



ICLG

The International Comparative Legal Guide to:

Shipping Law 2015

3rd Edition

A practical cross-border insight into shipping law

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EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Shipping Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of shipping laws and regulations.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting shipping law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in shipping laws and regulations in 41 jurisdictions.

All chapters are written by leading shipping lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Ed Mills-Webb of Clyde & Co LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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South Africa



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1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

i) Collision

While South Africa (“SA”) did not ratify the 1910 Brussels Collision Convention, the South African Merchant Shipping Act No.57 of 1951 (“MSA”) in effect adopted and incorporated certain concepts of the Convention into the MSA. Section 255 of MSA provides that whenever damage or loss is caused by the fault of two or more ships or to the cargo or freight of one or more of them or to any property on board one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which the ship was at fault. Where it is not possible to establish different degrees of fault, liability shall be apportioned equally. In the absence of this eventuality, the apportionment of such liability will be subject to the provisions of The Apportionment of Damages Act No.34 of 1956 (“ADA”). A SA’n court will have regard to the following law when dealing with collision matters that occur within its territorial waters:

- The South African Merchant Shipping Act.
- The Apportionment of Damages Act.
- International Regulations for the Prevention of Collisions at Sea.
- Perhaps curiously, English common law decided cases on collision regulations before November 1983. This is due to the provisions of section 6 of the Admiralty Jurisdiction Regulation Act No.105 of 1983 (the “AJRA”) which enjoined a South African Admiralty Court to do so.

However, in the event of the collision having occurred elsewhere, our courts will in some instances apply the *lex loci delicti*, the law of the place the collision occurred and if on the high seas, then either the law of the flag of the vessels, and if that is not possible or contradictory, then it will assume that the proper law is the law of South Africa.

ii) Pollution

The Marine Pollution (Control and Civil Liability) Act No.6 of 1981 (“MPA”) regulates pollution from ships, tankers and offshore installations (see below).

Of more recent introduction and promulgation are the following pieces of legislation recognising the relevant Conventions:

- Merchant Shipping (Civil Liability Convention) Act (“Civil Liability Act”).
- Merchant Shipping (International Oil Pollution Compensation Fund) Act (“the Fund Act”).
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act (“Contributions Act”).
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act.

The Civil Liability and Fund Act have given full force and effect to the 1992 Conventions on Civil Liability for Oil Pollution Damage and the International Fund for Oil Pollution Damage.

In terms of the Contributions Act, a levy is imposed on any person who, during a tax year period (defined as a calendar year), received in excess of 150,000 metric tonnes of “contributing oil” (defined as crude or fuel oil) which is either transported by sea to a port or terminal installation within the Republic or discharged in a port or terminal installation of a non-contracting state of the 1992 Fund Convention and thereafter transported into South Africa by other means. If a corporate entity, or any of its subsidiaries, receive in excess of 150,000 tonnes of contributing oil during a tax period, each entity will be liable to pay the levy for the actual quantity of oil received by that entity, despite the fact that the quantity did not exceed 150,000 metric tonnes. The amount of the levy to be imposed for a particular tax period and the date on which it is to be paid is to be determined the Minister by way of notice in the Government Gazette. When determining the levy, the Minister is required to take the following into account:

- the contributions calculated and invoiced by the Director of the Fund in terms of Article 12 of the 1992 Fund Convention in respect of the tax period; and
- the volume of the contributing oil imported in the tax period.

The recently enacted legislation will ensure that South Africa is financially secured for liability and compensation for loss or damage caused by contamination resulting from the escape of oil from an oil tanker.

In addition, the provisions of the International Convention on Civil Liability for Oil Pollution Damage of 1969 (“CLC”) have been incorporated into the MPA. It should be noted that the provisions of the MPA, and therefore CLC, apply to pollution from any ship and not only tankers. Separately, the International Convention for the Prevention of Pollution from Ships, 1973 (“MARPOL”) also applies.

In terms of the MPA, any discharge of oil from a ship, tanker or offshore installation within 12 miles of the SA’n coast is an offence, unless it can be shown the discharge was due to certain exceptions, which mirror those to be found in CLC.

