

REPUBLIC OF SOUTH AFRICA

MERCHANT SHIPPING (CIVIL LIABILITY CONVENTION) 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 20B—2013]

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BILL

To enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 into law; and to provide for matters connected therewith.

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

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SCHEDULE

Definitions

1. In this Act, unless the context indicates otherwise, any meaning ascribed to a word or expression in the 1992 Liability Convention bears the meaning so ascribed, and—
- “**Authority**” means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);
 - “**Contracting State**” means a country or territory specified in a notice published in terms of section 5; 15
 - “**Minister**” means the Minister of Transport;
 - “**organ of state**” has the meaning ascribed to it in section 239 of the Constitution of the Republic of South Africa, 1996;
 - “**prescribed**” means prescribed by regulation in terms of section 15; 20
 - “**the 1969 Liability Convention**” 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 *Gazette* No. 5867 of 27 January 1978;
 - “**the 1992 Liability Convention**” means Articles I to XII ter, including the model certificate, of the 1969 Liability Convention as amended by the 1992 Protocol and referred to in paragraph 2 of Article 11 of the 1992 Protocol; 25
 - “**the 1992 Protocol**” means the International Maritime Organisation Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969— 30
 - (a) approved on 23 October 1997 by the National Assembly and on 15 March 1999 by the National Council of Provinces as is required by section 231(2) of the Constitution of the Republic of South Africa, 1996; and
 - (b) published for general information under Notice No. 1535 of 2009 in *Gazette* No. 32723 of 20 November 2009; 35
 - “**the Republic**” includes the Prince Edward Islands referred to in section 4; and
 - “**this Act**” includes the regulations made under section 15.

PART 1

INTRODUCTORY PROVISIONS

Enactment of 1992 Protocol into law 40

2. (1) Subject to this Act, the 1992 Protocol has the force of law in the Republic.
- (2) The Minister may by notice in the *Gazette* publish for general information any changes made to the 1992 Liability Convention under Article 14 or 15 of the 1992 Protocol if those changes are binding on the Republic in terms of section 231 of the Constitution of the Republic of South Africa, 1996. 45
- (3) For the purposes of this Act, the English text of the 1992 Protocol prevails for the purposes of interpretation.

Act binds State

3. This Act binds the State and every organ of state.

Application of Act

4. This Act also applies to the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948).

Publication of list of states to which 1992 Liability Convention applies

5. The Minister must, by notice in the *Gazette*, publish a list of states, other than the Republic, to which the 1992 Liability Convention applies.

PART 2

COMPENSATION

Construction of certain provision and references in 1992 Liability Convention

6. (1) Paragraph 1 of Article VII of the 1992 Liability Convention, in so far as it relates to the Republic, must be construed as requiring the owner of a ship registered in the Republic to maintain the insurance or other financial security referred to in that paragraph.

(2) For the purposes of paragraph (a)(i) of Article II of the 1992 Liability Convention, and in so far as it relates to the Republic, the reference to the territorial sea must be construed as a reference to the territorial waters of the Republic referred to in section 4 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

(3) For the purposes of paragraph (a)(ii) of Article II of the 1992 Liability Convention, and in so far as it relates to the Republic, the reference to exclusive economic zone must be construed as a reference to the exclusive economic zone of the Republic within the meaning of section 7 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

Claims for compensation

7. (1) The High Court exercising its admiralty jurisdiction has jurisdiction, including jurisdiction for all incidental purposes, to hear and determine claims for compensation under the 1992 Liability Convention in respect of incidents—

- (a) that have caused pollution damage in a place to which the 1992 Liability Convention applies; or
- (b) in relation to which preventative measures have been taken to prevent or minimise pollution damage in a place to which the 1992 Liability Convention applies.

(2) For the purposes of this Act, the area of jurisdiction of a court shall be deemed to include that portion of the exclusive economic zone and the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

Applications to determine limit of liability

8. (1) If a claim for compensation under the 1992 Liability Convention is made in the High Court against, or is apprehended by, the owner of a ship, or the insurer or other person providing financial security for the liability of the owner of the ship for pollution damage, the owner, insurer or other person, as the case may be, may apply—

- (a) in the case where a claim for compensation under the 1992 Liability Convention has been made in the High Court, to the division of the High Court in which the claim for compensation has been made; or
- (b) in any other case, to any division of the High Court having jurisdiction contemplated in section 7,

to determine whether he or she may limit his or her liability under the 1992 Liability Convention and, if so, the limit of that liability.

