

MEMORANDUM VI

FURTHER COMMENT BY THE CAPE COMMITTEE ON THE ISSUES IN MEMORANDUM IV AND ISSUES DISCUSSED AT THE 2008 AGM, OTHER THAN SECTION 6.

Section 1 (1), definition of maritime claim

1. The Durban Workshop is against the Cape Chapter's proposal (para 3 of Memo 2) that the definition of a maritime claim should include the limitation that the claim must be one which by reason of its nature is a maritime matter. In agreeing to some of the definitions in s 1 (1) proposed by Durban, the Cape Chapter did so on the basis that this limitation would exist. We have no objection to omitting this proposed general limitation which would avoid a double test for determining jurisdiction provided the individual definitions are dealt with so as to avoid the problems this proposal was designed to meet. Legislation in comparable jurisdictions does not include any such general limitation in respect of heads of jurisdiction because there is no need to as these do not give rise to the anomalies which some of the definitions in s 1 result in.

Section 1 (1) (i)

2. Section 1 (1) (i) refers to any container. Read with the definition of a container this gives rise to an absurdity, namely, the inclusion of claims having no maritime connection at all - eg damage caused to a container by a collision in the builder's yard during its construction. The further anomaly is that in terms of this section the jurisdiction in respect of a container is wider than the jurisdiction in respect of the goods carried in the container. The word goods simply means property and covers packaging and containers. There is thus no need to have a reference to containers as a separate maritime claim. The legislation in comparable jurisdictions (England, Australia, New Zealand and Canada) do not include a reference to containers, presumably for this very

reason. If there are those who still have doubts there is a simple solution. Section 1 (1) (g) should be amended to read

~~Loss or damage to goods including packaging and containers~~ .q

or alternatively ~~goods~~ can be defined as including packaging and containers. The reach of the jurisdiction would then be the same for goods, packaging and containers and would avoid the absurdity and anomaly referred to above. It follows that we are similarly against the definition of a container in s1 (1). That definition is, in our view, not only unnecessary but underlines the absurdity. Jurisdiction in respect of damage to goods is limited to goods ~~carried or which ought to have been carried~~ in a ship. The definition of a container includes damage to a container ~~not being used for such carriage~~ .q This makes it clear, for example, that damage to a container in a collision with a vehicle in a builder's yard would constitute a maritime claim which is clearly untenable. Containers should not be treated separately from ~~goods~~ .q This, moreover, creates the impression that containers are not comprehended by the word ~~goods~~ where that word appears in s 1 (1) (g), (h), (m) and (v).

Section 1 (1)(o)

3. In para 7 of Memo II we set out our reasons why we considered that s1 (1) (o) should simply read ~~disbursements~~ .. on account of a ship and should not include the words ~~or the owner or charterer of a ship~~ .q This proposal was adopted by the Cape Chapter without dissent. At the AGM it was said that this would constitute a problem for agents - they would have to sue separately for disbursements not ~~on account of the ship~~ .q On this basis an agent or other supplier who supplies goods both for the employment of the ship and for the owner or just for the owner should also be able to claim in admiralty in respect of the claims against the owner. Gys Hofmeyr points out that this has never been our law and in terms of the Act is not our law now (see s 1 (1) (m)). Nor has it ever been the English law and is not the law in comparable jurisdictions.

As pointed out in Memo II the fundamental basis on which goods, services and disbursements are recoverable in admiralty is the same, namely, that they inure for the benefit of the ship (the ship's employment or operation). If they simply inure for the benefit of the owner they are not, in accordance with established law, recoverable in admiralty. That is why it is no surprise that the legislation in England and the other jurisdictions which have inherited English admiralty law like Australia, New Zealand and Canada refer only to disbursements on account of the ship. To include disbursements on account of the owner or charterer, moreover, leads to a striking anomaly. A disbursement in respect of goods supplied to the owner would be recoverable in admiralty, while a claim in respect of the goods in respect of which the disbursement is made, would not be. Gys is of the view that this is clearly untenable. He has no doubt that s1 (1) (o) should be amended to exclude the words "or the owner or charterer of a ship". The suggestion is made in Memo IV that there are disbursements on account of the owner which are of a maritime nature. Gys would like to know what these are. He points out that, in any event, the section does not require the disbursement to be of a maritime nature. What about those that are not of a maritime nature? The test for jurisdiction in respect of goods, services and disbursements has always been the same and all fall within the general definition of necessities. Why are containers singled out for separate treatment? Or are we going to make a further amendment so that goods supplied and services rendered to the owner also constitute maritime claims despite the fact that they do not constitute necessities. In Gys's view the section makes a mess of the law.

