
Comite' Maritime International

Report of the ad hoc Working Group on a legal regime for the Arctic and Antarctic to the Executive Council at its meeting in Oslo, Norway on September 25, 2011 and, if approved, to the Assembly on September 27, 2011

The ad hoc Working Group was formed earlier this year to identify legal issues involving the Arctic Ocean and the Southern Ocean. It consists of the following CMI members:

Chairman - Nigel Frawley

Professor Aldo Chircop, Dalhousie University, Halifax, Nova Scotia, Canada

Professor Donald Rothwell - Australian National University, Canberra

Douglas Davis - MLAUS

Apart from a number of e-mail exchanges, a meeting of the Group was held in Fairbanks, Alaska on July 26, 2011 on the occasion of a Workshop conference at the University of Alaska. A co-sponsor of the conference was Dalhousie University of Halifax, N.S. The outcome of our CMI meeting is attached hereto.

There were about 100 registrants at the Workshop - mostly academics, Government officials and a few marine lawyers from all the Arctic States and a few from China and other countries who are interested in the subject of future governance of the Central Arctic Ocean beyond national jurisdiction. The discussions included Climate Change, Marine Biology and Geology, a Fisheries Regime, the new Arctic Search and Rescue Agreement, the Arctic Council's "Arctic Marine Shipping Assessment", UNCLOS, Defence and Security Issues, the Seabed, the proposed Polar Code, Shipping in the Northern Sea Route, the North West Passage and future possibilities for commercial shipping through the Central Arctic Ocean.

The CMI is in the process now of putting together an International Working Group to study the issues that were recommended by the ad hoc Working Group.

Nigel H. Frawley
Secretary - General

September 9, 2011

Nigel Frawley

From: "Nigel Frawley" <nhfrawley@earthlink.net>
To: "Aldo Chircop" <aldo.chircop@dal.ca>; <RothwellD@law.anu.edu.au>; "Davis, Doug" <Doug.Davis@kyl.com>
Sent: Saturday, July 30, 2011 7:27 PM
Subject: CMI Working Group Meeting - Workshop in Fairbanks, Alaska July 24-27, 2011 on the Arctic Ocean Beyond National Jurisdiction
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Meeting of the Arctic / Antarctic Working Group in Fairbanks, Alaska on July 25, 2011.

Present: Nigel Frawley (Chairman), Professor Aldo Chircop, Professor Donald Rothwell and Douglas Davis.

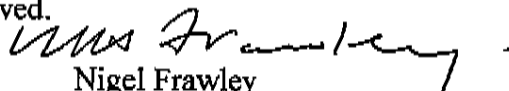
Purpose: To identify matters for further study by the CMI.

The consensus of the WG was to choose subjects that are basically uncontroversial and are relevant to both the Central Arctic Ocean ("CAO") beyond national jurisdiction, and the Southern Sea in the Antarctic.

After discussion, the following was decided (in no particular order) :-

1. Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS).
2. Load Line Convention (LLC).
3. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW).
4. International Convention on Maritime Search and Rescue, 1979 (SAR); Nuuk Declaration May 12, 2011.
5. Arctic Marine Oil Pollution Preparedness and Response (EPPR); Nuuk Declaration May 12, 2011.
6. The International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 relating thereto (MARPOL 73/78).

The WG decided that before the CMI Executive Council meeting in Oslo on September 25, 2011, the foregoing will be expanded upon with one or two paragraphs of explanation of what should be considered and might be achieved.


