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THE LIABILITY AND COMPENSATION FOR BUNKER OIL POLLUTION DAMAGE BILL, 2017

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TABLE OF CONTENTS

1. Introduction
 - 1.1 Background
2. Salient Features of the Convention
 - 2.1 Definitions
 - 2.2 Scope
 - 2.3 Liability of Shipowner
 - 2.4 Exclusion
 - 2.5 Incidents Involving Two or More Ships
 - 2.6 Limitation of Liability
 - 2.7 Compulsory Insurance
 - 2.8 Time limit
 - 2.9 Jurisdiction
 - 2.10 Recognition and Enforcement
 - 2.11 Recommendations from the Conference
3. Importance of Implementing the Bunkers Convention in Kenya
 - 3.1 Introduction
 - 3.2 Kenyan Situation
4. Incorporation
 - 4.1 Kenya's Legal Framework
 - 4.2 The Convention
5. Conclusion

AN EXPLANATORY NOTE OF THE LIABILITY AND COMPENSATION FOR BUNKER OIL POLLUTION DAMAGE BILL, 2017

6. INTRODUCTION

The International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) (Bunkers Convention) entered into force on 21st November 2008 with the sole purpose of ensuring that adequate, prompt and effective compensation is available to persons who suffer damage caused by oil spill when carried in ship's bunkers. Kenya acceded to this Convention on 7th October, 2015 and is therefore bound by the obligations in it.

1.1 Background

The 1990s saw lots of maritime pollution incidents as a result of spills that were attributed to bunker oil. States felt there was need to regulate this kind of spills and also to ensure that costs incurred in remedying the situation could be recovered, for it had been difficult for States to recover the hefty cleanup costs or compensation for damage caused.¹ This was majorly because most Shipowners did not have liability insurance cover for bunker oil pollution and for those that had, it involved a cumbersome legal process that was also not economical.

The *Pacific Adventurer* incident of 2009 was the driving force behind the Australian proposal on bunker oil pollution at the International Maritime Organization (IMO). The vessel lost approximately 270 tons of heavy fuel oil affecting 56 kilometres of the South East coast of Queensland.² The initial assessment of the clean-up cost was estimated at over USD 25,000,000 yet the limit of liability as per the Convention on the Limitation of

¹ Gaskell, N. and Forrest, C., *Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003* (UQLJ 27(2), 2008) 127.

² LEG 96/ 12/1 of 31 July 2009.

Liability for Maritime Claims, 1976 (LLMC) as amended by the 1996 Protocol was 7,556, 400 SDRs- an amount much lower than the cleanup cost.³

It is as a result of this predicament and the realization that general cargo ships carry more oil as bunkers than tankers carry as cargo that Australia submitted a proposal to the IMO Marine Environment Protection Committee in 1994 and later to the Legal Committee in 1995.⁴ The proposal justified the need for international requirement to be set for ship owners to have effective financial security to meet their liabilities for bunker oil pollution damage; hence the Bunkers Convention which is modelled on International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC) as amended by the 1992 Protocol.

The CLC⁵ only covers pollution as a result of oil spill, including bunker oil spill from vessels adapted to carry oil in bulk as cargo (tankers) and did not cover bunker oil spill from vessels other than tankers. The Bunkers Convention therefore fills the gap in the international regime for compensation for damage caused by bunker oil pollution.

7. SALIENT FEATURES OF THE CONVENTION

2.1 Definitions

Article 1 of the Bunkers Convention is the definition section. This part will however only cover some of the definitions in the Convention.

A Ship is defined as a seagoing vessel and seaborne craft of any type whatsoever.

Person means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

According to the Convention, a Shipowner is the owner, including the registered owner, bareboat charterer, manager and operator of a ship.

³ LEG 96/13 of 14 October 2009, p.29.

⁴ Australia's proposal on the need for compulsory insurance at the 73rd Session of the IMO Legal Committee in LEG 73/12/1 of 12 September 1995.

⁵Article I(1) of CLC.

A Registered owner means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "registered owner" shall mean such company.

Bunker oil is defined as any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.

The Convention defines preventive measures as any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

Incident is defined as any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

State of the ship's registry means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

Article 1(9) of the Bunkers Convention defines pollution damage as:

- a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- b) the costs of preventive measures and further loss or damage caused by preventive measures.

Both Bunkers Convention and CLC deal with oil pollution from vessels. The distinction however is that while CLC deals exclusively with oil pollution from tankers, Bunkers Convention on the other hand covers bunker oil pollution from all vessels that are not covered by the CLC.

It is important to note that unlike the CLC⁶ which restricts a Shipowner to the registered owner or person owning the ship, the Bunkers Convention defines a ship owner as the owner including the registered owner, bareboat charterer, manager and operator of the ship.⁷ The implication of subjecting the above- mentioned parties to liability is that it increases the chances of affected State Parties getting compensation as compared to a situation where only the registered owner is responsible and is incapable of settling the claims for damages.

2.2 Scope

Article 2 states that the Convention applies to pollution damage caused on the territory including territorial sea and exclusive economic zone of State Parties. For States that have not established the exclusive economic zone, it is an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. It also applies to preventive measures taken to prevent such damage.

