

SHIPPING WASTE AND WASTE SHIPS

MAY 2018

- SEATRADE CASE RAISES INTERESTING QUESTIONS
- ENVIRONMENTAL AND HEALTH AND SAFETY ISSUES ARE CURRENTLY AT THE TOP OF THE AGENDA FOR THE MARITIME INDUSTRY



“GIVEN THE ECONOMIC AND REGULATORY DISPARITY BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, THERE HAS LONG BEEN A CONCERN THAT RICHER NATIONS HAVE BEEN DUMPING THEIR WASTE IN POORER NATIONS.”

Dutch shipowner Seatrade was recently found in breach of the EU Waste Shipment Regulation¹ (the “Waste Regulation”) after selling four reefer ships for scrapping in India, Bangladesh and Turkey in 2012. This case raises interesting questions about the interaction between the Waste Regulation and the EU Ship Recycling Regulation² (the “Recycling Regulation”), attracting considerable interest from owners and operators alike.

With environmental and health & safety issues currently appearing at the top of the agenda for the maritime industry as well, it is a good time to review the international and EU laws that govern the transboundary movement of waste and the end-of-life scrapping of ships as well as the potential impact of Brexit on the UK’s international obligations in these areas.

The Basel Convention³

The Basel Convention was introduced to regulate transboundary movement of hazardous materials, such as asbestos, polychlorinated biphenyls (also known as PCBs), waste oils and other materials that can be harmful to human health and the environment⁴. One of its primary aims is to ensure that the receiving country has the

¹ Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on Shipments of Waste, 14 June 2006.

² Regulation (EC) No. 1257/2013 of the European Parliament and of the Council on Ship Recycling, 20 November 2013.

³ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

⁴ <http://www.basel.int/Home/tabid/2202/Default.aspx>

“THE WASTE REGULATION BRINGS THE BASEL CONVENTION INTO EU LAW BY MAKING THE TRANSFER OF WASTE BETWEEN COUNTRIES SUBJECT TO A SYSTEM OF ‘PRIOR INFORMED CONSENT’.”

facilities required to store and treat such waste⁵. Given the economic and regulatory disparity between developed and developing countries, there has long been a concern that richer nations have been dumping their waste in poorer nations, irrespective of the recipient’s ability to properly deal with the waste, and exposing their workforces to high rates of injury and death. The Basel Convention entered into force on 5 May 1992 and to date 186 countries are party to it.

Waste Regulation: Overview

The Waste Regulation brings the Basel Convention into EU law by making the transfer of waste (not just hazardous waste) between countries subject to a system of ‘prior informed consent’ between the regulatory agencies of those countries.

The type of prior informed consent required depends on the following factors:

- the type of waste being transported;
- whether it is being shipped for disposal or recovery; and
- whether the waste is to be transferred between two EU member states or out of the EU to (or via) a ‘third country’⁶ (and whether that third country is subject to the OECD Decision⁷ or a signatory to the Basel Convention).

Type of waste

The Waste Regulation categorises waste types under two principal headings⁸:

- ‘Green Listed Waste’ (essentially non-hazardous waste); and
- ‘Amber Listed Waste’ (essentially hazardous waste).

Green Listed Waste is generally subject to lighter touch regulation, provided it is being shipped for recovery⁹. However, Green Listed Waste must still be accompanied by certain prescribed information and must be managed in an environmentally sound manner throughout its movement.

Amber Listed Waste is subject to a formal notification procedure whereby the shipper of the waste must submit a notification to the regulatory authority in the country of origin, which then notifies the destination regulatory authority and any authorities in transit countries. The notification procedure is subject to strict time limits and, if the shipment cannot be completed, the waste must be returned to its origin. This ‘take-back’ mechanism for waste that cannot be adequately (or is illegally) recovered or disposed of, reflects an important tenet of the Basel Convention. Shipments of Green Listed Waste for recovery to non-OECD third countries are also subject to enhanced regulation until the point of recovery.

⁵ Ibid

⁶ i.e. non-EU country

⁷ OECD Decision C(2001)107 as amended by Decision C(2004)20.

⁸ Note that there are further sub-categories for mixtures of waste and for Green Listed Waste awaiting inclusion in the relevant annexes to the Basel Convention.

⁹ See below for difference between recovery and disposal.

“WHILST THE WASTE REGULATION HAS DIRECT EFFECT IN EU MEMBER STATES, NATIONAL LEGISLATION IS REQUIRED TO DESIGNATE A COMPETENT AUTHORITY AND SET OUT OFFENCES AND PENALTIES IN THE CASE OF A BREACH.”

Disposal or recovery?