(2) If the High Court determines that a person's liability may be limited under the provisions of the 1992 Liability Convention, the High Court may make any order it thinks fit in respect of the apportionment and distribution, in accordance with those provisions, of a fund for the payment of claims under those provisions.

PART 3

INSURANCE CERTIFICATES

Interpretation

9. In this Part—

- (a) **“Government ship”** means a ship, including a warship, owned by a state, and includes a ship owned by the Government of the Republic; 5
- (b) a reference to a contract of insurance, or to other financial security, in respect of a ship, must be construed as a reference to a contract of insurance, or to other financial security, covering the liability of the owner of the ship under the 1992 Liability Convention for pollution damage caused in a place to which the 1992 Liability Convention applies; and 10
- (c) a reference to the limits of the liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention, in relation to a ship, must be construed as a reference to the amount to which the owner of the ship is entitled, under that paragraph, in its application to the ship as part of the law of the Republic, to limit his or her liability under the 1992 Liability Convention in respect of any one incident. 15

Application

10. (1) Subject to subsection (2), this Part applies to every ship that is carrying more than 2 000 tonnes of oil in bulk as cargo and, where such ship is unregistered, this Part applies to that ship as if it were registered in the state whose flag the ship is flying. 20

(2) This Part does not apply to a Government ship, or other ship operated by a state, including a ship operated by the Government of the Republic, that is being used for non-commercial purposes.

Insurance certificates to be carried on certain ships 25

11. (1) If a ship enters or leaves, or attempts to enter or to leave, a port in the Republic, or arrives at or leaves, or attempts to arrive at or to leave, a terminal in the territorial waters of the Republic, without having on board the ship the relevant insurance certificate that is in force in respect of that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R250 000. 30

(2) If a ship that is registered in the Republic enters or leaves, or attempts to enter or to leave, a port in a state other than the Republic, or arrives at or leaves, or attempts to arrive at or to leave, a terminal in the territorial sea of such a state, without having on board the ship the relevant insurance certificate that is in force in respect of that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R250 000. 35

(3) If, otherwise than in circumstances to which subsection (1) applies or, in the case of a ship registered in the Republic, to which subsection (2) applies, at any time a relevant insurance certificate is in force in respect of a ship to which this Part applies and that insurance certificate is not on board that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R20 000. 40

(4) An officer may require the master or other person in charge of a ship to produce the relevant insurance certificate that is in force in respect of that ship and, if the master or other person refuses or fails to produce that insurance certificate to the officer, he or she is guilty of an offence and liable on conviction to a fine not exceeding R20 000. 45

(5) If the Authority has reasonable grounds to believe that the master or other person in charge of a ship is attempting to take the ship out of a port in the Republic at a time when the ship does not have on board the relevant insurance certificate that is in force in respect of that ship, the Authority may detain the ship until such insurance certificate is obtained or produced to the Authority, as the case may be. 50

(6) If a ship detained at a port in terms of subsection (5) leaves the port before it has been released from detention, the master and the owner of that ship are both guilty of an offence and liable on conviction to a fine not exceeding R500 000 or to imprisonment for a period not exceeding five years, or to both such fine and to such imprisonment.