Kenya has established its territorial waters at 12 nautical miles and has declared its exclusive economic zone at 200 nautical miles.⁸

2.3 Liability of Shipowner

The Convention provides for strict liability and if an incident consists of a series of occurrences having the same origin, the liability attaches to the Shipowner at the time of the first occurrence.⁹

Shipowners are only exempted from liability if they prove that: the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; the damage was wholly caused by an act or omission done with the intent to cause damage; or damage caused by the negligent or

⁶Article I(3) of the CLC.

⁷Article 1(3) of the Bunkers Convention.

⁸Maritime Zones Act of 1989 (Cap 371) of the Laws of Kenya.

⁹Article 3(1).

wrongful act of a government or authority responsible for maintenance of lights or other navigational aids.¹⁰

The Convention also provides that if the Shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from negligence of that person, the Shipowner may be exonerated wholly or partially from liability to such person.¹¹

In Article 3(5) and (6), the Convention does not allow for compensation claims for pollution damage otherwise than as provided therein and further provides that nothing in the Convention shall prejudice the Shipowner's right of recourse existing independently of the Convention.

2.4 Exclusions

The Bunkers Convention¹² does not apply to pollution damage covered by the CLC whether or not compensation is payable for the same under the CLC.

An interpretation of this is that in spite of a State being party to the Bunkers Convention, if there is a bunker oil spill from a tanker, one cannot seek recourse by relying on the provisions of the Bunker's Convention but only the CLC.¹³

Unless the State opts otherwise, the Convention does not apply to warships, naval auxiliary or other ships owned and operated and used only on government non-commercial service. If a State subjects the above- mentioned vessel to the Convention, then it has to inform the Secretary- General specifying the applicable conditions.¹⁴

As for ships owned by State Parties and used for commercial purposes, each State shall be subject to suit in the jurisdiction set forth and shall waive all defences based on its sovereignty.¹⁵

¹⁰Article 3(3).

¹¹Article 3(4).

¹²Article 4(1).

¹³M. Jacobsson, *Bunkers Convention in force* (2009) 15 JIML 21 at 24-5.

¹⁴ Article 4(2) and (3).

¹⁵Article 4(4).

Unlike the CLC,¹⁶ the Bunkers Convention does not exclude claims against parties other than the owner. It is suggested that such exclusion has not been factored in to enable injured parties claim compensation from different sources.¹⁷

2.5 Incidents Involving Two or More Ships

If a pollution damage incident involving two or more ships occurs, unless exonerated,¹⁸ the Shipowners of all the involved ships shall be jointly and severally liable for all such damage which is not reasonably separable.¹⁹

2.6 Limitation of Liability

The Convention in Article 6 allows for limitation of liability by the Shipowners, insurance or persons providing financial security under any applicable national or international regime such as the 1976 LLMC as amended by the 1996 Protocol if ratified by a State. It is worth noting that Kenya has ratified the 1996 Protocol. The Merchant Shipping Act,²⁰ attempts to incorporate LLMC but unfortunately its limits are still based on the 1976 LLMC and therefore in need of revision.

2.7 Compulsory Insurance

Article 7 of the Convention covers compulsory insurance and stipulates State's obligations with regards to insurance or financial security. Below are the different provisions:

The Bunkers Convention provisions on compulsory insurance are similar to the provisions in the CLC and the Nairobi Wreck Removal Convention.²¹

¹⁶Article III(4) of the 1992 CLC.

¹⁷Ibid (n1) 103.

¹⁸Article 3 provides for the circumstances under which a Shipowner can be exonerated from liability.

¹⁹Article 5.

²⁰Part XVII of the Merchant Shipping Act, 2012 (2009).

²¹ Martinez, N A Gutierrez., *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and particular liability regimes* (2011 Routledge, New York)165.

Just like in the CLC, a key requirement in Article 7(1) of the Bunkers Convention is the need for the registered owner of a vessel of over 1000 gross tonnage to maintain insurance cover or other financial security to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international regime.

The Convention in Article 7(2) stipulates for a State Party, through its appropriate authority to issue certificates attesting that insurance or another financial security for a ship registered in its registry is in force. If a ship is not registered in a State Party, then such a certificate ought to be issued by the appropriate authority of a State Party. The State Party is also expected to fully guarantee the completeness and accuracy of certificate. In case of such delegation, the State is expected to notify the Secretary-General of the delegated responsibilities and the date the authority or withdrawal of such authority takes effect. Such certificates are to be recognized by other State Parties as having the same force as certificates issued by the State.

The authority issuing the certificates also ought to have the power to withdraw the certificates if the conditions upon which the certificate was issued are not maintained.

The Convention provides for the basic details that such a certificate must have. They include: name of ship and number, port of registry, principle place of business of registered owner, IMO ship identification number, nature and duration of security, name and principle place of business of insurer and validity of the certificate.

In the Kenyan situation, this certificate shall be issued by the Kenya Maritime Authority (KMA) which has the responsibility of regulating maritime affairs and prevention of marine pollution as it is also responsible for managing the national oil contingency plan, hence the competent Oil Spill Authority.²²

The certificate ought to be carried on board the ship and a copy deposited with the authority keeping records of the State's registry or if not registered in a State Party, then it shall be with the authorities issuing or certifying the certificate.