Where the owner is found to be in breach, apart from the criminal penalty that can be imposed by the Courts, he will be liable for any loss or damage caused in SA resulting from the discharge of oil (by the State or any third party), but also for the costs and measures taken for the purposes of reducing the loss or damage or to prevent such loss or damage. The general limitations of liability of CLC apply.

The Bunker Convention has not as yet been adopted or given the force of law, although plans are in place to do so. The Conventions on the Territorial Sea and Contiguous Zone, the Continental Shelf, High Seas in case of Oil Pollution Casualties, Dumping of Waste and Intervention Conventions do apply.

iii) Salvage / general average

The Wreck and Salvage Act No.94 of 1996 (“WSA”) regulates the law of Salvage in South Africa. The WSA incorporates the 1989 Salvage Convention in its entirety.

A salvage claim is a maritime claim as defined in terms of section 1(1)(k) of the Admiralty Jurisdiction Regulation Act of 1983, as amended (“AJRA”). In terms of the AJRA, a SA’n court exercising its admiralty jurisdiction is vested with jurisdiction to hear and determine any claim for salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salvaged or which would, but for the negligence or default of the salvor or a person who attempted to salvage it, have been salvaged. This also includes claims in respect of ships, cargo and goods found on land.

A salvage claim is one that gives rise to a maritime lien and would entitle a salvor to enforce such a lien, in the absence of satisfactory security, against the vessel he salvaged for the amount of salvage due to him. A claim for salvage may be enforced either by way of an action *in rem* or an action *in personam*.

iv) Wreck removal

In terms of the WSA, a wreck includes any, “flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress”.

Section 18 of the WSA provides that when a ship is wrecked, stranded or in distress, the South African Maritime Safety Authority (“SAMSA”) may direct the master or owner of such ship, or both such master and such owner, either orally or in writing to move such ship to a place specified by SAMSA or to perform such acts in respect of such ship as may be specified by SAMSA. In addition, SAMSA may also cause any wreck or any wrecked, stranded or abandoned ship or any part thereof to be raised, removed or destroyed or dealt with in such a manner as it may deem fit, if it has not been able to contact the master or the owner of the said wreck, ship or part thereof.

If the master or owner fails to comply with SAMSA’s directive, then SAMSA may cause such an act to be performed and claim the cost of performing such an act from the shipowner or in the case of an abandoned wreck or ship, from the person who was the owner thereof at the time of the abandonment.

It should be noted that wreck removal costs do not fall within any provisions for limitation of liability, whether specific or global.

The authorities have given notice that they intend shortly (as at June 2013) acceding to and incorporating the Wreck Removal (Nairobi) Convention into the domestic legislation and, to the extent required, amending the WSA to take account of this, which will include a requirement that any vessel entering SA’n territorial waters will be required to have in place compulsory insurance for wreck removal costs.

v) Limitation of liability

SA is not party to any Limitation Conventions. Limitation is, however, regulated by *inter alia* section 261 of the MSA, which while not making it applicable *per se*, follows the 1957 Limitation Convention regime (including the onus of proving a lack of personal fault or privity on the part of the owner or charterer). The MSA provides that the owner or charterer of a ship, whether registered in SA or not, shall be liable for damages in excess of certain amounts in respect of personal injury, loss of life or damage to property if that loss or damage was caused without his fault or privity. The provisions of the MSA apply to any kind of vessel used in navigation by water, however it is propelled or moved. Liability is assessed according to the tonnage of the ship, damaged or undamaged and Special Drawing Rights (“SDR”) are used as the unit of account.

Section 261 of the MSA distinguishes between three categories which are limited per gross registered tonne (“GRT”) as follows:

1. Damages for loss of life or personal injury where there is no damage to property; such claims are limited to the Rand equivalent of 206.67 SDR per GRT.
2. Damages incurred for loss of or damage to property where there is no personal injury or loss of life; such claims are limited to the Rand equivalent of 66.67 SDR per GRT.
3. Damages for both loss of life and property, such claims are limited to 206.67 SDR per GRT, provided that in this case claims for personal injury and loss of life have priority to the extent of an aggregate amount of 140 SDR per GRT and, insofar as the balance of the limitation fund is concerned, claims for injury and loss of life rank equally with the claims for loss of and damage to property.

