

NOTICE 1438 OF 2006
(Gazette 29277, 13 October 2006)

SOUTH AFRICAN MARITIME SAFETY AUTHORITY

**DRAFT MERCHANT SHIPPING AMENDMENT BILL:
FOR PUBLIC COMMENT**

The South African Maritime Safety Authority (SAMSA) publishes for public comment the proposed Bill set out in the accompanying Schedule. Written submissions should reach SAMSA **on or before 30 November 2006** (Note: late submissions may be disregarded). These should be addressed to the Chief Executive Officer (for the attention of Mr C Briesch) and may be either:

- hand-delivered to SAMSA, 161 Lynnwood Road, Brooklyn, Pretoria; or
- mailed to SAMSA, PO Box 13186 Hatfield 0028; or
- faxed to (012) 366 2601; or
- emailed to cbriesch@samsa.org.za.

Telephonic enquiries should be directed to Mr C Briesch at (012) 366 2600. Attention is invited to the Objects Memorandum accompanying the Bill.

SCHEDULE

DRAFT MERCHANT SHIPPING AMENDMENT BILL

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

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

BILL

To amend the provisions of the Merchant Shipping Act, 1951, relating to limitation of liability for maritime claims; and for related matters.

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

Amendment of section 261 of Act 57 of 1951, as amended by section 33 of Act 30 of 1959, section 7 of Act 25 of 1985, section 4 of Act 16 of 1995, and section 11 of Act 23 of 1997

1. Section 261 of the Merchant Shipping Act, 1951 (hereinafter called the principal Act), is amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) The owner of a ship, whether or not registered in the Republic or **[not]** elsewhere, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused **[without his actual fault or privity]**—

(a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding **[206,67 special drawing rights for each ton of the ship's tonnage]** an amount determined by the Minister by notice in the *Gazette* and, until the time that the amount is so determined, shall not be liable for such damages to an aggregate amount exceeding—

(i) two million special drawing rights for a ship with a tonnage not exceeding 2 000 tons; and

(ii) for a ship with a tonnage over 2 000 tons, two million special drawing rights together with the following additional amount:

for each ton from 2 001 to 30 000 tons, 800 special drawing rights;

for each ton from 30 001 to 70 000 tons, 600 special drawing rights;

for each ton over 70 000 tons, 400 special drawing rights; or

(b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding **[66,67 special drawing rights for each ton of the ship's tonnage]** an amount determined by the Minister by

notice in the Gazette and, until the time that the amount is so determined, shall not be liable for such damages to an aggregate amount exceeding—

(i) one million special drawing rights for a ship with a tonnage not exceeding 2 000 tons; and

(ii) for a ship with a tonnage over 2 000 tons, one million special drawing rights together with the following additional amount:

for each ton from 2 001 to 30 000 tons, 400 special drawing rights;

for each ton from 30 001 to 70 000 tons, 300 special drawing rights;

for each ton over 70 000 tons, 200 special drawing rights; or

(c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding **[206,67 special drawing rights for each ton of the ship's tonnage]** the amount worked out in accordance with paragraph (a): Provided that **[in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank *pari passu* with the last-mentioned claims]**—

(i) the amount by which the amount worked out in accordance with paragraph (a) exceeds the amount worked out in accordance with paragraph (b) shall be applied only to claims for damages in respect of loss of life or personal injury;

(ii) the amount worked out in accordance with paragraph (b) shall be applied *pro rata* to the balance of the claims for damages in respect of loss of life or

personal injury and the claims for damages in respect of loss of or damage to property or rights;

- (iii) in any event, the amount to be applied to claims for damages in respect of loss of or damage to property or rights shall not exceed the amount worked out in accordance with paragraph (b) for those claims; and
- (iv) all claims shall be paid in accordance with the appropriate ranking of the claims set out in section 11 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983).";

- (b) by the insertion after subsection (1) of the following subsections:

"(1A) However, the owner of a ship is not entitled to the benefit of the limits of liability in subsection (1) if it is proved that the loss, injury or damage in question resulted from the owner's personal act or omission, committed either with intent to cause the loss, injury or damage or recklessly and with knowledge that the loss, injury or damage would probably result. The onus of proving that this subsection applies is on the person alleging its application.