The insurance or financial security shall not be considered as satisfying this Article if it can cease for reasons, other than expiry of the validity period specified in the certificate before three months have elapsed from the date on which notice of its termination is

²² Section 5(f) of the Kenya Maritime Authority Act No. 5 of 2006.

given to the authorities, unless the same has been surrendered to the authority or a new certificate issued within the same period.

A State of ship's registry shall determine the conditions for the issuance and validity of a certificate and can rely on information from other States or organizations relating to the financial standing of the insurance providers or financial security. This however does not waive the State's responsibility as pertains issuance of certificate.

Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case the defendant may invoke the defences (other than bankruptcy or winding up of the Shipowner) which the Shipowner would have been entitled to invoke, including limitation pursuant to Article 6 of the Convention. Even if the Shipowner is not entitled to limitation of liability according to Article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained by the Convention.

Moreover, the defendant may invoke the defence that the pollution damage resulted from the willful misconduct of the Shipowner, but he shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the Shipowner against the defendant. The defendant shall in any event have the right to require the Shipowner to be joined in the proceedings.

Each State Party shall ensure, under its national law, that insurance or other security, to the extent specified in the Convention, is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea. Further, a State Party is expected to notify the Secretary- General in case such ships are not required to carry certificates as the State Party has electronic records of the same.

If insurance or financial security is not maintained for State- owned ships, the provisions on insurance shall not be applicable but the ship shall carry a certificate from the appropriate authority stating that the ship is owned by the State and that its liability is covered in the limits prescribed by national legislation or the LLMC.

7.1 Time Limits

Action under this Convention has to be instituted within 3 years from the date when the damage occurred but not later than 6 years from the date of the incident.²³

2.9 Jurisdiction

In case of pollution damage or preventive measures employed to prevent or minimize pollution damage, action for compensation against Shipowner, insurer or persons providing security for Shipowner's liability may be brought only in the courts of the affected State Parties. Each State Party therefore ought to ensure that its courts have jurisdiction to entertain the actions for compensation or there is a special court in places that has jurisdiction.²⁴ In Kenya, the Judicature Act²⁵ stipulates that the Admiralty Court which is a division of the High Court has jurisdiction (admiralty jurisdiction) over all matters arising on the high seas, in territorial waters or other navigable inland waters in Kenya.

2.10 Recognition and enforcement

Judgment given by a Court with jurisdiction (court of highest hierarchy) shall be recognized and enforced in any State Party as soon as the formalities required in that State are complied with, so long as it was not obtained by fraud and fair hearing availed to defendant.

Kenya has in place the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya that provide for the procedure and formalities for the enforcement of foreign Judgments.

2.11 Recommendations from the Conference

²³Article 8.

²⁴Article 9.

²⁵ See Laws of Kenya, Judicature Act Chapter 8 of 2016 (2012).

The Conference while adopting the Convention made three Resolutions and urged States to give effect to them.²⁶ The following are the Resolutions:

“Resolution on limitation of liability - the resolution urges all States that have not yet done so, to ratify, or accede to the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976. The 1996 LLMC Protocol raises the limits of liability and therefore amounts of compensation payable in the event of an incident, compared to the 1976 Convention.”

“Resolution on promotion of technical co-operation- States to promote and provide directly or through IMO, support to states that request technical assistance in the implementation of the Convention”.

“Resolution on protection for persons taking measures to prevent or minimize the effects of oil pollution - the resolution urges States, when implementing the Convention, to consider the need to introduce legal provision for protection of persons taking measures to prevent or minimize the effects of bunker oil pollution. It recommends that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result. It also recommends that States consider the relevant provisions of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as a model for their legislation.”

For purposes of the explanatory notes there is need to focus on Resolution 1 and 3 on the limitation of liability and protection for persons taking measures to prevent or minimize the effects of bunker oil pollution when implementing the Convention.

²⁶ Resolution adopted in the Diplomatic Conference. See LEG/CONF.12/11 of 6th February, 2001.

The Bunkers Convention's provisions on protection of persons taking reasonable measures to prevent or minimize pollution damage are quite similar to the CLC²⁷ and the interpretation of this section may be that claims of economic loss which have a causal link with loss of or damage to property can be recovered in both Conventions.²⁸

8. IMPORTANCE OF IMPLEMENTING THE BUNKERS CONVENTION IN KENYA

3.1 Introduction

There are several Conventions that deal with marine pollution but for the purposes of the explanatory notes, it is important to look at the CLC, whose provisions are quite similar to the Bunkers Convention.

The CLC was established with the aim of ensuring that adequate compensation was available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. At this point there was still a gap with regards to pollution as a result of bunker oil from non- tanker vessels; yet the nature of bunker oil is that it is viscous, therefore more costly and cumbersome to clean up as compared to crude oil hence the urgency for States not only to ratify but also to implement this Convention.

There are several provisions that are similar including those on pollution damage, the available defenses, strict liability regime, resolutions on responder immunity, compulsory insurance and direct action.