- (7) For the purposes of this section, a relevant insurance certificate in respect of a ship is—
- (a) if the ship is registered in the Republic and is not a Government ship, a certificate issued in terms of section 12;
 - (b) if the ship is registered in a Contracting State and is not a Government ship, a certificate issued in respect of that ship under a law of the Contracting State in question giving effect to Article VII of the 1992 Liability Convention;
 - (c) if the ship is registered in a state that is not a Contracting State and the ship is not a Government ship, a certificate issued in terms of section 12 or a certificate that must be regarded as a relevant insurance certificate for the ship for the purposes of this paragraph in terms of the regulations;
 - (d) if the ship is owned by the Government of the Republic, a certificate issued in terms of section 14;
 - (e) if the ship is owned by the government of a Contracting State, a certificate issued in respect of that ship under a law of the Contracting State in question giving effect to Article VII of the 1992 Liability Convention or a certificate of the kind referred to in section 14(1) issued by the government of that Contracting State; or
 - (f) if the ship is owned by the government of a state that is not a Contracting State, a certificate of the kind referred to in section 14(1) issued by the government of the state in question or a certificate that must be regarded as a relevant insurance certificate for the ship for the purposes of this paragraph prescribed in terms of the regulations.
- (8) In this section, “officer” means a person who—
- (a) is an officer of customs within the meaning of the Customs and Excise Act, 1964 (Act No. 91 of 1964);
 - (b) is a surveyor for the purposes of the Merchant Shipping Act, 1951 (Act No. 57 of 1951); or
 - (c) is appointed by the Authority, in writing, to be an officer for the purposes of this section.

Issue of insurance certificates

- 12.** (1) The owner, master or agent of a ship that is registered in the Republic or that is registered in a state that is not a Contracting State, may apply to the Authority for the issue of an insurance certificate for the ship.
- (2) The application in terms of subsection (1) must be made in the prescribed manner and form together with the supporting documentation and information determined by the Authority.
- (3) The Authority must—
- (a) if it is satisfied that the owner of the ship is maintaining insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship, issue to the applicant an insurance certificate for the ship; or
 - (b) if it is not so satisfied, refuse to issue such a certificate in respect of the ship.
- (4) An insurance certificate issued under this section in respect of a ship—
- (a) must be in accordance with the prescribed form, being a form that contains, but is not limited to containing, the particulars set out in paragraph 2 of Article VII of the 1992 Liability Convention;
 - (b) comes into force on the day specified in the certificate; and
 - (c) remains in force, subject to this Part, until—
 - (i) a date 12 months after the day on which the certificate comes into force; or
 - (ii) the date that the Authority is satisfied is the last day in the balance of the period during which the insurance or other financial security in respect of the ship is to remain in force, whichever is the earlier date.

Extension, cancellation and lapsing of insurance certificates

13. (1) If—

- (a) a ship for which an insurance certificate has been issued under section 12 is not at a port in the Republic at the time when the certificate expires or is about to expire; and 5
- (b) the Authority is satisfied that, after the day specified in the insurance certificate as the day until which the certificate is to remain in force, there will be in force a contract of insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship, 10

the Authority may extend the certificate for a period that expires on or before the day that the Authority is satisfied is the last day in the balance of the period during which that contract of insurance or other financial security is to remain in force, being a period that does not exceed one month from the day contemplated in paragraph (b).

(2) An extension of an insurance certificate in terms of subsection (1) expires upon the ship's arrival at a port in the Republic. 15

(3) The Authority may cancel an insurance certificate issued under section 12 if it is satisfied that, because of any modification or variation of, or to, the contract of insurance or other financial security for the ship, the owner of the ship will not be covered for an amount that is not less than the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship. 20

(4) If, while an insurance certificate issued under section 12 for a ship registered in the Republic or in a state that is not a Contracting State is in force, the ship ceases to be registered in the Republic or in the state in question, as the case may be, the certificate so issued thereupon ceases to be in force. 25

(5) (a) If an insurance certificate issued under section 12 is cancelled in terms of subsection (3) or ceases to be in force by virtue of subsection (4), the master of the ship must without delay return the certificate to the Authority.

(b) A master who fails to comply with paragraph (a) commits an offence and is liable on conviction to a fine not exceeding R20 000. 30

Ships owned by Government of Republic

14. (1) The Minister may, with the approval of the Minister of Finance and in respect of a ship that is owned by the Government of the Republic, issue a certificate certifying that the ship is owned by the Government of the Republic and that any liability for pollution damage up to the limits of liability applicable in relation to the ship under Article V of the 1992 Liability Convention will be met by the Government of the Republic. 35

(2) Subject to subsection (3), a certificate issued under subsection (1) remains in force for the period stated in the certificate.