Section 1 (1) (p)

4. At the Cape Chapter Meeting it was decided without dissent that s1 (1) (p) should be deleted. In para 8 of Memo II the reasons supporting this decision are set out. The Durban Workshop decided that the section should not be deleted but no reasons for this decision are given in Memo IV so we have nothing to add at this stage. What is Durban's response for example to one of the points we made, namely, why mention agents, brokers and advisers and not stevedores, surveyors, fumigators, divers, metallurgists, cleaners, lirage

companies and others, all of whom may render services for the employment of the ship? The test is not the capacity in which a person renders services which is decisive, it is the nature of the services. In terms of s1 (1) (m) anyone rendering services for the employment of the ship can recover in admiralty. Section 1 (1) (p) is both redundant and unduly limiting. Similarly, services rendered to goods carried or to be carried on a ship are similarly recoverable not only by agents but by anyone, provided such services relate to the employment, maintenance, protection or preservation of a ship. For example, stevedores who remove goods from a ship so that she can continue her voyage are rendering services for the employment of a ship. So is an agent who arranges those services. On the other hand, an agent who arranges for goods being transported inland by road after discharge from a ship to be repackaged, is rendering a service either to the owner or consignee and the claim is not an admiralty claim. There will be borderline cases and these cases, involving not just agents but others, should be decided by the application of the general admiralty principle which governs claims relating to such services. It must be remembered too that in doubtful cases recourse may, in any event, be had to s1 (1) (ee). Finally, it is not without significance that none of the comparable jurisdictions to which I have referred have included a provision similar to s 1 (1) (p).

Sections 1 (1) (a) (b) (c) (d) (h) (i) and (m)

5. The Durban Workshop held the view that the definitions in s 1 (1) (a) (b) (c) (d) (e) (h) (i) and (m) should remain as they are on the grounds that it should be left to the court to decide whether a claim is a maritime claim or not.

We agree with this view except in regard to s 1 (1) (i) dealt with in para 2 above and except that I do think that our suggested change to s 1 (1) (a) should be retained, namely, that the words ~~any agreement for~~ and ~~any agreement with~~ regard to ~~q~~ which are unduly limiting, should be deleted. This latter proposal was approved at the 2008 AGM and I think it likely that the Durban Chapter will

be happy with this. However, I do not feel strongly about this latter aspect. As the Durban Workshop has pointed out s 1 (1) (ee) can always come to the rescue.

Section 1 (1) (e)

6. In regard to the amendment to s 1 (1) (e) set out in para 3 of Memo III, we suggested the concluding words should read

~~the~~ whole or any part of bunkers, goods or containers
carried in or on or being loaded on or off a ship.

Section 1 (1) refers only to goods and not to cargo. This suggestion avoids any confusion caused by the introduction of the word ~~‘cargo’~~ (The reference to ~~‘containers’~~ is strictly unnecessary particularly if goods are defined to cover containers. See para 2 above.) Durban have not had an opportunity to comment on this.

Section 1 (1) (v)

6. It had been suggested that s 1 (1) (v) should be amended by substituting the word ~~‘cargo’~~ for the word ~~‘goods’~~. The word ~~‘goods’~~ has a wider meaning than the word ~~‘cargo’~~ and the word used in s1 (1) (g), (h), (m) and (p) is ~~‘goods’~~ and not ~~‘cargo’~~.

We see no reason to make this change.

