

# REPORT OF CMI IWG (POLAR SHIPPING) ACTIVITIES

(1 January-30 June 2016)

IWG Membership: Aldo CHIRCOP, *Chair*; Frida ARMAS PFIRTER; David BAKER; Peter CULLEN; Nigel FRAWLEY, *advisor*; Gen GOTO; Tore HENRIKSEN; Kiran KHOSLA; Young-Kil PARK; Bert RAY; Nicolò REGGIO; Henrik RINGBOM; Lars ROSENBERG OVERBY; Donald ROTHWELL; Alexander SKARIDOV; David (Duke) SNIDER, *Technical Advisor*

## 1. INTRODUCTION

The IWG continued to operate on the basis of its current work plan through e-mails and telephone conferences.

The IWG's main work was conducted through the following subgroups:

- Conventions: N. Frawley (chair), G. Goto, T. Henriksen, B. Ray, H. Ringbom & A. Skaridov.
- Load lines: A. Chircop (chair), B. Ray, N. Reggio & D. Snider.
- Civil liability: L. Rosenberg Overby (chair), D. Baker, P. Cullen, K. Khosla, B. Ray, S. Skaridov; by invitation, E. Røsæg and O. Gayazova (Scandinavian Maritime Institute, University of Oslo, Norway).
- Polarworthiness: P. Cullen (lead), A. Chircop & N. Frawley
- Collision avoidance regulations: A. Chircop (lead), P. Cullen & N. Frawley

## 2. IWG ACTIVITIES SINCE CMI ISTANBUL

### 2.1 Review of private maritime law conventions

The systematic review of thirty private and some public maritime law conventions to ascertain their applicability or otherwise to the Arctic and Antarctic has been completed under the leadership of N. Frawley. The review considers whether there are instruments that would benefit from amendment to better address the needs of polar shipping. Final inputs into the current version of the draft report are expected before finalization.

The review concludes as follows:

1. The IWG recommends that the CMI draft a definition of "Polarworthiness" for the Hague Rules, Hague-Visby Rules, and Rotterdam Rules as referred to in paragraphs 8, 9, and 12 herein.
2. The IWG further recommends that the CMI study the Nairobi International Convention on the Removal of Wrecks, 2007 (referred to in paragraph 18) with respect to whether liability under this Convention (currently limited to the LLMC as amended) will be

sufficient to cover potential liability.

3. Of all the Conventions referred to in this Report, the fact that the HNS Convention is not yet in force will have a disastrous impact on the Arctic Ocean and the Southern Ocean if a major HNS spill occurs. It is recommended that the CMI's Ratification and Implementation Committee bring as much pressure to bear on the IMO as is possible to convince States to ratify this Convention as soon as possible.
4. As noted above, the Ballast Water Management Convention 2004 is not yet in force. Discharge of ballast water into the Arctic Ocean and Southern Ocean would have a disastrous impact on the eco-systems in those waters. It is recommended that the CMI bring pressure to bear on Governments to ensure that this Convention comes into force as soon as possible.

Pending further discussion, at this time the IWG is not submitting specific recommendations to ExCo and Assembly.

## **2.2 Load lines in polar shipping**

At CMI Istanbul the IWG meeting agreed that work on polar load lines should be continued on the basis of the working paper with a view to advancing a recommendation to ExCo and Assembly advising the International Maritime Organization to consider load lines for Arctic shipping within the framework of the International Convention on Load Lines, 1968 (LLC). A. Chircop will present an updated rationale for action on load lines at CMI New York (Polar Shipping and Arctic Development Symposium on 5 May 2016; see below), with the title "The Load Lines Convention and Arctic Navigation."

The IWG will have a pre-conference meeting in New York and will, among other, discuss a draft recommendation to ExCo and Assembly. With the expected increase in international shipping in the Arctic and in the aftermath of the adoption of the Polar Code with amendments to SOLAS, MARPOL and STCW, it is appropriate to consider whether the LLC in its present state is sufficient for load lines in this region. At this time, the LLC does not contain an Arctic-specific annex and the only and partial provision concerns the boundaries of the North Atlantic Winter Seasonal Zone I load lines, which apply off the coast of Greenland. Recent IMO regulations for polar shipping did not address load lines. Moreover, recent science demonstrates that the Arctic waters regime is in a state of flux with larger concentrations of fresh water than previously thought. The reduced freeboard may have to be considered for transits in the region in consequence of a higher percentage of fresh water. With increased traffic particularly focused on resource extraction and export, ships will be loading to full marks in a region under different assumptions.