(3) If, while a certificate issued under subsection (1) is in force, the ship ceases to be owned by the Government of the Republic, the certificate so issued thereupon ceases to be in force. 40

(4) In any proceedings brought in a court in the Republic to enforce a claim in respect of a liability incurred under the 1992 Liability Convention, every Contracting State must be regarded as having submitted to the jurisdiction of that court and must be regarded as having waived any defence based on its status as a sovereign state, but nothing in this subsection must be regarded as allowing the levy of execution against the property of such a State. 45

PART 4

MISCELLANEOUS 50

Regulations

15. (1) The Minister may make regulations—

- (a) regarding any matter which, in terms of this Act, may or must be prescribed;
- (b) giving effect to Article X of the 1992 Liability Convention;
- (c) fixing fees to be paid in respect of any matters arising from the application of Article X of the Convention; 55

- (d) regarding the conversion of the amounts of money referred to in paragraph 1 of Article V of the 1992 Liability Convention into amounts of money expressed in South African currency;
 - (e) regarding guarantees that are acceptable for the purposes of paragraph 3 of Article V of the 1992 Liability Convention; 5
 - (f) regarding the extent to which the right of subrogation provided for in paragraph 5 of Article V of the 1992 Liability Convention may be exercised by a person other than a person referred to in that paragraph;
 - (g) the ascertainment of the tonnage of a ship, including the estimation of the tonnage of a ship in circumstances where it is not possible or reasonably practicable to measure its tonnage; and 10
 - (h) regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.
- (2) Any regulation fixing fees must be made with the approval of the Minister of Finance. 15

Jurisdiction

16. Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty prescribed by this Act.

Amendment of law

20

17. The law specified in the second column of the Schedule is hereby amended to the extent indicated in the third column thereof.

Transitional provisions

18. Anything done, whether under a law or otherwise, prior to the commencement of this Act, and which can be done under a provision of this Act, must be regarded as having been done under this Act. 25

Short title and commencement

19. This Act is called the Merchant Shipping (Civil Liability Convention) Act, 2013, and comes in operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE*(Section 17)*

Act No. and Year	Short Title	Extent of amendment
Act No. 6 of 1981	Marine Pollution (Control and Civil Liability) Act, 1981	The repeal of sections 13, 14 and 15.

MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING (CIVIL LIABILITY CONVENTION) BILL, 2013

1. PURPOSE OF BILL

The Bill seeks to enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (the Civil Liability Convention) into law. The Bill forms part of a package of measures designed to give effect to the Republic's obligations under the Civil Liability Convention and the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the Fund Convention). Parliament has already approved the two protocols under section 231(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The full package includes the Bill and the—

- Merchant Shipping (International Oil Pollution Compensation Fund) Bill, which gives effect to the Fund Convention;
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Bill, which is a money Bill contemplated in section 77 of the Constitution; and
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Bill, which deals with the administrative matters of the money Bill.

2. CIVIL LIABILITY AND FUND CONVENTIONS

- 2.1 The Civil Liability and Fund Conventions were adopted under the auspices of the International Maritime Organization. They deal with questions of liability and compensation for loss or damage caused by contamination resulting from the escape or discharge of persistent oil from tankers (i.e. ships constructed or adapted for the carriage of oil in bulk as cargo).
- 2.2 Under the Civil Liability Convention claimants are entitled to compensation from the registered shipowner (or the provider of financial security for the shipowner's liability) for pollution damage suffered in the territory (including territorial sea) or exclusive economic zone of a Contracting State. The shipowner's liability is strict (only limited exemptions and defences are available), but this liability is subject to limitation in accordance with the provisions of the Civil Liability Convention. Where limitation applies, the shipowner's liability is determined with reference to the tonnage of the ship concerned.
- 2.3 Whereas the Civil Liability Convention establishes and regulates the liability of the registered shipowner, the Fund Convention establishes an international fund, called the International Oil Pollution Compensation (IOPC) Fund, the purpose of which is to pay compensation to victims of pollution damage (within the meaning of the Civil Liability Convention) where they have been unable to obtain compensation, or compensation in full, under the provisions of the Civil Liability Convention. The IOPC Fund receives its funds from cargo owners, specifically from persons who receive annually, in the ports or terminal installations of the Contracting States, more than 150,000 tonnes of contributing oil. The maximum amount of compensation payable by the IOPC Fund in respect of a single incident is currently SDR 203 000 000 (± ZAR 3,04 billion)*. This amount includes the compensation paid by the shipowner or the shipowner's insurer under the Civil Liability Convention.

