

**BALLAST WATER
MANAGEMENT CONVENTION
2004
COMPLIANCE UNCERTAINTY
&
THE CHALLENGE TO SHIPOWNERS**

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4th March 2013

Speaker's details

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Jonathan is a partner in Dale Stevens LLP, a specialist maritime law firm based in London with an office in Newcastle upon Tyne.

Taking advantage of an early career at sea as a navigating officer in the Royal Navy, Jonathan qualified as a solicitor in 1990 and has gained an intimate knowledge of the mechanics of shipping, marine insurance and international trade. He has worked in Singapore, London and Newcastle.

Jonathan has a particular interest in ballast water regulations and has advised the United Kingdom's Maritime & Coastguard Agency on the challenges in enforcing BWM Convention 2004 requirements. He is a member of the IMarEST Ballast Water Expert Group.

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Outline

- Introduction
- The BWM Convention – Other Regulations
- The D-2 Standard
- Type approval – problems
- Considerations for Owners
- Some hope?

Introduction

- The BWM Convention – and similar regulations – already provide a new area of regulation to shipowners.
- Shipowners are familiar with dealing with new regulations, e.g. ISM, ISPS.
- BWM has one **big** difference: it is dealing with living organisms. Marine organisms do not behave like chemicals or oil. It is impossible to evaluate the number of organisms with 100% accuracy.

Introduction

- The big issue: How can compliance with the BMW Convention standard D-2 and G-2 be verified?
- Put simply, samples are required that are *“representative of the whole discharge of ballast water from any single tank or any combination of tanks being discharged.”*
- Scientific research indicates a near impossibility in sampling a tank in a way that would (a) not cause delay and (b) is statistically representative.

Introduction

- Another big issue: The BWM Convention requires ships not to be delayed unreasonably.
- The approach of regulatory authorities will vary:
 - “Common sense” approach: equipment working and documentation in order.
 - “Obstructive” approach could lead to ships having to go offshore for ballast water exchange leading to:
 - Delay
 - expenses

THE BWM CONVENTION 2004

The 2004 Ballast Water Management Convention

- Current status of the Convention:
 - Adopted by the IMO in 2004
 - Requirement to enter force:
 - 30 States, representing
 - **35%** world tonnage
 - Then a 12 month waiting period
 - As at 31 January 2013:
 - 36 States have ratified
 - Representing **29.07%** world tonnage

States that have ratified at 31st January 2013

Albania	Kiribati	Niue
Antigua	Korea, Republic of	Norway
Barbados	Lebanon	Palau
Brazil	Liberia	Russian Fed.
Canada	Malaysia	St Kitts & Nevis
Cook Islands	Maldives	Sierra Leone
Croatia	Marshall Is.	South Africa
Denmark	Mexico	Spain
Egypt	Mongolia	Sweden
France	Montenegro	Syria
Iran	Netherlands	Trinidad
Kenya	Nigeria	Tuvalu

What is the legal effect of the Convention entering force?

- In any State:
 - Has that State ratified the Convention?
 - If yes, what is the legal process for the Convention to have force of law in that State?
 - e.g. a requirement for separate law to bring it into force?
 - automatic?

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 - If yes, what is the legal process for the Convention to have force of law in that State?
 - e.g. a requirement for separate law to bring it into force?
 - automatic?
- The timing of the Convention having legal effect will vary.

Existing and planned ballast water regulations e.g.

- USA Federal
- California
- Brazil
- Argentina
- Canada – Great Lakes
- Australia

THE D-2 STANDARD

The D-2 Standard

- **Regulation D-2 *Ballast Water Performance Standard***
Ships conducting ballast water management shall discharge (1) less than 10 viable organisms per cubic metre greater than or equal to 50 micrometers in minimum dimension and (2) less than 10 viable organisms per milliliter less than 50 micrometres in minimum dimension and greater than or equal to 10 micrometers in minimum dimension; and (3) discharge of the indicator microbes shall not exceed the specified concentrations.