The terms ‘disposal’ and ‘recovery’ are defined in the Waste Framework Directive¹⁰. Broadly speaking, disposal operations comprise landfill, incineration or permanent storage/impoundment and recovery operations comprise reclamation or re-use of the materials in some way. Disposal and recovery are mutually exclusive activities; however, the distinction may not always be entirely clear, especially given that recovery and disposal operations have experienced significant technological advances in recent years. With innovative ways of treating waste coming to market all the time, it can become unclear at what stage recovery operations are complete.

Prohibited waste shipments

There are several circumstances in which the Waste Regulation prohibits shipment, which are broadly set out below¹¹:

- imports and exports of waste for disposal between an EU member state and a third country¹²;
- imports and exports of hazardous waste for recovery between an EU member state and a third country¹³;
- exports of any waste from an EU member state to the Antarctic¹⁴; and
- exports of any waste for disposal from an EU member state to its overseas countries or territories and, in some cases, exports of hazardous waste for recovery from an EU member state to its overseas countries or territories¹⁵.

UK implementation

While the Waste Regulation has direct effect in EU member states, national legislation is required to designate a competent authority and set out offences and penalties in the case of a breach. These requirements are implemented in the UK under the Transfrontier Shipment of Waste Regulations 2007¹⁶ (as amended).

Recycling of Ships

Hong Kong Convention¹⁷

The Hong Kong Convention was adopted in 2009 and will come into force 24 months after ratification by 15 states with at least 40% of the world shipping fleet between them and a combined maximum annual recycling capacity of at least three percent of their combined registered tonnage over the previous decade. At the time of writing, six countries have ratified the Hong Kong Convention but to satisfy the relevant fleet and recycling capacity conditions, certain countries such as China, India, Pakistan and Bangladesh will need to ratify it. Much progress was made in 2017 with India drafting legislation that will pave the way for ratification of the Hong

¹⁰ Annexes I and II of Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives, 19 November 2008.

¹¹ Note, however, that certain exceptions and provisos apply to each of these circumstances (e.g. re OECD/EFTA countries) and these are not set out in this note.

¹² Waste Regulation, Article 34 and 41.

¹³ Ibid, Article 36 and 43.

¹⁴ Ibid, Article 39.

¹⁵ Ibid, Article 40.

¹⁶ SI 2007/1711.

¹⁷ Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships.

“THE RECYCLING REGULATION ENTERED INTO FORCE ON 30 DECEMBER 2013 ALTHOUGH ITS PROVISIONS WILL COME INTO FORCE INCREMENTALLY, WITH SOME NOT APPLICABLE UNTIL 31 DECEMBER 2020.”

Kong Convention “in the not-too-distant future”¹⁸; however, in an effort to reduce waste imports and fight pollution, the Chinese government recently announced an import ban on ship scrap imports, which will take effect from 31 December 2018¹⁹. This puts the onus firmly on the Indian subcontinent – which has been experiencing a recent resurgence in its ship breaking industry²⁰ – to take the necessary steps to ratify the Hong Kong Convention. At present, there is no requirement on EU member states to ratify the Hong Kong Convention; however the Recycling Regulation puts EU member states in a position to comply with the Hong Kong Convention once it is in force.

The Recycling Regulation

The Recycling Regulation entered into force on 30 December 2013 although its provisions will come into force incrementally, with some not applicable until 31 December 2020.

In 2016, under the Recycling Regulation, the EU commission adopted a first version of a European list of approved ship recycling facilities (the “European List”)²¹. The European List will apply from 31 December 2018 and will prevent large commercial seagoing vessels flying the flag of an EU member state from being recycled anywhere other than a recycling facility that meets certain specific safety and environmental requirements. The application of the European List aims to facilitate safe and sound ship recycling, thereby reducing its negative impacts on human health and the environment.

Also applicable from 31 December 2018 is the prohibition or restriction of the installation or use of certain hazardous materials on ships, including asbestos and ozone-depleting substances. Each new EU-flagged ship (or a ship flying the flag of a third country calling at an EU port or anchorage) will be required to have on board an inventory of hazardous materials (“IHM”) and EU-flagged ships going for dismantling must also have an IHM on board. Ship recycling yards will also be required to provide a “Ship Recycling Plan”, specifying the manner in which each ship will be recycled, depending on its particulars and its inventory.

UK implementation

As with the Waste Regulation, the Recycling Regulation has direct effect in EU member states but individual member states must implement national legislation to designate competent authorities and set out offences and penalties in case of breach. The UK intends to implement its own statutory instrument²² to support the Recycling Regulation but since consultation ended on 15 September 2017, no further updates have been provided by the UK Government.