Nigel Frawley
Chairman

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Comments by Nigel H. Frawley on the Collision Regulations, 1972 as applicable to the Arctic and Southern Oceans

The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (herein COLREGS¹) sets out seamanship and technical rules for the prevention of collisions on the High Seas and in all waters connected therewith which are navigable by seagoing vessels. The rules apply to navigation in the Arctic and Antarctic, but they do not contain specific rules for ships navigating in ice-covered waters. For example, there have been collisions in the Arctic between ships in ice convoys led by ice breakers. The Central Arctic Ocean beyond National Jurisdiction and the Southern Ocean of the Antarctic can safely be described as the High Seas though presently in large part covered by ice most of the year. With the advent of climate change, and computer model predictions of ice-free conditions in much of these waters in the summer months in the next 20 years or so, the extended shipping season and increased shipping in the Polar regions give rise to the need to examine the COLREGS as they can be expected to assume greater importance. The COLREGS do, however, cover situations where a ship is restricted in its ability to manoeuvre. Although ice is not specifically referred to, it might, given the circumstances, permit an exemption from compliance with certain rules. Further, the application of some other rules may need to be considered with reference to ice navigation. The navigation safety rules in this Convention were, no doubt, adopted with open waters in mind. Open waters in the Polar regions do not necessarily mean ice-free waters, but rather waters that are navigable under certain conditions. Those conditions frequently change and often ice breakers are needed. Compulsory Pilots or Ice Navigators will need to be considered and possibly provided for if and when the IMO Polar Code is completed and made mandatory. Some considerable revision and clarity in the rules appears to be called for.

Nigel H. Frawley
Secretary-General

September 6, 2011

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International Convention On Load Lines;
Issues For The Arctic And Antarctic
Comments by Douglas R. Davis

The First International Convention on Load Lines was adopted in 1930 and eventually became the International Convention on Load Lines in 1966 ("CLL"). The Convention was amended by the 1988 Load Lines Protocol and further revised in 2003. The Convention included provisions for determining the freeboard of ships by subdivision and damage stability calculations. The Convention's regulations take into account the potential hazards proposed by different geographical zones and seasons. The technical annex provides for additional safety measures with respect to doors, freeing ports, hatchways and other items. The purpose of these measures are to ensure the watertight integrity of ships below the freeboard deck.

In 2008, the Intact Stability Code ("IS Code") was adopted and became mandatory under SOLAS and the 1988 Protocol. The IS Code provides stability criteria and other measures in an attempt to ensure safe vessel operation, and minimize risks to ships, crews, and the environment. Part A of the IS Code contains mandatory provisions, while Part B is recommendatory in nature, and relates to intact stability criteria for all types of ships covered by IMO instruments.

Chapter 6, Part B of the IS Code contains recommendations for ships operating in icing conditions where ice accretion is likely to occur and which may adversely affect stability. Specific recommendations are included for vessels carrying deck cargoes of timber, fishing vessels, and offshore supply vessels. Part B, Chapter 6, also contains guidance with respect to areas where icing considerations should apply in north and south latitudes.

The IMO's Guidelines for Ships Operating in Polar Waters, 2009, attempt to promote safety of navigation and pollution from ships operating in polar waters. The Guidelines provide various recommendations with respect to construction and operation of vessels in these waters, as well as vessel safety systems, training, and emergencies, and environmental protection and damage control.

Given recent and increased attention to Arctic and Antarctic shipping issues, the CLL and IS Code should be reviewed to determine whether their provisions are up to date and relevant for navigation in and adjacent to the central Arctic Ocean and the Southern Ocean. Any changes to the CLL should be undertaken after full review of other regulatory provisions in existing conventions as well as suggested

guidelines such as the IMO's Polar Guidelines. Consideration should be given as to whether desired objectives can best be accomplished by amending the existing CLL, or by incorporating desired regulatory changes into new regulatory provisions.

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Arctic/Antarctic Working Group

Comments by Aldo Chircop, Marine & Environmental Law Institute,
Schulich School of Law, Dalhousie University

