowner’s right to limit liability originated in Roman Law has not been a uniform one as there are no actual records in Roman Law of limitation in maritime law from that era even though commentators in support of that idea refer to the *actio noxalis*, the *actio de peculio*, and the *cessio bonorum* in support of their views. (Martínez Gutiérrez, 2011, p5). The notions contained in Roman law are not specifically in relation to a shipowner's limitation, but rather related to the doctrine of limitation of liability in general. It seems that the right of a shipowner to limit liability first made an appearance around the eleventh century in the ‘Tables of Amalfi’, which suggests the origin of the right was in Italy before later spreading to France and Spain. (Martínez Gutiérrez, 2011, p5). The limitation of liability provisions provided by the Code of Valencia and *Consolato del Mare* signified the arrival of the right in Spain. Owners and part-owners’ liability was restricted to their respective share value in the ship. (Martínez Gutiérrez, 2011, p5). It has been argued that through the growth of trade by sea during the Middle Ages came the development of the limitation of liability in order to promote investment in maritime voyages. (Donovan, 1979, p1000). Interestingly, other codes of the middle ages such as the Oleron Laws, Gotland Sea Laws and Flanders Sea Laws provided that the wrongdoer in any collision should give full compensation for any damage caused and did not provide for limitation of liability. (Fernandes, 1985, p221). This was, in effect, putting the injured party in the same position he was in before the damage was caused.

The recognition of the shipping enterprise consisting of a vessel and her voyage as a community has been around for many years. Ships often had several owners and it was thought that laws were necessary to deal with the rights and liabilities of shareholders as a result, often, of a lack of the modern corporation. (Staring, 2008, p321). This was the position in Roman law as pointed out by Judge Ware in *The Rebecca* [from Justinian]:

“If there were several exercitors, each was bound in solido for the full amount of the obligations of the master, arising ex contractu...But for obligations ex
delicto, each was bound only for his part, that is, in proportion to the interest he had in the ship.” (*The Rebecca*, 2007, p1198).

The Rhodian Law of Jettison also came from this period and was later developed as general average in which the master has the vessel, cargo and freight partnered under his authority. (Staring, 2008, p321). This too was adopted into Roman Law and taken, amongst other concepts, into the Middle Ages and further. The uniquely distinct business regulation of the maritime industry was evident in the way the marine adventure as an entity was to be protected and encouraged, which could be understood as recognition of its economic importance both to the power of the state and the prosperity of its society, a clear objective that has lasted till this day. (Staring, 2008, p322). Seemingly these considerations were the foundation for the advance of the limitation of liability doctrine.

The limitation of liability concept had expanded to more European maritime countries by the sixteenth and seventeenth centuries. The 1603 statutes of Hamburg, the Hanseatic Ordinances of 1614 and 1644 as well as the 1667 Maritime Code of Sweden all contained limitation provisions. However, the 1681 Marine Ordinance of Louis XIV, which codified maritime law in France and was later used as a model in Venice, Netherlands, Prussia and Spain (Griggs, 1997, p370), expressed the concept briefly as follows [as translated]: “The owners of ships shall be answerable for the deeds of the master; but shall be discharged, abandoning their ship and freight.”. (Ordonnance de la Marine,1681,Tit. 4, Art. II).

The concept was not adopted in the United Kingdom (UK) until 1733 through the Responsibility of Shipowners Act of 1733. This Act came about as a result of shipowners and merchants displeasure with the judgment in *Boucher v Lawson*, where a shipowner had been held personally liable over a shipment of bullion appropriated by the master. ((1733) Cas. T. hard 53; 95 E.R. 116). This result led to shipowners and merchants petitioning Parliament “that, unless some provision is
made for their relief, trade and navigation will be greatly discouraged, since owners of ships find themselves . . . exposed to ruin” (Donovan, 1979, p1007). The Act provided for the limitation of liability of a shipowner in respect of theft by master or crew to the value of the ship and her freight. (Griggs, 1997, p370). But this limitation right was later extended beyond just theft during the 18th century as a result of the development of trade by sea during this period. The preamble of this Act displayed that the motivation behind same was commercial:

“Whereas it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein;...[Shipowners answerable for goods and merchandise on board] although the said goods and merchandise, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners by means whereof merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom” (Messon, 2003, p107).”

This addressed two fears in that the British merchant fleet would be jeopardized without limitation rights and that commercial ventures would be inhibited as a result of there being no limitation. (Griggs, 1997, p371). The UK also adopted the continental shared risk concept in permitting the limitation by a shipowner by referring to his ship value plus the freight earned on the voyage in question. (Griggs, 1997, p371). This meant the maritime risks were shared between the shipowner and cargo interests. This approach would have been suitable during a period when it was still uncommon to insure this type of risk. The concept of limitation according to the value of the vessel was still active till the 1976 Limitation Convention.
For a concept to have lasted as long as limitation of liability has, it would be expected to have a decent rationale behind it. Dr. Lushington explained the rationale behind the right to limit liability in “The Amalia” as follows: “The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons”. ((1863) B & L 151). Lord Denning reached the same conclusion in “The Bramley Moore” where he stated that the shipowner’s right to limit liability “is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience” ([1963] 2 Lloyd’s Rep.429).

Historically the concept of limitation of liability shows that while there may not have been insurance as we know it today, the concept was an instrument for the sharing of loss by the different participants in the maritime voyage. This sharing of loss of the maritime voyage ensured that the risk was not too great for the shipowner and investors and thereby resulting in reduced loss on the part of the shipowner. This also assisted in encouraging potential shipowners and investors to still get involved in the maritime industry despite the risks involved. The shipowner’s liability was often only to the extent of the value of his vessel in that specific maritime voyage. This was so that the vessel in that situation would almost be providing insurance for the liability for what would be seen as the loss caused by the ship should anything go wrong in a maritime adventure.

There have been four original systems that have shaped the system of limitation of liability (Wetterstein, 1980, p290 as cited by Donner, 2016). Firstly, the French system, also known as the abandon system, where there was unlimited personal liability for the shipowner but he could absolve himself through the abandonment of his maritime fortune (ship and freight) to his creditors. It was only from this abandoned property that the creditors had to satisfy their claims. This system still exists in some African and Latin American countries. Secondly, the German system, also known as the execution system, where there was no personal liability on the shipowner but the creditors had a lien on the ship and its freight. This lien followed
the ship so their claims could be satisfied regardless of a change of ownership. Thirdly, the English system, where there was personal liability on the shipowner, however, this was limited to the extent of the value of the ship before the accident. This limitation was later changed to be calculated according to the ship’s tonnage. Lastly, the American system, also considered the mixed system, where there was personal liability on the shipowner to a certain sum of money the equivalent of the ship value after the accident plus the pending freight. However, the shipowner could absolve himself from liability through the abandonment of the ship to his creditors as in the French system. The system now exists in its updated form, which comprises of the first solution, of shipowner’s personal liability amount limited to the equivalent of the ship’s value after the accident plus the pending freight, being upheld and the introduction of an additional financial limit for personal claims calculated according to the ship’s tonnage.

There were some similarities in the French and German systems such as the recognition of the maritime voyage as the unit of limitation and liabilities subject to limitation were those that might arise during that specific voyage. The shipowner’s assets to be surrendered were the vessel and the freight for the voyage. Whilst there were some similarities, there were also several differences between the systems which is why there was a need for international uniformity of the rules in respect of limitation of liability. (Donner, 2016, p6). It is interesting to note that the English and American systems came about much later than the other systems as the concept of limitation of liability for maritime claims only extended to England and the United States in the eighteenth and nineteenth century respectively. (Tetley, 1992, p586).

The advance of trade and its capital demands, and variations in the business relations of owners and masters, as well as the sea adventure dangers and the lack of control of the owners over the fortunes they sent on ocean voyages was the reason for the spread of statutory limitation during the sixteenth and seventeenth centuries. (Staring, 2008, p323). This was in addition to policy and legal considerations aimed
at encouraging participation in the shipping industry and the protection of shipping interests.

2.2 Common Law v Civil Law concept of Limitation

Limitation in common law countries was only through statute. (Tetley, 1992, p586). For example the shipowner was liable without limitation for the contracts of the master as well as damage caused by the master or crew in the ship’s service under English common law. (Rein, 1979, p1265). But this changed with the first limitation statute under English law dating back to the eighteenth century. The United States, also a common law country, only had limitation statues from the nineteenth century. Common law systems are characterized by a limit based on the ship tonnage as well as on the value of the ship before the incident giving rise to liability occurred. (Tetley, 1992, 586). The United States was the exception to this as the American system, as mentioned earlier, calculates limit according to the value of the ship after the incident which gave rise to the liability that occurred, including any pending freight.

Limitation could only be invoked in the English system for claims arising from the wrongful acts of the owner’s servants committed in the course of their service to the ship and the unit of limitation was any “distinct occasion” which gave rise to liability. The inspiration for this unique aspect is thought to be the development of marine insurance, for which England, at the time, was more advanced than other maritime countries. (Rein, 1979, p1265). From the wording of “distinct occasion”, it is not difficult to see how that may be subject to interpretation in a situation where the claims resulted from the same act of negligence, but it is not clear what constitutes a distinct or separate occasion in an incident. (White, 2000, p323). A “distinct occasion” scenario could arise in a situation where there is a collision at the beginning and at the end of a specific voyage, there is a possibility the court could consider each collision a “distinct occasion”, therefore giving rise to a separate
limitation fund for each occasion. (Ozcayair, 1998, p368). However courts have had their say in situations where seemingly separate occasions have been caused by the same act. This was the case in *The Rajah*, where a ship struck both a tug and a tow. The court held that since the casualty was caused by one act of negligence, it is considered as one distinct occasion, consequently one limitation fund should be established. ([1872] L.R. 3A. &E. 539). It is necessary to note the English development of the limitation of liability concept as the international limitation of liability conventions are largely based on the English version of limitation. (Killingbeck, 1999, p5).

Limitation in civil law countries, much like the American system, is based on the value of the ship after the incident which gave rise to liability. Two theories of limitation existed under civil law; abandonment, which is linked to France, and execution, applied in Germany and Scandinavia. (Tetley, 1992, p587). Naturally, when you have different systems for the same concept there is bound to be conflict where there are differences. It is these differences that led to a need for international uniformity on the subject of limitation of liability for maritime claims.

### 2.3 Limitation of Liability Conventions

There have been numerous endeavours to achieve international uniformity for limitation of liability. Traditionally there have been three International conventions governing the general right to limit liability of a shipowner, namely the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels and Protocol of Signature (1924 Convention), the International Convention Relating to the Limitation of the Liability of Owners of Sea-going ships, Brussels 1957 (1957 Convention) and the Convention on Limitation of Liability for Maritime Claims, London 1976 (LLMC).

#### 2.3.1 International Convention on the Limitation of Liability 1924
This was the first international convention on limitation in an effort to achieve international uniformity on the subject. This convention was very similar to section 503 of the UK Merchant Shipping Act 1894. This section provided for limitation of liability for loss of life and personal injury or loss of or damage to property that took place without the owner’s fault or privity. The 1924 Convention was so similar to this Act that UK Legislators did not find it necessary to amend the Act to be in full compliance with the Convention. (Killingbeck, 1999, p6). This Convention was a compromise between the English and French systems. (Donner, 2016, p6). In terms of this Convention the limitation unit is the accident and the limitation fund was established based on the value of the ship after the accident plus 10 per cent of its value at the start of the expedition. (Ozcayair, 1998, p303). It was, however, not a very successful convention as only 15 states ratified it and therefore it did not have much influence internationally. (Killingbeck, 1999, p6).

2.3.2 International Convention relating to the Limitation of Liability of Owners of Seagoing Ships, Brussels 1957

Following the failure of the 1924 Convention, the Comite Maritime International (CMI) introduced a new Convention in 1957. This convention entered into force in 1968 and was based on the 19th century English system. (Donner, 2016, p6). This basis is noted in a quote by Albert Lior, as cited by Griggs: “the Convention (1957 Convention) resolutely comes round to the British conception of limitation on a forfeit basis, which takes into account the tonnage of the ship, whatever becomes of the latter.” (Griggs, 1997, p372). This convention included certain activities directly concerning the maritime adventure on water and land including loading, carriage and discharge as well as areas now covering contractual and non-contractual fields. Not only did the convention increase the limits but it also extended the influence of same as now the manager, the charterer, the master, the operator, the crew and other specific servants also had the right of limitation extended to them (Killingbeck, 1999,
The limitation under this convention continues with the “distinct occasion” concept and the fund is established exclusively based on the tonnage of the ship. With the new convention came a few changes but as a compromise following the 1924 Convention, where the limitation fund was constituted on the based on the value of the ship, the 1957 Convention reinstated the measure based on the average value of British ships. This was done in order to accommodate both states for and against a higher limit.

The 1957 Convention was the primary convention for many years and one notable amendment to same was a 1979 Protocol replacing Poincare gold francs calculated figures with Special Drawing Rights (SDR) as follows:

(1) Article 3, paragraph (1) of the Convention is replaced by the following:

"(1) The amounts to which the owner of a ship may limit his liability under Article 1 shall be:

(a) where the occurrence has only given rise to property claims an aggregate amount of 66.67 units of account for each ton of the ship's tonnage;
(b) where the occurrence has only given rise to personal claims an aggregate amount of 206.67 units of account for each ton of the ship's tonnage;
(c) where the occurrence has given rise both to personal claims and property claims an aggregate amount of 206.67 units of account for each ton of the ship's tonnage, of which a first portion amounting to 140 units of account for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 66.67 units of account for each ton of the ship's tonnage shall be appropriated to the payment of property claims. Provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund.

(2) Article 3, paragraph (6) of the Convention is replaced by the following:
(6) The unit of account mentioned in paragraph (1) of this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in that paragraph shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency on the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that State is equivalent to such payment. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.”

Whilst the 1957 convention had over 50 parties (currently around 35), several of the major maritime nations, including the USA and Greece did not ratify this convention. (Donner, 2016, p6). It was during the 1970s period that depreciation in monetary values made the monetary values unrealistically low, which largely led to a need to revise the 1957 Convention. The inconsistency of the International Convention on Civil Liability for Oil Pollution Damage 1969 with the 1957 Convention accelerated the need for revision of the 1957 Convention. (Bundock, 2007, p.227).

This revision subsequently led to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC) which came into force on 1 December 1986. The 1976 Convention was meant to abrogate previous conventions. (LLMC, 1976, Art. 17(4)).

2.3.3 Limitation of Liability for Maritime Claims (LLMC)
The LLMC came about as a balance needed to be created between compensation levels that were adequate for successful claimants and the need for shipowners, for public policy reasons, to limit liability to a readily insurable amount at a reasonable premium. (Killingbeck, 1999, p7). This was in line with the recommendation from the Comite Maritime International which was, as reported by Selvig (1986, p9):

“the limits should be fixed by reference to the amount of liability insurance, which having regard to the cost thereof, can reasonably be required of ships engaged in ordinary commercial shipping, since the cost of this insurance is inevitably reflected in the freight rates payable by shippers.”