It is not necessary to establish a limitation fund or to commence a litigation action for the limitation to apply. A shipowner/charterer may plead limitation by way of a defence to a claim, either alone or in the alternative to a general or specific demand as to primary liability on the merits. They can also apply to court under the AJRA for a declaratory order that they are entitled to limit their liability, but will bear the onus of establishing such entitlement.

The State has indicated it intends to adopt the provisions of the 1976 Convention (LLMC 1976) and 1996 Protocol and draft bills will shortly be circulated for general comment. It remains to be seen how long this procedure will take to be implemented.

1.2 What are the authorities’ powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

The South African Maritime Safety Authority (“SAMSA”), established by The South African Maritime Safety Authority Act No. 5 of 1998, is empowered by the MSA to hold preliminary and full enquiries following shipping casualties in certain circumstances.

The investigating officer has general powers, which include, *inter alia*, power to board any ship in South African waters, inspect the vessel, equipment or documents, interrogate the crew, enter the premises, summon any person who may be able to assist in the enquiry to be interrogated or produce books and/or documents, as the case may be. Failure to co-operate may result in a penal sanction being imposed either by way of a fine or imprisonment. The same sanctions will apply to any person/s who obstruct any investigative enquiry. At the conclusion of a preliminary enquiry, the investigating officer will compile a report to the relevant government official and a decision is then taken as to whether to pursue the matter any further, prosecute or abandon investigations.

A Court of Marine Enquiry (“CME”) is a court constituted by the relevant section of the MSA which is empowered to hold a full, formal investigation into shipping casualties. It may be held at any time, irrespective of whether a preliminary enquiry has been held or not, but will always be subject to ministerial discretion. The predominant purpose of the CME is to enquire into the cause(s) of a particular maritime casualty, return a finding as to how the casualty occurred and to make recommendations where deemed necessary or appropriate which would be aimed at preventing a similar occurrence. Punitive measures will be applied by the court against any party whom it identifies as having acted in such a way to have caused or contributed to a particular casualty. Its punitive powers relate only to the ship’s masters and officers of vessels registered or licensed in SA or which are registered in countries other than SA if they are wholly engaged in trading between ports in SA.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

The SA’s Carriage of Goods by Sea Act No.1 of 1986 (“COGSA”) incorporates the provisions of the Hague-Visby Rules (“HVR”), 1968 into SA’s law. The COGSA has force of law in relation to and connection with:

- the carriage of goods by sea on ships where the port of shipment is a port in SA, irrespective of whether or not the carriage is between ports in two different States within the meaning of Article X of the HVR;
- any bill of lading if the contract contained in or evidenced by it expressly provides that the HVR shall govern the contract;
- any receipt which is a non-negotiable document marked as such if the contract evidenced by it is a contract for the carriage of goods by sea and which expressly provides that the HVR are to govern the contract as if the receipt were a bill of lading, but subject to any necessary modifications; and
- deck cargo or live animals.

There are, however, some other important reservations with regard to the applicability of the HVR in addition to the above, including a provision that an exclusive jurisdiction clause in a bill of lading which purports to oust the jurisdiction of a SA’s court, is unenforceable.

SA has not ratified the Rotterdam or Hamburg Rules. Many of SA’s trading partners have ratified the Hamburg Rules and therefore its provisions cannot be completely ignored by the shipping fraternity in SA.

2.2 What are the key principles applicable to cargo claims brought against the carrier?

In terms of Article IV Rule 5 of the HVB, a carrier would be entitled to limit its liability in respect of any cargo claims brought against it. The upper limit being 666.67 SDR or 2 SDR per kilogram of gross weight of the goods damaged or lost. This presupposes that the nature and value of the goods have not been declared by the shipper prior to loading and inserted into the bill of lading.

It also worth noting that while a carrier is entitled to rely upon the limitation under COGSA when faced with a cargo claim, it may also invoke the limitation provided for under section 261 of the MSA as the fallback “safety net”.