The proposed Draft Recommendation is as follows:

## DRAFT RECOMMENDATION TO EXECUTIVE COUNCIL AND ASSEMBLY

“The International Working Group on Polar Shipping recommends to the Executive Council and Assembly to invite the International Maritime Organization to consider whether, in light of the absence of Arctic-specific international load lines applicable to waters subject to the Polar Code, it is timely and appropriate to consider the need for formal extension of the North Atlantic Winter Seasonal Zone I load lines as defined in Annex II of the International Convention on Load Lines, 1968,<sup>1</sup> as amended, to Arctic waters as defined in the Polar Code, or, if appropriate, to consider the development of a new annex on Arctic load lines for inclusion in the Convention.”

### **2.3 The pollution liability regime in polar regions**

The sub-group on civil liability in polar shipping chaired by L. Rosenberg Overby (with contributions from D. Baker, P. Cullen, K. Khosla, B. Ray, E. Røsæg, O. Gayazova and A. Skaridov) continued work after CMI Istanbul to complete the working paper entitled: “Report on the Legal Framework for Civil Liability for Vessel Source Oil Spills in Polar Regions.” The paper was compiled and edited by L. Rosenberg Overby. The paper has been submitted to the CMI Yearbook for publication and will be posted on the website and presented by L. Rosenberg Overby in CMI New York (Polar Shipping and Arctic Development Symposium, 5 May 2016; see below).

The working paper concludes with the following:

The legal infrastructure in the Arctic is very good technically speaking in the sense that the coastal states have in place legislation that deals with pollution, liability, calculation of losses, responsible parties and funding.

A major oil spill may reveal the need for considering the current regulation of “pollution damage” in the CLC 1992 convention in terms of what measures are “reasonable” and as regards impairment of the environment. The representatives of the International Group of P&I Clubs and the International Chamber of Shipping do not believe that the analysis in section 11 of the report supports this conclusion.

It is possible that a major oil spill will stress the monetary limits of the CLC and Fund Convention regime although the Supplementary Fund may be sufficient in most instances. This view is not shared by the representatives of the International Group of P&I Clubs and the International Chamber of Shipping who consider the two funds in combination with the vessels compulsory P&I cover adequate.

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<sup>1</sup> “The North Atlantic Winter Seasonal Zone I lies within the meridian of longitude 50°W from the coast of Greenland to latitude 45°N, thence the parallel of latitude 45°N to longitude 15°W, thence the meridian of longitude 15°W to latitude 60°N, thence the parallel of latitude 60°N to the Greenwich Meridian, thence this meridian northwards.” International Convention on Load Lines, 5 April 1966, 640 UNTS 133 (in force 21 July 1968), Annex II, Art. 46(1).

It is an open question how the requirement that environmental reinstatement cost must be reasonable – in the context of the CLC and Fund Convention regime – will be applied by courts in the relevant coastal states and the IOPCF to such reinstatement attempts in the special Arctic environment. Clarification of the recoverability of reinstatement costs under the CLC and Fund Convention regime would therefore assist the coastal States. The representatives of the International Group of P&I Clubs and the International Chamber of Shipping disagrees with this conclusion.

These observations are even more apparent considering the current response facilities and equipment that are available in the Arctic.

Russia would benefit from participating in the Supplementary Fund Protocol to the Fund Convention 1992 should a major oil pollution occur. So would Iceland.

There is a gap with respect to the High Seas in the Arctic but this is not problematic at the moment. In time, the issue should be addressed in the interest of the International community.

As regards the United States there is no indication that it will join the CLC and Fund Convention regime, and will continue to enforce its domestic laws governing spills, including OPA 90.

The Antarctica is exposed to legal uncertainty in the event that a pollution incident occurs until the liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty is ratified. Therefore, it is specifically recommended that the Antarctic Treaty Protocol States ratify the Liability Annex described in section above.

The Polar Shipping Working Group proposes that the report is submitted to the IMO Legal Secretariat and discussions take place with the IMO Legal Secretariat to consider further.

Finally, it would be natural for the coastal state IWG members to provide their competent local authorities with a copy of this report

Accordingly, in New York the IWG will discuss the following Draft Recommendation:

#### DRAFT RECOMMENDATION TO EXECUTIVE COUNCIL AND ASSEMBLY

The International Working Group on Polar Shipping proposes to the Executive Council and Assembly that the “Report on the Legal Framework for Civil Liability for Vessel Source Oil Spills in Polar Regions” be submitted to the International Maritime Organization’s Legal Affairs and External Relations Division for consideration and further discussion as necessary.

## **2.4 Polarworthiness**

P. Cullen prepared a preliminary outline of a working paper on polarworthiness for discussion at the IWG's meeting in New York. A presentation on aspects of the working paper, entitled "Polarworthiness – a new standard of seaworthiness in the Polar context?" will be made by P. Cullen at the Polar Shipping and Arctic Development Symposium on 5 May 2016 (see below).