Section 1 (1) (x)

8. We do, however, think that s (1) (1) (x) should be amended as follows, as proposed by the Cape and Durban Committees :

~~The~~ distribution of a fund or escrow money or any other money or property
or any portion thereof constituting security furnished or held pursuant to

- (i) any agreement between the parties arising out of or relating to a maritime claim; or
- (ii) the provisions of this Act or the rules promulgated in terms thereof; or
- (iii) the direction of any court in the exercise of its admiralty jurisdiction or any officer of any court exercising such jurisdiction.

The proposed amendment is, in our view, more embracing and constitutes an improvement on the existing section. We do not feel strongly about this and if the Durban Workshop hold a different view and this view prevails, so be it.

Section 1 (1) (bb)

9. It has also been suggested that the opening words of s 1 (1) (bb) should be amended to read

~~Wrongful~~ or malicious proceedings including the wrongful arrest, attachment or

and that s 1 (1) (ee) should be amended by the deletion of the words ~~marine or~~. These changes do in our view constitute improvements and have been agreed by the Durban and Cape Committees.

10. It is not clear whether or not the Durban Workshop has considered the changes suggested in paras 8 and 9 above.

Definition of cargo

11. It has also been suggested that s 1 (1) should be amended to include a definition of cargo reading

~~Cargo~~ includes any goods carried or to be carried or which were or ought to have been carried in a ship.

Section 1 (1) does not refer to ~~‘cargo’~~ but refers to ~~‘goods’~~ which has a wider meaning. Section 1 (1) (g) refers to ~~‘goods’~~ ~~‘carried or which ought to have been carried in a ship.’~~ ~~‘Goods’~~ falls within the meaning of ~~‘cargo’~~ and the adoption of this definition would result in a conflict between s 1 (1) (g) and the definition of cargo. Moreover, without the limitation referred to in para 1 above the definition of cargo goes too far as it includes goods to be carried or which were at any time carried on a ship. This would, for example, embrace claims which clearly do not belong in admiralty and will be criticised as a self-serving provision designed to increase jurisdiction for the benefit of admiralty lawyers. It is one thing to ensure that the Act includes all matters properly belonging to admiralty jurisdiction. It is quite another to seek to include those which do not without any sustainable reason. We are against the introduction of this definition. We need to have Durban’s view.

Definition of wreck

12. The Durban and Cape Committees agreed that s 1 (1) should be amended to include a definition of ~~‘wreck’~~ reading as follows:

~~‘Wreck includes any ship, the equipment, furniture, stores of a ship, cargo and containers of a ship or any part thereof, lost, abandoned, stranded or in distress found on or in the sea or on the shores of the sea.’~~

The need for this definition arises because the Committees were of the view that ~~‘wreck’~~ should be included in s 3 (5). We need to have the view of the Durban Workshop.

13. It seems therefore that the only important areas of disagreement in regard to s 1 (1) will relate to s 1 (1) (o) and s 1 (1) (p), the provisions relating to containers and the addition of a definition of cargo. We feel that our views are well motivated and avoid messing with the existing law and serve to eliminate

serious anomalies. We are fortified by the fact that reference to legislation in comparative jurisdictions lends support to our views.

Section 1 (3)

14. The Durban Chapter/Workshop agrees with our view that this section should be amended to read

- ~~(a)~~ 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 in relation to any maritime claim in respect of which the demise charterer is personally liable and which maritime claim arises from the employment of the ship by such charterer.
- (b) The provisions of (a) above shall not prevent the arrest of a ship subject to a charter by demise in respect of a claim in respect of which the owner is personally liable.

The Accrual of the Action in Rem

15. Different views were expressed by the members of the Cape Committee. The Cape Chapter was also divided but the majority felt that the date of the arrest should be the relevant date. The Durban Chapter's view reflected in para 5 of Memo IV is the same on the basis that it would be unfair to shipowners to make the issue of summons the relevant date. At the 2008 AGM two points were raised. First, that if the date of arrest was made the relevant date there may be an anomaly between ordinary and associated ship arrests and that if that is so the relevant date should be the issue of process. The view was that even if that were not so, the position should be ~~re-viewed~~ We don't see any anomaly. Second, that if the date of arrest were to be the relevant date, we would lose some work - the issue of process to secure claims.