There is also an important piece of legislation related to, *inter alia*, *locus standi* to sue, which has to be kept in mind with regard to all

cargo claims, which is the Sea Transport Documents Act No.65 of 2000 (“STD”), which replaced the old English Bills of Lading Act that applied from Colonial times and updated the law to modern times, including provisions related to electronic trade.

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

The obligation of the carrier to issue the shipper with a comprehensive bill of lading as provided for in Article III Rule 3 of the HVB is to a large extent dependent upon the shipper’s reciprocal obligation to provide the carrier with accurate details of the cargo by, *inter alia*, identifying the marks, number and weight of cargo clearly and legibly.

By virtue of Article III Rule 5, the shipper is deemed to have guaranteed the accuracy of the information provided to the carrier and consequently the carrier can call upon the shipper to indemnify it against all loss, damage and expenses arising or resulting from inaccuracies resulting from misdescription.

The STD also has important provisions regarding the obligations and liability of the shipper and transferor of a negotiable sea transport document.

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

SA is not a party to the Athens Convention (Convention Relating to the Carriage of Passengers and their Luggage by Sea). As such, the carrier’s liability is normally determined by contract (generally by the Booking and Passenger Ticket terms and conditions, but subject to the limitations imposed by local consumer legislation such as the Consumer Protection Act).

Nevertheless, in many instances the Athens Convention and its limitation provisions (and prohibitions) are very often incorporated and made applicable to the contract by the conditions themselves.

A claim by a passenger (or a crew member), for collisions, sinking, loss or damage to baggage or personal effects, or any other claim related to the vessel or the carriage on her, are all maritime claims as defined in the AJRA and can be brought and enforced before and by the SA’s court in exercise of its admiralty jurisdiction, including the arrest *in rem* or attachment *in personam* of the ship or other assets of the carrier.

Such claims are subject to limitation in accordance with the provisions of the MSA.

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

Section 5(3) of the AJRA provides that 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 *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be enforceable but for any such arbitration or proceedings. It is therefore open to a claimant to arrest any property which is in SA and belongs to their adversaries in the proceedings in the other jurisdiction in order to obtain security for the claim which is the subject of the proceedings underway or contemplated, whether or not the substantive proceedings are subject to the law of SA or not. It is worthy of noting that by bringing a security arrest, the claimant does not thereby submit to SA'n jurisdiction for the merits of the claim in respect of which security is sought.

The procedure when bringing a security arrest is to bring a substantive application before a judge in which the claimant must establish the following:

1. that he has a maritime claim as defined by the AJRA and that such a claim is enforceable in SA by an action *in personam* against the owner of the property to be arrested or by an action *in rem* against such property, including where appropriate, an associated ship;
2. that he has a *prima facie* case with reasonable prospects of success in the substantive proceedings;
3. why he requires the assistance of the SA'n court;
4. that the property to be arrested has not previously been arrested nor has security already been given for the same claim of the same claimant; and
5. that he has a genuine and reasonable need for security. In this regard, he would need to establish that he does not already have any or sufficient security and that he is unable to obtain security in the other pending or contemplated arbitration or proceedings.

The SCA has also held that a “genuine and reasonable apprehension” that the respondent will not be able to pay the claim if the proceedings are successful, establishes this requirement.

4.2 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

Any maritime claim can be enforced against any party, including seeking security subject to the security arrest requirements and provisions of the AJRA. Where the party from whom security is sought is a foreigner, an arrest or attachment of their property within the SA'n court's jurisdiction, is however required.

SA's jurisdictional requirements do not provide for the “serving out” of proceedings, absent the defendant being found within the jurisdiction, or the attachment or arrest of an asset to found or confirm jurisdiction.

4.3 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

A First-class South African bank guarantee or a letter of undertaking from a Protection & Indemnity Club (“P&I”) is acceptable security. While the Admiralty Rules envisage cash being paid to the Registrar of the Court to be held as security, this seldom happens. In practice, P&I Club letters of undertaking, particularly from P&I Clubs that are members of the International Group, are usually accepted by claimants' lawyers.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

In terms of section 5 of the AJRA, it is possible to obtain a court order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing and for the taking of evidence of any person, if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence which has been or may be brought before a court, arbitrator or referee.

