

MARPOL ANNEX V: an update on amendments relating to disposal of cargo residues

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In July 2011, by resolution MEPC.201(62), the Marine Environment Protection Committee (“MEPC”) adopted certain amendments to MARPOL Annex V. Those amendments entered into force on 1 January 2013, causing a certain amount of concern within the shipping and international trade community as to their practical implications. This article is intended to address certain of those concerns, some of which have been considered by the IMO, and to clarify certain aspects of the amendments in relation to the disposal of cargo residues.

Background to and scope of the amendments

Annex V is primarily directed at prohibiting the disposal of garbage at sea and, when it first came into force in 1988, its main focus was to reduce the disposal at sea of plastics, such as drinking water bottles and synthetic nets, by cruise ships and fishing vessels.

Under previous versions of Annex V, disposal of garbage at sea was generally permitted (with certain exceptions and conditions), provided it was disposed of far enough from the nearest land. The new regime sets out a blanket prohibition such that disposal of all garbage at sea is now prohibited, except as otherwise provided in Annex V.

The definition of “Garbage” includes “Cargo Residues”, which are defined as “*the remnants of any cargo which are not covered by other Annexes to the present convention...*”

Accordingly, Annex V applies to the disposal of any cargo residue of any dry bulk cargo/commodity that is not an oil, a noxious liquid or carried in packaged form (as covered by Annexes I, II and III and defined therein).

To which parties does Annex V apply and what are their obligations?

Regulation 2 (Application) of Annex V provides that “*the provisions of this Annex shall apply to all ships*” and the primary focus of Annex V is, therefore, on the vessel’s compliance. Accordingly, every vessel’s owners, operators and crew should ensure that the vessel complies with Annex V and takes every precaution to avoid discharging any garbage at sea other than in accordance with the exceptions set out in Annex V.

In this regard, in addition to the general prohibition on disposal of garbage at sea, Annex V also sets out three positive obligations which apply depending upon the size/tonnage of the vessel in question. These are as follows:

- a. Regulation 10.1.1: every ship of 12m or more in length and fixed/floating platforms must display placards to notify the crew and passengers of the discharge requirements of regulations 3-6 of Annex V;
- b. Regulation 10.2: every ship of 100 gross tonnage or above must carry a garbage management plan, which the crew follow and which meets the specified criteria; and
- c. Regulation 10.3: every ship of 400 gross tonnage or above must carry a Garbage Record Book, in the form specified in the appendix to Annex V, and ensure that it records the information stipulated in Regulation 10.3.1-4.

Annex V contains no specific terms applicable either to shippers or time/voyage charterers, but this does not necessarily mean that a charterer or shipper could never have any liability in respect of a breach of Annex V.

In this regard, paragraph 3.4 of the 2012 IMO Guidelines for the implementation of Annex V (the “Guidelines”) does provide that “*solid bulk cargoes should be classified and declared by the shipper as to whether or not they are harmful to the marine environment*” (“HME”). However, because the Guidelines are non-mandatory, it seems as though a breach of the Guidelines would not amount to a violation of either the Convention or Annex V and therefore not render a shipper liable if it did not provide such a declaration.

Nevertheless, it seems to us that, if a master were to discharge cargo residue at sea in good faith, in reliance on a shipper’s declaration that it was not HME, and it then transpired that the cargo residue was HME and that the declaration had been fraudulently or negligently given by the shipper, then the possibility that the relevant authorities might seek to prosecute the shipper cannot be ruled out.

Permitted disposal of cargo residues

Regulation 4.1.3 of Annex V states that discharge at sea of “*cargo residues that cannot be recovered using commonly available methods for unloading*” can take place at sea provided that:

1. this happens at least 12 nautical miles from the nearest land (and not within a special area); and
2. the discharge contains no substances that are harmful to the marine environment. It should be noted, however, that this only applies to cargo residues “*that cannot be recovered using commonly available methods for unloading*” (our emphasis), such that the amount of any cargo residue to be disposed of at sea should be minimised.

In this regard, the Guidelines state that ports, terminals and ship operators should consider cargo loading, unloading and on board handling practices in order to minimise production of cargo residues. Every effort should be made, therefore, to ensure that as much of the cargo as possible is unloaded in port.

