

MEMORANDUM IV

DURBAN CHAPTER RESPONSE TO MEMORANDA FROM CAPE CHAPTER AND CAPE COMMITTEE

26 May 2008

1. Introduction

Following the receipt of Memoranda I, II and III, a fourth Durban Chapter workshop on the Admiralty Jurisdiction Regulation Act amendments was convened at the offices of Deneys Reitz on Monday 26th May 2008.

The aim of the workshop was to consider, in the first instance, the proposed amendments to s.6 of the AJRA, and to consider such other proposals as time allowed.

The workshop was well attended. From the bar there were Douglas Shaw QC, Malcolm Wallis SC, John Pammenter SC, Steven Mullins SC and Dusty Donnelly. From the side bar there were Mike Posemann, Andrew Pike, Andrew Robinson, Malcolm Hartwell and Langa Dlamini. Roy Martin attended as Chapter Chairman and as a commercial member of the MLA.

2. Section 6

What follows, is, by necessity, a paraphrase of the discussions held. The workshop benefited enormously from the historical contributions

provided by Douglas Shaw and Malcolm Wallis and it would appear that there are certain differences of opinion regarding the evolution of admiralty law (as opposed to the common law) and the effect that the disappearance of the Admiralty Courts after 1875 might have had on the development, or otherwise, of admiralty law since that date.

The general view was that it would in fact be difficult, if not impossible, to identify, let alone apply, the general principles of the admiralty law as referred to in Annexure "A" of Memorandum I.

There was further debate as to whether there was any need to amend the current s.6 (save for the obvious inaccuracies) especially as no one could recall circumstances where s.6 had, in fact, caused any significant problems.

The view was expressed, and received support, that in most instances the lawyers and the courts would identify the proper law of the contract or tort / delict and would apply that law to the facts.

There was some concern that it was not that simple a matter to determine which claims among those set out in s.1(1) (a) to (ff) were claims over which the Colonial Courts of Admiralty would have exercised jurisdiction. The view was expressed that the law in this regard was accessible and understandable and ought not to present any difficulties. However, there was no consensus in this regard and it may be necessary for this particular issue to be revisited.

With regard to the notion that the South African courts may “develop, supplement or modify” the general principles of admiralty law, there was some concern expressed as to whether or not this provision did not run against Constitutional provisions which state, in effect, that the courts cannot create the law, they should only interpret it.

Queries were also raised with regard to the draft s.6(2) as there was a general view that it was not clear what “Any law of the Republic” actually meant.

Two final points were made on the draft.

In the first instance it was thought that any amendment should make it clear that s.6 ought not to apply to the interpretation of the AJRA itself. In this regard it was felt that Mr Justice Corbett’s view as expressed in the *mv “Andrico Unity”* that reference was to be had to English Law with regard to the interpretation of the South African Statute was simply wrong. Secondly, it was felt that the section should make it clear that English statutory provisions since 1890 should be excluded.

The general consensus of the workshop was that a further possible amendment should be discussed along the lines originally proposed by Pike/Robinson. An amended version of this proposal would be drafted and circulated.

[Note: An alternative proposal by the Durban Chapter for the amendment of section 6 was thereafter circulated. See document headed “DRAFT AMENDMENT TO SECTION 6: DURBAN CHAPTER PROPOSAL: JUNE 2008”.]

3. Section 3(8)

It was suggested, and there seemed to be general acceptance of this proposition, that s.3(8) should be repealed in its entirety on the grounds that the purpose behind this section lay in the 1952 Convention, the corresponding provision being to make it clear that a ship could only be arrested once in one jurisdiction - it could not be arrested in another jurisdiction for the same maritime claim. In Great River Shipping Inc -vs- Sunny Face Marine Limited 1992(2) S.A.87(C) it had already been held that once a ship had been arrested and security provided, then it could not be arrested again. If a ship was in fact arrested again there were suitable remedies available to the aggrieved party.

4. Section 3(6) - Repairing the Heavy Metal problem

The general view of the Durban Chapter was that the reasoning behind the decision in the Heavy Metal case was quite wrong and that the anomaly in the amended Act that led to that reasoning should be cured.

The anomaly lies in s3(7)(b)(ii) of the amended Act which reads:

“A person shall be deemed to control a company if he has power, directly or indirectly, to control the company;”

It was felt that the notion of the power to control a company was a hangover from the original wording of s.3(7)(a) which referred to the control of shares in a company.

Malcolm Wallis kindly suggested that s.3(7)(b)(ii) should be amended to read:

“Control of a company shall be constituted by the power to direct its affairs whether that power is expressed directly or indirectly”

5. Accrual of an action *in rem*

It was generally accepted by the Durban Chapter that it would be manifestly unfair to shipowners if the Act were to be amended so as to allow the issue of the *in rem* proceedings to create some sort of “statutory lien” which could be enforced against subsequent purchasers of that vessel - assuming, of course, that the claimant did not have a lien as recognised as such under English law.

6. Maritime claims

The general view of the workshop was that the subsections dealing with maritime claims should, by and large, be left as they were. Any attempts specifically to refer to additional maritime claims might have quite the contrary effect to what was intended and that little should

be done that might better the discretion of the Court in determining whether a claim was, or was not, a maritime claim. As such the Durban Chapter was not in favour of the proposed amendment to s.1(1) and supported the view of Steven Mullins already recorded in that Memorandum.

7. Sections 1(1)(a),(b),(c),(d) and (e) of the Act

The Durban Chapter was in favour of leaving these sections as they were and was not in favour of any new section being added as had been proposed by the Cape Committee.

8. Sections 1(1)(h) and (i)

The general consensus of the Durban Chapter was that these two sections should not be amended. It was explained that the original reason for the inclusion of s1(1)(h) was to ensure that charterparty contracts were included as there was some argument at the time that a charterparty was not a contract for the carriage of goods by sea. It has now been internationally established that this is the case and there was therefore no need to tinker further with those subsections.

9. Section 1(1)(m)

The view of the Durban Chapter was that this subsection should be left as it currently reads in the Act.

10. Section 1(1)(o)

Following submissions made by Captain Roy Martin that there certainly were occasions where owners or charterers incur disbursements of a marine or maritime nature that are not on behalf of or on account of a ship, it was decided that no amendment should be made to this subsection. Of those assembled no one could recall ever having had any difficulty with this subsection.

11. Section 1(1)(p)

The general consensus of the Durban Chapter was in favour of the “Durban Committee” proposal.

12. Section 1(3)

The general view of the Durban Chapter was to endorse the proposal that s.1(3) should read as set out in paragraphs (a) and (b) on page 11 of Memorandum II.

13. Section 3(6)

The general consensus of the Durban Chapter was to follow the draft proposed by Steven Mullins namely:

“A ship may be arrested as an associated ship notwithstanding that it is the ship in respect of which the maritime claim arose”

Unfortunately there was insufficient time to complete a proper review of s.5(2) of the Act.

With regards to s.11(5)(e), the Durban and Cape Committees will need to consider whether the current amendments to s.11 are in any way relevant.

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DRAFT AMENDMENT TO SECTION 6
DURBAN CHAPTER PROPOSAL
JUNE 2008

6(1) Notwithstanding anything to the contrary contained in any law or the common law, 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 England and Wales would have applied with regard to such a matter at such commencement, insofar as that law can be applied;**
- (b) not apply any statutory enactments of the United Kingdom promulgated subsequent to the Colonial Courts of Admiralty, 1890;**
- (c) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic;**

(d) with regard to the interpretation of this Act, apply South African law;

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