3.2 Kenyan Situation

Mombasa is a home to several ports consisting of Kilindini Harbour, Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. All these ports, especially Kilindini

²⁷ Article I(7) of CLC.

²⁸ See (n18) 160.

and Lamu are very busy; Lamu- majorly fishing vessels and Kilindini- a myriad of vessels as it is the main harbor.

The importance of Kenyan Ports cannot be overemphasized. Kilindini harbour not only serves Kenya in terms of imports and exports but it is also a transit port serving Kenya's landlocked neighbours like Northern Sudan, Uganda, Congo, Rwanda and Burundi. Many vessels falling in the ambit of this Convention dock at the Mombasa Port on a daily basis which makes Kenya's internal waters, territorial sea and the exclusive economic zone susceptible to possible bunker oil pollution hence the need for Kenya to incorporate the Convention so as to effectively protect the State and its citizens from damage resulting from this form of pollution.

Kenya has so far been fortunate with regards to major bunker oil pollution but looking at other affected countries, this kind of pollution can be an environmental catastrophe with adverse effects for it smothers small species of fish and invertebrates, destroys mangroves and coral reef, causes economic loss by affecting tourism and the tourism- dependent industry and to humans, the poisonous chemical could result in different ailments including skin complications.

Compulsory insurance or financial security by ship owners ensures that in case of bunker oil pollution which may be costly to contain, there is the availability of funds to cover the damage caused and an affected State can get respite.

The process of getting reprieve for pollution damage has been simplified for the Convention allows for claim for compensation for pollution damage to be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage.

The Convention does encourage attempts to prevent pollution damage as it provides for the protection of persons taking measures to prevent or minimize pollution damage.

Another important aspect of the Convention is that it expands the definition of Shipowner to include registered owner and bareboat charterer, manager and operator of a ship. By so doing, several parties are potentially liable in case of pollution and an injured party can seek recompense from different parties.

9. INCORPORATION

4.1 Kenya's Legal Framework

Kenya, being a former British colony, adopted the British legal system (common law) and since independence, it had been a dualist nation in relation to the application of international law. International law and national law were viewed as two different legal systems. However, the promulgation of the Constitution of Kenya (2010) brought a shift in the relations between national law and international laws.

Article 2(6) of the Constitution states that a treaty or convention ratified by Kenya shall form part of the laws of Kenya. This provision while recognizing that all international and regional instruments to which Kenya is a party form part of the laws of Kenya also has the effect of making Kenya a monist State. This was a shift from Kenya's status of being a dualist State prior to the promulgation of the Constitution 2010.

As a dualist State, all ratified international instruments had to be incorporated into national law in order to give effect to the relevant instrument. This is contrary to the current state of affairs where a ratified treaty is automatically applicable as national laws.

This was reiterated in a decided case: *Beatrice Wanjiku & Another v The Attorney-General & Another*²⁹ where the Court stated as follows:

“Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya has ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular article 2(5) and 2(6) gave new colour in the relationship between international law instruments and national law”

This is however not open ended as the Constitution in Article 94(5) restricts law-making to parliament or a person with the authority conferred by the Constitution or legislation. This means that no treaty can be ratified without prior approval of parliament. It therefore

²⁹ High Court of Kenya at Nairobi, Petition 190 of 2011 para17.

follows that the danger of treaties being ratified and becoming applicable if they are not in tandem with the spirit of the Constitution or if Kenya is incapable of implementing the same is minimized.

The Kenyan case is nevertheless not a clear cut one as it has been argued that in spite of the Constitution expressly making Kenya a monist State, the implementation procedure of international instruments has not changed much because they are still enacted into national legislation and the bills have to be tabled in parliament. Be that as it may, international instruments are still considered as part of national law on ratification, a fact emphasized by Court's application of the instruments even before enactment and the necessity to enact relevant legislation can be seen as a way to ensure ease in the implementation of the instruments.

4.2 The Convention

The Bunkers Convention is not a self- executing Convention and therefore ratification of the same is not sufficient. It has several provisions that need further legislation by States to be able to apply it effectively.

This Convention can be incorporated either by an Act of Parliament, by Regulations stemming from the Merchant Shipping Act, 2009,³⁰ or by amending the Merchant Shipping Act, 2009

Kenya having ratified the CLC, it would have been advisable to fashion this legislation on the approach used on the CLC due to their similarity. Unfortunately, the CLC although ratified has not yet been incorporated into an Act of Parliament. Indeed by incorporating the Bunkers Convention, this may be a starting point for the CLC and other liability Conventions that have been ratified to also be incorporated in a similar manner.

Section 410 of the Merchant Shipping Act, 2009 gives the Minister (Cabinet Secretary) power to make regulations for the protection and preservation of the marine environment from pollution and further lists the international conventions from which regulations may be derived but does not include the Bunkers Convention. It is therefore not advisable to opt for the regulations.

³⁰ Merchant Shipping Act, 2009 as revised in 2012.