The shipping industry was continuously evolving and due to technological advancements and investment in the industry, ships were getting bigger and more advanced. There was also a need to consider the position of salvors following The Tojo Maru case, where a salvor was not permitted to limit their liability for a negligent act of a diver assisting in the salvage operation. ([1971] 1 Lloyd’s Rep 341). The depreciated monetary values in the 1957 Convention also no longer reflected the industry appropriately. Also with the LLMC, it was the first time referring to the value of the vessel when determining limitation amounts was done away with. Limits were also identified for three forms of claims, namely, claims for loss of life or personal injury, passenger claims and property claims (such as damage to other ships, property or harbour works).

The 1976 LLMC created a right to limit liability to sums which are calculated in relation to the vessel’s tonnage. Both shipowners and salvors may claim the right defined in Article 1(2) provided firstly that the relevant claim is covered by Article 2 and secondly that it is not a claim excluded by Article 3. These exclusions are as follows:

“The rules of this Convention shall not apply to:
(a) claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;
(b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force;
(c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
(d) claims against the shipowner of a nuclear ship for nuclear damage;
(e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.”

In terms of the LLMC, the right to limit can only be lost where the loss incurred resulted from the personal act or omission of the person liable wishing to limit the claim “committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.” (LLMC, 1976, Art. 4). This made the right to limitation of liability almost impossible to break in return for limits of liability that are noticeably higher.

The tonnage upon which the minimum liability is based was raised from 300 tons to 500 tons. Under the 1976 LLMC the limits were set at 333,000 SDR for personal claims for ships not exceeding 500 tons plus an additional amount based on tonnage. The limit of liability for other claims was fixed at 167,000 SDR plus additional amounts based on tonnage on ships exceeding 500 tons. (IMO, n.d.). The limitation amounts increased through the increasing of the tonnage of ships as a result of the
adoption of the 1969 Tonnage Convention as the tonnage on which the limits of liability were based (Donner, 2016, p13) as well as being based on gross tonnage instead of net tonnage in the earlier conventions. With the adoption of the Protocol of 1996 the amount of compensation payable in the event of an incident were substantially increased and the Protocol also introduced a "tacit acceptance" procedure for updating these amounts. (IMO, n.d). The tonnage upon which the minimum liability is based was raised from 500 tons to 2000 tons under the Protocol of 1996. The 1996 Protocol was adopted on the 2nd of May 1996 and entered into force on the 13th of May 2004.

Amendments to the 1996 Protocol were adopted on the 19th of April 2012 and entered into force on the 8th of June 2015. With the amendment, the limit of liability for loss of life or property on ships not exceeding 2,000 gross tonnage increased from 2 million SDR to 3.02 million SDR. The limit of liability for property claims for ships not exceeding 2,000 gross tonnage also increased from 1 million SDR to 1.51 million SDR.

2.3.4 International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992

The original convention was adopted in 1969 and entered into force on the 19th June 1975 but was later replaced by the 1992 Protocol to the convention which entered into force on the 30th of May 1996. The 1969 CLC convention applies to all seagoing vessels actually carrying oil in bulk as cargo. The 1992 CLC went slightly further by adding the condition that “a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard”. However, only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage. The CLC convention was adopted to ensure that adequate compensation is
available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. In the CLC convention the liability for such damage is placed on the owner of the ship from which the polluting oil escaped or was discharged. (IMO, n.d.). Three major changes that came with the CLC were, the introduction of strict liability for pollution damage (regardless of fault or negligence); a compulsory insurance requirement for shipowners of ships carrying more than 2,000 tons of oil as cargo in bulk and claimants now being able to institute a direct action against the insurer.

Under the 1992 Protocol, similar to previous conventions, a shipowner cannot limit liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. The 2000 Amendments to the 1992 Protocol came into force on the 1st of November 2003. With these amendments, the compensation limits from the 1992 Protocol were raised by 50 percent. Following the amendments the minimum liability for a ship not exceeding 5,000 gross tonnage, is limited to 4.51 million SDR (US$5.78 million) and increasing by 631 SDR for each additional gross tonne over 5,000 for ships up to 140,000 gross tonnage and liability is limited to 89.77 million SDR for ships over 140,000 gross tonnage. (CLC, 1992, Article V).

2.3.5 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker)

The Bunkers convention which was adopted on the 23rd of March 2001, came into force on the 21st of November 2008. This convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. (IMO, n.d.). Similar to the International Convention on Civil Liability for Oil Pollution Damage, 1969, a key requirement in the bunkers convention is the need for the registered
owner of a vessel to maintain compulsory insurance cover. The Bunkers convention is modelled on the CLC 1969 convention. (IMO, n.d). The Bunkers Convention imposes liability on the ‘shipowner’, a term which has been defined as including “the registered owner, bareboat charterer, manager and operator of the ship”. (2001, Art.1(3)). This is unlike the 1992 CLC convention which channels the liability exclusively to the registered owner, thereby giving the Bunkers Convention a wider definition than the CLC convention. (Martínez Gutiérrez, 2012, p240). Direct action, which permits a claim for compensation for pollution damage to be brought directly against an insurer, is a significant provision contained in the Bunkers convention. However, there will be competing compensation claims between a compensation claim for damage caused by bunkers and other property claims arising out of the same accident as well within the limits of global limitation. (Bright, 2001 as cited by Donner, 2016, p21). Ships over 1,000 gross tonnage are required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in a sum equal to the limits of liability under the applicable national or international limitation regime, however in all cases, not exceeding an amount calculated in accordance with the 1996 Protocol, as amended, to the 1976 LLMC.

2.3.6 The Hague-Visby Rules

In terms of the Hague-Visby Rules the liability of the carrier for loss of or damage to cargo is limited to the equivalent of 666.67 units of account per package or unit or 2 SDR per kilo of gross weight of the goods lost or damaged, whichever is the higher. (Hague-Visby Rules, 1968, Art 4.5(a) ). These limits are higher in the Hamburg Rules at 835 SDR and 2.5 SDR respectively. As this is not related to the size of the ship, it leads to coordination problems with the global limitation, which is defined with regards to the tonnage of the ship. (Donner, 2016, p21). Each individual claim is limited before all the claims related to a single event are added together for the purposes of global limitation under the Hague-Visby Rules. (Gaskell, et.al. p415).
The implication of this is that both limitations of liability are applied and the ultimate limit is whichever the lower is. (Donner, 2016, p22). Similar to the 1976 LLMC, the right to limit liability is lost, under the Hague-Visby Rules, if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. (Hague-Visby Rules, 1968, Art 4.5(e)). Also, in terms of Article 4.2(q) the carrier is exempted from liability altogether for claims “arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier”. (Hague-Visby Rules, 1968). The concept of “actual fault or privity” will be discussed later.
In the previous chapter we discussed the origins of the concept of limitation of liability. It is clear that whilst the objective of the IMO and CMI may be for international uniformity when it comes to the concept, the current position worldwide is that not every state is applying the same limitation regime. The 1976 LLMC, as amended, limitation regime is the latest choice for states wishing to at least attempt uniformity with the concept, however, not all states are party to this convention and some states are still applying the 1957 limitation regime or their own limitation regime that is not quite part of any convention. One such state is South Africa.

Section 2 of the South African Admiralty Jurisdiction Regulation Act, 1983(AJRA) grants the High Court of South Africa jurisdiction over claims to limit liability. The section provides:

“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.”
The above section covers any maritime claim. The Act includes claims for limitation of liability under the definition of maritime claims. S1 (1) (w) includes “the limitation of liability of the owner of a ship or of any other person entitled to any similar limitation of liability” under the definition of maritime claim. (AJRA, 1983).

Limitation of liability often arises as a consequence of another recognised maritime claim. Limitation of liability is impliedly included in s5 of AJRA as it provides that the admiralty court may “consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim”. (1983, s5(2)(a)). Claims for limitation of liability are said to be “brought within the direct purview of s1(1)(w) read with s5(2)(a) of the Admiralty Act.”(The Nagos 1996(2) 261(D) at p271). Therefore the Admiralty court in South Africa is well within its jurisdiction to adjudicate matters relating to limitation of liability in terms of the powers conferred upon the court by statute.

Section 7(1)(a) of AJRA which deals with forum provides:

“A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.” (1983).

This section accords the court the discretion to choose not to exercise its jurisdiction if it is of the view that it would be more appropriate that the matter be adjudicated in another court. The fact that the Admiralty court may decide that another court in the Republic is more suited to adjudicate the matter indicates that the Admiralty court does not have exclusive jurisdiction over maritime claims. Therefore a matter may seemingly just as simply be heard in another appropriate court in South Africa that is
not an Admiralty court, without there being grounds for appeal based on that court’s jurisdiction to hear the matter. (*The Wave Dancer v Toron Screen Corp (Pty) Ltd* 1996 (4) 1167(SCA) at p1188). The South African Admiralty Court may also in terms of s7 (1) of AJRA decide that the appropriate forum to hear and determine the limitation of liability is a foreign court. A situation like this actually arises where different limitation of liability regimes are applied in the different possible forums chosen by the parties to the matter. This often leads to a clash of conventions with the situation usually being the 1957 convention versus the 1976 LLMC. The party wishing to limit their liability would prefer the jurisdiction applying the 1976 LLMC as the right to limitation is almost unbreakable under that convention. Cases dealing with this will be discussed later in this paper.

English law has had a major influence on South African maritime law. This has been the position since the English established Vice-Admiralty courts in their colonies with these courts exercising the jurisdiction of the English High court of Admiralty. (Hofmeyr, 2006, p3). In South Africa, both the Cape and Natal had Vice-Admiralty courts exercising the jurisdiction of the English High court of Admiralty in applying the English Admiralty law. (Hofmeyr, 2006, p3). The English law influence is evident in s6 (1) of AJRA providing:

“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;”(1983).
The effect of this is that English law is applicable as at 1 November 1983 where a pre-1983 South African Admiralty court that was established through the Colonial Courts of Admiralty Act, 1890 exercised jurisdiction before 1 November 1983. Therefore it seemingly follows that English law would be applicable to a limitation of liability claim in the South African Admiralty court because it was the English High court of Admiralty that had jurisdiction in proceedings relating to limitation under s13 of the Admiralty Court Act 1861. (Griggs, Williams & Farr, 2005, ch38). However, in terms of s6 (2) of AJRA curtails this in providing that the provisions contained s6 (1) of AJRA “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.” (1983). The effect of this section is that English law will not be applicable where South Africa has statute in their domestic law that is applicable to a limitation of liability claim. There is one such act in place in South Africa which curtailed the applicability of the English law for limitation matters. This Act is the South African Merchant Shipping Act 57 of 1951, particularly s261 which provides for limitation for claims for personal injury, loss of life or any loss of or damage to property. While English law with regards to limitation of liability may be curtailed by s261 of the Merchant Shipping Act read with AJRA, pertinent English precedent, although not binding anymore because of s6(2) of AJRA, may still provide persuasive authority. (Griggs, Williams & Farr, 2005, ch38).

3.1 Tonnage limitation

Section 261(1) of the Merchant Shipping Act provides:

The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity— (a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect
of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or (b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; or (c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank pari passu with the last-mentioned claims.

It is clear that this section is modelled on the 1957 Convention even though South Africa is not a party to the 1957 Convention or the 1976 LLMC. On closer inspection, it becomes evident that this section is loosely based on s503 of the English Merchant Shipping Act, 1894 where the words “without his actual fault or privity” first appeared with regards to the limitation of liability concept. It must also be pointed out that s261 does not appear to be applicable to incidents that give rise to wreck removal or oil pollution. Wreck removal would be provided for under the South African Wreck and Salvage Act 94 of 1996 which has incorporated the International Convention on Salvage, 1989 and oil pollution liability is covered by the Marine Pollution (Control and Civil Liability) Act 6 of 1981.
Peculiarly, the SA Merchant Shipping Act limitation provisions do not include a provision containing specific claims that are excluded or excepted like the 1976 LLMC. Therefore at first glance it would appear that a shipowner would be entitled to attempt to limit his liability with regards to the claims excepted under Article 3 of the 1976 LLMC. Furthermore, with regards to claims from which the shipowner is exempted from liability, s6 of AJRA seemingly leads us to applying s502 of the English Merchant Shipping Act, 1894. This would be applied in terms of s6 of AJRA because this would have been the English law, as it would have been in November 1983, applying to all maritime claims in respect of which the English Colonial Admiralty Court had jurisdiction. This section however only excludes liability where there was loss or damage as result of a fire on board the ship or as result of robbery, embezzlement, making away with or secreting of specific items that did not have a declared value at the time of shipment. (Merchant Shipping Act, 1894, s502). Therefore it appears that these would be the only claims that a shipowner is exempted from liability under South African law.

However, this approach becomes doubtful when considering that South African courts, in order for the English Merchant Shipping Act to be applicable, would have to strictly interpret s502 and the section specifically refers to British ships. Therefore this section would only cover British ships coming into South Africa and would thus leave non-British ships in the dark. The only saving grace for non-British ships appears to be in the case where both the SA Merchant Shipping Act and COGSA would be applicable because COGSA does provide for exemptions from liability under Article 4(2). (1986).

However it must be pointed out that, s502, no matter how limited it may be, applies to all liabilities and not just cargo claims like COGSA. (Merchant Shipping Act, 1894). This could therefore be a reason why a shipowner might actually choose to invoke s502 of the English Merchant Shipping Act over COGSA. (Hare, 2009, p803). This appears to be another issue yet to be tested in South African courts. Since
the South African limitation provisions are based on s503 of the English Merchant
Shipping Act, 1894 it seems that it might have been wise to similarly adopt s502 of
the same act with regards to exemptions of liability to avoid a lengthy interpretation
just to arrive at looking to apply that section anyway. Considering the above
discussion, it remains to be seen what the approach of a South African court would
be in terms of limitation of liability in a situation where a fire on board a non-British
ship results in the loss of the entire cargo and a crew member sustains a burn injury
while attempting to put out the fire in question. This illustration is made because,
unlike under the LLMC, claims by servants of the shipowner are not specifically
excepted from limitation under the SA Merchant Shipping Act. It is likely that the
courts in such a situation would have to consider extending the section by
substituting ‘Britain’ for ‘South Africa’. However there is not much jurisprudential
authority to support such an approach by the courts. (Hare, 2009, p803).

The unit of account for calculating limitation of liability in South Africa is now
Special Drawing Rights (SDR). SDRs came into the South African limitation regime
on 1 September 1997 through Shipping General Amendment Act 23 of 1997, as the
unit of account prior to this was gold francs following the 1957 Convention and prior
to that it was the British pound. There is a conversion of SDRs into South African
currency as determined by the International Monetary Fund on the date which
judgment is given and can be established by a certificate issued by the South African
Treasury. Considering the South African currency, the amounts to which a shipowner
or other party is permitted to limit his liability are significantly lower in South Africa
than in countries in which the 1976 Convention applies, resulting in South Africa
being a favourable jurisdiction for shipowners who are successful in discharging the
onus of proving an absence of fault or privity. (Dyason, 2001, p495).