What substances will be considered harmful to the marine environment (“HME”) for the purposes of Annex V?

The term “*harmful to the marine environment*” is not defined in Annex V itself, but guidance as to what constitutes an HME substance is set out in the Guidelines.

Paragraph 3.2 of the Guidelines states that cargo residues will be considered HME if they are solid bulk substances that meet the seven parameters that are set out in paragraphs 3.2.1-3.2.7 of the Guidelines. These parameters are based on the fourth revised edition of the UN Globally Harmonised System (“GHS”) 2011.

The difficulty for those in the industry is that there is no list of solid bulk cargoes or assessment of individual cargoes that are HME, in relation to compliance with Annex V for the discharge of solid bulk cargo residues. As a result, there is no easily accessible reference source to which owners/charterers/shippers/masters/operators or any other party can refer in order to assess whether or not a given cargo residue is HME.

The IMO has recognised that there are certain “challenges” in classifying solid bulk cargoes and with the discharge of the associated residues. It has issued a circular (MEPC.1/Circ.791) stating that, for a transitional period (from 1 January 2013 to 31 December 2014), competent governmental authorities should accept provisional classifications.

However, such provisional classification is only permitted where reliable data as to four of the listed criteria is not available and where such provisional classification is based on the other three criteria (namely acute aquatic toxicity, chronic aquatic toxicity and the plastic/polymer/rubber content of that cargo). There is no exception in relation to aquatic toxicity (whether acute or chronic) or the plastic/polymer/rubber content, for which it appears all cargoes must be tested.

It is also unclear whether, if one laboratory tests a particular type of bulk cargo and determines that it is not harmful to the marine environment, other parties will be entitled to rely upon that determination in dealing with other cargoes of the same commodity.

Much may depend upon the nature of the cargo in question. If the cargo is of a standard nature, such that there is little/no variation in chemical make-up between cargoes, then we anticipate that, once it has been tested in accordance with the criteria specified in paragraph 3.2 of the Guidelines, that determination as to whether or not that cargo is HME ought to hold good for all cargoes of the same type.

The position will be more complex, however, where the chemical composition of a type of cargo varies widely from consignment to consignment, or where cargoes are blended so as to produce a new substance, or where a cargo that would generally be considered as non-harmful contains a tiny proportion of a substance that might be considered harmful. In those circumstances, we anticipate that it may be necessary to sample and test individual cargoes and, where a product is to be blended, test both the blended product and any by-product (including the waste resulting from any tank washings) in accordance with the specified criteria. In doing so, it should be borne in mind that a cargo may react with seawater such that it becomes harmful on contact with the sea, although we anticipate that this possibility is likely to be covered by the tests for chronic and acute aquatic toxicity.

IMO’s Marine Environment Protection Committee addresses Industry Concerns

Since the amendments to Annex V regarding cargo residues came into force, a number of concerns have been raised by the shipping and trade community, both in relation to the classification of cargoes as HME or non-HME and in respect of the inadequacy of the existing port reception facilities for disposal of HME garbage (which is not permitted to be disposed of at sea).

Certain of these concerns were initially addressed at the 65th Session of the Marine Environment Protection Committee (MEPC)¹ at which the MEPC:

1. adopted amendments to the 2012 Guidelines for the implementation of MARPOL Annex V, to add references to E-waste generated on board such as electronic cards, gadgets, equipment, computers, printer cartridges, etc.;

¹ Held from 13-17 May 2013

2. approved draft amendments to the form of Garbage Record Book under MARPOL Annex V, to update the Record of Garbage Discharges, for circulation, with a view to adoption at the 66th session of the MEPC; and

3. approved an MEPC circular² on adequate port reception facilities for cargoes declared as HME under MARPOL Annex V, which agrees that, until 31 December 2015, cargo hold washwater from holds previously containing solid bulk cargoes classified as HME, may be discharged outside special areas under specific conditions. This is prompted by the recognition that *“as a result of the difficulties experienced by shippers, consequential problems are being experienced by shipowners and operators in obtaining HME declarations and, when cargoes have been classified as HME, finding adequate reception facilities at receiving terminals”*. The circular also urges Parties to MARPOL Annex V to ensure the provision of adequate facilities at ports and terminals for the reception of solid bulk cargo residues, including those contained in washwater and that, in the absence of such facilities, terminals should facilitate the discharge of all solid bulk cargo residues ashore, including hold sweepings.