As for amending the Merchant Shipping Act, 2009, the Act is intricately organized and it may be time-consuming to incorporate relevant amendments. Further, bunkers pollution is a unique facet in the maritime field, different from the issues the Act has covered—majorly safety of life at sea, and the best way to incorporate this Convention is by an Act of Parliament. To enact the same, a draft document will be prepared by KMA and the same shall be presented to the relevant stakeholders for comments after which it shall be reviewed and a copy sent to the Ministry of Transport.

A team shall then be set up comprising of the technical team from KMA and Ministry of Transport to proofread the document and thereafter the same shall be submitted to the Drafting Department of the Attorney General's Chambers for its finalization. The document shall then be tabled before a Parliamentary Committee and if approved, the Government printers shall produce a final copy and the Minister of Transport shall gazette the same.

The Act of Parliament shall be known as the Liability and Compensation for Bunkers Oil Pollution Damage Act and shall comprise of the Long Title, Short Title and 24 sections which will be under Part I to Part VII.

Part I- PRELIMINARY

Section 1: Citation and Commencement, Section 2: Interpretations, Section 3: Application of the Act.

Part II- ADMINISTRATION

Section 4: Power of Cabinet Secretary to Administer Act; Section 5: Delegation by Cabinet Secretary; Section 6: Relief from Prosecution; Section 7: Power of Cabinet Secretary to give Directions; Section 8: Regulation; Section 9: Communication, Cooperation and Consultation.

Part III- POWERS OF THE AUTHORITY

Section 10: Survey, Inspection and Monitoring.

Part IV- LIABILITY

Section 11: Liability of Shipowner, Section 12: Incidents involving two or more ships, Section 13: Responder Immunity, Section 14: Limitation of Liability.

Part V- INSURANCE AND SECURITY

Section 15: Compulsory Insurance or Financial Security.

Part VI- RECOGNITION AND ENFORCEMENT

Section 16: Recognition and Enforcement, Section 17: Offences; Section 18: Service of Documents and Application of Fines, Section 19: Extinguishment of Claims.

Part VII- MISCELLANEOUS

Section 20: General power to dispense, Section 21: Forms, Section 22: Fees and Fines, Section 23: Contravention of the Act, Section 24: Transition.

In order to effectively implement the Convention, Kenya is required to give effect to certain provisions in the Convention.

First and foremost, as pertains insurance, Kenya is expected to facilitate the issuance of certificates for the ships that comply with the insurance or financial security requirements and ensure Port State and Flag State inspections to monitor compliance. This means that this function shall be delegated to the relevant authority, in this case the KMA whose inspectors shall see to this. Further, all States, including Kenya, are allowed to formulate preconditions for the issuance of the certificate in addition to those prescribed by the Convention.

Secondly, as concerns the Resolution on limitation of liability, Article 6 of the Convention allows Shipowners, persons providing insurance or financial security to limit liability under any applicable national or international regime such as LLMC.

Kenya has ratified the LLMC and the same has been incorporated in the Merchant Shipping Act, 2009. The specific section is Part XVII with the heading: Limitation of Liability for Maritime Claims. The Sections on limitation of liability which are similar to the LLMC provisions however do not expressly provide that bunker oil pollution damage is subject to limitation which has raised questions of whether the same ought to be implied as included. Indeed Kenya is not the only State Party that has to contend with this problem as seen in the many articles and observations written about the applicability

of LLMC to oil pollution in the Bunkers Convention. One proponent of this school of thought is Martinez who states that:

“LLMC Convention does not expressly list pollution claims in Article 2. It is however believed that such inclusion may be implied from an analysis of the Convention as a whole and travaux preparatoires...”³¹

Just like other State Parties to this Convention, the applicability of Article 2 to pollution claims can therefore also be implied in the Kenyan situation.

Section 386(1), which is the same as Article 2 of LLMC provides for claims that are subject to limitation and although Section 386(1)(a) and (f) may be construed as covering pollution damage in direct operation of ship, Section 388(d) of the Act states that the limitation of liability shall not apply to claims for oil pollution damage in respect of any liability and compensation for oil pollution. This is contrary to Article 3 of the LLMC which only excludes oil pollution damage covered in the CLC.

Therefore, for the Act to be in tandem with the LLMC and to give the desired effect, there is need to amend Section 388(d) of the Merchant Shipping Act, 2009 to read as follows:

“claims for oil pollution damage within the meaning of International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force”.

There is also need for further amendment to the Act with regards to the limits of liability in Section 391 for it to reflect the limits of liability as provided by Article 3 of the Protocol of 1996 to amend the LLMC, 1976. The current limits provided by the Act are based on the 1976 LLMC which are much lower than the 1996 Protocol limits. Therefore, to be in tandem with the international community, it is necessary to make the amendments for the sake of certainty even though the 1996 Protocol limits already apply by virtue of ratification.

³¹ Ibid (n18) 190.

Secondly, Kenya has a duty to introduce legal provisions for protection for persons taking measures to prevent or minimize the effects of bunker oil pollution.