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) as amended

The international standards and rules concerning polar seafaring are in a state of transition. At this time, despite a number of initiatives, there are no international mandatory standards and rules. Polar seafaring requires particular education, training, experience and related qualifications. Ships navigating polar waters also require competent and experienced ice navigator(s) onboard, upon whose knowledge and skill the safety of the vessel and those on board depends and the protection of the marine environment ensured. A finding of a recent Arctic Council seminal report on Arctic shipping notes that most ice navigator training programmes are *ad hoc* and there are no uniform international training standards (*Arctic Marine Shipping Assessment, 2009, 68*). The current voluntary IMO Guidelines for Ships Operating in Polar Waters (IMO Resolution A.1024(26), 2 December 2009), provide for onboard manuals including drills and emergency instructions, and also recommend at least one ice navigator on board the ship. Particular training for polar seafarers includes skills to address certain problems without shore and support infrastructure. The recent 2010 Manila amendments to STCW (IMO Doc. CONF\STCW\2\34.DOC) address aspects of polar seafaring, but again stop short of adopting detailed mandatory standards and rules in anticipation of a future mandatory polar code, currently under development at the IMO, likely to be completed not before 2015-2016. Chapter V, Section B-V/g of the amended STCW provides guidance and special training requirements of masters and officers operating in polar waters. The amendments advise on several important matters, such as experience of masters and officers, safe routing and passage planning, risk assessment and operating a ship in ice, local requirements for entering different regions (e.g., the Antarctic Treaty, national requirements), safety precautions and emergency procedures, safe working procedures, awareness of the most common hull and equipment damages and how to avoid them, fire-fighting systems limitations and environmental considerations. Resolution 11 adopted at the Manila Conference called upon governments to take measures to ensure competency of masters and officers of ships operating in polar waters, and in particular to be able to plan voyages taking into account the unique navigational conditions of polar regions and to supervise and ensure compliance.

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Arctic/Antarctic Working Group

Comment by Aldo Chircop, Marine & Environmental Law Institute,
Schulich School of Law, Dalhousie University

International Convention on Maritime Search and Rescue, 1979 (SAR Convention); Nuuk Agreement on Cooperation in Aeronautical and Maritime Search and rescue in the Arctic, 2011

Maritime search and rescue (SAR) in both polar regions faces major challenges in terms of remoteness, harsh environment and insufficient SAR infrastructure. The 1979 SAR Convention establishes a duty on State Parties to ensure that necessary arrangements are made for the provision of adequate SAR services for persons in distress at sea near their coasts and calls for regional cooperation in the provision of SAR services. Both the Antarctic and Arctic have such cooperative arrangements. The IAMSAR Manual provides guidelines for implementing SAR. In the Antarctic region (defined to also include peripheral areas) Argentina, Australia, Chile, New Zealand and South Africa have agreed to share SAR coordination by dividing Search and Rescue Regions, each having a Rescue Coordination Centre under the auspices of the IMO (SAR Convention, 1979, Annex) and ICAO (Chicago Convention on International Civil Aviation, 1944, Annex 12). In the Arctic, Arctic Council members (Canada, Denmark/Greenland, Finland, Iceland, Norway, Russian Federation, Sweden, United States) implemented AMSA recommendation "E" by concluding the Agreement on Cooperation in Aeronautical and Maritime Search and rescue in the Arctic at the recent Ministerial Meeting in Nuuk in May 2011. As in the case of Antarctic SAR, SAR regions are apportioned among Parties, some peripheral areas are included and the SAR and Chicago conventions (to which all Arctic States are parties) constitute the basis for conducting operations in the region. In addition to the individual undertaking of State Parties to build their SAR capacities, the agreement provides for information exchange, exercises and includes procedures for entry into the territory of a State Party, including for refuelling, consistently with the SAR Convention. The agreement contains provision for cooperation with non-Parties. This is useful because of the growing presence, for example in the Arctic, of ships that are owned or flagged in non-Arctic States.

While regional agreements have gone some way in addressing deficiencies, SAR will continue to be a challenge as shipping, and in particular cruise shipping with substantial numbers of passengers, increases in these remote and harsh environments. While delivery of SAR services in this and other scenarios can be expected to be an issue, the legal framework for SAR per se is not necessarily at issue. The rationale of SAR is humanitarian assistance to persons in distress at sea and therefore there is no expectation that States that deliver the service expect to be remunerated for their services. However, the group will undertake study of particular case studies involving SAR in polar waters to determine if legal issues arose.