South Africa has no particular procedure institution of a limitation action or fund that
is equivalent to the procedural rules in this regard contained in English law. There
are two accepted ways in which the limitation of liability notion can be raised, a
party can either commence a declarator action in respect of one’s entitlement to limitation of liability or a party may raise the right to limitation of liability as a defence to any claim. (Lucas, 2011, p293). Courts have thus far only made inferences with regards to the limitation provisions actually establishing jurisdiction for the substantive claim. It seems as though there must be commencement of proceedings in the South African jurisdiction by at least one claimant before a party can proceed with an application with regards to its limitation of liability right under s261. (The Nagos 1996 (2) SA 261 (D)). Thus it appears as though a limitation action may not be instituted in South Africa unless the court already has jurisdiction over the substantive claim and the proceedings with regards to the substantive claim have been started. It appears that courts have however not decided authoritatively on this aspect yet. (Lucas, 2011, p293).

The inference in such a situation does make one consider it in relation to a limitation fund. The SA Merchant Shipping Act does not specifically provide for a limitation fund like Article 11 of the LLMC therefore this could lead to the type of security provided, if any, still possibly being a contentious issue in South African courts. A Bank guarantee has previously been accepted in this regard but the type of security accepted still remains open to be decided by the courts as the Act is silent.(The Nagos 1996 (2) SA 261 (D)). It must also be noted that P&I letters of undertaking (LOU) do constitute sufficient security in admiralty cases. (The Bow Neptun Unreported case No. 462/2005 (C)). It must however be highlighted that this issue, in the case of P&I LOUs, does not appear to have been authoritatively decided upon in cases involving limitation in South Africa as the case which accepted a P&I LOU was a matter dealing with providing adequate security to secure the release of an arrested vessel. It also remains to be seen how much of a contentious issue security for limitation would actually be in South Africa as limitation proceedings would likely be part of the main substantive claim assuming the inference to be correct that a limitation action could not be brought separately from the substantive claim in South Africa. It also appears as though a shipowner raising limitation in South Africa
might still have his other assets at risk as the SA Merchant Shipping Act does not specifically provide for a limitation fund and subsequently a bar to other actions like the LLMC does under Article 13. (1976). However this appears to be another issue with regards to limitation that South African courts are yet to be tested on.

3.1.1 Which persons are able to limit?

The limitation provisions are extended to builders, owners or other persons interested in any ship built at any port or place in South Africa, this shall be from and include the period when the ship in question is launched until the registration of same under the provisions of the Merchant Shipping Act. (1951, s261 (2)). Furthermore for the purposes of the limitation provisions, the definition owner shall include ‘any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.”. The mention of “any charterer” here seems to include time, voyage and demise charterers. This is wider than the United States limitation as only the bareboat charterer may limit their liability under US law as they are the only charterer considered owners pro hac vice.(Diamond S.S. Transp. Corp. v. Peoples Saving Bank & Truct Co., 152 F.2d 916, 921 (4th Cir. 1945). It must also be pointed out that the reference to “the charterer” in the 1976 LLMC, unlike the SA Merchant Shipping Act, has left room for interpretation as to what type of charterer the convention actually intended to include here. (The Aegean Sea [1998] 2 Lloyd’s Rep. 39 & The CMA Djakarta [2003] 2 Lloyd’s Rep. 50) On this point the SA Merchant Shipping Act seems to be clearer as any charterer is included.

3.1.2 Can the limitation of liability right be lost once it has arisen?

The reference to arising in the SA Merchant Shipping Act has been said to be suggesting that the claim must have arisen and must continue. However, it has been held that this event is independent of some other supervening event occurring after the time the claim has already arisen. (Griggs, Williams & Farr, 2005, ch38).
Therefore this would include an instance where a claim has been brought by way of action *in rem*. In such a situation a shipowner would then be able to attempt to invoke the protection of s261(1)(b). This would even be the case where the *in rem* proceedings are later withdrawn prior to a declarator application for the applicant’s right to limitation of liability. (*The Nagos* 1996(2) 261(D) at p271).

### 3.1.3 Conduct barring limitation

In terms of s261 (1) of the SA Merchant Shipping Act, the right to limitation is only lost if the person wishing to rely on the right is proved to have “actual fault or privity”. This requirement is similar to the 1957 Convention also requiring “actual fault or privity” on the part of the owner. (Art.1). This results in a limitation right that is seemingly easier to break than the almost unbreakable limitation right contained in the 1976 LLMC where it must be proved that the owner committed a personal act or omission, with the intention or reckless conduct with the knowledge that such loss would result, where loss resulted. (Art.4). There have been many English court decisions on the matter of conduct barring limitation under both the 1957 Convention and the 1976 LLMC. These are relevant in the case of South Africa as English decisions still provide persuasive authority even though they may no longer be binding in South Africa. Furthermore there still has been no valid rationale put forward to advocate for not considering similar South African provisions in line with English precedent on the subject. (*Atlantic Harvesters of Namibia v. Unterweser Reederei* 1986 (4) SA 865 (C) at p875). Judicial perspectives on conduct barring limitation will be discussed in the next chapter.

### 3.2 Bunker limitation

The South African Marine Pollution (Control and Civil Liability) Act 6 of 1981 (MPCC Act) provides for bunker spills oil pollution damage limitation of liability as follows:
“(5) If the owner of any ship, tanker or offshore installation incurs a liability in terms of the provisions of subsection (1) for any loss or damage suffered or costs incurred as a result of an incident which occurred without such owner's actual fault or privity—
(a) the provisions of section 261 of the Merchant Shipping Act 1951 (Act 57 of 1951) shall not apply in respect of such liability;
(b) the aggregate of all amounts payable by such owner in respect of such liability, in so far as it relates to a particular incident, shall not exceed—
(i) in the case of a ship or a tanker, one hundred and thirty-three units of account for each ton of the ship's or tanker's tonnage, or fourteen million units of account, whichever is the lesser;
(ii) in the case of an offshore installation, a sum determined by the Minister, but not exceeding fourteen million units of account.”(s9(5)(a)).

It is specifically stated in this Act that the limitations contained under s261 of the Merchant Shipping Act do not apply in respect of liability under this Act as this Act provides an independent limitation. (MPCC Act, 1981, s9 (5) (a.) This approach also seems characteristic of the South African limitation regime thus far as the Bunker Convention, while it is a different convention dealing with similar liability as the MPCC Act, applies the 1976 LLMC limits. Interestingly, the MPCC Act has a limit ceiling of 14m SDRs which is lower than that provided by the 1992 CLC and the Bunker Convention. The MPCC Act, like the South African Merchant Shipping Act, remains with what could be called outdated limits with regards to the limitation regimes applied by major maritime nations as the limitation contained thereunder is the limitation from the original International Convention on Civil Liability for Oil Pollution Damage, 1969 before the 1992 Protocol.

The MPCC Act in providing its own independent limitation provisions is similar to CLC, as the CLC also provides independent limitation provisions and does not use the 1976 LLMC limitations like the Bunkers Convention. However the right to limit
is only lost if the owner had actual fault or privity whereas in both the 1992 CLC and the Bunkers Convention, the right to limit, similar to the 1976 LLMC, is only lost if it proved that the damage was caused by the owner’s personal act or omission, done with the intention to cause damage, or recklessly with knowledge that such damage would probably result. The MPCC, in this regard, seems to have followed the original 1969 CLC wording which also contained the ‘actual fault or privity’ test. Once again, like the LLMC, the 1992 CLC and Bunkers Convention limitation is almost impossible to break because proving that an owner intended to cause pollution damage or knew the pollution damage would result but continued recklessly is very hard to prove. Considering the negative media attention attracted by the shipping company and possible liability that might arise from the pollution damage, it is hard to think that an owner would intentionally try to pollute with, in some situations, only the slightest chance that they might get away with it. It proves difficult to show actual intent to cause the pollution damage from the owners in such situations.

It must be noted that this act contains a definition for oil which is wider than the definition contained under the Bunkers Convention. The definition for oil under the MPCC Act includes “any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water or any other substance”. (1981, s1 (1)). Whereas in the Bunkers Convention, bunker oil is defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil”. (2001, Art. 1(5)). This definition brings two important considerations to light, firstly, whether the oil in question is being used for its intended purpose for operating or propelling the ship and secondly, the Bunkers Convention definition of bunker oil, unlike the 1992 CLC definition of oil, may include lighter fuels such as marine diesels and lubricating oils as its definition is not limited to persistent oils. (Martinez Gutiérrez, 2012, p238). The MPCC Act similarly does not limit its definition of oil to persistent oils, therefore it may also include marine diesels and lubricating oils.
3.3 Package limitation

The South African Carriage of Goods by Sea Act 1 of 1986 provides for package limitation in South Africa. This Act incorporates the Hague-Visby Rules even though South Africa is not a party to the Rules. Article 4(5) provides for limitation and it, in part, provides:

“(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. [Amended by the Shipping General Amendment Act, 1997]” (COGSA, 1986).

SDRs are the unit of account mentioned in this section. South Africa does not appear to have much precedent when it comes to limitation of liability under Article 4(5) of the Rules therefore it is most likely that South Africa would look to English law when it comes to interpretation of the Rules. (Griggs, Williams & Farr, 2005, ch38).

3.4 Contractual limitation

In South Africa it is possible to rely on a clause in the contract limiting liability or even a clause exempting a person from liability altogether. However such exemptions need to be provided for expressly in the contract. A clause that exempts a person from liability for negligence may be accepted by a South African court even if it might be viewed as being against public policy. (Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)). Therefore, a shipowner or carrier might still escape liability through an exemption clause contemplated above even if they are found to have actual fault in terms of the Merchant Shipping Act or COGSA thereby losing their right to limitation.
3.4.1 Exclusion or limitation of Third Party liability

Interestingly, South African law does recognise a contract for the benefit of a third party as valid. This was adopted from Roman-Dutch writers who had built on the work of late-scholastics from Spain. (Girvin, 1997, p115). In terms of the Article 5(5) of the Hague-Visby Rules and consequently COGSA, the carrier’s right to limit is extended to servants and agents of the carrier. This provision has allowed for the Himalaya Clause which entitles a third to the benefits of an exclusion clause under a bill of lading. The admiralty court in South Africa has recognised the Himalaya Clause in cases like The Tigr No 1 1995 (4) SA 49 (court a quo), where a towage charterparty not applying the Carriage of Goods by Sea Act (COGSA) and the Hague-Visby Rules contained a Himalaya clause. In this case there was a towage contract entered into between the charterer of a tug and Bos 400, the owner of the barge that was to be towed. The tug owners sought to invoke the benefits of the towage contract itself based on the Himalaya Clause in the towage contract even though they were not originally parties to the towage contract between the owners of Bos 400 and the charterers of the Tigr tug. The court held that while the charterer of the tug did not have authority from the tug owner to contract on its behalf in the exemption clause provided in the towage contract, there was a ratification of the exemption clause by ensuring the availability of its tug and beginning the tow. The court further stated that the authority for representations to be made to induce the contract must be considered included within the authority retrospectively conferred upon the (formerly unauthorised) agent.

The court seemed to rely on the rationale of agency in considering the validity of the clause. However this may not have been necessary as there had already been previous decisions such as the The Sanko Vega which had recognised the validity of the Himalaya Clause without any such rationale. (1989 (2) SA 182 (D)). The court found that an outsider party wishing to rely on the benefit of a Himalaya Clause
could not acquire rights or defences beyond those acquired by the principal party who entered into the contract on behalf of the outsider. Even though the Himalaya Clause may now comfortably be accepted in South Africa, a carrier may still wish to insert a pactum de non petendo into the agreement in terms of which the shipper and its assigns agree not to institute legal proceedings against the carrier’s port terminal operators, stevedores or other named servants. (Hare, 2009, p544). This would be done to ensure that the carrier’s agents and servants are not held liable by shippers. The inclusion of such an agreement would be capable of being enforced in South African law (HNR Properties CC and Another v Standard Bank of South Africa Ltd 2004 (4) SA 471 (SCA) at p479). Furthermore the carrier’s minimum liability in relation to the shipper provided by COGSA would not be affected by such an approach. (Hare, 2009, p544).
CHAPTER FOUR

Judicial implications

Generally a person who suffered loss or damage caused by another, whether in contract or in tort, generally may seek redress through the power of the law. However such redress is not without its limits as most systems of law require the loss or damage to at least be a result of the defendant’s actions. As can be seen from the previous chapters, the concept of limitation of liability has remained around for a lengthy time and is now well established in maritime law. Public policy is behind the notion that a shipowner can be liable for a lesser amount than the actual damage caused by its ship, with or without fault. As discussed previously in this paper, it comes from the need to keep possible shipowners and investors interested in the shipping industry and less reluctant because of the possible liability that could fall on them in the event there is loss or damage during a voyage.

This is based on the idea that sea voyages are often dangerous and unpredictable given the perils of the sea and shipowners are taking a big risk in conducting their trade business, which benefits many worldwide, using the seas as opposed to roads or railway. These other modes of transport pose less of a threat to damage or loss of the goods as these modes, road or railway, are considered to be in a safer conditions.

The court in *The Nagos* (1996 (2) SA 261 (D)), unlike Lord Denning in the *Bramley Moore*, thought the concept of limitation of liability is considered to be somewhat a matter of justice. In *The Nagos*, limitation was referred to as “that time-honoured and internationally endorsed practice, which is now embodied in the domestic
statute” by Alexander J. (1996 (2) SA 261 (D) at 271). The idea here seems to be that limitation has developed over time and been well established internationally and continuing in the interests of public policy, the notion became a part of statutory law. The notion could be considered a matter of justice in that it seems to be providing some protection to shipowners who, considering the many perils at sea, are involved in a risky, but very useful, business to world trade.

Section 261 of the South African Merchant Shipping Act 57 of 1951 almost mirrors s503 of Merchant Shipping Act, 1894. As discussed previously, what was notable about the English concept of limitation of liability was that it recognised the value of the ship and freight as a determining factor of the shipowner’s liability. In this regard, the English took the value of the ship before the accident that caused the damage as opposed to their other European counterparts who took the value after the accident. Liability was determined according to the tonnage of the ship, damaged or undamaged. Under the South African Merchant Shipping Act the right to limitation of liability is extended to any defendant shipowner, local or foreign, regardless of where the ship is registered.

S261 (3) only provides for claims that have arisen ‘on any single occasion’. This is similar to the ‘distinct occasion’ notion discussed in chapter two. Similarly, this subsection precludes the combining of claims ‘arising out of two or more distinct occasions’.

4.1 Loss of right to limitation

The questions asked in determining actual fault or privity under English case law are similar to those asked in South African law when determining fault with the ‘Reasonable person’ test. The well-established test for fault under South African law as provided by Holmes JA is as follows:

“For the purposes of liability culpa arises if —
(a) a *diligens paterfamilias* in the position of the defendant

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.” (*Kruger v Coetzee* 1966(2) SA 428 (A)).