## **2.5 COLREGs in polar environments**

A. Chircop prepared an initial annotated outline for a working paper on this subject for discussion at the IWG's meeting in New York.

## **2.6 Website**

The IWG page on the CMI website was updated with the assistance of the Secretariat.

# **3. IWG ACTIVITIES AT CMI NEW YORK**

## **3.1 IWG meeting**

The annual IWG plenary will convene at the Hilton Midtown in New York on 3 May at 10.00 with the following draft agenda:

1. Review of draft and adoption of agenda
2. Review of progress of work since Istanbul
  - (a) Load Lines Convention draft recommendation to ExCo and Assembly
  - (b) Pollution liability working paper and draft recommendation (L. Rosenberg-Overby)
  - (c) Private maritime law conventions (N. Frawley)
  - (d) Polarworthiness: status (P. Cullen)
  - (e) Colregs in polar environments: status (A. Chircop)
3. Proposals for new IWG areas of study
4. Membership matters
5. Any other business

## **3.2 Polar Shipping and Arctic Development Symposium**

The IWG Chair worked closely with P. Buhler (MLAUS) with regard to the Polar Shipping and Arctic Development Symposium: A Joint Program of the MLA International Organizations Committee and the Polar Working Group of the CMI on 5 May 2016.

The IWG will be fielding the following members as speakers at the Symposium: D. Baker, A. Chircop, P. Cullen, T. Henriksen, B. Ray, L. Rosenberg Overby and A. Skaridov.

The session's programme has now been finalized as follows:

0900-0910	Introduction and Opening Remarks	<b>Aldo Chircop</b> , Chair, Polar Shipping IWG of the CMI <b>Phillip Buhler</b> , Chair, IOCS Committee of the MLA
0910-1015	Keynote Speaker	<b>ADM Robert Papp</b> (Ret), Chair, Arctic Council, Special Representative for the Arctic, U.S. Dept. of State
1015-1045	Tea & coffee break	
1045-1145	Panel Discussion on Status and Issues with the Polar Code	<b>Phillip Buhler</b> , Moseley, Prichard, Parrish, Knight & Jones, Jacksonville, Moderator <b>RADM Steven Poulin</b> , Judge Advocate General and Chief Counsel, USCG <b>Peter Pamel</b> , Borden, Ladner Gervais LLP, Montreal <b>Tore Henriksen</b> , Professor & Director, K.G. Jebsen Center for the Law of the Sea, University of Tromso – The Arctic University of Norway
1145-1300	Panel Discussion on Civil Liability for Drilling and Transportation of Petroleum Products	<b>Larry Kiern</b> , Winston & Strawn, LLP, New York, Moderator <b>Lars Rosenberg Overby</b> , Hafnia Law Firm, Copenhagen <b>Bert Ray</b> , Keesal Young & Logan, Anchorage <b>David Walker</b> , Royston, Rayzor Vickery & Williams LLP, Houston
1300-1400	Lunch Break	
1400-1445	Regulation of Fisheries Regimes	Introduction: <b>Mark Coberly</b> , Chair MLA Fisheries Committee <b>Ambassador David Balton</b> , Deputy Assistant Secretary for Oceans and Fisheries, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State
1445-1545	Polarworthiness, Load Lines and Related Issues of Vessel Safety	<b>RADM Frederick Kenney</b> , USCG (Ret.), Director, Legal Affairs and External Regulations Division, International Maritime Organization <b>Aldo Chircop</b> , Prof. of Law and Canada Research Chair in Maritime Law & Policy, Schulich School of Law, Dalhousie University <b>Peter Cullen</b> , Stikeman Elliott, Montreal
1545-1630	Vessel Traffic Control and Separation Schemes	<b>Gary Rasicot</b> , Director of Marine Transportation Systems, USCG <b>Alexander Skaridov</b> , Professor, Chair Leader, Admiral Makarov Maritime University, St. Petersburg, Russian Federation
1630-1700	Lessons from the Antarctic	<b>David Baker</b> , Group Secretariat, International Group of Protection & Indemnity Clubs

#### **4. FUTURE INTENTIONS**

The major tasks identified as next steps include:

- Periodic review of IWG membership.
- Continue work to develop a working paper on polarworthiness.
- Develop a working paper on collision avoidance rules applicable to shipping in Arctic waters.
- Follow up decisions from the New York meeting.

Respectfully submitted,

Professor Aldo Chircop  
Chair, CMI IWG (Polar Shipping)  
Halifax, Canada, 12 April 2016