Thirdly, States including Kenya are expected to make exclusions on the applicability of the Convention as is relevant to the specific State and issue certificates to vessels that have complied with the insurance requirement.³²

Lastly, Article 9 makes it the responsibility of States to provide for a Court with jurisdiction to deal with the bunker oil pollution claims. The Judicature Act³³ provides that the High Court has jurisdiction over admiralty matters and therefore can deal with bunkers pollution and can also see to it that foreign judgments are enforced through the application of the Foreign Judgment (Reciprocal Enforcement) Act of the Laws of Kenya, after the amending the Act to ensure that the Bunker's Conventions' stipulation that the merits of such a case are not re-opened are factored in.

10. CONCLUSION

In view of the above and to plug a gap in the pollution legislation so that most if not all harmful substances escaping from a ship are now covered by a liability and compensation regime,³⁴ it is imperative for States, including Kenya to incorporate the Convention's provision into the national laws for only in so doing will it be possible for all the provisions in the Convention that are incapable of self executing and are in need of further action to be employed for the effective application of the Convention.

Indeed a State may not enjoy the maximum benefits that can be derived from this Convention with regards to liability for marine pollution damage if the Convention is not only ratified but also incorporated by way of an enabling legislation: The Liability and Compensation for Bunker Oil Pollution Damage Act, 2017.

³²Article 7(2).

³³Section 4 of the Judicature Act Chapter 8 of 2007(2003).

³⁴ P.Griggs, *A Busy Schedule for International Maritime Law* 4(1) (S. & T.L.I 2003) 29 at 30.

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DAMAGE BILL, 2017**

ARRANGEMENT OF SECTIONS

Section

PART I – PRELIMINARY

1. Citation and Commencement.
2. Interpretation.
3. Application of Act.

PART II- ADMINISTRATION

4. Power of Cabinet Secretary to administer Act.
5. Delegation by Cabinet Secretary.
6. Relief from Prosecution.
7. Power of Cabinet Secretary to give Directions.
8. Regulation.
9. Communication, Cooperation and Consultation.

PART III- POWERS OF THE AUTHORITY

10. Survey, Inspection and Monitoring.

PART IV- LIABILITY

11. Liability of the Shipowner.
12. Incident involving two or more ships.
13. Responder Immunity.
14. Limitation of Liability.

PART V- INSURANCE AND SECURITY

15. Compulsory Insurance or Financial Security.

PART VI- RECOGNITION AND ENFORCEMENT

16. Recognition and Enforcement.
17. Offences.
18. Service of documents and application of fines.
19. Extinguishment of Claims.

PART VII- MISCELLANEOUS

20. General power to dispense.
21. Forms.
22. Fees and fines.
23. Contravention of the Act.
24. Transition.

FIRST SCHEDULE: INSURANCE CERTIFICATE

**THE LIABILITY AND COMPENSATION FOR BUNKER OIL POLLUTION DAMAGE
BILL, 2017**

**ACT of Parliament to make provision for the liability and compensation for bunker oil
pollution damage.**

ENACTED by the Parliament of Kenya, as follows-

PART I - PRELIMINARY

Citation
and
Commencement

1. This Act may be cited as the Liability and Compensation for Bunker Oil Pollution Act, 2017, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation

2. In this Act, unless the context otherwise requires-

“Administration” means the Government of the Party whose flag the Ship is entitled to fly;

“Authority” means Kenya Maritime Authority;

“bunker oil” means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to shipping;

“Civil Liability Convention” means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended;

“company” means the owner of a ship and includes the manager, or the bareboat charterer any other person or organization, who has assumed the responsibility for operation of the ship from the Shipowner and who has agreed to take over all the duties and responsibilities imposed on the company by these regulations;

“Court” means the High Court of Kenya;

“Director- General” means the Director- General of the Kenya Maritime Authority appointed under the Kenya Maritime Authority Act;

“gross tonnage” means gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969;

“incident” means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave or imminent threat of causing such damage;

“Organization” means the International Maritime Organization;

“person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions;

“pollution damage” means:

- a) loss or damage caused outside the ship by
contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- b) the costs of preventive measures and further loss or damage caused by preventive measures.

“preventive measures” means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

“registered owner” means the person or persons registered as the owners of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that state is registered as the ship’s operator, registered owner shall mean such company

"Secretary-General" means the Secretary-General of the Organization;

"ship" means any seagoing vessel and seaborne craft, of any type whatsoever;

"shipowner" means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.

"State of the ship's registry" means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

Application of Act

3. (1) Unless otherwise expressly provided, this Act shall apply exclusively -
 - (a) to bunker oil pollution damage caused in the internal waters, territorial sea and the exclusive economic zone of Kenya; and

(b) to preventive measures, wherever taken, to prevent or minimize such damage.

(2) This Act shall not apply to pollution damage as defined in Civil Liability Convention whether or not compensation is payable in respect of it under that Convention.

(3) Except as otherwise provided in this Act, the provisions of this Act shall apply to all ships apart from-

(a) warships or naval auxiliary ships or;

(b) other ships owned or operated by a State and used for the time being only for government non- commercial services.

PART II- ADMINISTRATION

Power of
Cabinet
Secretary to

4. The Cabinet Secretary shall, in addition to any other power conferred on him by any other provisions of this Act, be responsible for the administration and implementation of this Act.