It is clear in both the South African and previous English position that a certain degree of reasonableness is required from the person wishing to escape liability. This degree of reasonableness is evident in the test of shipowner’s actions described by Sheen J who had presided over several English decisions dealing with the limitation of liability regime prior to 1976 LLMC coming into effect. The test described was as follows:

“the owning company is not guilty of actual fault unless it can be shown that there came a moment when a reasonably competent director would have said to the offending director, "But surely you ought to do this or you ought not have done that"” (Sheen, 1987, p476).

This test seemed to focus solely on the person who can actually be said to be the one making decisions as if those decisions were actually made by the company itself. Subsequent decisions did actually recognise the acts of subordinates as being those of the company. (*The Lady Gwendolen* [1964] 2 Lloyd’s Rep 99).

### 4.1.1 Burden of proof

The onus of proof in limitation of liability cases was altered in England with the decision in *The Norman*, where the House of Lords required the shipowners to prove their failure to act did not cause the casualty. ([1960] 1 Lloyd’s Rep 1 (HL) at p480). In this case the *Norman* trawler sank with only one person out of the twenty that were on board surviving after the trawler ran onto an uncharted rock in foggy
conditions off the coast of Greenland. The master had been informed by the owner’s marine superintendent about the navigational difficulties and dangers that he would face during a fishing expedition off the inhospitable coast of Greenland with many uncharted hazards. The owners had specifically instructed the master not to fish in the Greenland waters in which the rock was located. The owners were notified of the position of the rock in question after the vessel had sailed but deemed it unnecessary to radio this information to the vessel. In absolving the owners of any fault or privity and allowing limitation of the crew dependants’ claims, the court of first instance found that the owners had a reasonable expectation that the master would follow their instructions and avoid the area. This decision was, however, reversed by the House of Lords on appeal. This appellate decision was followed in The Dayspring ([1968] 2 Lloyd’s Rep 204). With regards to onus of proof, it must be pointed out that the procedure contained in the law of South Africa is that the defence of limitation to the cargo plaintiff’s claim is raised at first instance by the shipowner. (Hare, 2009, p524). In such a situation it follows that the burden of proof would be on the shipowners who claimed the protection of limitation of liability. This is different from the approach before The Norman described by Sheen, in which the cargo claimants in limitation proceedings would have to plead the actual fault that the owners were allegedly guilty of. (Sheen, 1987, p480). This was, however, described as being the universal practice by Sheen. However, the approach taken by South Africa, while different, is not surprising as it is similar to that contained in s503 of the English Merchant Shipping Act, 1894 which could also be interpreted as placing the burden of proof on shipowners claiming the protection of limitation. As mentioned previously, the South African limitation regime under s261 of the South African Merchant Act could be said to be loosely based on the provisions of the English Merchant Shipping Act, 1894. As a result, South African courts could be said to still be following many of the English decisions based on the 1894 Act.

4.1.2 Actual fault or privity/ Conduct barring limitation
In the *The Lady Gwendolen*, the tanker *Lady Gwendolen* was on one of its usual voyages between Dublin and Liverpool in foggy conditions when the vessel was involved in a collision with the *MV Freshfield*. ([1964] 2 Lloyd’s Rep 99). The master, along with failing to reduce speed, also failed to utilise the radar, which the vessel was equipped with, appropriately. The errors of the master could clearly be attributed to fault in navigation therefore the shipowners action to limit their liability was dismissed by Hewson J on account of the owners not taking any steps to ensure that their masters were actually using their radars in an appropriate manner. Hewson described the radar problem as being “one of such serious import as to merit the personal attention of the owners.” ([1964] 2 Lloyd's Rep. at p112). The shipowners appealed this decision but their appeal was dismissed, during the appeal Lord Justice Willmer stated:

“At first sight it may well seem that this is an obvious case for a decree of limitation. The fault which brought about the collision was prima facie a fault in navigation, which would ordinarily be regarded as entirely within the province of the Master of the ship .... The case set up by the defendants in opposition to the claim for a decree of limitation was that faults in the navigation of the Lady Gwendolen were at least partly due to failure on the part of the management to exercise proper control over the Masters of their ships.” ([1965] 1 Lloyd's Rep. at p341).

This approach indicates that the courts now expected better oversight of their employees from the shipping companies even if the fault in question could be attributed solely to acts of the master. Sheen J justifies this approach based on the fact that full warning had been given to the owners of the consequences of not tightening up the management of the company and issuing strict instructions to their masters. (1987, p484). Another significant finding in *The Lady Gwendolen* case was that a head of department of a company, although not a director, who heads a special department in charge of running the company’s ships, should be considered as acting
as if it were the company itself acting with regards to the company's ships. ([1965] 1 Lloyd's Rep 335).

In defining “privity”, the court in The Eurysthenes, a case which considered the meaning of the term in the context of the Marine Insurance Act, 1906, defined it as meaning “with knowledge and consent”. ((1976) 2 Lloyd's Rep 171). This did not necessarily mean that the owner wilfully took part in misconduct but rather that he knew of the act beforehand and agreed with it being done. (Hodges, 1999, p319). While it may not be wilful misconduct there does seem an element of recklessness to an owner knowing beforehand and still consenting to the acts of a master giving rise to fault. However it is not inconceivable that the owner might not always fully comprehend the navigational acts needed to be taken by the master in all situations.

In what could be defined as a controversial decision for the concept of limitation of liability under English law, the court of first instance, per Sheen J, in The Marion found that an assistant operations manager was not the alter ego of the company therefore no actual fault or privity could be attributed to him for limitation of liability. ([1982] 2 Lloyd’s Rep 52). The decision was reversed by the House of Lords on appeal when the court held that an absentee director not leaving instructions when leaving on a business trip that the Liberian authorities annual inspection report should be sent to him instead of his marine superintendent, whom he had designated receipt of the report to, amounted to actual fault or privity on the part of the owners. ([1984] 1 Lloyd’s Rep 1 (HL). According to this case, board members and the individual dealing with actual management and control over the pertinent branch of the company’s business could be looked at as the alter ego of the company. This decision seemed to show that the courts were willing to go to great lengths not to promote the right to limitation that shipowners had now received through statute. This also happened to be one of the last decisions in the English court before the 1976 LLMC limitation regime came into effect.
The court in *The St Padarn*, one of the leading cases for limitation of liability in South Africa, where there was an oral agreement between the parties in which the defendant’s tug *Luneplate* was to tow an unmanned vessel owned by Atlantic Harvesters from Ijmuiden to Bremerhaven on the terms and conditions contained in the Unterweser towage agreement. (1986 (4) SA 875 (C)). Whilst on the journey, the plaintiff’s vessel *The St Padarn* ran aground when the two vessels parted. The plaintiffs subsequently instituted a damages claim in the amount of R500-000 for a breach of contract by the defendants through their servants. The tug owners raised the defence of limitation. Van Heerden J found that the owners of *Luneplate* had not discharged the burden of proof placed on them to show that the damage was caused without their fault or privity. (1986 (4) SA at p876). The owners, due to their lack of instruction and supervision with regards to the inspection of the towing stretchers, the use of an appropriate towing line and the fitness for the use of the towing stretchers, were regarded as having actual fault or privity. The tug owner’s right to limit was affected by their failure to instruct its masters to report on and be in compliance with any qualification attached to a certificate of seaworthiness of the tow and to prevent the onset of the towage in the prevailing weather conditions. It must be pointed out that, similar to *The Lady Gwendolen* case, the owner’s nautical superintendent, while not a director of the company, was still responsible for several departments including the harbour towage and salvage department, supply shipping department as well as the sea carriage and salvage department. Therefore, inspecting towing equipment would have been part of the superintendent’s designated tasks.

*The St Padarn* followed the earlier decision in *The Lady Gwendolen* as opposed to the one in *The Marion* and the position in South Africa appears not to have changed since then. Therefore, the acts of subordinates may still be attributable to the company in order to break limitation. This would therefore still seem to be a more suitable forum for proceedings for claimants wishing to break limitation, compared to a jurisdiction which applies the 1976 LLMC regime. One such example is *The Leerort* case, where the *Zim Piraeus* collided into *The Leerort* while entering
Colombo harbour and *The Leerort* subsequently flooded and the appellant’s cargo was either lost or damaged. ([2001] 2 Lloyd’s Rep. 291). The *Zim Piraeus* owners admitted liability for the collision based on the fact that the vessel had entered the harbour at excessive speed; the master failed to engage manual control before going astern when he ought to have known the vessel's forward speed would jeopardize an astern start-up in automatic mode; and having engaged manual control the master failed to put the engine immediately full astern. In the court of first instance, Sheen J allowed the owners of the *Zim Piraeus* to limit their liability and this decision was confirmed on appeal where the appeal was dismissed.

The court of Appeal held that it is necessary to identify the causative act or omission on the part of the shipowner, charterer, manager or operator of a sea-going ship that caused the loss and that such act or omission was committed to cause such loss, or recklessly with knowledge that such loss would probably result to defeat the right to limit, thereby requiring foresight of the very loss that actually occurs, and not merely of the type of loss that occurs. ([2001] 2 Lloyd’s Rep at p294). The court also found it totally absurd to suggest that a 50 second interruption in the operation of the engine, which resulted in the collision taking place, might be attributable to an act or omission of the owners done with the intention of bringing their ship into a collision, or performed recklessly with knowledge that it was likely to produce this result. ([2001] 2 Lloyd’s Rep at p298). This case is an example of just how strong the 1976 LLMC limitation is. From this decision it is evident that limitation will only be broken in such a situation if the innocent ship owners in a collision prove that the owners of the guilty ship (the ship that caused the collision) intended that the ships should collide or in the alternate, intended that his ship should collide with another vessel or acted recklessly with the knowledge that it was likely to do so. Such intent or knowledge seems extremely difficult to actually prove in practice.

The first case in England where a party’s ability to limit its liability under the LLMC regime was held potentially to be open to the possibility of being broken, was in the
**Saint Jacques II.** The *Saint Jacques II*, a motor fishing vessel, collided with the motor tanker *Gudermes* in the English Channel after the *Saint Jacques II* had crossed the South West Traffic Lane and headed against the flow of traffic. ([2003]1 Lloyd's Rep. 203). The owner of the *Saint Jacques II* subsequently instituted limitation proceedings, in an attempt to limit any liability he might have for damages arising out of the collision under the Merchant Shipping Act 1995. This entitlement to limitation was opposed by the first defendant. The claimants then applied for summary judgment and a decree of limitation and an order that the owners of the *Gudermes*’ defence be struck out or summary judgment be granted on the grounds that the owners of the *Gudermes* had no real prospect of challenging the right to limitation. This application was dismissed by the Admiralty Registrar. The matter was then taken on appeal, where the appeal court, per Gross J, held:

“as to the reckless navigation of *Saint Jacques II* across the Traffic Separation Scheme, this was a repeated practice in flagrant breach of the Collision Regulations directed personally by the first claimants for commercial reasons and for present purposes, conceded to be reckless; the first defendant had a real prospect of defeating the claimant's right to limit at trial” ([2003]1 Lloyd's Rep at p209).

This case illustrates just how difficult it is to break the limitation under the 1976 LLMC. This case is still considered more of an exception rather than the rule to the almost unbreakable limitation as it is difficult to find cases which have followed suit in English law.

The way the courts have interpreted ‘actual fault and privity’ in English and South African courts seems unsatisfactory. (Hare, 2009, p527). The interpretation, in terms of whose acts can be considered to show ‘actual fault or privity’, seems too broad as even the actions of people who are not at least directors in a company have been considered to be the acts of the company itself. Attributing actual fault or privity on the part of the company because of the acts of such persons seems below the standard
contained in the 1976 LLMC where the owner is only barred from claiming limitation where the loss “resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result”. (1976, Art 4). This could be considered the formula for the almost unbreakable limitation contained in the convention. (Hare, 2009, p527).

4.2 Forum shopping

Internationally, the application of different legal regimes that have different implications will almost always lead to forum shopping where possible. The concept of limitation of liability is no different, as the calculation of the limitation of liability is a statutory matter for the law of the forum. (Hare, 2009, p537). It follows that all claims for damages, both tort and contractual, brought in a forum of choice, of convenience, of commission or otherwise, will be subject to the limitation legislation adopted in the country of that forum. The limitation legislation adopted in that country will also override any choice of law provision contained in the contract as limitation is a matter of procedural law and not substantive law, regardless of what law created the liability, in tort or in contract. (Hare, 2009, p537). This is in line with the position of the English courts as seen in Caltex Singapore Pte Limited v BP Shipping Ltd. ([1996] 1 Lloyd’s Rep 286).

Given the limitation legislation adopted by South Africa not being in accord with the 1976 LLMC, it is not surprising that examples of forum shopping have arisen in the past. Litigation in England and South Africa in The Tigr No4 proved to be a prime example of such forum shopping. (1998 (4) SA 740 (C)). This case was over the loss of the derrick barge BOS 400 near Cape Town in June 1994. An Azerbaijani tug, the Tigr, was towing the barge into Cape Town when the tow wire broke in a storm and the BOS 400 ran aground. The owners and charterers of the Tigr were sued for £50million by the owners of the BOS 400 barge. The Cape Town port authority was one of the third parties drawn into the dispute. Limitation based on the gold franc
applied to this case because the cause of action arose before amendments to s261 of the South African Merchant Shipping Act which brought about Special Drawing Rights as the unit of account. Cape Town was the preferred forum for proceedings for the owners of the BOS 400 it was considered easier to break limitation in South Africa by proving actual fault or privity. The English High Court had ruled, per Rix J, that the owners and charterers of the Tigr may limit their liability in the English action to £573 717. (Bouygues Offshore SA v Caspian Shipping Co [1997] 2 Lloyd’s Rep 493). However Bouygues, who had favoured Cape Town as the preferable forum, appealed the limitation order as well as the injunction granted to the charterers of the tug preventing Bouygues from further proceedings in Cape Town. Walker J found that England adopting the 1976 limits was a reflection of what was internationally regarded as ‘substantial justice’. As stated previously, in order to break limitation under the 1976 LLMC proof of intent to cause loss, or reckless and with knowledge that such loss would arise is required. This is why the owners of the BOS 400 would have been so intent on proceeding with their matter in South Africa instead of England. King DJP in the Cape court found that there was ‘nothing opprobrious’ in seeking the most advantageous limitation regime as a ‘legitimate juridical advantage’ where competing regimes had jurisdiction to hear a claim. (The Tigr No 4 1998 (4) SA 740).