How can D-2 be enforced?

- D-2 states that ballast water discharged shall contain less than the specified organic content.
- Issues raised:
 - There is no breach of regulations if the ballast water is not discharged overboard.
 - How does the ship know if the ballast water complies or not?
 - On what basis can a port state order ballast water not to be discharged?
 - If the ship is delayed, who pays?

How can D-2 be enforced?

Sampling

- It is recognised that if you sampled the same tank of ballast water with different types of sampling equipment, there will be different results.
- Because marine organisms reproduce quickly, good scientific sampling and analysis procedures are vital. Problem: very few laboratories can do this.
- Ship types have different sampling problems.

How can D-2 be enforced?

Sampling

- Strictly, according to the BWM Convention, compliance with the D-2 Standard cannot be verified until all the ballast water has been discharged and sampled – otherwise it cannot be representative.

TYPE APPROVAL PROBLEMS

Type approval

- What are the specifications for ballast water treatment used in type approval?
- Currently being reviewed by IMO: acknowledged difficulties.
- Level of organisms and sediment in the testing input water – cleaner than some ports?
- Some manufacturers have voluntarily withdrawn their own products.

CONSIDERATIONS FOR OWNERS

Considerations for Owners - Equipment

- Keep up to date with changes in IMO and flag state guidance.
- Plan well ahead for installation of BW treatment equipment.
- Review onboard testing equipment now being developed. Can this help with an aggressive port state inspector?

Considerations for Owners - Contracts

- Protect your position as well as you can:

PORT STATE FLAG STATE



Penalties/fines for regulatory breach
and
Orders causing lost time/expenditure



CAPTAIN/CREW

SHIP OWNER

THE SHIP

The ship owner/operator may seek to recover
losses under the following contracts



SHIPBUILDING
CONTRACT

CHARTERPARTY

BWM EQUIPMENT
SUPPLY CONTRACT

INTERTANKO Time C/P Ballast Water Management Clause

1. *Owners shall maintain a ballast water management plan in accordance with the vessel's flag state requirements, and carry out ballast water operations in accordance with such plan.*
2. *If Owners fail to comply with the obligations in 1, Owners shall bear any additional costs, expenses and penalties and the vessel shall be off hire for any time lost.*
3. *If Owners have complied with the obligations in 1, **but additional ballast water operations are required** then the vessel shall remain on hire and any additional costs, expenses and penalties shall be for Charterers' account.*

INTERTANKO Voyage C/P Ballast Water Management Clause

1. *Owners shall maintain a ballast water management plan in accordance with the vessel's flag state requirements and carry out ballast water operations in accordance with such plan.*
2. *If Owners fail to comply with the obligations in 1, Owners shall bear any additional costs, expenses and penalties. Any time lost shall not count as laytime or time on demurrage.*
3. *If Owners have complied with the obligations in 1, **but additional ballast water operations** are required then:*
 - a. *the validity of the Notice of Readiness shall not be affected,*
 - b. *any time lost due to such additional ballast water operations shall count as laytime or time on demurrage, and*
 - c. *any additional costs, expenses and penalties shall be for Charterers' account."*

Considerations for Owners - Contracts

- How can an owner prove that it has complied with ballast water management obligations if there is not way of checking it?
- What if the output is outside the D-2 Standard without the ship being aware?
- Need for a plan.

Prosecution for regulatory breach of D-2 Standard

- IN UK it is recognised that the necessary factors for a prosecution based on sampling are unlikely to be met.
- Shipowners and P&I Clubs can work to prepare a rapid reaction plan to a possible prosecution. Immediate assistance from sampling laboratory and experienced legal assistance vital.

Some hope?

- Increasing recognition of near impossibility of enforcing the D-2 Standard.
- Current discussion of a “gross negligence threshold” – a multi-layer approach to port state checks.
- Port State Control guidelines are now thought to be necessary and are being reviewed.

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