Waste Regulation and Recycling Regulation: Interplay

End-of-life ships contain a range of hazardous materials and substances including asbestos, heavy metals, oil residues and PCBs to name but a few. Whilst the Waste Regulation does not specifically reference ships as waste, end-of-life vessels can of

¹⁸ <https://www.thehindubusinessline.com/economy/logistics/india-pledges-to-ratify-imos-convention-on-recycling-of-ships/article9976847.ece>

¹⁹ <https://loydslist.maritimeintelligence.informa.com/LL1122467/Import-ban-on-scrap-ships-deals-a-heavy-blow-to-Chinese-shipbreakers>

²⁰ <https://loydslist.maritimeintelligence.informa.com/LL1122387/Pakistani-yards-reopen-for-tanker-scraping>

²¹ A copy of the European List can be obtained from <http://ec.europa.eu/environment/waste/ships/list.htm>

²² The Ship Recycling (Requirements in relation to Hazardous Materials on Ships) Regulations.

course be caught should they or their constituent parts fall within the definition of waste under the Waste Framework Directive.

There is some debate as to whether the Waste Regulation should apply to the recycling of ships or not, as this is actually more appropriately covered by the Hong Kong Convention (once in force) and the Recycling Regulation. In support of this school of thought, the European Commission has stated that to “ensure legal clarity and avoid administrative burden, ships covered by the [Recycling Regulation] will be excluded from the scope of the [Waste Regulation]”²³.

Given that the European List will apply from 31 December 2018, the temptation may be to ‘flag out’ of the EU to avoid the Recycling Regulation. However, the Waste Regulation applies to all vessels trading in Europe regardless of the flag they sail under and the Seatrade case acts as a stark reminder that for the time being at least both legislative regimes should be observed in the context of ship scrapping.

Brexit Effect

“END-OF-LIFE SHIPS CONTAIN A RANGE OF HAZARDOUS MATERIALS AND SUBSTANCES INCLUDING ASBESTOS, HEAVY METALS, OIL RESIDUES AND PCBS.”

The UK Government’s current policy is that the UK will continue to be bound by its international environmental obligations following Brexit. A distinction will have to be made, though, between: international agreements entered into by the EU alone (which the United Kingdom will need to sign and/or ratify); mixed agreements entered into by both the UK and the EU (where the legal position on whether the UK will remain bound will need to be clarified); and agreements that the UK has separately signed/ratified (where the position is relatively simple).

The UK signed the Basel Convention in 1989 and went on to ratify it in 1994²⁴ meaning that it will remain bound by it following Brexit. However, it will be a “third country”, which means that the movement of waste between the UK and the EU will become more problematic and, in the case of hazardous waste, unlawful. In terms of EU law specifically, the EU Withdrawal Bill will, once enacted, transpose all direct EU legislation into UK law so, notwithstanding their direct effect already, the Waste Regulation and Recycling Regulation will remain UK law following withdrawal.

Whilst on the face of it the position in respect of transboundary shipment of waste and scrapping seems relatively simple compared to other areas of international environmental law, there is an inherent risk that, following Brexit, those operating from or through the UK will be faced with a regulatory vacuum. For example, one problem that has not been meaningfully discussed is that underlying ECJ/CJEU case law will not form part of UK law despite the well-meant intentions of the EU Withdrawal Bill. UK judges would need to consider whether to take into account new CJEU decisions following Brexit when interpreting EU-derived UK law. The potential for divergence from EU law following Brexit is obviously one of the advantages of leaving the EU but the reality is that if we are to have a successful trading relationship with our European neighbours, the prospect of any significant divergence of standards or systems of governance may be vanishingly small.

More specifically regarding ship scrapping, the European List currently includes facilities in the UK; however the European Commission issued a Notice to

²³ <http://ec.europa.eu/environment/waste/ships/>

²⁴ As required under Council Decision 93/98/EEC.

Stakeholders dated 28 March 2018 in which it stated that, subject to any transitional arrangement pertaining to Brexit, the EU rules on ship recycling including the Recycling Regulation, shall no longer apply to the UK as of 00:00hrs (CET) on 30 March 2019.²⁵ Presumably, therefore, following Brexit, if a UK ship recycling facility wishes to be considered to be (re)included on the European List, it will have to apply to the Commission as a third country facility.

This gives just a flavour of some of the loose ends and unanswered (perhaps even unasked) questions that the UK Government is going to have to grapple with during the transition period and in the years after any withdrawal from the EU.

Conclusion

The Waste Regulation has wide application and, as demonstrated in the Seatrade case, can be used to apply to the scrapping of ships. The safe scrapping of ships is high on the agenda for the EU and the introduction of the European List is demonstrative of the EU's drive to improve global standards for ship breaking. Despite the UK's decision to withdraw from the EU, it is highly unlikely that UK standards will diverge from the EU given its international commitments and the need to maintain strong political and economic relations with its European neighbours.

²⁵ https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_ship_recycling_final.pdf

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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