When parties are able to choose the forum in which they wish to proceed and the parties elect two different forums that apply different limitation regimes, a clash of conventions is bound to occur. The Herceg Novi and Ming Galaxy is a case where such a situation arose. ([1998] 2 Lloyd’s Rep. 454). A collision took place between the plaintiffs’ ship Herceg Novi and the defendants’ ship Ming Galaxy in Singapore territorial waters. In this case the owners of Ming Galaxy appealed Clarke J’s decision in the previous court to refuse the defendants’ application to stay the action on the ground that England was not the appropriate forum and the action ought to be brought in Singapore. The court of Appeal held:
“(1) the 1976 Convention had not received universal acceptance or anything like it; it was not an internationally sanctioned and objective view of where substantial justice was now viewed as lying; it was simply the view of some 30 states which had acceded to the Convention ([1998] 2 Lloyd’s Rep. at p460);

(2) the International Maritime Organisation was not a legislature; it might commend the 1976 Convention to the international community but if by doing so it were found to have enacted an international consensus, that would be to deprive sovereign states, to a large extent of their right to stay with some other regime; jurisdiction could often be obtained by arresting a vessel in a 1976 country but if that action were allowed to proceed despite there being a more appropriate forum where 1957 prevailed the 1957 country would be left with no effective use for its own law ([1998] 2 Lloyd’s Rep. at p460);

(3) it was impossible to say that substantial justice was not available in Singapore; the preference for the 1976 Convention had no greater justification than for the 1957 regime; the 1976 Convention provided a greater degree of certainty but in terms of abstract justice, neither Convention was objectively more just than the other; substantial justice would be done in Singapore; the appeal would be allowed and an unconditional stay of the English action granted” ([1998] 2 Lloyd’s Rep. at p460).

The proceedings in this matter seemed a classic case of one convention versus the other convention. The reason why the parties wished to proceed in different forums in this case was because of the difference between Ming Galaxy’s limitation funds in Singapore and in England. The Singapore courts would apply the 1957 convention limitation regime and in England, the 1976 LLMC regime would be applied. Just to emphasise the difference, in England because of the application of 1976 LLMC
limitation regime, Ming Galaxy’s limit of liability was about U.S.$5,800,000 unless the plaintiff could break the almost unbreakable limitation of the defendant in terms of Article 4 of the LLMC. However, in Singapore, Ming Galaxy's limit of liability would be U.S. $2,900,000 provided that the defendants proved that the collision was caused without their actual fault or privity. Such a situation would still arise in South Africa as, especially considering the new LLMC limits that came into effect in June 2015, the limits contained in South African law are considerably lower.

**4.3 Limitation for Cargo claim liability under South African Carriage of Goods by Sea Act**

As discussed previously in South African law it is s261 of the Merchant Shipping Act which provides for global limitation of liability for all liabilities of the shipowner, except oil pollution. However the South African Carriage of Goods by Sea Act 1 of 1986 also provides for limitation of liability of the carrier for cargo claims under South African law. This Act incorporates the Hague-Visby Rules into South African law even though South Africa has not ratified the Rules. Whilst the rules are also applied in many of the major maritime nations, it is the contractual aspect of carriage of goods contracts that still leaves room for interpretation as not all nations have the same approach to contract law. One such situation that has been subject to different interpretations is what constitutes an ‘unreasonable deviation’. Article 4(4) of the Hague-Visby Rules states:

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.” (Hague-Visby Rules, 1968).

What constitutes a reasonable deviation is however not defined in the Rules and therefore courts are often given the task of trying to determine whether or not a
deviation in a particular case was not unreasonable. The difference in interpretation was evident in the English law interpretation of a contractual deviation.

Previously under English law, a deviation from contractual terms was serious enough to justify the conclusion that the carrier had repudiated the contract which took the right to rely upon the cancelled contract terms at all away from the defaulter. (Dockray, 2000, p76). This was the position in Hain Steamship v. Tate & Lyle, where the House of Lords, per Lord Atkin stated that:

“the event falls within the ordinary law of contract...deviation did not automatically cancel the express contract. But it was a breach of contract of such a serious character that, however slight the deviation, the other party to the contract was entitled to treat it as going to the root of the contract and declare himself as no longer bound by any of its terms” ((1936) 41 Com. Cas. 350 at p354).

Lord Atkin further explained that the cargo owner would no longer be bound by exclusion clauses in the contract in favour of the shipowner or by any other promise made in the contract, including the obligation to pay freight which became due on delivery of the cargo if the contract was terminated. However, the party affected by the breach could elect to treat the contract as remaining in effect, in which case the contract remained in force and the carrier could claim the benefit of any of the agreed terms. One of these terms could be limitation of the carrier’s liability.

Compared to South Africa, the change in the English law position in 1980 was relatively recent. The change came about with the Photo Production v Securicor Transport case where the court held that the question of whether particular clauses applied to excuse or limit liability was solely a matter of construction of the contract. ([1980] AC 827). The doctrine of fundamental breach had no significant part to play. There was an analysis of the distinction between primary and secondary obligations by the court. A fundamental breach, whilst bringing an end to primary obligations
under the contract, does not necessarily bring an end to secondary obligations, such as exclusion clauses. There was no rule of law that liability could not be excluded, let alone limited in respect of deliberate breach. This position by the court could be said to be the fall of the fundamental breach notion in English law, however, there is still room for confusion with the law relating to deviation in contracts for the carriage of goods in a ship as the decision in *Hain* was not overruled. (Dockray, 2000, p76).

The fundamental breach does, however, still appear to be practiced by certain courts in the United States. In *Jones v. The Flying Clipper*, the first reported case to address the issue of deviation in the United States, the court held that the $500 limitation does not apply in the event of an unreasonable deviation, because it "so change[s] the essence of the agreement as to effect its abrogation." (116 F. Supp. 386, (S.D.N.Y. 1953)). The reasoning of the court was that without an exception to COGSA's liability limitation, a carrier would be free to "reckless[ly] ... violate the terms of [a] bill of lading, knowing that it cannot be called upon to pay more than $500 per package." (*Jones v. The Flying Clipper*, 116 F. Supp. 386, (S.D.N.Y. 1953) p390). This decision was followed by the majority of the courts in the United States. (Lennon, 2012, p442). Deviation being an issue is largely due to the United States Carriage of Goods by the Sea Act [Title 46 U.S.C.] not containing a definition for “unreasonable deviation”. As with most matters involving reasonableness it leaves room for interpretation and the court often has to look at surrounding factors of the matter in order to come to a decision. The court will often take the safe approach in not reading too much into the interpretation of such undefined terms. This seems to be the approach taken by Judge Weinfeld in refusing to read the statute as eliminating a principle "so firmly entrenched in maritime law" in the absence of a clear expression of congressional intent to do so in either the language of the statute or in its scant legislative history. (*Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953) p389).
The doctrine of fundamental breach has never been a part of South African law. The court in the South African case of *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*, described the doctrine of fundamental breach as a question to the root of the contract and that it was relevant to whether or not there was a right to rescission but that fundamental breach had no bearing to the construction of an exemption clause and could not govern its compass. (1993 (3) SA 424 (A) 430I-J). Some commentators have described this as meaning that there is no law forbidding an exemption clause from exempting consequences of fundamental breach. (Christie, 2011, p193). However, it is envisaged that the wording of the contract should expressly provide for such a situation and it should not be required to be read in through interpretation of the clause by a court.

Therefore the position in South Africa is that, in certain cases, a breach going to the root of the contract may be treated as repudiated by the person in breach and the innocent party may treat the contract to be at an end. However, the rights of the parties to seek damages from the other will continue to be determined by the breach and remedies terms contained in that same contract and the Hague-Visby Rules provides for the rights of the parties upon default. (Hare, 2009, p675). In a situation where the Hague-Visby Rules are incorporated voluntarily into the contract of carriage, there is deemed to be a repudiation of the contract by the carrier for a major breach of the contract which goes to the root of same and in this instance the shipper may elect to treat the contract as at an end. It follows that the shippers’ remedies will then be set out in the Rules, possibly with the addition of other contractual terms, and similarly, the residual rights of the carrier in the event of a default will be regulated similarly. (Hare, 2009, p676).

In terms of Article 4(2) of the Rules, the breach of the carrier may be exculpated completely or there may be limitation of the carrier’s liability for consequences of the breach in terms of Article 4(5). (Hague-Visby Rules, 1968). Should the shipper not make the choice to consider the contract as at an end, then the contract continues
and both parties are required to perform accordingly, subject to the innocent party’s rights to damages for the breach by the other party. The terms of a contractually incorporated Hague-Visby Rules contract, would therefore survive a breach under South African contract law, no matter the size of the breach. (Hare, 2009, p676). There is however an exception to this in cases of geographic deviation from the contractual route, English decisions, such as Stag Line, Ltd. v. Foscolo, Mango & Co. (The Ixia) have stated, per Lord Atkin, as follows:

“I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies.” ([1932] AC 328 at p340).

The carrier would therefore forfeit their right to rely upon the Hague-Visby Rules and contractual exceptions. With this approach it seems the House of Lords was not reading in what was not expressly there as this would not have been what the drafters intended, otherwise they would have provided for same with their wording.

According to s6 of the South African Admiralty Jurisdiction Regulation Act, 1983, English law would be applicable to claims relating to cargo that is carried into South Africa. In a situation where the Rules are statutorily applicable and relating to limitation, through the qualification ‘in any event’ contained in Article 4(5), geographic deviation should not result in the carrier losing his rights, which should survive the deviation as any major breach. (Hare, 2009, p676).

Article 4(4) of the Hague-Visby Rules allows carriers to make reasonable deviations where goods are carried on the terms of a bill of lading. Furthermore, the carrier is not deprived of absolutely all rights for an unjustified deviation under the Rules.
(Dockray, 2000, p98). It is considered common practice to include considerable freedoms to deviate where a vessel is voyage chartered. Therefore, the common law deviation rules do not have the same influence as they once did, however the inflexible essence of those rules does leave room for prejudice to an unsuspecting carrier. (Dockray, 2000, p98). Such prejudice could arise in the different interpretation of the effect of an unreasonable deviation on the contract of affreightment in jurisdictions around the world. This follows from the possibility that the contract could fall away with the deviation breach resulting in the defaulter losing the right to rely on the now repudiated contract terms, including limitation of liability, in some jurisdictions. The common law deviation rules would have been well entrenched in jurisdictions around the world as the rationale for the evolution of the common law approach was as a result of shippers often losing their insurance coverage when a vessel unjustifiably deviated from the contract of carriage. (Peacock, 1989, p978). Such a rationale is seemingly in accordance with the trend of public policy influencing developments in the shipping industry and as shipping is a global industry, maritime nations around the world would often follow suit with such developments.

4.3.1 Package or unit limitation

The Hague-Visby Rules, Hamburg Rules and the South African Carriage of Goods by Sea Act provide a definition of ‘package under Article 4(5)(c), Article 6(2)(a) and Article 4(5)(c) respectively as follows:

“Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.”
Whether or not cargo is considered a package is a question of fact and it is not necessary for the goods to be totally enclosed or packaged. This is evident in courts holding the following to be packages in terms of COGSA: six cartons of 40 TV tuners strapped to pallet boards (Standard Electrica SA v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft and Colombus Lines Ltd [1967] 2 Lloyd’s Rep 193); a bundle of 22 tin ingots (The Fernland [1975] Lloyd’s Rep 461); 30 small fire engines, individually stowed on a flat rack (The Marjorie Lykes 1988 AMC 2113). The inquiry considers primarily at the description of the cargo in the bill of lading, while the way the cargo is described is not conclusive, it is ‘highly relevant’. (Schoenbaum, 2004, p145). In terms of the word ‘unit’, the Australian Federal Court in considering whether or not ‘200945 piece posters and prints’ which a twenty foot TEU was ‘said to contain’ were units, or whether, for limitation purposes, the container should be the package. ([2004] 2 Lloyd’s Rep 537). The court found that the default situation of the container being the limitation package should prevail as a result of there being no statement of how the pieces were packaged within the container. This could be considered a surprising approach taken by the court as the ‘said to contain’ reservation is usually applied to qualify the guarantee by the carrier of the number of packages received.

The current position in the United States is one provided by Mitsui & Co v American Export Lines, where the court preferred to ‘return to the bill of lading to see how the parties had described the cargo. If the bill of lading revealed the number of individual packages within the container, then these were packages for limitation purposes’. (Sturley, 1996, p331). This decision was a change from one of the leading cases on the issue in the United States, Leather’s Best Inc v The Mormaclynx, where the court found that a container was ‘functionally part of the ship’ and should therefore rarely be regarded as a package. (451 F2d 800).

4.3.2 COGSA v s261 Limitation
Occasionally a situation may arise where an accident gives rise to both loss and damages claims as well as cargo claims. As previously discussed in this paper, limitation regimes can provide for limitation of liability for loss and damages claims and for cargo claims under different pieces of legislation. The position is no different in South Africa where a carrier could be entitled to rely upon the COGSA kilogram or package limitation as well as being able to utilise the s261 Merchant Shipping Act global limitation. Both of these limitations may be pleaded in response to a cargo claim. Practically, this is not easy in practice as the carrier might need to assess whether its total exposure under s261 to all damage liabilities, including cargo claims arising from a single occasion, exceed its global limitation. The carrier should in this regard, look at all the claims filed against it and moderate the total of these claims to the degree that the aggregate exceeds its maximum liability under s261. (Hare, 2009, p684). The issue here is that the carrier is not always sure of its full exposure until after judgment or settlement out of court of the individual claims. It is also possible that the excess of claims over s261 could be minimal. In such a situation, it could be in the carrier’s best interests to delay the settlement of any claims for at least the one year time-bar period provided by Article 3(6), if there is a possibility that its total liability for all types of claims may exceed its s261 limitation exposure. (Hare, 2009, p684). This would be done in the hope that the carrier would have a list of all the cargo claims by the time the one year time-bar period has passed, thereby enabling the carrier to determine whether the total claims exceed the applicable global limit once the package limitation is applied in each cargo claim. These, now reduced, cargo claims would then be aggregated with all other damage claims. However, there is no guarantee that the carrier would get all the claims in this period which may affect the carrier’s ability to make an adequate assessment in this regard.

An example of such a situation arising in South Africa was in _The Nagos_, where the sinking of the _MV Nagos_ off the South African coast resulted in the loss of life and cargo. (1996 (2) SA 261 (D)). The owners of the _MV Nagos_ instituted proceedings in terms of s1(1)(w) read with s5(2)(a) of the Admiralty Jurisdiction Act, 1983, under
which they claimed the right in terms of s261(1)(b) of the Merchant Shipping Act, for limitation of their liability for cargo claims to the equivalent of 850 gold francs per ton of the ship’s tonnage. All that was recovered from the vessel, nine lifejackets, had been arrested in rem by cargo interests to begin proceedings against the vessel in the jurisdiction of the Durban High court but these proceedings were subsequently withdrawn. Alexander J held, in responding to the cargo interests challenge of the court’s power to grant a declaratur seeking limitation under s261:

“The shipowner applicant had not sought to have its liability determined; it had sought no more than a declaration that it had a right, if any, to limit its liability to cargo claimants as provided for in the Act...The present proceedings fell within the direct purview of the Admiralty Jurisdiction Regulation Act: the definition of ‘maritime claim’ in the Act included ‘the limitation of liability of the owner of a ship...’(s1(1)(w) and s5(1)(a) empowered the Court, in the exercise of its admiralty jurisdiction, to ‘consider and decide any matter arising in connection with any maritime claim...” (The Nagos 1996 (2) SA 261 (D) at p271).