It is not a prerequisite for the application of this section that proceedings must have been commenced. This provision is particularly useful and can be invoked by a party who wishes to inspect a vessel, cargo, equipment or documents before the vessel leaves port.

The power of inspection is limited to actions commenced or to be commenced in SA, however, in exceptional circumstances, the court may order the taking of evidence in regard to a maritime claim that has been or may be brought before a court or arbitrator elsewhere than SA. The court can, in certain circumstances, order the applicant to put up security where the order is likely to cause undue hardship to the person against whom it is obtained.

The provisions of section 5 cannot be invoked to circumvent any privilege which pertains to any document in the possession of, or any communication to or the giving of evidence by, any person. Neither can the provisions be used for a “fishing expedition” to try to find evidence to establish a claim.

The procedure to be adopted when approaching a court for such an order is set out in Admiralty Rule 14(1). In terms of this Rule, the court may define the issues on which the evidence may be given and prescribe the procedure for the taking of evidence, which may include, *inter alia*, the appointment of a commissioner to take the evidence concerned, the duties and powers of the commissioner, the directions with regards to the recording and preservation of evidence taken and such other matters as the court may deem fit.

5.2 What are the general disclosure obligations in court proceedings?

The general disclosure obligations in court proceedings are regulated by Uniform Rule 35. In terms of this Rule, a party to an action may require the other party, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action which are or have at any time been in the possession or control of such other party.

In essence, the purpose of discovery is to allow each party knowledge of and eventual access to documents in the possession of the other party that might be relevant at trial.

The notice to discover results in the delivery of a discovery affidavit which contains a comprehensive list of all documents – relevant to either party's case – which the opposing party declares to be in his possession.

On receipt of the discovery affidavit, a party is entitled to either call for the inspection of certain documents described in the affidavit, request the opposing party to specify which documents or tape recordings they intend to use at trial or produce the original of a discovered document at trial.

It should be noted that under the SA'n procedure, no witness statements have to be disclosed prior to or during trial, as long as they were taken and noted in contemplation of litigation (so they retain privilege), nor are such statements exchanged prior to the hearing. Only expert witness evidence has to be summarised prior to trial (but even then their statements themselves do not have to be disclosed or exchanged, although they very often are).

6 Procedure

6.1 Describe the typical procedure and time-scale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

The law and practice of admiralty in SA is regulated by the AJRA. Only the High Court of SA is able to exercise admiralty jurisdiction. Each High Court has jurisdiction to hear and determine any maritime claim irrespective of the place where it arose, the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

The area of jurisdiction of any High Court would include that portion of the territorial waters of SA adjacent to the coastline of its area of jurisdiction. In order for a High Court to exercise its admiralty jurisdiction, the claimant's claim must fall within the definition of a maritime claim as set out in section 1(1) of the AJRA. The definition of a maritime claim includes all causes of action in relation to ships, carriage of cargo and all maritime matters, including those "ancillary" to the shipping industry.

In terms of section 5(2)(e) of the AJRA, a court is empowered in the exercise of its admiralty jurisdiction to order that any matter pending or arising in proceedings before it be referred to an arbitrator or referee for a decision or report for the appointment, remuneration and powers of the arbitrator or referee and for the giving of effect to his decision or report.

There is, however, no permanent generally recognised arbitration panel or tribunal for admiralty or maritime matters, albeit that an informal group of recognised maritime lawyers and retired judges exists from whose ranks arbitrators or referees can and are frequently appointed.

There is no statutory requirement for mediation or ADR before court proceedings are commenced.

The time for commencement of and completion of legal proceedings (or arbitration/ADR) differs considerably between the different geographic divisions of the High Court, depending on the state of their awaiting trial rolls, which in itself fluctuates and also depends on the complexity of the matter, what factual issues are placed in dispute to be proved by evidence in person by witnesses – and therefore how many days need to be allocated for the trial hearing. The fewer number of days, the shorter the waiting period for the allocation of a hearing date.

However, formal pleadings should be closed within on average three months (depending on how many pleadings are filed) and thereafter it is unlikely the matter will be disposed of by trial within two years of that date. However, the courts are trying to reduce this backlog.