Delegation
by
Cabinet
Secretary

5. (1) The Cabinet Secretary may, by notice in the Gazette, delegate to the Director- General or any other officer appointed under this Act and specified in such notification, the exercise of any powers (other than the power to make regulations) or the performance of any duties conferred or imposed on him by or under this Act, subject to such conditions and restrictions as may be specified in such notification.

(2) A delegation in the terms of Subsection (1) shall not affect the exercise of such powers or the performance of such duties by the Cabinet Secretary.

(3) Every officer purporting to act pursuant to any delegation under this Section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of such delegation.

Relief from
Prosecution

6. No action shall lie against the Government or any other public officer or any other person appointed or authorised to perform any function under this Act in respect of anything done or omitted to be done by him in good faith in the exercise or performance of any power, authority or duty conferred or imposed on him under this Act.

Power of
Cabinet
Secretary to
give directions

7. The Cabinet Secretary may from time to time give the Director- General such general directions, not inconsistent with the provisions of this Act or any regulations made thereunder, on the policy to be pursued in the administration of

this Act, as he may consider necessary, and the Director- General shall forthwith take such steps as are necessary or expedient to give effect thereto.

Regulations

8. The Cabinet Secretary, on the recommendation of the Authority, shall make Regulation for-

- (1) the manner and extent to which the provisions of this Act shall apply to Government ships operated for non- commercial purposes;
- (2) fees, levies, charges and any other payment under this Act;
- (3) the holding of enquiries and investigations for bunker oil pollution incidents under this Act;
- (4) any other issue suitable for better implementation of the provisions of this Act.

Communication,
Cooperation and
Consultation

9. To further the objectives of this Act, the Director- General may co-operate with-

- (1) any department or agency of the national or county government;
- (2) governments of other States who are parties to the Bunkers Convention;
- (3) International, inter- governmental and non- governmental organisations;
- (4) Shipowners, seafarer's associations, ship agents, and any other organisations involved or interested in shipping or in the protection of the marine environment.

PART III- POWERS OF THE AUTHORITY

Surveys,
Inspection and
Monitoring

10. Without prejudice to a vessel's rights under any Convention, where there are clear grounds that a ship within areas covered under this Act is in violation of the Act, the Director- General or any authorised person may-

- (1) board and inspect any ship to which this Act applies;
- (2) enter port facilities and demand the production of documents, records and other evidence; and take testimony of witnesses under oath, for the purpose of conducting inspection and survey and for undertaking other activities authorised or required under this Act; and

- (3) where the vessel warrants, institute proceedings including detention of the vessel in accordance with this Act.

PART IV- LIABILITY

Liability of the Shipowner

11. (1) Except as provided in Subsections (3) and (4), the Shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the Shipowner at the time of the first of such occurrences.

(2) Where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several.

(3) No liability for pollution damage shall attach to the Shipowner if the Shipowner proves that-

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or and irresistible character; or
- (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

(4) If the Shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the Shipowner may be exonerated wholly or partially from liability to such person.

(5) No claim for compensation for bunker oil pollution damage shall be made against the Shipowner otherwise than in accordance with this Act.

(6) Nothing in this Act shall prejudice any right of recourse of the Shipowner which exists independently of this Act.

Incidents Involving Two or More Ships

12. When an incident involving two or more ships occurs and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Section 11, shall be jointly and severally liable for all such damage which is not reasonably separable.

Responder Immunity

13. No claim for compensation for damage under this Act or otherwise may be made against any persons taking reasonable measures to prevent or minimize the effects of oil pollution under this Act unless-

- (1) the liability in question resulted from their personal act or omission, committed with the intent to cause damage or;
- (2) recklessly and with knowledge that such damage would result.

Limitation of Liability 14. Where as a result of any occurrence, the owner of a ship incurs liability under Section 11 by reason of a discharge or escape or by reason of any relevant threat of contamination, then the provisions of Part XVII, Section 391 of the Merchant Shipping Act, 2009 shall apply.

PART V- INSURANCE AND SECURITY

Compulsory Insurance or Financial Security 15. (1) The registered owner of a ship having a gross tonnage greater than 1000 registered in Kenya shall be required to maintain insurance or other financial security, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability set out in Section 391 of the Merchant Shipping Act, 2009.

(2) A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Part shall be issued to each ship after the Authority has determined that the requirements of Subsection (1) have been complied with. The certificate shall be in the form prescribed by the Cabinet Secretary under the relevant regulations made pursuant to Section 8 of this Act and shall contain the following particulars-

- (a) name of ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the registered owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
- (f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

(3) The Authority may authorize an organization recognized by it pursuant to Section 10 of the Merchant Shipping Act, 2009 to-

(a) issue the certificate referred to in Subsection (2). Such organization shall inform the Authority of the issue of each certificate. In all cases, the Authority shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy these obligations.

(b) withdraw certificates issued under this Act if the conditions under which they have been issued are not maintained.

(4) The certificate issued under this Part shall be in English language.

(5) The certificate shall be carried on board the ship and a copy shall be deposited with the Authority.