An order establishing a limitation fund was made by the court, this was to be done through the provision of a bank guarantee drawn on the bankers of the shipowner and to be lodged with the registrar. It must be pointed out that this case was decided prior to the 1997 SDR amendment in South African law. A carrier in the same position in England might be able to deal with such a situation in a seemingly more efficient way through the filing of a writ of limitation which would result in all claims, tort and contractual, being under the limitation regime adopted by the court. (Hare, 2009, p685).
CHAPTER 5

Conclusion

There are currently 54 and 52 contracting parties to the 1976 LLMC and its 1996 Protocol respectively. These figures represent 54, 80% and 57, 41% respectively of the world tonnage. (IMO, 2016). These figures still do not quite reflect uniformity when it comes to limitation of liability of shipowners worldwide. Especially when compared to other conventions containing limitation of liability like the 1992 CLC Protocol which has 136 contracting parties, making up 97% of the world tonnage. (IMO, 2016). Some major maritime nations, like the United States, have not ratified the 1976 LLMC and its Protocol and it is doubtful that they ever will. The 1976 LLMC was intended to replace the 1957 Convention on limitation, however, many states still apply the previous convention. (IMO, n.d). With the 1976 LLMC and its protocol, as amended, came much higher limits of liability for shipowners in exchange for claimants accepting a limitation that is almost impossible to break.

The differing limitation regimes has been known to result in forum shopping. The case often being a situation of a party, in considering whether or not limitation can be broken in possible forums, a test of whether 'the loss resulted from the shipowner's personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result' versus the test of 'actual fault or privity'. South Africa is one such destination considered if one wishes to have more of a chance of breaking limitation. Such a forum could be equally attractive for a shipowner wishing to have lower limits of liability if he was sure there was no way he could be found to have had actual fault or privity. Despite the
lack of uniformity worldwide when it comes to limitation, it still seems an efficient tool for capping shipowners’ potential liabilities. The limitation throughout the history of the concept seems to have been a move favourable with public policy in keeping shipowners and investors interested in the shipping industry for the benefit of society by not overburdening them with the risk of excessively high full liability amounts that would otherwise put them out of business.

The origins of the limitation concept and the modern day limitation regimes were covered in previous chapters. This paper has discussed several aspects of the limitation concept in a South African perspective, including which claims are subject to limitation, whether the limitation right can be lost once it has arisen, conduct barring limitation, onus of proof in limitation matters, and the test for breaking limitation. This paper has also discussed judicial decisions in relation to these aspects. Certain possible issues were also pointed out with regards to the concept in South Africa as a few features appear yet to be tested by South African courts.

There still seems to be an uncertainty in South African courts with regards to the concept of limitation of liability as the South African courts are largely untested when it comes to a few aspects of limitation. South Africa appears to still rely heavily on old English decisions and legislation prior to the UK adopting the 1976 LLMC regime. With its lower limits often making the jurisdiction not applying the 1976 LLMC a favourable forum, whether or not this was actually the aim of South Africa, does not appear to have found favour in front of English courts when parties have disputed forum. This can be seen in cases like Caltex Singapore Pte Limited v BP Shipping Ltd and Tigr cases. ([1996] 1 Lloyd’s Rep 286 & [1997] 2 Lloyd’s Rep 493). It is not inconceivable that judges in different jurisdictions would biasedly assume their forum is best suited to the matter. This even seems to go back to courts adopting a ‘our system is better’ attitude.
Considering the length of time the 1976 LLMC and its protocol has been in operation, South Africa does not appear to be in any rush to become party to that convention. However, becoming a party to same could elucidate a lot of the uncertainty when it comes to the South African limitation regime. As things stand, South Africa could be one controversial decision away, on a previously untested aspect of their limitation regime, from setting a dangerous precedent. This could be the case even if English admiralty law has decided on that issue because the South African court is not bound to follow that decision.

Considering the uncertainty and the limitation provisions being largely untested, shipowners and charterers appear to not have much incentive to commence proceedings in South Africa even with the lower limits applied. This was the case for charterparties or bill of ladings in South Africa prior to the SA COGSA, incorporating the Hague-Visby Rules, coming into effect. (Girvin, 1997, p121). Whilst this aspect has not yet been authoritatively decided upon in South Africa, it seems a move in the right direction in terms of certainty as current decisions from other jurisdictions could be looked to for guidance unlike having to rely on dated legislation and subsequent decisions thereof.

Considering that South Africa already often has to look elsewhere for precedent for many aspects of limitation of liability, they should probably be considering at least attempting uniformity when it comes to the concept of limitation of liability. The limits applied in South Africa, especially considering the new LLMC limits from June 2015, are now so low that it seems unlikely that a foreign court would agree to stay proceedings in favour of the South African jurisdiction in a forum dispute. This is because it would now almost seem a disadvantage to the party not wishing for the South African forum to have those limits applied compared to what they might be able to recover under the 1976 LLMC limitation regime with higher limitation amounts which are more in tune with the maritime industry as it is today as these amounts are revised regularly.
The SA Merchant Shipping Act SDR factors for limitation based on tonnage are the same for all ship sizes. Therefore to illustrate just how big the difference is, for a loss of life or personal injury claim for a ship falling into the category of 2,001 to 30,000 gross tonnage, the limitation calculation amount to be applied is 1,208 SDRs for each ton above 2,000 under the 1976 LLMC, as amended whereas if applying the SA Merchant Shipping Act, the calculation amount is 206, 67 SDR for each ton, regardless of the ship size. These lower South African regime limits are, however, at the risk of a limitation that is easier to break which would result in the shipowner’s liability being unlimited. Depending on the value of the total claim, it might not be worth the risk of protracted, costly litigation just for the shipowner’s right to limitation to be broken considerably easier than it would under the 1976 LLMC limitation regime, under which the shipowner would get an almost unbreakable limitation in exchange for higher limits, but limits nonetheless.

Given the heightened risks of transporting dangerous cargo, pollution damage by oil, increased environmental protection laws, technological advancements, more expensive cargo and evolution of the maritime industry in general, which leads to larger investment by all in maritime voyages, it only seems appropriate to raise limitation amounts accordingly considering the growing costs that people who have to ship their goods have to endure. Which is what the LLMC does but the SA Merchant Shipping Act fails to do. Given the paucity of limitation matters in South African courts, one would think that South Africa adopting the 1976 LLMC limitation regime would be as seamless as South Africa enacting the COGSA, incorporating the Hague-Visby Rules. At the very least in the unlikely situation that the adoption of the LLMC is not feasible, South Africa could update their limitation regime with a few amendments to the SA Merchant Shipping Act. One such amendment could be to include a provision stating the claims from which a shipowner is exempted from liability, as provided by s502 of the English Merchant Shipping Act, 1894, now updated by s186 of the English Merchant Shipping Act, 1995. Also, a provision providing the types of claims specifically excluded from
limitation, like the LLMC provides, could be a useful amendment to elucidate some uncertainty. Exclusions from limitation may be found in other acts like the MPCC but not in the SA Merchant Shipping Act where it is seemingly also needed. Finally, in making adjustments to the South African limitation regime, it also might be more helpful for South Africa to adopt a writ of limitation procedure similar to English law in limitation matters as this seems more efficient than seeking a declaratur. Increased limits in South Africa would also be protecting the interests of its importers and exporters, which would be good for South African trade.
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APPENDICES

Appendix 1  Admiralty Jurisdiction Regulation Act

ADMARLTY JURISDICTION REGULATION ACT 105 OF 1983

[ASSENTED TO 8 SEPTEMBER, 1983] [DATE OF COMMENCEMENT: 1 NOVEMBER, 1983]

(Afrikaans text signed by the State President)

as amended by:


ACT

To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.

ARRANGEMENT OF SECTIONS

1. Definitions

(1) In this Act, unless the context indicates otherwise—

“admiralty action” means proceedings in terms of this Act for the enforcement of a maritime claim whether such proceedings are by way of action or by way of any other competent procedure, and includes any ancillary or procedural measure, whether by way of application or otherwise, in connection with any such proceedings;

“container” means a container for the carriage of goods by sea, including any such container which is empty or otherwise temporarily not being used for such carriage;

“fund” means a fund mentioned in section 3 (11);

“maritime claim” means any claim for, arising out of or relating to—

(a) the ownership of a ship or a share in a ship;

(b) the possession, delivery, employment or earnings of a ship;

(c) any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;

(d) any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or respondentia bond;

(e) damage caused by or to a ship, whether by collision or otherwise;

(f) loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship;

(g) loss of or damage to goods (including the baggage and the personal belongings of the master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;

(h) the carriage of goods in a ship, or any agreement for or relating to such carriage;

(i) any container and any agreement relating to any container;

(j) any charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;

(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;

(l) towage or pilotage;

(m) the supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship;
(n) the rendering, by means of any aircraft, ship or other means, of services in connection with the carrying of persons or goods to or from a ship, or the provision of medical or other services to or in respect of the persons on being taken to or from a ship;

(o) payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship;

(p) the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act—

(i) as an agent, whether as a ship’s, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship; or

(ii) as a broker in respect of any charter, sale or any other agreement relating to a ship or in connection with the carriage of goods in a ship or in connection with any insurance of a ship or any portion or part thereof or of other property referred to in section 3 (5); or

(iii) as attorney or adviser in respect of any matter mentioned in subparagraphs (i) and (ii);

(q) the design, construction, repair or equipment of any ship;

(r) dock, harbour or similar dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act, 1998, or the South African Maritime Safety Authority Levies Act, 1998;

(s) the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;

(t) general average or any act claimed to be a general average act;

(u) marine insurance or any policy of marine insurance, including the protection and indemnity by any body of persons of its members in respect of marine matters;

(v) the forfeiture of any ship or any goods carried therein or the restoration of any ship or any such goods forfeited;

(w) the limitation of liability of the owner of a ship or of any other person entitled to any similar limitation of liability;

(x) the distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction;

(y) any maritime lien, whether or not falling under any of the preceding paragraphs;

(z) pollution of the sea or the sea-shore by oil or any other substance on or emanating from a ship;
(aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;

(bb) wrongful or malicious proceedings in respect of or involving any property referred to in section 3 (5), or the wrongful or malicious arrest, attachment or detention of any such property, wherever any such proceedings, arrest, attachment or detention took place, and whether in the Republic or elsewhere, and any loss or damage contemplated in section 5 (4);

(cc) piracy, sabotage or terrorism relating to property mentioned in section 3 (5),

or to persons on any ship;

(dd) any matter not falling under any of the previous paragraphs in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict c. 27), of the United Kingdom, was empowered to exercise admiralty jurisdiction immediately before the commencement of this Act, or any matter in respect of which a court of the Republic is empowered to exercise admiralty jurisdiction;

(ee) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs; and

(ff) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest;

“Minister” means the Minister of Justice;

“rules” means the rules made under section 4 or in force thereunder;

“ship” means any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not;

“this Act” includes the rules.

(2)(a) An admiralty action shall for any relevant purpose commence—

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action in rem;

(iv) by the giving of security or an undertaking as contemplated in section 3 (10)(a).
(b) An action commenced as contemplated in paragraph (a) shall lapse and be of no force and effect if—

(i) an application contemplated in paragraph (a)(ii) is not granted or is discharged or not confirmed;
(ii) no attachment is effected within twelve months of the grant of an order pursuant to such an application or the final decision of the application;
(iii) a process contemplated in paragraph (a)(iii) is not served within twelve months of the issue thereof;
(iv) the property concerned is deemed in terms of section 3 (10)(a)(ii) to have been released and discharged.

(3) For the purposes of an action in rem, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.

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.

3. Form of proceedings

(1) Subject to the provisions of this Act any maritime claim may be enforced by an action in personam.

(2) An action in personam may only be instituted against a person—

(a) resident or carrying on business at any place in the Republic;
(b) whose property within the court’s area of jurisdiction has been attached by the plaintiff or the applicant, to found or to confirm jurisdiction;
(c) who has consented or submitted to the jurisdiction of the court;
(d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act No. 27 of 1943);
(e) in the case of a company, if the company has a registered office in the Republic.

(3) An action in personam may not be instituted in a court of which the area of jurisdiction is not adjacent to the territorial waters of the Republic unless—
(a) in the case of a claim contemplated in paragraph (a), (b), (j) or (u) of the definition of "maritime claim", the claim arises out of an agreement concluded within the area of jurisdiction of that court;

(b) in the case of a claim contemplated in paragraph (g) or (h) of that definition, the goods concerned are or were shipped under a bill of lading to or from a place within the area of jurisdiction of that court;

(c) the maritime claim concerned relates to a fund within, or freight payable in, the area of jurisdiction of that court.

(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action in rem—

(a) if the claimant has a maritime lien over the property to be arrested; or

(b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

(5) An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

(a) The ship, with or without its equipment, furniture, stores or bunkers;

(b) the whole or any part of the equipment, furniture, stores or bunkers;

(c) the whole or any part of the cargo;

(d) the freight;

(e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;

(f) a fund.

(6) An action in rem, other than an action in respect of a maritime claim referred to in paragraph (d) of the definition of "maritime claim", may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

(7)(a) For the purpose of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose—

(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or;

(iii) owned, at the time when the action is commenced, by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.
(b) For the purposes of paragraph (a)—

(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;

(iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.

(c) If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.

(8) Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.

(9) . . . . .

(10)(a) (i) Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.

(ii) Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking.

(b) That security shall for the purposes of sections 9 and 10 be deemed to be the freight or the proceeds of the sale of the property.

(11)(a) There shall in any particular case be a fund consisting of—

(i) any security or undertaking given in terms of subsection (10)(a), unless such security or undertaking is given in respect of a particular claim by a particular person;

(ii) the proceeds of the sale of any property mentioned in subsection (5)(a) to (e), either in terms of any order made in terms of section 9, or in execution or otherwise.

(b) A fund shall, for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given.

(c) If an action in rem is instituted against or in respect of a fund in terms of subsection (5), the plaintiff shall give notice of the said action to the registrar of the court or other
person holding the fund, and to all persons known by the plaintiff to be interested in the fund. (d) The interest of any person in, or any claim by any person against, a fund shall be capable of attachment to found jurisdiction.

4. Procedure and rules of court

(1) Subject to the provisions of this Act the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the rules made under section 43 of that Act shall mutatis mutandis apply in relation to proceedings in terms of this Act except in so far as those rules are inconsistent with the rules referred to in subsection (2).

(2) The rules of the courts of admiralty of the Republic in force in terms of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, immediately before the commencement of this Act, shall be deemed to be rules made under section 43(2)(a) of the Supreme Court Act, 1959, and shall apply in respect of proceedings in terms of this Act.

(3) The power of the Chief Justice to make rules under section 43 of the Supreme Court Act, 1959, shall include the power to make rules prescribing the following:

(a) The appointment of any person or body for the assessment of fees and costs and the manner in which such fees and costs are to be assessed;

(b) measures aimed at avoiding circuity or multiplicity of actions;

(c) the practice and procedure for referring to arbitration any matter arising out of proceedings relating to a maritime claim, and the appointment, remuneration and powers of an arbitrator.

(4)(a) Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an incola either of the area of jurisdiction of that court or of the Republic.

(b) A court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and such an order may be carried into effect when that property comes within the area of jurisdiction of the court.

