

REPUBLIC OF SOUTH AFRICA

SEA TRANSPORT DOCUMENTS BILL

*(As amended by the Portfolio Committee on Transport (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF TRANSPORT)

[B 28B—2000]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP SEEVERVOERDOKUMENTE

*(Soos gewysig deur die Portefeuljekomitee oor Vervoer (Nasionale Vergadering))
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VAN VERVOER)

[W 28B—2000]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To regulate the position of certain documents relating to the carriage of goods by sea; and to provide for incidental matters.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
- “court” means a competent court having jurisdiction in the matter; 5
 - “holder” means a holder referred to in section 3(2);
 - “Minister” means the Minister of Transport;
 - “Republic” includes the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948);
 - “sea transport document” means— 10
 - (a) a bill of lading;
 - (b) a through bill of lading;
 - (c) a combined transport bill of lading;
 - (d) a sea waybill; or
 - (e) any consignment note, combined transport document or other similar 15 document, relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable;
 - “this Act” includes any regulation made under section 9.

Application of Act

2. (1) This Act applies— 20
- (a) to any sea transport document issued in the Republic, irrespective of whether it was issued before or is issued after the commencement of this Act;
 - (b) to goods—
 - (i) consigned to a destination in the Republic; or
 - (ii) landed, delivered or discharged in the Republic; and 25
 - (c) to any proceedings instituted in the Republic in any court or before any arbitration tribunal after the commencement of this Act in respect of any sea transport document or goods contemplated in paragraph (a) or (b), irrespective of whether those proceedings relate to a cause of action arising before or after the commencement of this Act. 30
- (2) Sections 3, 4, 5 and 6 apply only to sea transport documents that are transferable or negotiable, and any reference in those sections to a sea transport document must be construed accordingly.

(3) This Act binds the State and all organs of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

Transfer of sea transport documents

- 3.** (1) A sea transport document may be transferred by the holder, either— 5
- (a) by delivery of the document, endorsed as may be necessary; or
 - (b) subject to section 9(1)(a), through the use of a telecommunication system or an electronic or other information technology system.
- (2) A person is the holder of a sea transport document if that person is in possession of the original sea transport document, or possession of that document is held on that person's behalf, and that person is— 10
- (a) the person to whom the document was issued;
 - (b) the consignee named in the document; or
 - (c) a person to whom the document has been transferred in accordance with subsection (1).
- (3) For the purposes of subsection (2), a person must be regarded as being in possession or as holding possession of an original sea transport document if— 15
- (a) the original document has been lost or cannot, for any reason, be produced by that person or on behalf of that person; and
 - (b) that person or the agent of that person would be entitled to possession of the document if the original could be produced. 20

Transfer of rights and obligations

- 4.** (1) The holder of a sea transport document—
- (a) is subject to the same obligations and entitled to the same rights against the person by whom or on whose behalf the document was issued or who is responsible for the performance of the contract of carriage evidenced by or contained in the document as if the holder were a party to a contract with that person on the terms of the document; and 25
 - (b) must be regarded as the cessionary of all rights of action for loss of or damage to the goods referred to in the document, whether arising from contract or the ownership of the goods or otherwise. 30
- (2) A holder who has transferred a sea transport document must be regarded as having ceded his, her or its rights and as having delegated his, her or its obligations to the new holder except in so far as those rights or obligations arise from a *delectus personae* relating to the holder.

Saving of rights 35

- 5.** Any—
- (a) right or obligation under a contract of carriage evidenced by or contained in a sea transport document; or
 - (b) liability of the consignee or holder by reason or in consequence of— 40
 - (i) that person being such consignee or holder;
 - (ii) that person's receipt of the goods by reason or in consequence of such consignment; or
 - (iii) the transfer of the document to that person,
- has full force and effect except to the extent to which it is affected or varied by this Act.

Evidence of shipment 45

- 6.** A sea transport document that—
- (a) represents that goods have been shipped on board a vessel or have been received for shipment on board a vessel; and
 - (b) has been signed by the master of the vessel or by another person who had the actual authority, whether express or implied, or the ostensible authority of the carrier to sign that document, 50
- is, as against the carrier—
- (i) *prima facie* evidence in favour of a holder of the document, who is the shipper or other person to whom it was issued; and

(ii) conclusive evidence in favour of a subsequent holder, of the shipment of the goods or of their receipt for shipment, as the case may be.