Any potential liability issues that could arise would more likely relate to the liability of carriers, in particular passenger carriers such as cruise and venture vessels under the Athens Convention, and which are increasing operations in these remote areas. It is possible that the seaworthiness of non-ice class passenger vessels in these waters could be questioned. Also, it is conceivable that such vessels could be operating outside their trading region for marine insurance purposes, unless special cover is obtained.

Comité Maritime International**Arctic/Antarctic Working Group**

comments by Professor Donald R. Rothwell, Professor of International Law, ANU College of Law,
Australian National University

12 September 2011

Emergency, Preparedness, Prevention and Response (EPPR)

Both the Arctic and Southern Oceans are remote from emergency response facilities. In Antarctica scientific bases along the continent have limited capacity and infrastructure to provide EPPR, and similar issues arise in the sub-Antarctic where islands are either uninhabited or have minimal infrastructure. Identical issues arise in the central Arctic Ocean due to its isolation and the potential for extreme weather to interfere with any EPPR. These issues were highlighted in the Southern Ocean by the November 2007 sinking of the *MV Explorer* in the Bransfield Strait off King George Island, which resulted in a response from the Chilean mainland. An Action Group on Antarctic Fuel Spills (AGAFS) was formed following this incident. This is notwithstanding that EPPR is addressed under Article 15 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty under which the parties agree to provide response to environmental emergencies and cooperate in the formulation of contingency plans. However no more detailed mechanisms have been established by the Council of Managers of National Antarctic Programs (COMNAP). The Arctic Council has a dedicated EPPR Working Group which was established in 1996 which has sought to coordinate the response of Arctic states, develop work plans and conduct emergency exercises. A Strategic Plan of Action has been devised and was updated in 2010. However a feature of the mechanisms in place in both the Arctic Ocean and the Southern Ocean is that there is no clear legal framework for EPPR and this raises particular issues in areas that are beyond the limits of national jurisdiction. This gap in the legal framework has been highlighted by the 2011 Nuuk Declaration of the Arctic Council which has decided to establish a Task Force to develop an EPPR international instrument for the Arctic.

Marine Pollution and MARPOL

The polar marine environment is particularly susceptible to the impact of marine pollution. The 1989 *Exxon Valdez* maritime disaster in Prince William Sound, Alaska, while occurring in the sub Arctic, highlighted the potential impact a substantial oil spill would have upon the polar oceans and marine environment. MARPOL, as the principal international instrument regulating ship-sourced marine pollution has given some recognition to the importance of the polar oceans, however that protection is not comprehensive. The Southern Ocean is listed as a 'Special Area' under MARPOL, Annex I, II, and V. However, there is no equivalent listing for the Arctic Ocean. The potential for greater numbers of vessels to navigate within and through the polar oceans raises for consideration whether MARPOL and the regime for its implementation is adequate. Under MARPOL Annex VI neither the Southern Ocean or the Arctic Ocean has a designated emission control area. In 2009 the Arctic Marine Shipping Assessment (AMSA) recommended that Arctic states support the development of improved practices and innovative technologies for ships so as to reduce a number of emissions. In that regard, MARPOL has given increasing attention to coastal and port state

implementation. However in the Southern Ocean, with the exception of the sub-Antarctic islands, coastal states are not recognised as having sovereignty or jurisdiction and are therefore unable to exercise traditional coastal state jurisdiction with respect to marine pollution. Likewise, port states may be some considerable distance from areas where a pollution incident has occurred, which due to its isolation may never have been identified in the first instance. While coastal state jurisdiction is recognised in the Arctic, the central Arctic Ocean is beyond national jurisdiction, and extremely remote. Issues arise here also with respect to the potential for port state jurisdiction to also be effective. While the Antarctic Treaty System under Annex IV of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, and the Arctic Council under the Protection of the Arctic Marine Environment working group have sought to address some of these issues, there has to date been no comprehensive legal response. These factors suggest the need for MARPOL to be modified to reflect the particular issues that arise in regard to marine pollution in the polar regions.