(c) Subject to the provisions of section 3 (3)—

(i) a court may make an order for the arrest or attachment, to found jurisdiction, of property not within the area of jurisdiction of the court if—

(aa)(aaa) that property is in the Republic or is likely to come into the Republic after the making of the order; and

(bbb) no court in the Republic otherwise has jurisdiction in connection with the claim or can otherwise acquire such jurisdiction by an arrest or attachment to found jurisdiction; or

(bb) other property within the area of jurisdiction of the court has been or is about to be arrested or attached to found jurisdiction in connection with the same claim;
(ii) any such order may be executed and any arrest or attachment pursuant thereto effected at any place in the Republic as contemplated in section 26 (1) of the Supreme Court Act, 1959 (Act No. 59 of 1959);

(iii) the arrest or attachment of any property pursuant to any such order shall be an arrest or attachment which shall found the relevant jurisdiction of the court ordering the arrest or attachment.

(d) A court may make an order for the arrest or attachment, to found jurisdiction, of any ship which, if the action concerned had been an action in rem, would be an associated ship with regard to the ship in respect of which the maritime claim concerned arose.

5. Powers of court

(1) A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.

(2) A court may in the exercise of its admiralty jurisdiction—

(a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim;

(b) order any person to give security for costs or for any claim;

(c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;

(d) notwithstanding the provisions of section 3 (8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just;

(d) on application made before the expiry of any period contemplated in section 1 (2)(b) or 3 (10)(a)(ii), or any extension thereof, from time to time grant an extension of any such period;

(e) order that any matter pending or arising in proceedings before it be referred to an arbitrator or referee for decision or report and provide for the appointment, remuneration and powers of the arbitrator or referee and for the giving of effect to his decision or report;
(f) make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of the commencement of the action, as to it appears just;

(g) subject to the provisions of any law relating to exchange control, order payment to be made in such currency other than the currency of the Republic as in the circumstances of the case appears appropriate, and make such order as seems just as to the date upon which the calculation of the conversion from any currency to any other currency should be based.

(3)(a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings.

(aA) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings.

(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

(4) Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage.

(5)(a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion—

(i) if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing and for the taking of the evidence of any person;

(ii) in making an order in terms of subparagraph (i), make an order that any person who applied for such first-mentioned order shall be liable and give security for any costs or expenses, including those arising from any delay, occasioned by the application and the carrying into effect of any such order;

(iii) grant leave to any such person to apply for an order that any such costs or expenses be considered as part of the costs of the proceedings;

(iv) in exceptional circumstances, make such an order as is contemplated in subparagraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator, referee or tribunal elsewhere than in the
Republic, in which case subparagraphs (ii) and (iii) shall mutatis mutandis apply.

(b) The provisions of this Act shall not affect any privilege relating to any document in the possession of, or any communication to or the giving of any evidence by, any person.

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.

(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.

(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.

(4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

7. Disputes as to venue or jurisdiction

(1)(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.

(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.
(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 of the court, the court may 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.
(3) The provisions of subsection (2) shall not affect any other objection to the jurisdiction of any court.
(4) No appeal shall lie against any decision or order made under subsection (2).
(5) The Minister may, on the recommendation of the judge president of any provincial division of the Supreme Court of South Africa, submit the question as to whether or not a particular matter gives rise to a maritime claim, to the Appellate Division of the Supreme Court of South Africa and may cause that question to be argued before that Division so that it may decide the question for future guidance.

8. Arrests
(1) Where property has been attached to found or to confirm jurisdiction at common law, that property may nevertheless be arrested in connection with a maritime claim, subject to such directions as the court thinks fit.
(2) Where property has been attached to found or to confirm jurisdiction relating to a maritime claim, sections 9, 10 and 11 of this Act shall apply as if the property had been arrested in an action in rem, whether or not the property has been arrested in terms of this Act.
9. Sale of arrested property

(1) A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.

(2) The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court.

(3) Any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever.

10. Vesting of property in trustee, liquidator or judicial manager excluded in certain cases

Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.

10A. Power of court regarding claims against fund

(1) The court may make an order with regard to the distribution of a fund or payment out of any portion of a fund or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5 (2)(e).

(2)(a) If an order is made referring all such claims to a referee or if the court so orders, all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order.

(b) The costs of any proceedings already instituted but which have been stayed in terms of paragraph (a) shall be added to any relevant claim proved in accordance with any such order.

(3)(a) Notwithstanding the provisions of section 11 (2) and (9), any claimant submitting as proof of a claim a default judgment may be required by the referee or other person to whom the claim is submitted or by any person having an interest in the fund, to furnish evidence justifying the said judgment.

(b) If a claimant is in terms of paragraph (a) required to furnish such evidence, the judgment alone shall not be sufficient proof of the claim.

(c) Any person other than a referee so requiring a claimant to furnish such evidence shall be liable for any costs incurred by such claimant in so doing, unless the claimant fails to justify the said judgment or a court otherwise orders.

(4)(a) A claim which is subject to a suspensive or resolutive condition or otherwise not yet enforceable or is voidable may be proved, where appropriate, on the basis of an
estimate or valuation, but no distribution shall be made in respect thereof until it has become enforceable or no longer voidable.

(b) The court may make an order as to the time when a claim contemplated in paragraph (a) which has not become enforceable or is voidable shall no longer be taken into account for the purposes of the distribution in question or no longer be regarded as voidable.

11. Ranking of claims

(1)(a) If property mentioned in section 3 (5)(a) to (e) is sold in execution or constitutes a fund contemplated in section 3 (11), the relevant maritime claims mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11).

(b) Property other than property mentioned in paragraph (a) may, in respect of a maritime claim, be sold in execution, and the proceeds thereof distributed, in the ordinary manner.

(2) The claims contemplated in subsection (1)(a) are claims mentioned in subsection (4) and confirmed by a judgment of a court in the Republic or proved in the ordinary manner.

(3) Any reference in this section to a ship shall, where appropriate, include a reference to any other property mentioned in section 3 (5)(a) to (e).

(4) The claims mentioned in subsection (2) are the following, namely—

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;

(b) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;

(c) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim—

(i) contemplated in paragraph (s) of the definition of “maritime claim”;

(ii) in respect of port, canal, other waterways or pilotage dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act, 1998, or the South African Maritime Safety Authority Levies Act, 1998;

(iii) in respect of loss of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;
(v) in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof;

(vi) in respect of the salvage of the ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship;

(vii) in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or

(viii) by any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in subparagraph (vii);

(d) a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of a ship, and in respect of any lien to which any person mentioned in paragraph (o) of the definition of “maritime claim” is entitled;

(e) a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs;

(f) any other maritime claim.

(5) The claims mentioned in paragraphs (b) to (f) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection, and in accordance with the following rules, namely—

(a) a claim referred to in the said paragraph (b) shall, subject to paragraph (b) of this subsection, rank before any claim arising after it;

(b) a claim of the nature contemplated in paragraph (c) (vi) of that subsection, whether or not arising within the period of one year mentioned in the said paragraph, shall rank before any other claim;

(c) otherwise any claim mentioned in any of the subparagraphs of the said paragraph (c) shall rank pari passu with any other claim mentioned in the same subparagraph, irrespective of when such claims arose;

(d) claims mentioned in paragraph (d) of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;

(e) claims mentioned in paragraph (e) of subsection (4) shall, among themselves, rank in their priority according to law;

(f) claims mentioned in paragraph (f) of subsection (4) shall rank in their order of preference according to the law of insolvency;

(g) save as otherwise provided in this subsection, claims shall rank in the order in which they are set forth in the said subsection (4).

(6) For the purposes of subsection (5), a claim in connection with salvage or the removal of wreck shall be deemed to have arisen when the salvage operation or the removal
of the wreck, as the case may be, terminated, and a claim in connection with contribution in respect of general average, when the general average act occurred.

(7) A court may, in the exercise of its admiralty jurisdiction, on the application of any interested person, make an order declaring how any claim against a fund shall rank.

(8) Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid.

(9) A judgment or an arbitration award shall rank in accordance with the claim in respect of which it was given or made.

(10) Interest on any claim and the costs of enforcing a claim shall, for the purposes of this section, be deemed to form part of the claim.

(11) In the case of claims against a fund which consists of the proceeds of the sale of, or any security or undertaking given in respect of, a ship (hereinafter referred to as the ship giving rise to the fund) which is an associated ship in relation to the ship in respect of which the claims arose, the following rules shall apply, namely—

(a) all claims which fall under paragraphs (b) to (e) of subsection (4) and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as is contemplated in section 3 (7)(a)(i), shall rank immediately after claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned and after any claims which fall under paragraph (f) of subsection (4) and which arose from, or are related directly to, the operation of (including the carriage of goods in) the ship giving rise to the fund concerned;

(b) all claims which fall under the said paragraphs (b) to (e) and which arose in respect of a ship in relation to which the ship giving rise to the fund is such an associated ship as is contemplated in section 3 (7)(a)(ii) or (iii) shall rank immediately after any claims mentioned in paragraph (a) of this subsection or, if there are no such claims, immediately after claims which fall under the said paragraphs and which arose directly in respect of the ship giving rise to the fund concerned; and

(c) the provisions of subsections (5) and (9) shall apply with regard to any claim mentioned in paragraph (a) or (b).

(12) Notwithstanding the provisions of this section, any undertaking or security given with respect to a particular claim shall be applied in satisfaction of that claim only.

(13) Any balance remaining after the claims mentioned in paragraphs (a) to (e) of subsection (4) and the claims mentioned in subsection (11) have been paid, shall be paid over to any trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto or otherwise to any other person entitled thereto.
12. Appeals
A judgment or order of a court in the exercise of its admiralty jurisdiction shall be subject to appeal as if such judgment or order were that of a provincial or local division of the Supreme Court of South Africa in civil proceedings.

Section 2 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), is hereby amended by the substitution in subsection (2) for the definition of “superior court” of the following definition:
“ ‘superior court’ means a division of the Supreme Court of South Africa, save in sections 43, 45, 89, 292, 330 and 356 (1) (xxxv), where it means a court exercising its admiralty jurisdiction under the Admiralty Jurisdiction Regulation Act, 1983;”.

14. Jurisdiction of magistrates’ courts not affected
This Act shall not derogate from the jurisdiction which a magistrate’s court has under sections 131, 136 and 151 of the Merchant Shipping Act, 1951.

15. Act to bind the State
This Act shall bind the State.

16. Repeal of laws
(1) The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.
(2) Proceedings instituted before the commencement of this Act shall be proceeded with as if this Act had not been enacted.
(3) For the purposes of subsection (2) proceedings shall be deemed to have commenced upon service of the writ of summons.

17. Short title and commencement
This Act shall be called the Admiralty Jurisdiction Regulation Act, 1983, and shall come into operation on a date fixed by the State President by proclamation in the Gazette.
## Schedule

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Appendix 2  s261-263 Merchant Shipping Act

MERCHANT SHIPPING ACT 57 OF 1951

[ASSENTED TO 27 JUNE, 1951] [DATE OF COMMENCEMENT: 1 JANUARY, 1960] (Unless otherwise indicated) (Afrikaans text signed by the Governor-General) as amended by


When owner not liable for whole damage

261. (1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity—
(a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or

[Para (a) amended by s 33(a), Act 30/1959, and substituted by s 7(a), Act 25/1985, and by s 11(1)(a), Act 23/1997]

(b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; or

[Para (b) amended by s 33(b), Act 30/1959, and substituted by s 7(b), Act 25/1985, and by s 11(1)(a), Act 23/1997]

(c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank pari passu with the last-mentioned claims.

[Para (c) amended by s 33(c) and (d), Act 30/1959, and substituted by s 7(c), Act 25/1985, and by s 11(1)(a), Act 23/1997]

(2) The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.

(3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims
for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined.

(4) (a) The amounts mentioned in subsection (1) shall be converted into South African currency on the basis of the value of such currency on the date of the judgment or the date agreed upon by the parties.

(b) For the purpose of converting from special drawing rights into South African currency the amounts mentioned in subsection (1) in respect of which a judgment is given, one special drawing right shall be treated as equal to such a sum in South African currency as the International Monetary Fund have fixed as being the equivalent of one special drawing right for—

(i) the day on which the judgment is given; or

(ii) if no sum has been so fixed for that day, the last day before that day for which a sum has been so fixed.

(c) A certificate given by or on behalf of the Treasury stating—

(i) that a particular sum in South African currency has been so fixed for a particular day;

or

(ii) that no sum has been so fixed for that day and that a particular sum in South African currency has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day, shall be prima facie proof of those matters for the purposes of subsection (1); and a document purporting to be such a certificate shall, in any proceedings, be admissible in evidence and, in the absence of evidence to the contrary, be deemed to be such a certificate.

[Subs (4) added by s 33(e), Act 30/1959, and substituted by s 4(a), Act 16/1995, and by s 11(1)(b), Act 23/1997] (5) . . .

[Subs (5) added by s 33(e), Act 30/1959, substituted by s 7(d), Act 25/1985, and deleted by s 4(b), Act 16/1995]

**Tonnage how calculated**

262. (1) For the purpose of section two hundred and sixty-one, the tonnage of a ship shall be her gross register tonnage.
(2) There shall not be included in such tonnage any space occupied by seamen or apprentice-officers and appropriated to their use which has been certified by a surveyor to comply in all respects with the requirements of this Act.

(3) The measurement of such tonnage shall be—
(a) in the case of a South African ship, according to the law of the Republic;
(b) in the case of a treaty ship registered elsewhere than in the Republic, according to the law of the treaty country where the ship is registered;
(c) in the case of a foreign ship, according to the law of the Republic, if capable of being so measured.

(4) In the case of any foreign ship, which is incapable of being measured under the law of the Republic, the Authority shall, after consideration of the available evidence concerning the dimensions of the ship, give a certificate stating what would, in its opinion, have been the tonnage of the ship if she had been duly measured according to the law of the Republic; and the tonnage so stated in such certificate shall, for the purpose of section 261, be deemed to be the tonnage of the ship.

Application of this Part to persons other than the owners

263. (1) Any obligation imposed by this Part upon any owner of a ship shall be imposed also upon any person (other than the owner) who is responsible for the fault of the ship; and in any case where, by virtue of any charter or lease, or for any other reason, the owner is not responsible for the navigation and management of the ship, this Part shall be construed to impose any such obligation upon the charterer or other person for the time being so responsible, and not upon the owner.
(2) For the purposes of section 261 the word "owner" in relation to a ship shall include any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.

[Subs (2) added by s 8, Act 3/1981]
Appendix 3  s9 – s11 MPCC ACT

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MARINE POLLUTION (CONTROL AND CIVIL LIABILITY) ACT 6 OF 1981

To provide for the protection of the marine environment from pollution by oil and other harmful substances, and for that purpose to provide for the prevention and combating of pollution of the sea by oil and other harmful substances; to determine liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and offshore installations; and to provide for matters connected therewith.