* 1 SDR (Special Drawing Right) = ZAR 15.014200 (value on 6 June 2013—see http://www.imf.org/external/np/fin/data/rms_mth.aspx. Website accessed on 7 June 2013).

- 2.4 Because the Fund Convention is supplementary to the Civil Liability Convention, a state cannot become a party to the Fund Convention without, at the same time, also becoming a party to the Civil Liability Convention.

3. SUMMARY OF BILL'S PROVISIONS

- 3.1 *Clause 1* is a standard provision that defines certain words and expressions.
- 3.2 *Clause 2* seeks to enact the Civil Liability Convention into law.
- 3.3 *Clause 3* is a standard provision dealing with the enactment's application to the State and its organs.
- 3.4 *Clause 4* seeks to extend the application of the Act to the Prince Edward Islands, as provided for in section 4 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948). In terms of section 4 an Act of Parliament does not apply to the Prince Edward Islands unless by such Act it is expressed so to apply.
- 3.5 *Clause 5* allows the Minister of Transport to give publicity to the Contracting States to the Civil Liability Convention by appropriate notification in the *Gazette*.
- 3.6 *Clause 6* seeks to construe a certain provision of and certain other references in the Civil Liability Convention. The clause provides for the interpretation of paragraph 1 of Article VII (which requires the owner of a ship registered in a Contracting State to maintain certain financial security) in relation to ships registered in the Republic. References in the Convention to territorial sea and exclusive economic zone are to be construed in a manner that is consistent with the Maritime Zones Act, 1994 (Act No. 15 of 1994).
- 3.7 *Clause 7* deals with claims for compensation under the provisions of the Civil Liability Convention. It confirms the High Court's admiralty jurisdiction in relation to such proceedings.
- 3.8 *Clause 8* deals with limitation proceedings under the provisions of the Civil Liability Convention that are brought in the High Court.
- 3.9 *Clause 9* is the first clause of Part 3 of the Bill. Part 3 deals with "Insurance Certificates", and the clause seeks to define "Government ship" and construe certain references in the Civil Liability Convention that are relevant to that Part.
- 3.10 *Clause 10* seeks to specify to which ships Part 3 applies. Part 3 does not apply to Government ships used for non-commercial purposes.
- 3.11 *Clause 11* provides for the enforcement of insurance certificate carriage requirements and establishes penalties for non-compliance.
- 3.12 *Clauses 12 and 13* deal with matters related to the issue, validity and cancellation of certain insurance certificates, and provide for the functions of the South African Maritime Safety Authority (SAMSA) in that regard.
- 3.13 *Clause 14* deals with Government ships. For ships owned by the State, it allows the Minister of Transport, with the consent of the Minister of Finance, to issue a certificate stating that liabilities under the Civil Liability Convention will be met by the State, and provides for the period of validity and for the lapsing of certificates of this kind. The clause also embodies the Convention's rules (in paragraph 2 of Article XI) on sovereign immunity in relation to claims against Contracting States.

- 3.14 *Clause 15* seeks to allow the Minister of Transport to make regulations. Regulations fixing fees are required to be made with the consent of the Minister of Finance.
- 3.15 *Clause 16* seeks to extend the jurisdiction of Magistrates' Courts in matters of punishment.
- 3.16 *Clause 17* and *the Schedule* deal with consequential amendments to the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981).
- 3.17 *Clause 18* contains transitional provisions.
- 3.18 *Clause 19* is a standard provision dealing with the short title and commencement of the envisaged Act.

4. CONSULTATION

The Bill was published on 15 April 2009 in *Government Gazette* No. 32103 for comment. The Department of Transport did not receive any comments. The Department extensively consulted with the National Treasury from July 2009 to October 2012.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State; the Bill guarantees financial security for liability, and compensation, for loss or damage caused by contamination resulting from the escape or discharge of persistent oil from oil tankers.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Transport are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.