The MEPC has recently considered MARPOL Annex V at its 66th Session³ and, in particular, the draft amendments concerning the Garbage Record Book mentioned above. A number of delegations suggested:

- that there were perceived discrepancies between the text of the Convention and the proposed form of the Garbage Record Book.
- that the Garbage Record Book should be amended to cater for recording the disposal of residues of solid bulk cargo, in particular when those cargo residues are classified as harmful to the marine environment.

The Committee therefore agreed to postpone consideration of adoption of the draft amendments to MEPC 67⁴ pending further comments from interested member states and international organisations.

Practical guidance

As will be apparent from the above, the practical implications of the new rules are still being considered by the IMO and its member states and there is still some way to go in ironing out the detail. A number of practical questions arise including: who carries out any testing to determine whether a particular substance is considered harmful or not; whether the test result is centrally registered in some way and accessible to other parties; whether it is accepted as applicable to other similar cargoes; and whether it carries any particular status, if, for example, it supports the view that a substance is harmless, but a different view is taken by authorities in another part of the world. There is currently no indication as to whether the UN will seek to publish a comprehensive list of substances for the purposes of establishing whether or not a particular cargo is HME for the purposes of Annex V. It is possible that an official list will be

² MEPC.1/Circ.810

³ Held from 31 March – 4 April 2014. See the Report of the Session at MEPC 66/21.

⁴ To be held from 13 – 17 October 2014.

developed by the IMO in the period ahead, as the practical implications of the new Annex V become more widely appreciated.

Until these practical issues have been worked out in clearer detail, it is not easy to give practical legal guidance with as much clarity or certainty as is desirable, but, in the meantime, we consider it better to err on the side of caution regarding the classification and disposal of any cargo residue and, if in doubt, to discharge at appropriate discharge facilities ashore, rather than at sea.

We appreciate that disposal ashore costs money and is not always an available option. In those circumstances, we hope that the following ‘pointers’ may be of assistance:

1. ITOPF has published a helpful advisory note in relation to the disposal of bulk cargo tank washwater and cargo declarations under MARPOL Annex V.⁵ This provides advice on how to classify cargoes as HME (or not) and includes a flow diagram illustrating an example of how to gather data required for HME classification. The note also suggests that Port State authorities⁶ should be able to compare declarations and clarify any specific requests or queries.

2. GESAMP (the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection) publishes a list of certain products/minerals that are carried by ships, with a profile for each one that indicates whether or not it is considered “*hazardous*” to the marine environment. These profiles are not comprehensive for the purposes of establishing whether the listed products are HME pursuant to Annex V: the parameters for which GESAMP tests are conducted do not correspond precisely with the criteria set out in Paragraph 3.2 of the Guidelines and, in addition, the list of substances covered by GESAMP is not comprehensive and certain products (such as petcoke) are missing from the list. However, they do cover some of the UN GHS criteria specified in paragraph 3.2 of the Guidelines, and we suggest that the GESAMP list would be a good starting point when assessing whether or not a particular type of cargo is HME.

3. Any analysis relied upon ought to have been undertaken by a laboratory of international standing/repute, with the experience and equipment to properly analyse samples of the cargo in question in accordance with the specified UN GHS criteria. In this regard, we are aware that the issue of accurate testing has previously arisen in relation to cargoes of substances such as nickel ore, where mining companies/shippers have produced certificates as to a cargo’s transportable moisture limit in circumstances where the local laboratories in question have not had the correct equipment accurately to test for such characteristics.

4. The amount of any cargo residue to be disposed of at sea should be minimised and every effort made to ensure that as much as possible of the cargo is unloaded at port. Otherwise, we can only recommend that those concerned use their best efforts to establish whether any cargo residue is or would be considered harmful by reference to the UN GHS criteria specified in the Guidelines and that, in case of doubt, advice be sought from ITOPF or other appropriate

⁵ This was published in April 2013 and can be found at:

http://www.itopf.co.uk/information-services/publications/papers/documents/IMSBCDeclarationAdvisoryNote_002.pdf

⁶ See the list at BC.1/circ 66: http://www.imo.org/blast/blastDataHelper.asp?data_id=25143&filename=66.pdf

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