



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Snapshot – IMO 2019

The 2019 meetings at the International Maritime Organisation (IMO) got underway in mid-January.

With five main IMO committees¹ along with range of subcommittees (particularly under MSC and MEPC)², various working groups and correspondence groups, as well as associated international bodies such as the IOPC Funds and meetings of the London Convention parties³, keeping across the international work programme can be as much as a challenge for public authorities as for the private sector.

This note gives a quick glimpse into just some of the issues being considered at IMO relating to Environmental, Safety and Legal matters.

Environmental

Consistent with what we see in the international community globally, environmental issues continue to pose a challenge at IMO. The MEPC had the unusual experience of being at the centre of global media attention in April 2018 when it considered – and subsequently approved – the first greenhouse gas strategy, setting out the goals of reducing emissions for international shipping to align with the Paris Agreement. The IMO goal is to reduce total emissions from shipping by 50% in 2050, and to reduce the average carbon intensity by 40% in 2030 and 70% in 2050, compared to 2008. The ability for IMO to agree this measure was important to ensure that control of what is seen as a technical shipping issue was left to be dealt with by the maritime community rather than the global climate change community. Without the adoption of a strategy there were legitimate concerns that an emissions reduction target would be set for the maritime community rather than by the maritime community.

With the strategy now in place, the next step is the arguably more difficult task of agreeing and then implementing policies to meet these targets. A range of policy options could be on the table, (some of which are already in progress), including emission reduction measures, slow steaming, energy efficiency design index measures (EEDI) and market measures.

Related to that is the Global Sulphur Fuel cap that will come into force on 1 January 2020 under Annex 6 of MARPOL (regulating air emissions). These provisions had regulations that allowed review, but IMO confirmed the entry into force dates approximately two years ago. Under these provisions, the maximum sulphur content of fuel will reduce from the current limit of 3.5% to 0.5% in/hm. Notwithstanding some attempts to delay its implementation the IMO has held firm on the entry into force date.

One common concern is a question around the global availability of compliant fuel product by that 2020 deadline. Consequently, shippers and related industries such as refineries need to consider how best to prepare for this transition. One alternative to compliant fuel is the installation of scrubbers on board ships. Scrubbers is the common term used to describe what are basically exhaust gas cleaning systems that will enable ships to burn high sulphur content fuel but still comply with the new limit.

¹ Maritime Safety, Marine Environment Protection, Legal, Technical Co-operation, and the Facilitation Committee

² Dealing with matters such as the carriage of dangerous goods, radio communication search and rescue, ship design and equipment, standards of training, pollution prevention and response

³ Regulating the dumping of waste at sea

The installation of scrubber systems does involve significant investment and there are other potential issues shipowners may face, including the capacity of manufacturing and drydock facilities to meet demand as well as managing the overboard discharges from these systems. From a liability and legal perspective, consideration will need to be given to how these operational matters will relate to obligations under standard charter party terms, for example to have MARPOL compliant fuel.

Market based measures or proposals for slow steaming are more controversial. Slow steaming is of concern to countries like Australia and New Zealand that are often far from market, and producers of perishable goods. However, while Australia is a party to Annex 6 of MARPOL, New Zealand is not, a point that has been the subject of discussion and criticism. While many ships that come to New Zealand will need to comply with international standards by virtue of either their own flag state, or other port State requirements on the same voyages, not being a State party puts New Zealand on the back foot in terms of any negotiations relating to Annex 6 at the IMO. Fortunately, there has been some movement with the Ministry of Transport consulting on New Zealand becoming a party at the end of 2018. Public consultation closed on Monday, 11 February 2019 so we can hope to see some further progress during this year.

The changing climate conditions have also impacted trading routes, creating new opportunities for shipping in the Arctic regions. Such developments are being accompanied by measures to reduce the use and carriage of heavy fuel oil in these Arctic waters – an issue currently being considered by the pollution prevention and response subcommittee. The use and transport of Heavy Fuel Oil is already prohibited in Antarctic waters. MEPC will be having its 74th session in the week of 13 to 17 May 2019.

Safety

Polar waters are also on the agenda of the Maritime Safety Committee with New Zealand taking a lead on seeking further regulatory measures at IMO for the safety of “Non-SOLAS” ships operating in polar waters.

The IMO has long recognised that the polar regions, both Arctic and Antarctic, pose significantly different and additional safety risks to ships that operate in those waters. What started off with regional guidelines for additional safety measures for ships operating in Arctic waters eventually lead to the creation of the mandatory Polar code (covering both Antarctic and Arctic waters) that came into effect in 2017. However, the mandatory provisions of the Polar Code were implemented primarily through amendments to existing provisions under SOLAS (and MARPOL for environmental matters). That means that ships not covered by those parent conventions are not subject to the additional safety measures.