Delivery

7. (1) A carrier is discharged from the obligation to deliver if that carrier makes delivery of the goods to which a sea transport document relates to a person entitled to such delivery in terms of subsection (2). 5

(2) A person presenting a sea transport document is entitled to delivery of the goods to which the document relates—

(a) only in accordance with the contract and on the terms contained in the document and subject to compliance with any obligation to which that delivery may be subject; and 10

(b) subject to subsection (3), if that person is the first person presenting the document in respect of those goods.

(3) (a) A carrier may require any person presenting a sea transport document in respect of any goods to establish a right to delivery. 15

(b) Any person required to establish his or her right to delivery as contemplated in paragraph (a) may do so either by application to court or by any other means that may be acceptable to the carrier.

(c) If a right to delivery is established by means other than an application to court, the carrier bears the risk that the person has no right to delivery and the carrier may require an indemnity acceptable to the carrier in respect of the delivery. 20

(4) Unless the court on an application contemplated in subsection (3)(b) orders otherwise, delivery made in terms of this section does not affect any right to damages.

Persons acting in bad faith

8. (1) Nothing in section 3, 4, 5, 6 or 7 entitles any person in possession of a sea transport document or any person making delivery of any goods to which a sea transport document relates to any right or to any defence to or discharge from any obligation if, at the time when that person acquired possession of the document or made that delivery— 25

(a) in the case of a person acquiring possession, that person knew or had reasonable grounds for believing that— 30

(i) the goods to which the document related had not been shipped or received for shipment; or

(ii) the person from whom possession was acquired had no right to transfer the document or any right thereunder; or 35

(b) in the case of a person making delivery, that person knew or had reasonable grounds for believing that the person to whom delivery was made had no right to receive delivery.

(2) The onus of proving that subsection (1)(a) or (b) applies is on the person alleging its application. 40

Regulations

9. (1) Subject to subsections (2) and (3), the Minister may make regulations—

(a) prescribing the circumstances in which and the conditions subject to which a record or document produced by a telecommunication system or an electronic or other information technology system, and effecting transactions such as those effected by any sea transport document, is to be regarded as a sea transport document; 45

(b) regarding generally all matters that are reasonably necessary or expedient to be prescribed in order to achieve the objects of this Act.

(2) The Minister must publish all regulations proposed to be made under subsection (1) in the *Gazette* for comment at least three months before the date contemplated for their commencement. 50

(3) Before the final promulgation of any regulation, the Minister must take into account any comment received on proposed regulations.

Amendment of law

10. Section 1 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), is hereby amended by the addition of the following subsection:

“(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.”. 5

Short title and commencement

11. This Act is called the Sea Transport Documents Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SEA TRANSPORT DOCUMENTS BILL

1. Purpose of Bill

The Sea Transport Documents Bill seeks to clarify and modernise the law relating to the various documents, including bills of lading, commonly used in connection with the carriage of goods by sea.

2. Nature of problem

At present, the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), makes English law, as it stood at the commencement of that Act, applicable to various matters including bills of lading. Courts in the Republic are, by statute, obliged to apply the United Kingdom legislation enacted in 1855 which has been found to be unsatisfactory in the United Kingdom and has been replaced in that country by the Carriage of Goods by Sea Act, 1992. South African law, therefore, is in many respects out of date and unsatisfactory.

3. Summary of substantive provisions

3.1 *Clause 1* defines certain words and expressions. In particular, “sea transport document” is defined so as to include both negotiable or transferable and non-negotiable or non-transferable documents.

3.2 *Clause 2* provides for the Act’s sphere of application. It is proposed in clause 2(1) that the Act should apply also to documents issued before the Act’s commencement. A clear statement to this effect is desirable because it serves to clarify the applicable law and avoids doubt about retrospectivity.

3.3 *Clause 2(2)* provides for the application of clauses 3 to 6 to negotiable or transferable documents only.

3.4 *Clause 2(3)* provides that the Act binds the State and organs of state.

3.5 *Clause 3* provides for the transfer of negotiable or transferable documents. In particular, subclause (1)(b) regulates electronic transfer, and subclause (3) regulates the situation where the document has been lost.

