



Informing Progress - Shaping the Future

FOIL UPDATE 22 January 2021



Scrapyard Challenge 2

This virtual event was a follow-up to the one held on 17 November 2020, for which the [Update](#) is also available on the FOIL members' website. Both are collaborations between FOIL's Environmental, Marine and D&O Sector Focus Teams on the environmental and human cost of current practices in the decommissioning of marine vessels.

By way of introduction, delegates watched a short video showing graphically the working conditions for those involved in shipbreaking in Bangladesh, one of the three principal locations for this activity (with India and Pakistan), although there are other sites in countries such as Turkey and China.

The film showed huge numbers of beached ships awaiting dismantling. It was evident from both the images and the commentary that working conditions were extremely poor, with minimal personal protective equipment and a great deal of manual handling. Mortality rates were high, as were the levels of injury and illness. Types of risk were obvious, ranging from falling from height to poisoning from exposure to gases whilst cutting metal in enclosed spaces to the failure of wire ropes. Added to the human cost, was the risk to the environment, with the sea washing over discarded pollutants.

The focus of the subsequent debate was what FOIL, together with the insurance industry in the UK can and should be doing to address these issues.

The best existing regulations are in Europe. They came in at the end of 2018 and relate to the recycling of ships flagged within the EU. These require that such ships are recycled in one of forty-three recognised recycle yards. These have good health and safety and environmental regulations. The problem created by this is that recycling inevitably

IN BRIEF

In this second roundtable event on this topic, a panel of industry experts looked at how insurers can address the health and safety and environmental concerns arising from the recycling of vessels in parts of Asia.

The issues considered included the friction between ethics and commercial reality.

costs more (the yards pay less for the vessels) and there are not enough of them. Volumes of ships for recycling were already high, even before the impact of Covid-19.

In addition, there are European Waste Shipment regulations (linked to the Basel Convention) which state that no ship leaving the EU for recycling may be sent to a non-OECD country. For these purposes, the ship is deemed to be hazardous waste. Taking into account the overlap between EU approved yards and those on the OECD list, their influence is probably not greatly extended.

The Ban amendment to the Basel Convention, which came into effect in 2019, also requires any vessel passing through a country which is party to the convention to be recycled in an OECD yard.

Outside of these regulations, no others have yet been ratified, leaving it open to ship owners who wish to do so to circumvent the use of EU or OECD regulated yards and avoid the higher costs. The result is that three-quarters of the world's tonnage finishes up in yards in countries such as Bangladesh.

Issues of concern are the nature and extent of any insurance cover at this late stage in the life of the vessels and what happens after the vessel has been broken up. Some of the material recovered is recycled and repurposed. There must be concern as to whether there will be a willingness to insure these ship yards and/or the facilities processing the recovered material. Even beyond that is the question of the ethical supply chain and the purchase of recycled material that has gone through this process.

The answer must be to seek a level of regulation that bites on these currently unregulated yards. FOIL is currently looking closely at corporate responsibility and the issue of whether companies are adhering to their stated policies in areas such as climate change and the environment. It would seem that in this complex area, one way to influence events is for the consumer to call to account the actions of companies, with insurers producing appropriate products with exclusions which discourage poor governance.

One area of concern is what insurers are currently doing when there is a total loss of a ship. Are they concerning themselves with where the vessel will go to be broken-up, or are they looking for the best price for salvage? If it comes to light that an insurer has started the process by which a vessel finished up on one of these beaches, it could cause reputational damage. Policies could become more focused on responsibility for this type of situation, with clear exclusions.

It was also felt that marine insurers will start to look more closely at restricting cover where certain conditions are not adhered to. Steps have already been taken in relation to human rights and child labour.

It was thought that while global insurers were probably having a dialogue about this type of issue, in other areas, such as the Lloyds Market, not enough consideration may be being given to ethical matters. Insurers should be encouraged to revisit their corporate policies when considering types of insurance and how claims are handled.

Sight should not be lost of the limit on corporate responsibility. In this context, while there might be concern for activities in the ship yard and even the next stage of recycling, how far beyond that is it reasonable to go? For example, should it extend to the purpose for which any recycled steel was ultimately used?

From a D&O perspective one consideration would be the extent to which an officer of the company had complied with any relevant regulations. Liability would involve proving a negligent failure to pursue a requirement of the company's policy on a specific issue. In this context, under a D&O policy, a pollution exclusion would probably be in place. Accordingly, while there might be scope for exposure, it would be unlikely for cover to be in place to meet it. However, defence costs could be excluded for a criminal prosecution where it could be shown that the director had acted deliberately or had been grossly negligent in permitting the breach.

The question was put as to whether insurers could invest to provide additional capacity and at the same time address the issue of delay in disposing of vessels. There was concern, however, about the knock-on effect of competing with the shipyards under consideration. Appalling as the conditions might be, they are providing employment and that should not be overlooked. However, addressing these concerns within these yards would require world-wide regulation, which seems unlikely within a realistic timescale; or the establishment of compliant yards within these countries.

The proposed Hong Kong Convention has been delayed for years, primarily because those countries with the highest tonnage have failed to sign-up to it. Another option might be for there to be an end-of-life fund into which shipowners paid periodically during the life of the vessel, to meet the costs of recycling in a compliant way. It must be recognised that this would be yet another burden for shipowners, who over the years have had to meet additional costs as regulations have been put in place worldwide. The cost might need to be passed on or shared.

It was felt that D&O insurers should now be looking at what environmental policies prospective insureds have in place in relation to the environment and climate change. The directors should be required to prove that they are taking these issues seriously.

Going forward, insurers will need to be more open in why they take certain decisions and be prepared to introduce terms and conditions which reflect ethical issues.

A distinction should be drawn between disposal resulting from an insured event and disposal in the normal course of business, in which insurers will have little involvement.

A lot may be learned from watching the decommissioning of vessels of various types used in the North Sea oil and gas industry. This is the subject of a FOIL event on 17 February, hosted by the Energy Sector SFT. However, it seems that with some North Sea structures, the decision has been made to leave them in situ, to protect the marine life that has developed around them.

The reality is that the necessary standards will need to be included in trade deals between various countries, to ensure that a level playing field is created. These agreements will need to incorporate EU level standards.

FOIL and London FOIL will FOIL will continue to help to raise awareness of this subject and the discussion on what can be done to help.

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.