For an arbitration (which can be elected by agreement and reference in the middle of court proceedings), however, it should be possible for the hearing and disposal of a matter to be achieved within roughly six months.

6.2 Highlight any notable pros and cons related to South Africa that any potential party should bear in mind?

While the SA'n courts do take cognisance of the exigency of admiralty claims and allocate preferential hearing dates, as indicated above, most of the court rolls are currently backlogged. In the event that the matter is contested by the claimant's opposition, it could take months for a date to be allocated on the opposed roll and in some jurisdictions, years insofar as trial dates are concerned.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

The definition of an admiralty claim in terms of the AJRA includes any claim arising out of or relating to any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere.

The Enforcement of Foreign Civil Judgements Act No.32 of 1988 (based on a recognition of the Convention) provides for certified judgments of certain designated countries to be registered by a relatively simple procedure in SA and thereupon to have the full force of law as if it was a judgment of a local court seeking execution.

However, the Minister of Justice has neglected to "designate" any countries other than our immediate neighbouring countries in Africa and as such the provisions of the Act are in effect of little use in International Maritime litigation or disputes.

In theory, it is also possible to have judgments from non-designated countries recognised in SA by virtue of substantive applications made to the court by way of application. The enforcement of a judgment against a foreigner would require an attachment of the judgment debtor or the debtor's property in order to establish jurisdiction.

However, as the judgment of a foreign court (or arbitration tribunal) with regard to a maritime cause of action is in itself a separate and distinct "maritime claim", as defined in the AJRA, it can be enforced under the terms of the AJRA. In view of this, it is seldom, if ever, that the provisions of the Foreign Judgements Act are relied upon in the enforcement of foreign maritime claims.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

In terms of the Recognition and Enforcement of Foreign Arbitral Awards Act No.40 of 1977 ("REFAA") any provincial or local division of the court is vested with jurisdiction to recognise a foreign arbitral award, even one between two foreigners, and will enforce such an award if it can do so effectively.

This is done by way of a simple application to court to make the award an order of court with a certified copy of the award and normally an opinion from a lawyer in the arbitration jurisdiction that the respondent was given due notice of the proceedings, had an opportunity to defend the same and that such award is final and no longer subject to appeal.

The effective enforcement of a judgment based on a formally "recognised" arbitration award in SA under the REFAA would, however, still require an attachment or arrest of the debtor's property within the jurisdiction.

The reason that the provisions of the REFAA, despite its simple procedure, are seldom relied on is that under the Act the quantum of an award sounding (as they normally would) in a hard currency such as US Dollars or Euro, has to be converted to SA'n Rand at the rate applicable at the time of the application. Given the wide fluctuation of the rate of exchange of the SA'n Rand to the hard currencies, few claimants will take this risk.

An award, as with a judgment, if based in turn on a maritime claim, is in itself a maritime claim as defined. Most claimants, if properly advised, will simply sue on the award, which can normally be done by a simple arrest and summons *in rem* against the respondent's ship, or an associated ship at a relatively nominal cost.

8 Updates and Developments

8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

The SA'n government remains committed to building a strong maritime sector that is able to enhance employment opportunities, skills development and contribute to the economy of the country.

The registration of ships was expanded in line with international norms to permit the registration of bareboat chartered ships (and dual registration is permitted both "in and out"). A tonnage tax regime is in the course of debate and being pushed aggressively by the maritime sector, including Government agencies, in negotiation with the local *fiscus*.

The Customs & Excise Act 91 of 1964 will soon be replaced by a Customs Duty Act, Customs Control Act and Excise Duty Act. The first two Acts have been published but are not yet in force as the Rules still need to be finalised. They are expected to come into effect within the year. The Excise Act is still in a draft phase. This legislation will collectively have a profound impact on the movement of goods into and out of South Africa, including carriage by sea.

Plans are already underway to increase the capacity of the major ports in SA. Of particular importance are the government's plans which are well advanced to build a new Dug-Out port in Durban and to develop the surrounding area to service the new port. The new port will impact positively on the national economy and contribute to the development of the maritime industry. Other bonded customs free Industrial Development Zones continue to be developed.

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