3.6 *Clause 4* deals with the transfer of rights and obligations. Although there are conflicting views on the question whether a transfer should release the transferor from his, her or its obligations, it is considered reasonable to say that the transferor of rights should be released from those obligations unless his, her or its personal position was a significant factor in accepting him, her or it as an obligee (hence the reference in subclause (2) to *delectus personae*).

3.7 *Clause 5* provides for the saving of certain rights and obligations.

3.8 *Clause 6* provides that where a document represents goods to have been shipped on board or to have been received for shipment and is signed by the master or someone having authority or apparent authority to sign on behalf of the carrier, it is to be *prima facie* evidence that the goods were shipped if the person against whom (or, unusually, in whose favour) that proof is tendered is the person to whom it was originally issued. If, however, there is a subsequent holder (and this can apply only with regard to a transferable document) then no proof to the contrary can be tendered other than proof that the subsequent holder was not *bona fide* (see clause 8).

3.9 *Clause 7* relates to the right of the carrier to be regarded as having performed his, her or its obligation to make delivery. The carrier is discharged if he, she or it makes delivery to the first person presenting the document, subject to the carrier’s right to require the person claiming delivery to establish his, her or its right to delivery. In addition, the person presenting the document must, if he, she or it wishes to obtain delivery, perform all obligations to which delivery is subject. He, she or it may, for instance, have to pay freight. This is the general rule with regard to those presenting bills of lading in order to obtain delivery.

3.10 *Clause 8* deals with the position of persons acting in bad faith. There can be no claim by a person who knew that the document related to goods not shipped or received

for shipment and there can be no claim for a defence on the grounds that goods have been delivered if they have been delivered to someone known or reasonably believed not to have the right to receive delivery.

3.11 *Clause 9* empowers the Minister of Transport to make regulations for the purposes of the Act. In particular, regulations may be made in relation to the production and transfer of documents electronically.

3.12 *Clause 10* provides for an amendment to the Admiralty Jurisdiction Regulation Act, 1983. The said Act provides that an action *in rem* lies against a ship if there is a maritime lien or if there is a claim *in personam* enforceable against the owner. This deals satisfactorily with the position if the ship is operated and all its business is conducted by the owner. However, ships are chartered out and the business of a ship is frequently conducted by charterers. Charterparties give rise to complications in respect of the action *in rem*. One type of charterparty is a charter by demise, also known as a bareboat charter, in terms of which the owner of the ship generally parts with possession of the ship to the person who charters the ship, and the charterer engages the master, officers and crew and generally operates the ship. Where a ship is chartered by demise the usual position is that the demise charterer is the carrier of any goods in the ship and the owner is not the carrier. In charters other than by demise the usual position is that the charterer is not the carrier and, where the charter is from the owner, the owner is the carrier. Because the charterer by demise usually has full control of the ship, English and American law generally regards the charterer by demise as being the owner of the ship for the purposes of an action *in rem*. The position under the Admiralty Jurisdiction Regulation Act, 1983, is not clear, and the amendment will clarify the position in general and bring South African law into line with English and American law. The amendment will have the effect that, for the purposes of an action *in rem*, a charterer by demise is deemed to be the owner of the ship for the period of the charter by demise. It is included in this Bill because it generally relates to the subject matter of the Bill.

4. Consultation

The Sea Transport Documents Bill is promoted by the Maritime Law Association of South Africa (MLA). The provisions of the Bill were discussed extensively, both within the MLA itself and in consultation with other interested parties, before submission to the Department of Transport. The Department was also involved in the consultation process by virtue of its membership of the MLA, and participated in at least three MLA conferences at which the Bill was discussed. An earlier draft of the Bill was published in the *Gazette* for comment on 12 December 1997. Several interested parties responded, including the Association of Shipping Lines (ASL), Grincor Management Services (Pty) Ltd, the Council of South African Banks (Cosab) and Safmarine. All comments were considered in consultation with the MLA, and resulted subsequently in several amendments being made to produce the present text. The MLA and the Department are of the opinion that the concerns of those who participated in the consultation process have been addressed satisfactorily and that the Bill reflects a consensus position.

5. Financial implications for the State

None.

6. Parliamentary procedure

The Department of Transport and the State Law Advisers are of the opinion that the Bill should be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it contains no provision to which section 74 or 76 of the Constitution applies.