(1B) To avoid doubt, the liability limits in terms of subsection (1) shall apply only in respect of claims arising after the commencement of the provision establishing the applicable limits.";

- (c) by the deletion of subsection (2);
- (d) by the insertion after subsection (3) of the following paragraph, the existing subsection becoming paragraph (a):

"(b) The provisions of this section shall so apply only in respect of claims falling within the definition of 'maritime claim' in section 1 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983).";

- (e) by the substitution for subsection (4) of the following subsection:

"(4) (a) (i) The amounts mentioned in subsection (1) shall be converted into South African currency or any other currency that may be applicable on the basis of the value of [such] the currency on the date of the [judgment or the date agreed upon by the parties] occasion on which the claim arose.

(ii) The Court may, at any time, give the directions it thinks fit about the currency, or currencies, that are to be applicable and about the ascertainment, subject to

paragraphs (b) and (c), of the value of any applicable currency on the relevant date.

(b) For the purpose of converting from special drawing rights into South African currency the amounts mentioned in subsection (1), **[in respect of which a judgment is given]** one special drawing right shall be treated as equal to such a sum in South African currency as the International Monetary Fund have fixed as being the equivalent of one special drawing right for—

- (i) the **[date on which the judgment is given]** relevant date under paragraph (a); or
- (ii) if no sum has been so fixed for that **[day] date**, the last **[day before that day]** preceding date for which a sum has been so fixed.

(c) A certificate given by or on behalf of the National Treasury stating—

- (i) that a particular sum in South African currency has been **[so]** fixed as mentioned in paragraph (b) for a particular **[day] date**; or
- (ii) that no sum has been so fixed for that **[day] date** and that a particular sum in South African currency has been so fixed for a **[day] date** which is the last **[day] preceding date** for which a sum has been so fixed, **[before the particular day]**

shall be prima facie proof of those matters for the purposes of subsection (1); and a document purporting to be a such a certificate shall, in any proceedings, be admissible in evidence and, in the absence of evidence to the contrary, be deemed to be such a certificate."; and

(f) by the addition of the following subsection:

"(5) For the purposes of this section, 'owner', in relation to a ship, includes any charterer of the ship, any person interested in or in possession of the ship, and any manager or operator of the ship."

Amendment of section 263 of Act 57 of 1951, as amended by section 8 of Act 3 of 1981

2. Section 263 of the principal Act is amended by the deletion of subsection (2).

Short title and commencement

- 3.** (1) This Act is the Merchant Shipping Amendment Act, 2006.
- (2) This Act commences on a day fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING AMENDMENT BILL

Main objects

1 This Bill amends the Merchant Shipping Act, 1951 (Act No. 57 of 1951) ("the MSA").

2 The Bill's main object is to revise the limitation of liability provisions in section 261 of the principal Act—

- to correct technical deficiencies in the section; and
- to modernise the law relating to shipowner limitation by introducing provision that is consistent with the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol ("the LLMC") in respect of liability limits, conduct barring limitation and the burden of proof; and
- to make other consequential changes.

Analysis of clauses

3 *Clause 1* amends section 261 of the principal Act. The amendments propose to modernise the law relating to shipowner limitation by introducing key elements of the LLMC, notably in respect of liability limits and the test, and onus, for barring limitation. These changes also address current deficiencies affecting claims involving both personal injury and damage to property. While the LLMC test for barring limitation is much stricter than the current "fault or privity" test, this is balanced by significantly higher liability limits, which, for claimants, means the prospect of a larger limitation fund being available for the payment of claims. Provision is made for the Minister of Transport to set different limits should this become necessary over time.

4 *Clause 3* amends section 263 of the principal Act by deleting subsection (2). The provision is re-enacted in substantially the same terms in the amendments covered by *clause 1* of the Bill.

5 *Clause 4* is a standard provision dealing with the short title and commencement of the enactment. Commencement is to be on a day proclaimed by the President.