[Long title substituted by s 47, Act 23/1997]

Published: GN342/7427/1,25Feb1981 Commencement: 1 October 1982,
Proc156/8366/1,3Sep1982

as amended by

Prevention and Combating of Pollution of the Sea by Oil Amendment Act 59 of 1985

Published: GN1237/9772/1,5Jun1985 Commencement: 24 April 1985, section 2

Prevention and Combating of Pollution of the Sea by Oil Amendment Act 63 of 1987

Published: GN2132/10936/1,25Sep1987 Commencement: 25 September 1987, on publication

Prevention and Combating of Pollution of the Sea by Oil Amendment Act 9 of 1990

Published: GN585/12352/1,21Mar1990 Commencement: 21 March 1990, on publication

Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996

Published: GN1888/17599/1,22Nov1996 Commencement: 22 November 1996, on publication

Shipping General Amendment Act 23 of 1997

Published: GN942/18130/1,18Jul1997 Commencement: inter alia ss 27 to 47, 1 September 1997, Proc50/18246/1,29Aug1997, except inter alia ss 27(k), 28 and 43(d)

South African Maritime Safety Authority Act 5 of 1998

Published: GN468/18796/1,31Mar1998 Commencement: 1 April 1998,
ProcR35/18806/2,31Mar1998

Note: The following expressions have been substituted:

"Minister", except in ss 1, 9(2)(b) and (5)(b), 18, 24, 25, 26, 27, 28, 29 and 30(4), by s 2(2) (item 67(c) Sch), Act 5/1998.

Definitions

1. (1) In this Act, unless the context otherwise indicates—

"area of the Republic" includes the internal waters and the territorial waters;

[Definition of "area of the Republic" substituted by s 27(a), Act 23/1997]

"Authority" means the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act 5 of 1998;

[Definition of "Authority" inserted by s 2(2) (item 55 Sch), Act 5/1998] "certificate" means a certificate contemplated in section 13;

"Constitution" means the International Convention on Civil Liability for Oil Pollution Damage, signed in Brussels on 29 November 1969 and published for general information under General Notice No 58 of 1978 in Government Gazette No 5867 of 27 January 1978, and includes any amendments thereof and additions thereto signed, ratified or acceded to by the Republic of South Africa;

"Constitution State" means a state which is a party to the Constitution;

"Director-General" means the Director-General: Transport;

"discharge", in relation to a harmful substance, means any release, howsoever caused, from a ship, a tanker or an offshore installation into a part of the sea which is a prohibited area, and includes any escaping, disposal, spilling, leaking, pumping, emitting or emptying; and "discharge", when used as a verb, has a corresponding meaning;

[Definition of "discharge" substituted by s 27(b), Act 23/1997]

"exclusive economic zone" means the exclusive economic zone referred to in section 7 of the Maritime Zones Act 15 of 1994;

[Definition of "exclusive economic zone" inserted by s 27(c), Act 23/1997] "harmful substance" means any substance which, if introduced into the sea, is likely to create a hazard to human health, harm living resources and marine life, damage amenities or interfere with other legitimate uses of the sea, and includes oil and any other substance subject to control by MARPOL 1973/78, and mixtures of such substances and water or any other substance;

[Definition of "harmful substance" inserted by s 27(c), Act 23/1997]

"Fund" . . .

[Definition of "Fund" deleted by s 1(a), Act 9/1990] "high-water mark" means the highest line reached by the water of the sea during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods;

"incident" means any occurrence, or series of occurrences having the same origin, which causes a discharge of oil from any ship, tanker or offshore installation or which creates the likelihood of such a discharge;
"internal waters" includes the land between the high-water and low-water marks;

[Definition of "internal waters" inserted by s 27(d), Act 23/1997] "low-water mark" means the low-water line as defined in section 1 of the Maritime Zones Act 1994;

[Definition of "low-water mark" substituted by s 27(e), Act 23/1997] "Marine Pollution Acts" means the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986, including any instrument made thereunder, and this Act;


[Definition of "MARPOL 1973/78" inserted by s 27(f), Act 23/1997] "master", in relation to a ship or a tanker, means any person (other than a pilot) having charge or command of such ship or tanker and, in relation to an offshore installation, means the person in charge thereof;

"Minister" means the Minister of Transport;

[Definition of "Minister" substituted by s 27(g), Act 23/1997] "National Revenue Fund" means the National Revenue Fund established by section 213 of the Constitution of the Republic of South Africa Act 108 of 1996;

[Definition of "National Revenue Fund" inserted by s 27(h), Act 23/1997] "natural oil" . . .

[Definition of "natural oil" deleted by s 27(i), Act 23/1997] "nautical mile" means the international nautical mile of 1 852 metres;

"offshore installation" means a facility situated wholly or partly within the prohibited area and which is used for the transfer of harmful substances from a ship or a tanker to a point on land or from a point on land to a ship or tanker or from a bunkering vessel to a ship or a tanker, and includes any exploration or production platform situated within the prohibited area and used in prospecting for or the mining of natural oil;

[Definition of "offshore installation" substituted by s 27(j), Act 23/1997] "oil", in relation to a discharge of oil from—

(a) a ship, tanker or offshore installation in that part of the prohibited area which constitutes the territorial waters and the sea adjoining the said territorial waters to the landward side thereof, means any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water or any other substance;

(b) a ship, tanker or offshore installation in that part of the prohibited area which adjoins the said territorial waters to the seaward side thereof, means any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water or any other substance which contains one hundred parts or more of oil in a million parts of the mixture,

but in relation to loss or damage caused as contemplated in section 9(1)(a) where the discharge in question took place from a tanker, and for the purposes of section 13(1), means oil as defined in paragraph 5 of Article 1 of the Convention;

"owner", in relation to a ship or a tanker, means the person or persons registered as the owner of such ship or tanker or, in the absence of registration, the person or persons to whom
such ship or tanker belongs, but, in relation to a ship or tanker belonging to a state which is
operated by a person registered as the ship's or tanker's operator, "owner" means the person
so registered;

[Definition of "owner" substituted by s 27(l), Act 23/1997] "prescribed" means
prescribed by regulation;

"principal officer" means the officer in charge of the office of the Authority at any port;

"prohibited area" means the internal waters, the territorial waters and the exclusive economic
zone and, in relation to an offshore installation, includes the sea within the limits of the
continental shelf;

[Definition of "prohibited area" substituted by s 27(m), Act 23/1997] "sea"
means the water and the bed of the sea and includes the land between the high- and low-
water marks as well as any tidal lagoon or tidal river as defined in section 1 of the Sea-shore
Act 21 of 1935;

"ship" means any kind of vessel or other sea-borne object from which oil can be discharged,
excluding a tanker, whether or not such vessel or object has been lost or abandoned, has
stranded, is in distress, disabled or damaged, has been wrecked, has broken up or has sunk;

"State Revenue Fund" . . .

[Definition of "State Revenue Fund" deleted by s 27(n), Act 23/1997]
"tanker" means any seagoing vessel of any type whatsoever, actually carrying oil in bulk as
cargo and in respect of which the provisions of the Convention are applicable;

"territorial waters of the Republic" . . .

[Definition of "territorial waters of the Republic" deleted by s 27(o), Act 23/1997] "this
Act" includes any regulation made thereunder.

(2) Where more than one discharge of oil results from the same occurrence or from a
series of occurrences having the same origin, they shall for the purposes of this Act be
regarded as one discharge.
Liability for loss, damage or costs caused by discharge of oil

9. (1) Subject to the provisions of this Act the owner of any ship, tanker or offshore installation at the time of the incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence shall be liable for—

(a) any loss or damage caused, elsewhere than on such ship, tanker or offshore installation, in the area of the Republic by pollution resulting from the discharge of oil from such ship, tanker or offshore installation;

(b) the costs of any measures taken or caused to be taken by the Authority in terms of this Act after an incident has occurred in respect of such ship, tanker or offshore installation, for the purposes of reducing loss or damage caused as contemplated in paragraph (a) through the discharge of any oil, or for the purposes of preventing such loss or damage being caused, whether or not a discharge as contemplated in paragraph (a) has occurred and whether or not such a discharge in fact subsequently occurs; and

(c) any loss or damage caused in the area of the Republic by any measures so taken or caused to be taken after a discharge as contemplated in paragraph (a) has occurred.

[Subs (1) amended by s 35(a), Act 23/1997]

(2) For the purposes of subsection (1)(b)—

(a) any measures taken or caused to be taken by the Authority in terms of this Act to remove or prevent pollution of the sea by oil discharged or likely to be discharged from any ship, tanker or offshore installation, shall be deemed to be measures taken or caused to be taken by the Authority for the purposes contemplated in that subsection;

(b) the costs referred to in that subsection shall include—

(i) expenses reasonably incurred in connection with the taking of measures referred to in that subsection;

(ii) an amount deemed by the Director-General to be sufficient to compensate the South African National Foundation for the Conservation of Coastal Birds, an organization registered in terms of the National Welfare Act 100 of 1978, as a welfare organization, or any similar organization approved by the Minister, for expenses incurred in rescuing, conveying, treating, feeding, cleaning and rehabilitating coastal birds polluted by oil discharged from the ship, tanker or offshore installation in question.

[Subpara (ii) substituted by s 35(b), Act 23/1997]

(3) The owner of any ship, tanker or offshore installation shall not be liable for any loss, damage or costs as set out in subsection (1) if he proves that the discharge or, as the case may be, the anticipated discharge in question—

(a) resulted from an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and irresistible natural phenomenon; or

(b) was wholly caused by an act or omission on the part of any person, not being the owner or a servant or agent of the owner, with intent to do damage; or

(c) was wholly caused by the negligence or other wrongful act of any government or other
authority responsible for the maintenance of lights or other navigational aids, in the exercise of that function.

(4) Where a ship or a tanker is together with another ship or tanker or with an offshore installation involved in an incident and a liability is incurred by virtue of the provisions of subsection (1) by each of the owners concerned, but the loss, damage or costs for which each of the owners would be liable cannot reasonably be separated from that or those for which the other owner or owners would be liable, the owners concerned shall be jointly and severally liable for all such loss, damage or costs.

(5) If the owner of any ship, tanker or offshore installation incurs a liability in terms of the provisions of subsection (1) for any loss or damage suffered or costs incurred as a result of an incident which occurred without such owner's actual fault or privity—

(a) the provisions of section 261 of the Merchant Shipping Act 57 of 1951 shall not apply in respect of such liability;

(b) the aggregate of all amounts payable by such owner in respect of such liability, in so far as it relates to a particular incident, shall not exceed—

(i) in the case of a ship or a tanker, one hundred and thirty-three units of account for each ton of the ship's or tanker's tonnage, or fourteen million units of account, whichever is the lesser;

(ii) in the case of an offshore installation, a sum determined by the Minister, but not exceeding fourteen million units of account.

(6) The provisions of subsection (1)(b) shall not be construed as rendering, in the case of a tanker, any costs incurred in terms of the said subsection before a discharge of oil from such tanker has occurred, recoverable by virtue of the application of the provisions of the Convention.

(7) No legal proceedings to enforce a claim in respect of a liability incurred in terms of subsection (1) shall be entertained by any court unless such proceedings are commenced with not later than three years after the date on which such claim arose: Provided that no such proceedings shall be so entertained after the expiration of a period of six years after the date on which the incident by reason of which the said liability was incurred, took place, or in the case where the incident consists of a series of occurrences having the same origin, six years after the date on which the first of those occurrences took place.

(8) For the purposes of this section—

(a) "unit of account" means a Special Drawing Right as defined by the International Monetary Fund, and the value of such Special Drawing Right in South African currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund and which is in effect at the time when payment is made, or, in the event of an application in terms of section 12(1), at the time when such application is considered by the court;

(b) the tonnage of a ship or a tanker shall be its net tonnage with the addition of any engine room space deducted for the purpose of ascertaining its net tonnage.
Limitation of liability

10. (1) When an incident has occurred in respect of a ship, tanker or offshore installation the owner of such ship, tanker or offshore installation shall not be liable otherwise than under the provisions of this Act to any person for any—
(a) loss or damage referred to in section 9(1)(a) or (c); or
(b) costs referred to in section 9(1)(b), suffered or incurred as a result of that incident.

(2) No servant or agent of the owner of a ship, tanker or offshore installation shall be liable to any person for any loss, damage or costs referred to in subsection (1).

(3) Any person performing salvage operations in connection with a ship, tanker or offshore installation with the agreement of the owner or master thereof, shall, for the purposes of subsection (2), be regarded as the agent of such owner.

(4) Any person in the service or acting on the authority of the State or the Authority or any person engaged in terms of section 27(1) read with section 4(2)(a) or section 22(1), as the case may be, to perform any act required to be performed in terms of section 4(1), shall not be liable (except in the case of any wilful act or omission on the part of any such person) to any person for any loss of or damage to any ship, tanker or offshore installation or, in the case of such ship or tanker, its cargo or harmful substances, caused by or arising out of or in any manner connected with the performance of such act.

[Subs (4) substituted by s 2(2) (item 58 Sch), Act 5/1998]

(5) If by virtue of the provisions of section 5 measures are being taken to guard against, prevent or remove pollution of the sea by a harmful substance in the prohibited area, any person in the service or acting on the authority of the State or the Authority, any officer of or member of the crew of any vessel employed in the taking of such measures, the employer of such officer or member, or the owner of such vessel, shall not be liable (except in the case of any wilful act or omission on the part of any such person, officer, member, employer or owner) to any person for any loss or damage to any ship, tanker or offshore installation in the said area, or, in the case of such ship or tanker, its cargo or harmful substances, caused by or arising out of or in any manner connected with the taking of such measures.

[Subs (5) amended by s 36(a), Act 23/1997, and substituted by s 2(2) (item 58 Sch), Act 5/1998]

(6) Any person in the service or acting on the authority of the State or the Authority or any person engaged in terms of section 27(1) read with section 4(2)(a) or section 22(1), as the case may be, to perform any act required to be performed in terms of section 4(1), shall not be liable (except in the case of any wilful act or omission on the part of any such person) for any loss or damage suffered or costs incurred by any person as a result of any measures taken, or as a result of any measures not having been taken, in terms of this Act, to prevent or remove pollution of the sea by a harmful substance.

[Subs (6) amended by s 36(b), Act 23/1997, and substituted by s 2(2) (item 58 Sch), Act 5/1998]

Exemption in respect of warships or tankers used in the service of a state

11. (1) The provisions of section 9(1) shall not apply in respect of any warship or in
respect of any tanker for the time being used exclusively in the service of any state for other than commercial purposes.

(2) In relation to a tanker owned by a state and for the time being used for commercial purposes, section 13(1) shall be deemed to have been complied with if there is in force in respect of such tanker a certificate, issued by the government of such state, in which it is stated that the tanker is owned by that state and that any liability which may be incurred in connection with such tanker by virtue of the provisions of section 9(1) will be met by the government concerned to the extent of the aggregate amount contemplated in section 9(5).

(3) Every Convention State shall, for the purposes of any legal proceedings brought in a court referred to in section 20(1) to enforce a claim in respect of a liability incurred under section 9(1) as a result of a discharge of oil from a tanker referred to in subsection (2), be deemed to have submitted to the jurisdiction of that court: Provided that nothing in this subsection contained shall authorize the issue of execution against the property of any Convention State.