New Zealand, with its search and rescue region of approximately 30 million kilometres of ocean including Antarctic waters, has particular concern for the safety of pleasure craft and fishing vessels in the Southern Ocean. A working group has been established at MSC to consider the various proposals. These include proposals for amendments to SOLAS to extend the application of parts of the Polar Code; proposals for mandatory measures to determine ships operational limitations in ice; and proposals for the mandatory carriage of a Polar Water Operational Manual or an equivalent. In the meantime, consideration will be given to a resolution to encourage member states to implement recommendatory, rather than mandatory, measures. Guidelines are also to be developed by the subcommittee for ship design and construction for fishing vessels over 24 metres in length and pleasure craft over 300GT not engaged in trade.

Advancements in autonomous technology remains topical as regulation strives to keep up with its development and potential use. The challenge for IMO is not just considering autonomous vessels in the context of the existing regulatory framework but recognising the different legal frameworks that may apply and coordinating the work across various committees to ensure a coherent approach is taken across IMO.

The Maritime Safety Committee is taking the lead on this at IMO with a Regulatory Scoping Exercise. Fundamentally what that exercise needs to identify is how these autonomous ships (referred to as MASS) are or are not already subject to the existing frameworks, and then consider the policy question of whether the existing provisions are adequate or appropriate or if amendments or new provisions are required.

One challenge for the safety consideration is identifying and categorising the various and differing levels of autonomy, recognising that both the definition and related policy issues will not be the same in each case.

Several States have submitted papers proposing a method of work to advance this, and at least at this initial stage, it looks like MSC will take a reasonably high-level analysis of regulations and rules with the review of mandatory instruments the priority. In the meantime, intersessional work may continue with the possibility of guidelines being developed. The development of recommendatory guidelines recognises there may be a need for regulatory guidance or a uniform approach in the interim, while mandatory provisions – more contentious – are developed. The next meeting of the MSC will be 5-14 June 2019.

Legal

A similar regulatory scoping exercise for MASS is being undertaken by the IMO Legal Committee. The conventions for which the Legal Committee has responsibility have somewhat different issues to MSC, being focused more on jurisdictional matters in the context of the intervention powers of coastal states after casualties giving rise to pollution incidents, pollution liability and compensation provisions, requirements for mandatory insurance, and rights to limit liability. While this means that some of the issues that arise from differing levels of autonomy may be less relevant, liability and compensation regimes will pose their own unique issues to be considered and this scope may be expected to develop further.

The regulatory scoping exercise for MASS was one of two new work items added to the Legal Committee agenda in 2018, and a working group is expected to convene at the Committee's meeting on 27-29 March. The other new item on the agenda in 2018 related to measures to prevent the unlawful practices associated with the fraudulent registration and fraudulent registry of ships. In 2019 we can expect to see papers submitted by Member States with their proposals for concrete measures for the Committee to consider in order to address this issue.

Further proposals for another new work item are expected to be considered at the upcoming meeting with the International P & I Group and several other countries asking the Legal Committee to consider a unified interpretation of the ship owners right to limit liability under the various liability and limitation conventions.

At the heart of this paper is the practical question of the test for "breaking" limitation. Although being put before the Legal Committee, the issue follows concerns raised in the context of the IOPC funds meetings after the decision of the Spanish court in the Prestige case. In that case, not only did the shipowner lose the right to limit liability, but the court held the P & I Club was directly liable to up to amount of insurance held (US\$1 billion) notwithstanding the insurers right to limit liability under the CLC convention. As many of the liability conventions contain similar provisions, a consistent and uniform application is being sought. One difficulty may be whether States characterise the issues in the same way. Within IOPC Funds there has been debate on whether the problem relates to effective implementation of IMO conventions or is a question of interpretation or procedural law that is properly a matter for the relevant Member State.

These liability, insurance, and limitation issues are good examples of how different but related issues may come up in one international body but subsequently relate to matters that are in or need to be dealt with by another international body.

This is not limited to IMO matters. For example, the Antarctic Treaty partners (which include Australia and New Zealand) will also need to wrestle with questions of liability, insurance, and limitation in the context of how existing international regimes interact when the Liability Annex to the Antarctic treaty comes into force. Moreover, the questions of liability and limitation are also having to be re-framed and re-considered in the context of the technology developments referred to above. The introduction of new technologies may create new forms of liability including contract and product liability. The role and function of remote operators, and the definition of shipowners in the existing conventions will need to be looked at more closely, especially in the context of the right to limit liability. Questions of who should be required to hold mandatory insurance and potential enforcement or jurisdictional issues can also be foreseen if remote operators are based in countries other than the flag or member State.

The challenge for national regulators, especially when different internal agencies may have the lead, is to see the relationships and links between these different work streams and to take a consistent approach notwithstanding that issues may be dealt with across different committees or different bodies at the international level.

There is also an important role for private practitioners and organisations such as MLAANZ and CMI to contribute to work that may ultimately underpin proposals by Members States towards international regulatory design. That is the challenge for all of us.

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