(6) An insurance or other financial security shall not satisfy the requirements of this Section if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under Subsection (2), before three months have elapsed from the date on which notice of its termination is given to the Authority, unless the certificate has been surrendered to the Authority or a new certificate has been issued within the said period. This Subsection shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Section.

(7) (a) Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case the defendant may invoke the defenses, other than bankruptcy or winding up of the owner of the ship, which the owner of the ship would have been entitled to invoke, including limitation pursuant to Section 14.

(b) Furthermore, even if the Shipowner is not entitled to limitation of liability according to Section 14, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with Subsection (1). The defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the ship owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the ship owner against the defendant.

(c) The defendant shall in any event have the right to require the ship owner to be joined in the proceedings.

(8) The Authority shall not permit a ship registered in Kenya to which this Section applies to operate at any time, unless a certificate has been issued under this Section.

(9) Subject to the provisions of this Section, the Authority shall ensure, that insurance or other financial security, to the extent specified in Subsection (1), is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in Kenya or arriving at or leaving an offshore facility in its territorial sea.

PART VI- ENFORCEMENT, LEGAL PROCEEDINGS AND JURISDICTION

Enforcement 16. Part XVIII and Part XIX of the Merchant Shipping Act, 2009 shall apply to all matters covered in this Act as far as is appropriate.

Offence 17 (1) Where any ship or the Owner or Master thereof, fails to comply with any requirement of this Act, the Owner and Master of the ship is each guilty of an offence and liable on conviction to a fine not exceeding Kenya Shillings two hundred and fifty thousand.

(2) It shall be a defence for a person charged under Subsection (1) that he took all reasonable precautions and exercised all due diligence to avoid the commission of that offence.

(3) Where an offence under this Section is committed or would have been committed save for the operation of Subsection (2), by any person due to the act or default of some other person, that other person is guilty of the offence, and a person may be charged with and convicted of an offence by virtue of this Subsection whether or not proceedings are taken against the first mentioned person.

Service of documents and application of fines 18. (1) Any document authorized or required by virtue of any statutory provision to be served upon a Shipowner for the purposes of the institution of, or in connection with proceeding of an offence under the Act shall be served in accordance with Section 443 of the Merchant Shipping Act, 2009.

(2) A person exercising the power of detention in respect of an alleged contravention of this Act shall immediately release the ship if-

(a) no proceedings for the offence in question are instituted within ten days from the detention day;

(b) such proceeding are concluded without the master or owner being found liable;

(c) where a master or owner is found liable, any costs, fines, or expenses ordered to be paid by him have been paid.

Extinguishment
of Claims

19. Right of compensation under this Act shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six years period shall run from the date of the first occurrence.

PART VII- MISCELLANEOUS

General Powers
to Dispense

20. The Director- General may, and upon such conditions as he deems fit, exempt any ship from any specified provision under this Act or dispense with the observance of any requirement in respect of any ship if he is satisfied that-

(1) The requirement has been substantially complied with or that compliance with it is unnecessary in those circumstances;

(2) The action taken or provision made by the ship with respect to the requirement is as effective as or more effective than actual compliance with the requirement.

Forms

21. (1) The Director- General may prepare and approve forms for any books, certificate, document, instrument or paper required under this Act and may alter such forms as he deems fit.

(2) The Director- General shall cause every such form to be marked with the distinguishing mark of the Authority and, before finally issuing any form or making any alteration in a form, shall cause public notice thereof to be given in such manner as he deems fit in order to avoid any inconvenience.

(3) The Director- General shall cause such forms to be available from the Authority.

(4) Every such book, instrument or paper shall be made in such form, if any, approved by the Director- General, or as near as circumstances permit, and unless so made shall not be admissible in evidence in any civil proceedings on the part of the owner or master of any ship.

(5) Every such book, instrument or paper if made in a form purporting to be the proper form and to be marked in accordance with Subsection (2) shall be deemed to be in the form required by this Act, unless the contrary is proved.

(6) The foregoing provisions do not apply where special provisions are made by the Act.

(7) Where anyone prints, sells or uses any document purporting to be a form approved by the Director- General knowing that the document is not the form approved for the time being or that the document has not been prepared or issued by the Director- General, that person commits an offence and shall be liable, upon conviction, to a fine not exceeding fifty thousand shillings or to

imprisonment for a term not exceeding four months or to both such fine and imprisonment.

Fees and Fines 22. All fees, fines and any other monies payable under the Act pursuant to Section 8(2) and 17(1) shall be paid to the Authority.

Contravention of the Act 23. Where in respect of any Kenyan ship there is any contravention of a requirement of this Act or any Regulation made thereunder, the Director- General may suspend the Certificate of Registry of the ship until the contravention is rectified.

Transition 24. (1) Notwithstanding Section 388(d) of the Merchant Shipping Act, 2009, and until such time as the same Section shall be amended, Section 388(d) of the Merchant Shipping Act, 2009 shall read as follows: ‘claims for oil pollution damage within the meaning of International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force’.

(2) Any written law in force immediately before the coming into effect of this Act, relating to bunkers pollution shall have effect subject to any modification as may be necessary to give effect to this Act. Where the provisions of such law conflict with any provisions of this Act, the provisions of this Act shall prevail.