Given the importance of this issue and the fundamental question involved, the latter can hardly be a decisive criterion. However, in view of the differing views that have been expressed, we think we should follow Exco's general policy referred to above and avoid meddling with the Act in this regard.

Section 3 (5)

16. It seems to us that s 3 (5) (e) should simply read ~~any~~ container or any part thereof. The qualification which follows these words relates to jurisdiction and is dealt with in s 1 (1). Once the court has jurisdiction in respect of a container an action in rem can be brought against a container, the only qualification in the section is then that the claim must lie ~~against~~ or in respect of the container. Durban have not yet had an opportunity of commenting on this.

Section 3 (7) (ii)

17. Contrary to the view expressed by the Cape Chapter and some members of the Cape Committee, namely, that owners operate under a cloak of secrecy and that the decision in The Heavy Metal is a welcome step towards greater transparency, the view of the Durban Chapter and of those attending the 2008 AGM is that the decision is wrong and that s 3 (7) (ii) accordingly requires to be amended. Most of the Cape Committee agrees with this view. The trouble is the Cape Chapter and some members of the Cape Committee take a different view. Exco's view is that in the absence of agreement we should not amend. However, if the Cape Chapter changes its view, the following amendment, suggested by Malcolm Wallis, seems in order:

~~C~~ontrol of a company shall be constituted by the power to direct its affairs whether that power is expressed directly or indirectly.

Section 3 (7) (c)

18. Stephen Mullins suggested that a new s 3 (7) (c) be added reading as follows:

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

The Cape Chapter was not happy with this formulation and the following formulation was suggested by the Cape Committee and accepted by the Durban Committee:

~~If~~ the ownership of a ship at the time when the claim arose has become vested in another owner who is the owner of the same ship at the time when the action is commenced, and if both owners are or were controlled at the relevant times by the same person, then the ship may be arrested as if it were an associated ship.q

The Durban Chapter prefers Stephen Mullins's draft.

Section 5 (2)

19. Durban originally suggested adding the following to s 5 (2):

~~(h)~~ appoint any person or body for the assessment of fees and costs and the manner in which such fees and costs are to be assessed;

(i) make such order as would avoid a circuitry or multiplicity of actions;

(j) make such other order as the court may deem appropriate.q

We were unhappy with this as we felt that, having regard in particular to Rule 25, that these proposals were unnecessary and in any event not wide enough - see para 15 of Memo 2. The Cape and Durban Committees suggested that we should rather amend the existing s 5 (2) (e) to read:

~~order~~ that any matter pending or arising in proceedings before it be referred to an arbitrator, referee or any person or body of persons for decision or report and may provide for the appointment, remuneration or powers of such person or body, and make such further order in regard thereto as it deems fit.

Although strictly unnecessary the latter draft is more comprehensive and we are in favour of it. The recent Durban Workshop did not have time to consider this aspect and we need their view.

Section 11 (5) (e)

20. The Cape Committee suggested that this section be amended to read:

~~claims~~ mentioned in paragraph (e) of subsection 4 shall, among themselves, rank in such order as the court may prescribe.

As pointed out in para 16 of Memo II, the words ~~according to law~~ in the section are inappropriate because there is no such law. Our draft allows the court to apply the well established but discretionary ranking found in English law which will be strongly persuasive. The Durban Committee adopted the view that we should see to what extent this is affected by the proposed amendments to s 11 already in circulation. It is not, so we await Durban's view.

Section 3 (8)

21. The Durban Workshop has now suggested that this section should be deleted in its entirety - see para 3 of Memo IV. We are not quite clear on why this is considered to be appropriate and I think we should get clarification from Durban.

22. Durban should be asked to confirm that the matters agreed to by the Durban and Cape Committees set out in paras 6 to 10 and 13 to 23.5 of Memo III are not in dispute as far as the Durban Chapter is concerned.

Cape Committee

6 October 2008