SEMAPHORE

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Pollution Incident Would Prompt Antarctic Legal Quandary

Until sufficient nations ratify the Liability Annex of the Antarctic Treaty, thereby entering it into force, Antarctic waters are exposed to legal uncertainty if a pollution incident occurs.

Wynn Williams solicitor Emily Ferguson

Emily Ferguson, solicitor with Wynn Williams, explained this scenario in her address to the MLAANZ New Zealand branch conference titled “Iceberg Ahead? Liability Issues from Shipping in Antarctica”.

Detailing the background to the Antarctic Treaty, Ms Ferguson said it entered into force in 1961 and has produced three principal outcomes.

- ensuring that Antarctica is used for peaceful purposes only
- promoting international scientific co-operation
- ensuring the continuance of international harmony

It contains no provisions relating to liability and compensation.

The Antarctic Treaty has, however, temporarily set aside disputes over territorial sovereignty. Article IV effectively freezes existing territorial claims and provides that activities undertaken while the Treaty is in force will neither improve nor diminish claims.

While the solution has allowed co-operation between countries to undertake activities in Antarctica, it does not provide a permanent legal solution to the territorial claims or resolve the question of Antarctica’s legal status.

Ms Ferguson explained that the uncertain legal status of Antarctica has direct implications on whether International Maritime Organization (IMO) Conventions relating to liability and compensation apply to Antarctic waters.

The Bunker Convention (2001 International Convention on Civil Liability for Bunker Oil Pollution Damage) covers pollution damage caused by spills of oil when carried as fuel in ships’ bunkers, and the Wreck Removal Convention (2007 Nairobi International Convention on the Removal of Wrecks) provides a legal basis for states to remove shipwrecks that may have the potential to adversely affect the safety of lives, goods and property at sea.

However, these provisions may fall short when applied to Antarctic waters.

The scope of IMO conventions are generally limited to pollution damage caused:

- in the territory, including the territorial sea, of a state party
- in the exclusive economic zone of a state party, established in accordance with international law or, if a state party has not established such a zone, in 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
- in preventative measures, wherever taken, to prevent or minimise such damage

Ms Ferguson pointed out there are no coastal states with a generally-recognised territorial sea or exclusive economic zone or equivalent in Antarctic waters. The result of this is that the scope of the Bunker Convention and Wreck Removal Convention arguably does not apply to Antarctic waters – except, possibly "preventative measures" in certain circumstances.

The Antarctic Treaty does have a protocol on environmental protection. In the same protocol, Annex VI – Liability Arising from Environmental Emergencies, was adopted in 2005 to create a liability and compensation regime applicable to environmental emergencies in Antarctic waters. It will enter into force once all 29 consultative parties that attended the 28th Antarctic Treaty Consultative Meeting have ratified Annex VI.

Unfortunately, only 16 of the required 29 parties have done so and therefore the Annex is not yet in force.

Should it eventually be ratified by the required signatory nations, Annex VI would allow the undertaking of reasonable preventative measures to reduce the risk of environmental emergencies (Art 3), and also:

- require operators to establish contingency plans (Art 4)
- require operators to take prompt and effective response action to environmental emergencies (Art 5)
- create liability on the operator for costs taken by state parties in the event the operator fails to respond (Art 6)
- provide its own distinct limits of liability (Art 9)
- require operators to maintain insurance or financial security (Art 11)
- establish a fund to provide for the reimbursement of reasonable costs taken (Art 12)

In terms of what is an "environmental emergency", Annex VI defines this as: "Any accidental event that has occurred, having taken place after the entry into force of this Annex, and that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment."

The annex defines "response action" as: "Reasonable measures taken after an environmental emergency has occurred to avoid, minimise or contain the impact of that environmental emergency, which to that end may include clean-up in appropriate circumstances, and includes determining the extent of that emergency and its impact."

Annex VI does leave some areas of doubt.

It gives no rights of direct action against a financial security provider. It is unclear what the inter-relationship is between the limitation of liability provision in the Liability Annex and the Limitation of Liability for Maritime Claims. And there is potentially no liability for irreparable environmental damage, due to liability being linked to the cost of response action.

However the main “takeaway” point Ms Ferguson emphasised in conclusion was – if no relevant IMO liability regime applies, and the Liability Annex is not yet in force, then it leaves a gap in the international liability regime.

Until the Liability Annex enters into force, Antarctic waters are exposed to legal uncertainty if a pollution incident occurs.

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